

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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No.: **ICC-02/04-01/15**  
Date: **10 January 2020**

**TRIAL CHAMBER IX**

**Before:**

**Judge Bertram Schmitt, Presiding Judge  
Judge Péter Kovács  
Judge Raul C. Pangalangan**

**SITUATION IN UGANDA**

**IN THE CASE OF  
*THE PROSECUTOR v. DOMINIC ONGWEN***

**Public**

**Motion for Immediate Ruling on the Request for Dismissal of the Charge of Enslavement**

**Source: Defence for Mr Dominic Ongwen**

**Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:****The Office of the Prosecutor**

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## I. INTRODUCTION

1. The Prosecution alleged in the ‘Prosecutor’s Amended Application for the Arrest Warrant’ dated 18 May 2005 at **paragraphs 86-112** that Joseph Kony committed sexual and gender-based crimes (‘SGBC’), particularly sexual slavery imposed on girls.
2. On 27 July 2015, a decision on the Prosecution Application pursuant to 56 of the Rome Statute (‘Statute’) was delivered.
3. On 15 October 2015, the ‘Decision on the Prosecutor’s Request for permission to supplement the notice of intended charges against Dominic Ongwen filed on 18 September 2015’ was delivered and the Request was granted.
4. The SGBC against Mr Ongwen are laid out as charges 61-68 at **paragraph 124** of the ‘Decision on the confirmation of charges against Dominic Ongwen’ (‘CoC Decision’).

## II. TIMELINESS OF THE MOTION

5. This motion is timely. The Chamber in the Decision on ‘Defence Motions Alleging Defects in the Confirmation Decision’ in denying the motion *in limine* nevertheless decided that “[t]he Chamber will decide upon the proper legal interpretation of the charged crimes and modes of liability in the applicable law of its judgment”.<sup>1</sup>
6. It follows from this Decision that consistent with his fair trial rights guaranteed by 67(1)(e) and 21(2)(3) of the Statute, the Defence reserves the right to make submissions on the proper legal interpretation of the charged crimes and modes of liability in his defence to enable the Trial Chamber take his views into consideration prior to making a determination on the issue.
7. The Defence respectfully requests a decision by the Chamber now on the Defence’s request to dismiss the charge of enslavement (‘Defence’s Request’) and it reserves the right to make further submissions. A decision at this juncture will assist the Defence to properly prepare its closing arguments and briefs.

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<sup>1</sup> Decision on Defence Motions Alleging Defects in the Confirmation Decision, [ICC-02/04-01/15-1476](#), 7 March 2019, para 37.

### III. SUMMARY OF ARGUMENT

8. As a matter of law, no difference exists between the crime of enslavement and the crime of sexual slavery. This is demonstrated by a careful analysis of (i) the backgrounds to each provision; and (ii) the case law arising out of the International Criminal Court ('ICC') and the *ad hoc* Tribunals.
9. There are no separate distinctive elements identified in the jurisprudence of the ICC or of the *ad hoc* Tribunals. Indeed, this motion highlights the redundant elements in the case law.
10. Furthermore, there are no distinctive elements identified in the CoC Decision. Judge de Brichambaut in his Separate Opinion identifies the crime of enslavement as one of the eight crimes he lists for which the CoC Decision provides no definition of its elements.<sup>2</sup>
11. In not identifying the elements of enslavement, the CoC Decision is, therefore, silent on the *mens rea* and contextual elements required for a crime against humanity. Specifically, the contextual element is that the "conduct was committed as part of a widespread or systematic attack directed against a civilian population" and the *mens rea* is "the perpetrator knew that the conduct was part of, or intended the conduct to be part of a widespread or systematic attack directed against the civilian population."<sup>3</sup> None of these legal elements, nor factual support for them is found in the CoC Decision.<sup>4</sup>
12. Therefore the Defence submits that Mr Ongwen cannot be charged for enslavement and sexual slavery based on the same conduct given that (i) the crimes are the same; (ii) the CoC Decision does not identify any separate distinctive elements; and (iii) the pleading of the crime of enslavement is defective. It follows that the charge of enslavement should be dismissed.
13. Moreover, the charging and pleading of the crimes of enslavement and sexual slavery creates legal confusion. This confusion results in a violation of Mr Ongwen's fair trial right to notice under Article 67(1)(a) to be "informed in detail of the nature, cause and content of the charge...."
14. The Defence also submits that convicting Mr Ongwen under both provisions will only serve to add to the growing confusion in the ICC/*ad hoc* Tribunal case law (as explained below)

<sup>2</sup> Judge Marc Perrin de Brichambaut, Separate Opinion of Judge Marc Perrin de Brichambaut, [ICC-02/04-01/15-422-Anx-tENG](#), 6 June 2016, para 18.

<sup>3</sup> Elements of Crimes, p. 5.

<sup>4</sup> See Defence Motion on Defects in the Confirmation of Charges Decision: Defects in the Charged Crimes (Part IV of the Defects Series), [ICC-02/04-01/15-1433](#), paras 54-60.

surrounding the application of the provisions. This confusion is having negative consequences including the potential for double jeopardy convictions (see paragraph 52).

#### IV. APPLICABLE LAW AND ARGUMENT

##### A. The Provisions of the Rome Statute and Elements of Crime of the ICC

###### *Summary*

15. There are questions over the wording of footnotes 11 and 18<sup>5</sup> of the elements of enslavement and sexual slavery and whether it renders the elements incompatible with the definition of enslavement found in the Rome Statute.<sup>6</sup> Secondly, the same or very similar acts have been prosecuted under different crimes. Thirdly, indicia of the elements of the crimes found in the relevant case law are often the same for enslavement and sexual slavery thereby rendering the elements of sexual slavery redundant.

###### *Analysis*

16. The Elements of Crimes ('EoC') of enslavement and sexual slavery are identical save for the additional sexual element in sexual slavery. The definition of enslavement in the Statute is similar to the EoC of enslavement and sexual slavery in the EoC. There is no war crime of enslavement in the Rome Statute. There is also no definition of sexual slavery in the Statute. This creates uncertainty.
17. The definition found at 7(2)(c) of the Statute of enslavement is similar to footnotes 11 and 18 of the EoC of enslavement and sexual slavery. The legal definition of the Statute is based on the definition of the Slavery Convention of 1926 and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (hereafter 'Supplementary Convention') of 1956, according to which even lower forms of slavery (as servitude, servile marriage, debt bondage, forced labour as well as trafficking in persons) can be regarded as slavery. Condition is that these acts pass the threshold of exercising 'the powers attaching to the right of ownership'.

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<sup>5</sup> It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labor or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.

<sup>6</sup> Article 7(2)(c) of the Statute: Crime against humanity of Enslavement: Enslavement means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

18. The EoC, in contrast, seems to equate human trafficking with slavery ('the conduct ... includes trafficking in persons'). This would clearly contradict the Statute's definition and lead to an unlimited inclusion of acts into the crime of enslavement. An example of how confusion might arise could be that of a prosecutor attempting to prosecute under sexual slavery: the Prosecution would need to prove that element one is satisfied and could seek to rely on the footnote to establish what constitutes slavery. Because element one of sexual slavery is the same as element one of enslavement, this could, in turn, bring into consideration the definition of enslavement thereby creating uncertainty as to what constitutes slavery.
19. Therefore, before even considering the Trial and Appeal Chambers' holdings on the issue, there is already uncertainty around the wording of the provisions.

**B. Confusion Surrounding the Elements of Crimes of Enslavement and Sexual Slavery in Case Law – Trial Chamber and Appellate Holdings. What has been decided and what still needs to be decided?**

20. When should crimes be prosecuted under enslavement and when should they be prosecuted under sexual slavery? Is it necessary to prosecute crimes under other provisions such as "other inhumane acts"? Below the Defence set out summaries of the court holdings in cases involving these crimes to show (i) that, in the past, acts of a sexual nature have been prosecuted under enslavement; (ii) that there are conflicting views as to which provisions are applicable in respect of particular acts or conduct; and (iii) the Courts' holdings as regards the elements/indicia of the crimes of enslavement and sexual slavery.

• **Kunarac, Kovač and Vuković (first case of sexual slavery prosecuted in 2001) – International Criminal Tribunal for the former Yugoslavia ('ICTY')**

21. The accused were charged with enslavement as a crime against humanity. No separate offence of sexual slavery existed under the ICTY Statute. The Chamber applied the definition of the 1926 Slavery Convention.<sup>7</sup> It is important to note that the convictions for enslavement included sexual acts. Based on this, it would follow then, that there is no need for a separate provision of sexual slavery in the ICC Statute.

• ***Kunarac et al. Appeal Judgment*<sup>8</sup> - ICTY**

<sup>7</sup> *Kunarac et al.*, Judgment, [IT-96-23-T & IT-96-23/1-T](#), Trial Chamber II, 22 February 2001, paras 539–543.

<sup>8</sup> *Kunarac et al.*, Appeal Judgment, [IT-96-23 & IT-96-23/1-A](#), Appeals Chamber, 12 June 2002 ('*Kunarac Appeal Judgment*'), paras 116 to 124.

22. The Appeals Chamber held that the traditional concept of slavery has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the power attaching to the right of ownership.<sup>9</sup> If the traditional concept of slavery has evolved to encompass various contemporary forms of slavery and sexual slavery is a contemporary form of slavery, the two provisions and what constitutes them must be, at least, very similar.
23. The Appeals Chamber stated that whether an act is a form of enslavement will depend on the indicia identified by the Trial Chamber. The Appeals Chamber set out these indicia at **paragraph 119**. They include control of sexuality:

*“These factors include the “control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour”. Consequently, it is not possible exhaustively to enumerate all of the contemporary forms of slavery which are comprehended in the expansion of the original idea; this Judgement is limited to the case in hand.”*<sup>10</sup>

24. As the Appeals Chamber acknowledged that it is not possible to enumerate all the contemporary forms of slavery, it follows that there must be scope for other contemporary forms of slavery to be considered as forms of slavery in the future. If (i) enslavement covers control of sexuality; and (ii) there is scope for other sexual crimes to fall under enslavement it, again, follows that there is no need for a separate provision of sexual slavery.
25. The Appeals Chamber also said that it agreed with the Trial Chamber that *“the duration of the detention is another factor that can be considered but that its importance will depend on the existence of other indications of enslavement” and that the duration of the enslavement is not an element of the crime. It said that “the question turns on the quality of the relationship between the the accused and the victim. A number of factors determine that quality. One of them is the duration of the relationship. The Appeals Chamber considers that the period of time, which is appropriate, will depend on the particular circumstances of each case.”*

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<sup>9</sup> In the case of these various contemporary forms of slavery, the victim is not subject to the exercise of the more extreme rights of ownership associated with “chattel slavery”, but in all cases, as a result of the exercise of any or all of the powers attaching to the right of ownership, there is some destruction of the juridical personality; the destruction is greater in the case of “chattel slavery” but the difference is one of degree.

<sup>10</sup> *Kunarac* Appeal Judgment, para 119.

- **SCSL Cases**

26. The Statute of the Special Court for Sierra Leone ('SCSL') incorporated the crime of sexual slavery. Three cases contained allegations of sexual slavery. SCSL had to decide whether the so-called phenomenon of 'forced marriage' falls under the definition of sexual slavery or another crime. SCSL based its interpretation on the EoC of the ICC Statute. However, the Court came to different conclusions in each case.
27. **AFRC case: Trial Chamber:** the Trial Chamber regarded the phenomenon of 'forced marriage' as sexual slavery. Trial Chamber rejected a conviction of 'forced marriage' under the residual provision of other inhumane acts. It found that the conduct in question would be covered completely by the offence of sexual slavery.<sup>11</sup>
28. **AFRC case: Appeals Chamber:** the Appeals Chamber pronounced a new crime of 'forced marriage' to be tried under the residual offence of 'other inhumane acts'. The reason behind this assessment was the erroneous indictment of the prosecutor. The prosecutor had charged the same facts twice, under the counts of other inhumane acts and sexual slavery, leading to the cancellation of the more specific offence of sexual slavery due to double jeopardy. They also said that "*no tribunal could reasonably have found that forced marriage was subsumed in the crime against humanity of sexual slavery*".<sup>12</sup> Similar issues have arisen in the *Ongwen* case.
29. The Appeals Chamber also said in this case that 'forced marriage' is not completely covered by the crime sexual slavery because the victims had also to provide non-sexual acts and suffered therefore additional harm (conjugal duties, loyalty to exclusive husband, stigma of being a 'rebel wife').
30. The Appeals Chamber stressed especially that unlike sexual slavery 'forced marriage' implies a relationship of exclusivity between the 'husband' and 'wife' and concluded that 'forced marriage' is not predominantly a sexual crime. This is an example of why the introduction of sexual slavery is problematic: by introducing a more specific crime for use in place of the broader crime of enslavement, it creates opportunity for courts to determine wrongly that certain sexual crimes do not fit within the narrow scope of sexual slavery. The slavery

<sup>11</sup> *Brima, Kamaru and Kanu (AFRC)*, Trial Chamber Judgment, [SCSL-04-16-T](#), 20 June 2007 ('*Brima* Trial Judgment'), at para 713.

<sup>12</sup> *Brima* Trial Judgment, supra note 3, para. 711; *Brima, Kamara, and Kanu (AFRC)*, Judgment, (SCSL-2004-16-A), Appeals Chamber, 22 February 2008 ('*Brima* Appeal Judgment'), paras 190–195; T. Doherty, 'Prosecuting Sexual and Gender-Based Crimes before International/ized Criminal Courts: Developments in the Prosecution of Gender-Based Crimes – The Special Court for Sierra Leone Experience', 17 *AUJGSPL* (2009), 301, at 330–331.



aspects of crimes could be overlooked. This could lead to perpetrators getting away with certain sexual crimes or the crimes being punished under a lesser offence thereby trivialising the crime. This undermines the very reason why sexual slavery was introduced: to afford more protection to women in the context of sexual crimes.

31. **RUF case: Trial Chamber and Appeals Chambers:** the Chambers took the view of the *AFRC* Appeals Chamber and convicted the accused of ‘forced marriage’ as another inhumane act but also held that the crime of sexual slavery had been committed<sup>13</sup>. It was also said at **paragraph 162** of the Trial Chamber Judgment:

*“In addition to proving enslavement, the Prosecution must also prove that the Accused caused the enslaved person to engage in an act or acts of a sexual nature. The acts of sexual violence are the additional element that, when combined with evidence of slavery, constitutes sexual slavery”*<sup>14</sup>

32. **Taylor case: In the third case against the Liberian President Charles Taylor, the Trial Chamber** revisited the interpretation of the *AFRC* Trial Chamber. It convicted the forced marriage only of sexual slavery and renamed the phenomenon ‘conjugal slavery’.<sup>15</sup>
33. It declined a cumulative conviction for other inhumane acts. In its judgment, the Chamber made three decisive statements:
- The phenomenon of ‘forced marriage’ is not a new crime;
  - The phenomenon of ‘forced marriage’ constitutes a specific form of sexual slavery;
  - The phenomenon was suffering from a discriminatory misnomer and should be renamed ‘conjugal slavery’.
34. These cases show two opposing views on the matter. The first view is that all the acts can be adequately pursued as sexual slavery (*AFRC* and *Taylor* Trial Chamber). The second view is that the acts command a further conviction under other inhumane acts as necessary to capture the entire wrong of the act (*AFRC* Appeals Chamber and *RUF* Trial and Appeals Chamber).

- **Katanga Case**

<sup>13</sup> *Sesay, Kallon and Gbao*, Judgment, [SCSL-04-15-T](#), (*‘RUF Trial Judgment’*), supra note 3, paras 467, 1294–95, 1581.

<sup>14</sup> *RUF* Trial Judgment, para. 162.

<sup>15</sup> *Taylor* case, Trial Chamber II, [SCSL-03-01-T](#), 18 May 2012, paras 427–430.

35. The ICC has not yet contributed to the clarification of the offence. The Pre-Trial Chamber in *Katanga* applied the crime of sexual slavery to ‘forced marriage’ scenarios and simply relied on the EoC for interpretation of the offence.<sup>16</sup>
36. The Trial Chamber restated that the element of sexual slavery and enslavement as the ‘exercise of any or all of the powers attaching to the right of ownership over a person’ but added a rather strange explanation to the second element ‘sexual’. Sexual slavery is especially likely to encompass situations where women and girls are forced to share a life with someone with whom they must engage in acts of a sexual nature.<sup>17</sup> Thus, the Chamber saw ‘forced marriage’ as a typical form of sexual slavery. The interpretation does not really comply with the wording of the EoC (‘the perpetrator caused such person or persons to engage in one or more acts of a sexual nature’). The interpretation did not contribute to the understanding of the words ‘acts of a sexual nature’.<sup>18</sup>
37. The following was held by the Pre-Trial Chamber in relation to sexual slavery in relation to article 7(1)(g) of the Statute crimes against humanity:

*Sexual slavery is a particular form of enslavement.*<sup>19</sup>

*Forms of sexual slavery can, for example, be practices such as the detention of women in rape camps or comfort stations, forced temporary marriages to soldiers, and other practices involving the treatment of women as chattel.*<sup>20</sup>

*The mens rea of this crime, requires that the perpetrator intend to impose a deprivation of liberty and cause the victim to engage in one or more acts of a sexual nature.*<sup>21</sup>

*There were substantial grounds to believe that the crime against humanity of sexual slavery was committed in the aftermath of the attack on Bogoro village.*<sup>22</sup>

38. The following was held by the Trial Chamber in relation to sexual slavery in relation to article 8(2)(e)(vi) of the Rome Statute war crimes:

<sup>16</sup> Decision on the Confirmation of Charges against Germain Katanga and Mathieu Ngudjolo Chui, Katanga, [ICC-01/04-01/07-717](#), Pre-Trial Chamber I, 30 September 2008 (‘*Katanga* CoC’), paras 343–344.

<sup>17</sup> *Katanga*, Judgment, [ICC-01/04-01/07-3436-tENG](#), Trial Chamber II, 7 March 2014 (‘*Katanga* Trial Judgment’), paras 973–978.

<sup>18</sup> “Sexual slavery: Do we need this crime in addition to Enslavement?” Criminal Law Forum (2018) 29, p 282.

<sup>19</sup> *Katanga* CoC, para. 430.

<sup>20</sup> *Katanga* CoC, para. 431.

<sup>21</sup> *Katanga* CoC, para. 433.

<sup>22</sup> *Katanga* CoC, para. 436.

*Powers attaching to right of ownership mean the ability to use, enjoy and dispose of a person who is assimilated to property, by subjecting him or her to dependence which deprives him or her of any form of autonomy.*<sup>23</sup>

*Factors for determining if powers attaching to right of ownership exist may include detention or captivity; restrictions to freedom from restraint or any freedom of choice or movement, and, on the whole, any measure taken to prevent or deter escape; use of threats, force or other forms of physical or implied coercion, exaction of forced labour; psychological oppression; the victim's position of vulnerability and the socioeconomic conditions in which the power is exerted.*<sup>24</sup>

*The exercise of the right of ownership over someone need not be assimilated as a matter of course with a commercial transaction. The notion of servitude relates foremost to the victims inability to change his or her condition.*<sup>25</sup>

*Deprivation of liberty may be imposed in many ways. The person's perception of his or her situation as well as his or her reasonable fear must be considered.*<sup>26</sup>

*The notion of sexual slavery may also encompass situations where women and girls are forced to share the existence of a person with whom they have to engage in acts of a sexual nature.*<sup>27</sup>

*The perpetrator must have been aware of individually or collectively exercising one of the attributes of the rights of ownership over a person and caused such person to engage in one or more acts of a sexual nature.*<sup>28</sup>

*The perpetrator ought to be aware that he or she exercised such powers and meant to engage in the conduct in order to cause the person concerned to engage in acts of a sexual nature or that it will occur in the ordinary course of events.*<sup>29</sup>

- **Ongwen and Ntaganda Case**

39. The Pre-Trial Chamber in this case, on the other hand, held that forced marriage could be a basis for conviction as inhumane acts and sexual slavery simultaneously. The Prosecution had charged the forced marriage as inhumane acts and sexual slavery while the Defence pleaded that the acts are consumed by sexual slavery and could not be the basis for conviction

<sup>23</sup> Katanga Trial Judgment, para. 975.

<sup>24</sup> Katanga Trial Judgment, para. 976.

<sup>25</sup> Katanga Trial Judgment, para. 976.

<sup>26</sup> Katanga Trial Judgment, para. 977.

<sup>27</sup> Katanga Trial Judgment, para. 978.

<sup>28</sup> Katanga Trial Judgment, para. 981.

<sup>29</sup> Katanga Trial Judgment, para. 981.

as inhumane acts as well.<sup>30</sup> With this last statement the Pre-Trial Chamber is unmistakably following the same approach of the *AFRC* Appeals Chamber and *RUF* Trial Chamber while the Chambers in *Katanga* and *Ntaganda*<sup>31</sup> dealt with the ‘forced marriage’ phenomenon only under the crime of sexual slavery as had the *AFRC* and *Taylor* Trial Chambers.

### *Analysis*

40. Clearly there remains significant uncertainty as to what constitutes the crime of sexual slavery. Forced marriage has been charged under different crimes. Enslavement has been used to prosecute acts of a sexual nature. Sexual slavery has been held to be a “form of enslavement”; if that is the case, why can an act of a sexual nature not simply be charged under enslavement?
41. The ICC currently faces several cases which include charges of sexual slavery. The outcome of these cases may provide some clarity on the issue.

### **C. Are the Elements the same?**

42. It has been helpful to consider the history of the enslavement and sexual slavery provisions and the background leading to their inclusion in the Rome Statute in order to address this question.
43. There was widespread agreement that the crime of sexual slavery needed to be specifically named in the Rome Statute. It was not only an obvious codification of a specific kind of slavery increasingly recognized as a major problem worldwide, but it was also a contemporary and more correct way to describe certain harms that might otherwise have been narrowly referred to as “enforced prostitution” in an earlier era. With the addition of sexual slavery as a defined crime, the previous international law paradigm, which has cast crimes of sexual violence as crimes related solely to the honour and dignity of the victim, was definitively shifted. The ICC’s EoC also rightly refocused attention on the actions of the perpetrator, who exercises powers attaching to the right of ownership over another person and forces that person to engage in sexual acts. This definition clearly links the crime of sexual slavery with the well-recognized and widely condemned crime of enslavement. The inclusion

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<sup>30</sup> CoC Decision, paras 87–95, and para 91: “The Chamber agrees that forcing another person to serve as a conjugal partner may, per se, amount to an act of a similar character to those explicitly enumerated by article 7(1) of the Statute and may intentionally cause great suffering, and that forced marriage may, in the abstract, qualify as “other inhumane acts” under article 7 of the Statute rather than being subsumed by the crime of sexual slavery”.

<sup>31</sup> Decision on the Confirmation of Charges against Bosco Ntaganda, Ntaganda, [ICC-01/04-02/06-309](#), Pre-Trial Chamber II, 9 June 2014, paras 53–57.

of the crime of sexual slavery in the Rome Statute occurred without much debate and has since been recognized as simply reflecting customary law.

44. However, its inclusion does not come without complications. Issues such as the Court's desire to avoid offending the people of Sierra Leone by labelling forced/arranged marriage as sexual slavery have arisen resulting in new crimes having to be introduced. Secondly, and as discussed above, the crime is more specific in nature than that of enslavement meaning that there is scope to argue that certain crimes do not fall within its ambit. Thirdly, as the elements are so similar to the elements of enslavement, it is not clear when a crime should be charged under sexual slavery or enslavement. Finally, it creates the potential for double jeopardy (see more below).
45. In order to assess whether the crimes are the same, the question of whether sexual exploitation is covered by enslavement needs to be addressed.
46. Historically slaves had sexual obligations in addition to forced labour obligations. Labour-intensive slavery ('chattel slavery') and sexual slavery are therefore not mutually exclusive.<sup>32</sup> McDougall expressed the same view in her report on slavery in 1998: 'the term "sexual" is used in this report as of adjective to describe a form of slavery, not to denote a separate crime. In all respects and in all circumstances, sexual slavery is slavery.'<sup>33</sup>
47. As it can be seen above, the ICTY and the SCSL came to a similar conclusion. The Trial Chamber in the *Kunarac* case condemned both – sexual and nonsexual acts – as enslavement.<sup>34</sup>
48. Granting that the SCSL regarded the abduction and forced labour of civilians in diamond mines as enslavement while the so-called 'forced marriage' phenomenon was prosecuted as sexual slavery and/or other inhumane acts<sup>35</sup> the Trial Chamber in the *AFRC* case declared, nonetheless, obiter that the evidence of sexual slavery would have led to a conviction of enslavement if the prosecutor had indicted the accused accordingly.<sup>36</sup>

<sup>32</sup> Sexual slavery: Do we need this crime in addition to Enslavement?" Criminal Law Forum (2018) 29, para 282.

<sup>33</sup> G. McDougall, Contemporary Forms of Slavery: Systematic Rape, Sexual slavery and Slavery-like Practices during Armed Conflict, Economic and Social Committee, Sub-Commission on the Promotion and Protection of Human Rights, Final Report, UN Doc. E/CN.4/1998/13; 22 June 1998, at 9.

<sup>34</sup> *Kunarac*, Indictment, IT-96-23-PT, 8 November 1999, paras 10.1–10.4; 11.1–11.7; *Kunarac*, supra note 36, paras 883–890.

<sup>35</sup> *Taylor*, supra note 6, paras 445–450.

<sup>36</sup> *Brima*, supra note 3, paras 739–740, 1279–1394.

49. The EoC for enslavement is identical with the EoC for sexual slavery except for the sexual element. In the opinion of the judges of the SCSL and the ICC, the sexual act is an aggravating feature of slavery, which alters it to the separate crime of sexual slavery.<sup>37</sup> *Taylor* supports the notion that sexual slavery is a separate crime.
50. As seen above, the case law is unclear as to the application of sexual slavery.
51. It is important to note that when the offence of sexual slavery did not exist, sexual slavery activities were pursued as enslavement.<sup>38</sup> The conclusion that must be drawn is that the offence of sexual slavery need not be a separate crime to enslavement. The offence of sexual slavery merely serves to emphasize an often overlooked and tabooed form of enslavement.<sup>39</sup> Thus, the inclusion of sexual slavery, from a feminist perspective, may draw attention to an often ignored or overlooked crime, although it is legally unsound.
52. Ultimately, sexual slavery is not an offence *lex specialis* to enslavement. It does not possess – as the wording and interpretation of some of the Courts or Tribunals suggest – another criterion (sexual element). Sexual activities are also covered by the term enslavement/slavery.<sup>40</sup> Or with the words of Mr Kai Ambos: enslavement does not represent the ‘smaller crime’ while sexual slavery would be the ‘larger crime’ that encompasses the smaller crime. Sexual slavery does not require another element that is not part of enslavement.<sup>41</sup> The Court could theoretically convict the defendant for both crimes if sexual

<sup>37</sup> Brima, supra note 3, §§ 706–711; Sesay, supra note 3, §§ 158–164; Taylor, supra note 6, §§ 418–421; Katanga, supra note 8, §§ 973–978. Cf.: K. Ambos, ‘Sexuelle Gewalt in bewaffneten Konflikten und Völkerstrafrecht’, 5 Zeitschrift für Internationales Strafrecht (2011), 287, at 292; M. Cottier, ‘Article 8’, in: O. Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article, (2nd ed., Baden-Baden: Nomos 2008), Art. 8 Rn. 208; Oosterveld, Gender Jurisprudence, supra note 3, at 62; van der Wilt, supra note 16, at 277.

<sup>38</sup> DeBrouwer, supra note 51, at 141; Belair, supra note 3, at 562.

<sup>39</sup> Oosterveld, supra note 36, at 622–625, stresses that during the negotiations, many delegates were in favour of introducing an additional crime of sexual slavery besides enslavement to promote the recognition of sexual crimes in international criminal law. Furthermore, this would reconcile the ICC Statute with the human rights instruments that consider sexual slavery as a form of slavery and demand an explicit recognition in the ICC Statute. Many authors and NGOs advocated for an explicit inclusion of sexual slavery besides enslavement because only then the nature of the crime would be adequately and accurately reproduced. K. Askin, ‘Women and International Humanitarian Law’, in K. Askin, and D. Koenig (eds), Women and International Human Rights Law, Vol. I, (New York–Ardsley, Transnational, 1999), 41, at 83; Women’s Caucus for Gender Justice in the International Criminal Court, Recommendations and Commentary for December 1997 Prep. Com. Part III: War Crimes, Recommendation 7, 1–12 December 1997, at 10–11; C. Argibay, ‘Sexual slavery and the Comfort Women of World War II’, 21 Berkeley Journal of International Law (2003), 375, at 380–386.

<sup>40</sup> The German International Criminal Code has only incorporated the offence of enslavement and refused to include an additional offence of sexual slavery as a crime against humanity in the Code. The experts of the Ministry of Justice came to the same view that sexual slavery is already encompassed by enslavement and therefore no further crime of sexual slavery was necessary. G. Werle and W. Burchards, ‘§7 VStGB’, in: W. Joecks and K. Mießbach (eds), Münchner Kommentar zum Strafgesetzbuch, Vol. 6/2, (München: Beck 2009), at 77.

<sup>41</sup> Ambos, supra note 11, Vol II, at 248: ‘In such a case, every element of the crime that lies within the smaller circle (the ‘smaller’ crime) is indispensable to meet the requirements of the other crime that lies in the larger circle (the

activities were part of the slave's exploitation. This would lead to a forbidden double conviction of the same conduct (double jeopardy). The joint enumeration of enslavement and sexual slavery under crimes against humanity must be regarded as legally wrong.

#### **D. What are the Redundant Elements, if any?**

*Examples of indicia provided by case law in respect of element one of enslavement and sexual slavery*

53. An interpretation tool of enslavement can be found in the *Kunarac* Judgment. The judges drew up a list of indicia that suggest the exercise of powers attaching to ownership over a person:

*“The control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat or force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour”<sup>42</sup>(“Kunarac Indicia”).<sup>43</sup>*

54. This is cited with approval by the ICTY Appeals Chamber in the *Kunarac et al* case.<sup>44</sup>

55. In the Trial Chamber Judgment in the *Katanga* Case the following was stated at **paragraphs 975 and 976**:

*Turning to the first element, the Chamber considers that the various examples which the Elements of Crimes enumerate are not exhaustive, inasmuch as the “right of ownership” and the powers attaching to it may take many forms. Powers attaching to right of ownership must be construed as the use, enjoyment and disposal of a person who is regarded as property, by placing him or her in a situation of dependence which entails his or her deprivation of any form of autonomy<sup>45</sup>*

*To prove the exertion of powers which may be associated with the right of ownership or which may ensue therefrom, the Chamber will undertake a case-by-case analysis, taking account of various factors. Such factors may include detention or captivity and their respective duration; restrictions on freedom to come and go or on any freedom of choice or movement; and, more generally, any measure taken to prevent or deter any attempt at escape. The use of threats, force or other forms of physical or mental coercion, the exaction of forced labour, the exertion of psychological pressure, the victim’s vulnerability and the socioeconomic conditions in which the power is exerted may also be taken into account.<sup>46</sup> In*

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‘larger’ crime). The larger crime obviously requires elements which are not part of the smaller crime; the smaller crime is the ‘lesser included offence’.

<sup>43</sup> Judgment, *Kunarac et al.*, IT-96-23-T & IT-96-23/1-T, Trial Chamber II, 22 February 2001, para 543.

<sup>44</sup> Appeal Judgment, *Kunarac et al*, IT-96-23& IT-96-23/1-A, Appeals Chamber, 12 June 2002 para 119.

<sup>45</sup> *Katanga* case, Trial Chamber: Judgment (7 March 2014) at para. 975.

<sup>46</sup> ICTY, *Kunarac et al.*, Case No. IT-96-23-T & IT-96-23/1-T, Trial Judgement, 22 February 2001 (“*Kunarac et al.* Trial Judgement”), paras 542 and 543; ICTY, *Kunarac et al.* Appeal Judgement, paras 119 and 121; SCSL, *Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Trial Judgement, 2 March 2009 (“*Sesay, Kallon and Gbao* Trial

*the view of the Chamber, articles 7(1)(g)-2(1) and 8(2)(e)(vi)-2(1) of the Elements of Crimes are framed such that the exercise of the right of ownership over someone need not entail a commercial transaction. In fact, the Chamber considers that the notion of servitude relates first and foremost to the impossibility of the victim's changing his or her condition.*<sup>47</sup>

56. As set out above, the Trial Chamber in *Katanga* (a case concerned with sexual slavery) relied on the indicia set out in *Kunarac* (which are the indicia of enslavement) “to prove the exertion of powers which may be associated with the right of ownership”. Therefore, element one of enslavement and element one of sexual slavery has been held to be the same by the courts. It follows that element one of sexual slavery is redundant.
57. Similarly, the *RUF* case<sup>48</sup>, the *Taylor* case<sup>49</sup> and the *Ntaganda* case<sup>50</sup> accepted the *Kunarac* Indicia when deciding whether the first element of sexual slavery had been made out.
58. The following was stated at **paragraph 952** of the *Ntaganda* Judgement (8 July 2019):<sup>51</sup>

*There is no exhaustive list of situations or circumstances which reflect the exercise of a power of ownership.*<sup>52</sup>*In determining whether the perpetrator exercised such a power, the Chamber must take into account various factors, such as control of the victim's movement, the nature of the physical environment, psychological control, measures taken to prevent or deter escape, use of force or threats of use of force or other forms of physical or mental coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality, forced labour, and the victim's vulnerability.*<sup>53</sup> *The exercise of the right of ownership over someone need not entail a commercial transaction.*<sup>54</sup>

59. In determining whether the perpetrator exercised powers attaching to the right of ownership over the victim as a requisite element of the crime of sexual slavery, the Chamber examined

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Judgement”), para. 160; SCSL, *Taylor*, Case No. SCSL-03-01-T, Trial Judgement, 18 May 2012 (“Taylor Trial Judgement”), para. 420.

<sup>47</sup> *Katanga* case, Trial Chamber: Judgment (7 March 2014) at para. 976.

<sup>48</sup> *RUF* Trial Judgment, para 160.

<sup>49</sup> Prosecutor Against Taylor, Case No. SCSL-03-01-T, Trial Judgement, 18 May 2012, para 447.

<sup>50</sup> Decision on the Confirmation of Charges against Bosco Ntaganda, *Ntaganda*, (ICC-01/04-02/06), Pre-Trial Chamber II, 9 June 2014, para. 53.

<sup>51</sup> *Ntaganda*, Trial Chamber Judgment, 8 July 2019, ICC-01/04-02/06, para 952.

<sup>52</sup> The Elements of Crimes refer to definitions contained in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. See in this regard Elements of Crimes, Article 7(1)(g)-2, footnote 18 and Article 8(2)(e)(vi)-2, footnote 66. See also *Katanga* Judgment, para. 975; and SCSL, *Sesay et al.* Trial Judgment, para. 160.

<sup>53</sup> See ICTY: *Kunarac et al.* Appeal Judgment, paras 119 and 121. See also *Katanga* Judgment, para. 976; SCSL, *RUF* Trial Judgment, para. 160; SCSL, *Taylor* Trial Judgment, para. 420

<sup>54</sup> *Katanga* Judgment, para. 975; SCSL, *Taylor* Trial Judgment, para. 420; SCSL, *Brima et al.*, Trial Judgment, para. 709; see also UN Economic and Social Council, Systematic rape, sexual slavery and slavery-like practices during armed conflict – Update to the final report, E/CN.4/Sub.2/2000/21, 6 June 2000, para. 50.



the nature of such relationship<sup>55</sup> by considering various factors<sup>56</sup> collectively. In examining the nature of such a relationship, the Chamber was relying on paragraph 121 of the *Kunarac* Appeal Judgment (as set out at **paragraph 25** above). This is another example of a Chamber relying on the indicia of enslavement in considering whether sexual slavery had been made out.

60. As evidence by the above, element one of sexual slavery has been treated as the same as element one of enslavement in these cases.

*Examples of indicia provided in case law in respect of element 2 of sexual slavery and contrasting this with indicia of enslavement*

61. “Control of sexuality” is listed as part of the indicia of enslavement in the *Kunarac* case. If control of sexuality forms part of enslavement, then it follows that element 2 of sexual slavery is redundant.
62. Special Rapporteur McDougall also declared in her report on Contemporary Forms of Slavery in 2000 that acts such as ‘selling, buying, trading, kidnapping, imprisonment, detention, forced labour, forced sexual acts, physical or sexual violence’ are evidence of slavery.<sup>57</sup>
63. The following was held by the Pre-Trial chamber in the *Katanga* case:

*In the view of the Chamber, sexual slavery also encompasses situations where women and girls are forced into "marriage", domestic servitude or other forced labour involving compulsory sexual activity, including rape, by their captors. Forms of sexual slavery can, for example, be "practices such as the detention of women in 'rape camps' or 'comfort stations', forced temporary 'marriages' to soldiers and other practices involving the treatment of women as chattel, and as such, violations of the peremptory norm prohibiting slavery."<sup>58</sup>*

64. The Chamber’s view was that sexual slavery encompasses situations where women are forced into other forced labour involving compulsory sexual activity. Given that this wording is very

<sup>55</sup> For the nature of the relationship of ownership between the perpetrator and the victim, see ICTY, Prosecutor v. *Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, “Judgment”, 12 June 2002, para. 121.

<sup>56</sup> See Trial Chamber II, “Jugement rendu en application de l’article 74 du Statut”, 7 March 2014, ICC-01/04-01/07-3436, paras 973-980; Pre-Trial Chamber I, “Decision on the confirmation of charges”, 30 September 2008, ICC01/04-01/07-717, paras 430-432.

<sup>57</sup> G. McDougall, *Contemporary Forms of Slavery: Systematic Rape, Sexual slavery and Slavery-like Practices during Armed Conflict*, Commission on Human Rights, SubCommission on the Promotion of Human Rights, 52nd Session, Item 6 of the Provisional Agenda, Update to the final report, E/CN.4/Sub2/2000/21, 6 June 2000, at 8; cf.: M. O’Brien, ‘Prosecuting Peacekeepers in the ICC for Human Trafficking’, 1 *Intercultural Human Rights Law Review* (2006), 281, at 307; D. Luping, ‘Prosecuting Sexual and Gender-Based Crimes before Internationalized Criminal Courts: Investigation and Prosecution of Sexual and Gender-Based Crimes before the International Criminal Court’, 17 *AUJGSP* (2009), 431, at 477.

<sup>58</sup> *Katanga* CoC, para. 431.

similar to the *Kunarac* Indicia “control of sexuality and forced labour” this supports the argument that there is no need for the separate provision of sexual slavery.

65. The following was stated at **paragraph 432** of the *Katanga* Judgment in respect of element 2:

*The second element of the crime against humanity of sexual slavery requires that "the perpetrator caused such person or persons to engage in one or more acts of a sexual nature." Thus, a particular parameter of the crime of sexual enslavement - in addition to limitations on the victim's autonomy, freedom of movement and power - is the ability to decide matters relating to his or her sexual activity.<sup>59</sup>*

66. Again, “the ability to decide matters relating to his or her sexual activity” “is the same as ‘control of sexuality’” found in the *Kunarac* case.

### E. Conclusion/Analysis

67. There is clearly huge overlap of the provisions in terms of the wording itself and the indicia provided by case law. There are numerous different interpretations of the crimes by the courts and commentators. As such, it could be argued that the inclusion of sexual slavery into the statute was unnecessary and that it has only served to create confusion.

68. It is true to say that sexual acts are part of enslavement in same way that nonsexual acts are part of sexual slavery. Therefore, the elements must be the same.

### V. RELIEF SOUGHT

69. For the reasons described at **paragraphs 12-14** above, the Defence respectfully requests Trial Chamber IX to dismiss the charge of enslavement.

Respectfully submitted,



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Hon. Krispus Ayena Odongo  
On behalf of Mr Dominic Ongwen

Dated this 10<sup>th</sup> day of January, 2020

<sup>59</sup> *Katanga* CoC, para. 432