

**Cour  
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Internationale**

**International  
Criminal  
Court**



**Original: English**

**No. ICC-02/04-01/15  
Date: 19 December 2021**

**THE APPEALS CHAMBER**

**Before:** Judge Luz del Carmen Ibáñez Carranza, President  
Judge Piotr Hofmański  
Judge Solomy Balungi Bossa  
Judge Reine Alapini-Gansou  
Judge Gocha Lordkipanidze

**SITUATION IN UGANDA**

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

**Public**

*Amicus Curiae* Observations on the issue of  
**Sexual and Gender-based Crimes: Sexual Slavery & Forced Marriage**

**Source:** Prof Jean Allain, Monash University, Castan Centre for Human Rights Law;  
with research assistance from Andrea Jones, Policy Manager, Castan Centre  
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**Decision to be notified in accordance with regulation 31 of the Regulations of the Court to:**

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Ms Helen Brady

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Chief Charles Achaleke Taku  
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**Legal Representatives of Victims**

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Mr Francisco Cox

Ms Paolina Massidda

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**REGISTRY**

**Registrar**

Mr Peter Lewis

1. Having been granted leave to submit an *amicus curiae* on the merits of legal questions related to sexual and gender-based crimes, pursuant to the Decision of the Appeals Chamber dated 24 November 2021, the following consideration of sexual slavery and forced marriage is undertaken in line with the legal framework of the International Criminal Court and the relevant jurisprudence.

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2. Throughout the history of humanity, girls and women have been considered the spoils of war. For certain girls and women, military conquest has been manifest, in its most base form, in finding themselves under threat of death: abducted, distributed to soldiers, raped, compelled to force labour, forcibly impregnated, and often times made to accept their circumstances by staying with their captors. Unfortunately, there is nothing new in this: it is enslavement.

3. This form of enslavement uses the most debilitating means of asserting dominance and control: sexual violence. In the crimes which Ongwen was found guilty of a trial, his use of sexual violence was key to asserting his control; and the rota of continuous, periodic, rapes of girls and women was the means of maintaining enslavement by enforcing control, allowing for the exercise of other powers attaching to ownership. By looking to the substance of the relationship rather than the form (what it was called), it is evident that the phenomena under consideration is covered by the Crime of Sexual Slavery, as set out in the legal framework of the International Criminal Court.

4. The international crime of ‘forced marriage’ already exists and is acknowledged within the legal framework of the Court via the 1956 Supplementary Convention being referenced within the *Elements of the Crimes*. Whereas, during the negotiations of the 1998 *Statute of the International Criminal Court*, it was accepted that the phenomena of ‘forced marriage in wartime’ was covered by the Crime of Sexual Slavery.

5. To understand the content of that Crime of Sexual Slavery, and specifically that of Element 1 common to all instances of the crimes of Sexual Slavery as set out in the *Elements of the Crimes* one must, like opening successive Matryoshka Dolls, consider that the normative content of this Element of the crimes of Sexual Slavery is nesting within the Crime of Enslavement as set out in the *Statute*, which itself is nesting within the crime of slavery as established in public international law. Attention now turns to the unpacking these layers to establish, in part, the normative content inherent the crimes of Sexual Slavery.

## Slavery

6. In public international law, slavery is made a crime by way of the 1926 Slavery Convention, with the criminal act expanded by the 1956 Supplementary Convention.<sup>1</sup>

7. The definition of ‘slavery’ is first set out in the 1926 Slavery Convention and later confirmed by its inclusion in the 1956 Supplementary Convention.<sup>2</sup> As the *Statute* replicates, in substance, that definition as the Crime of Enslavement,<sup>3</sup> mention will be made of ‘slavery and enslavement’ to indicate that the discussion considering slavery also speaks to, or engages with, enslavement.

8. As set out in Article 1(1) of the 1926 Slavery Convention, the definition of slavery reads:

Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.

9. The essence of this definition turns on the concept of the exercise of the ‘powers attaching to the right of ownership’. Very little consideration was given to the substance of those powers during the Twentieth-Century, but for a 1953 Report by the UN Secretary-General setting out “the characteristics of the various powers attaching to the ‘right of ownership’, referred to in Article 1 of the International Slavery Convention of 1926” as:

1. the individual of servile status may be made the object of a purchase;
2. the master may use the individual of servile status, and in particular his capacity to work, in an absolute manner, without any restriction other than that which might be expressly provided by law;
3. the products of labour of the individual of servile status become the property of the master without any compensation commensurate to the value of the labour;
4. the ownership of the individual of servile status can be transferred to another person;
5. the servile status is permanent, that is to say, it cannot be terminated by the will of the individual subject to it;
6. the servile status is transmitted *ipso facto* to descendants of the individual having such status.<sup>4</sup>

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<sup>1</sup> See Article 6, Slavery Convention, 1926; and Article 6(1), Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956.

<sup>2</sup> See Article 1(1), Slavery Convention, 1926; and Article 7(a), Supplementary Convention, 1956.

<sup>3</sup> See Article 7(2)(c), Statute of the International Criminal Court, 1998.

<sup>4</sup> See United Nations, Economic and Social Council, *Slavery, the Slave Trade, and other forms of Servitude (Report of the Secretary-General)*, UN Doc. E/2357, 27 January 1953, p. 28.

10. Tangentially, in regard to these characteristics, one comment is worth making. Recognising that the Trial Chamber notes that duration is a factor to take into account in regard to the period of enslavement, note characteristic number 5 which speaks of the indeterminacy of enslavement for those subject to it.<sup>5</sup>

11. These six characteristics of the powers attached to the right of ownership provide an authoritative starting point for understanding the substance of the definition of slavery and, by extension, enslavement. Since the Report of the UN Secretary-General, and as a result of the conclusion of the 1998 Rome *Statute* and of the 2000 UN Trafficking Protocol,<sup>6</sup> as well as the expansion of international judicial *fora*; the Twenty-First Century has witnessed a marked increase in cases dealing with slavery and enslavement.

12. Until recently, the international jurisprudence has not sought to interrogate what constitutes those ‘powers attaching to the right of ownership’. Rather consideration has been given to “indications of enslavement” first elaborated by the ICTY, and relied upon by the Trial Chamber in *Ongwen* case; as well as the Special Court for Sierra Leone and the ECOWAS Court of Justice:<sup>7</sup> These indications of enslavement are:

a) the restriction or control of an individual’s autonomy; b) the loss or restriction of freedom of movement; c) the accruing of some gain to the perpetrator; d) the absence of the victim’s consent or free will, or it is rendered impossible or irrelevant by the threat or use of force or other forms of coercion, the fear of violence, deception or false promises; e) the use of physical force or psychological oppression; f) the victim’s position of vulnerability; g) detention or captivity; i) exploitation.

13. By contrast, in 2016, the Inter-American Court of Human Rights noted these ‘indications of enslavement’; and went on to consider the substance of the definition of slavery/enslavement.<sup>8</sup> The Inter-American Court looked beyond the periphery of the indicators of slavery/enslavement, and instead developed a core legal understanding of the normative

<sup>5</sup> See *The Prosecutor v Dominic Ongwen*, International Criminal Court, Trial Judgment, 4 February 2021, para. 2714; see also Guideline 3 – Possession is Foundational to Slavery, *Bellagio-Harvard Guidelines on the Legal Parameters of Slavery*, 2012 at:

<https://www.monash.edu/law/research/centres/castancentre/our-areas-of-work/human-trafficking/bellagio-harvard-guidelines-on-the-legal-parameters-of-slavery>.

<sup>6</sup> See Article 3(a), Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, 2000.

<sup>7</sup> See *Case of Prosecutor v. Kunarac*, ICTY, Trial Judgement, 22 February 2001, para. 542; *The Prosecutor v Dominic Ongwen*, International Criminal Court, Trial Judgment, 4 February 2021, para. 2712; *Brima et als*. Special Court for Sierra Leone, No. TESS-04-16-T-628, Trial Chamber, Judgment, 20 June 2007, para. 745; and, *Hadijatou Mani Koraou v. Republic of Niger*, ECOWAS Court of Justice, Judgment, 27 October 2008, para. 77.

<sup>8</sup> *Case of the Hacienda Brazil Verde Workers v. Brazil*, Inter-American Court of Human Rights. Judgement, 20 October 2016, para. 272; available at: [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_318\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_318_ing.pdf).

concept of slavery (and thus enslavement) and, more specifically, for our purposes, what constitutes the exercise of ‘the powers attaching to the right of ownership’.

14. The Court drew on the 2012 *Bellagio-Harvard Guidelines* in conceptualising slavery and by extension enslavement. Recognising, as the UN Secretary-General did, that the definition of slavery functions within a property paradigm, the *Research Network* which developed the *Guidelines* turned to the manifestations of ownership and the means by which the powers associated with ownership are exercised. In regard to enslavement, those powers attaching to the right of ownership are: possession, use, management, profit, transfer or disposal.<sup>9</sup>

15. Foundational to slavery is the exercise of the power attaching to the right of ownership known as possession. Amongst those powers, ‘possession’, that is: the background relationship of control – is “the foundation on which the whole superstructure of ownership rests”.<sup>10</sup> What is required in a situation of slavery or enslavement is for a person to exercise ‘control tantamount to possession’ over another human being. The same control over a person in a case of slavery or enslavement, as one would exercise in possessing a thing which one owns.<sup>11</sup>

16. For its part, the Inter-American Court elaborates further as to such control, stating that “when determining the level of control required to consider an act as slavery, [...] this could be equated to the loss of a person’s own will, or to a considerable decrease in personal autonomy.”<sup>12</sup> This threshold of control needed in cases of slavery or enslavement is consistent with a fundamental deprivation of liberty envisioned by the legal framework of the International Criminal Court which, in property law, is recognised as constituting ‘possession’ where one is speaking of a thing owned. The Inter-American Court then sets out its understanding of what constitutes the exercise of those powers and makes reference to deprivation of liberty:

the so-called ‘exercise of the powers attaching to the right of ownership’ should now be understood as constituting control over a person in such a way as to significantly deprive that person of his or her individual liberty, ‘with the intent of exploitation through the use, management, profit, transfer or disposal of that person. Usually, this exercise will be supported by and obtained through means such as violent force, deception and/or coercion’.<sup>13</sup>

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<sup>9</sup> See Guidelines 2-4, *Bellagio-Harvard Guidelines on the Legal Parameters of Slavery*, 2012. For the considerations of the *Research Network*, see Jean Allain (ed.), *The Legal Understanding of Slavery: from the Historical to the Contemporary*, 2012.

<sup>10</sup> A. M. Honoré, “Ownership”, A.G. Guest (ed.), *Oxford Essays in Jurisprudence*, 1961, p. 113.

<sup>11</sup> See Jean Allain and Robin Hickey, “Property Law and the Definition of Slavery”, *International and Comparative Law Quarterly*, Volume 61, 2012, pp. 915-938.

<sup>12</sup> *Case of the Hacienda Brazil Verde Workers v. Brazil*, Inter-American Court of Human Rights, Judgement, 20 October 2016, para. 271.

<sup>13</sup> *Id.*, para. 271. Footnotes excluded.

## Enslavement

17. The Crime of Enslavement is established as a crime against humanity by Article 7(1)(c) of the *Statute* and is defined in Article 7(2)(c) in the following terms:

‘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 definition of the Crime of Enslavement reproduces, in substance, the definition of slavery. The latter part of this definition – “and includes the exercise of such power in the course of trafficking in persons, in particular women and children” –, which is not found in the definition of slavery, should be understood as a “common drafting technique” which does not add to the substance of the definition; but rather brings trafficking in persons to the attention of judges so as not to exclude the issue *ipso facto* from the purview of enslavement.<sup>14</sup>

19. In regard to the Crime of Enslavement, Element 1 of the *Elements of the Crimes* is a reproduction of Element 1 common to the crimes of Sexual Slavery, including an identical, common Footnote.<sup>15</sup> As such, common Element 1 of the crimes of Sexual Slavery should be understood as consonant with the Crime of Enslavement as defined by the *Statute*.

## Sexual Slavery

20. For the purposes of this Brief, the ‘crimes of Sexual Slavery’ are those of Articles 7(1)(g), 8(2)(b)(xxii), and 8(2)(e)(vi) of the *Statute*. These crimes of Sexual Slavery share the following common Element 1 and Element 2 of the *Elements of Crimes*:<sup>16</sup>

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.

2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.

21. The crimes of Sexual Slavery also share a common Footnote.<sup>17</sup>

<sup>14</sup> By analogy, see *The Queen v Tang* [2008] HCA 39, 28 August 2008, para. 33.

<sup>15</sup> See Element 1 of Article 7(1)(c) of the *Elements of Crimes* and its accompanying footnote 11.

<sup>16</sup> See Article 7(1)(g)-2 – Crime against humanity of sexual slavery; Article 8(2)(b)(xxii)-2 – War crime of sexual slavery; and Article 8(2)(e)(vi)-2 – War crime of sexual slavery; of the *Elements of the Crimes*.

<sup>17</sup> See footnotes 18, 53, and 66 of the *Elements of the Crimes*.

### ***Common Element 1 of the Crimes of Sexual Slavery***

22. Article 9(1) of the *Statute* states that the “Elements of Crimes shall assist the Court in the interpretation and application” of the crimes; and at Article 9(3) that the “Elements of Crimes [...] be consistent with this Statute”.

23. *Prima facie*, Common Element 1 of the crimes of Sexual Slavery *appears* to extend the notion of enslavement, as defined by Article 7(2)(c) of the *Statute*, beyond that of “powers attaching to the right of ownership,” by introducing the notion of a “similar deprivation of liberty”. However, within the legal framework of the Court, the opposite is, in law, correct. To develop this line of interpretation, consideration turns first to the grammatical construction of the sentences of common Element 1 of the crimes of Sexual Slavery wherein the primary clause of common Element 1 reads: “the perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons”. The secondary clause provides a non-exhaustive list (“such as”) of powers attaching to the right of ownership: “purchasing, selling, lending or bartering such a person or persons”. Beyond providing such examples of powers, the secondary clause adds a final phrase which reads “or by imposing on them a similar deprivation of liberty”. In English grammar, the conjunction ‘or’ can provide for either a continuation or an alternative.

24. The first reading of the phrase “or by imposing on them a similar deprivation of liberty,” is that it is but a continuation of the examples provided in the secondary clause, so as to form part of the following train of examples of powers attaching to the right of ownership: “such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty”. In this first reading, a ‘*similar* deprivation of liberty’ is an example of another power attaching to the right of ownership.

25. A second reading of the final phrase of Element 1 would be that ‘or’ be read as an alternative. That “similar deprivation of liberty” would be distinct from (or an alternative to) the rest of the secondary clause. However, such a reading cannot hold, as the link between the final phrase and the rest of the secondary clause is established in two ways: First, the reference to the act of “imposing on *them*” relates to the “one or more persons” over whom the perpetrator is exercising powers attaching to the right of ownership. Second, mention of “*similar* deprivation of liberty”, speaks to a deprivation which is similar to those powers attaching to the rights of ownership which are enumerated.



26. Therefore, the final phrase (“similar deprivation of liberty”) is to be understood as an example of a power attaching to the right of ownership. Only in this manner can this phrase, and thus common Element 1 of the crimes of Sexual Slavery, be read to be consistent with the definition of the Crime of Enslavement as required by Article 9(3) of the *Statute*.

27. That said, deprivation of liberty is the ‘foundational’ power attaching to the right of ownership, as such a deprivation would necessitate the level of lost liberty, of agency, of freedom or autonomy, which would be recognised as establishing the type of control which, if it was over a thing owned, would constitute possession. This was the finding of the Inter-American Court of Human Rights.

28. In the *Ongwen* case, as we shall see, that deprivation of liberty, which amounts to the exercise of control tantamount to possession, was imposed by an initial and then periodic acts of sexual violence. As noted in the 2012 *Bellagio-Harvard Guidelines*, “while the exact form of possession might vary, in essence it supposes control over a person by another such as a person might control a thing”. Such control may be physical but [...] more abstract manifestations of control of a person may be evident in [...] attempts to forge a new identity through compelling a new religion, language, place of residence, or forcing marriage”.<sup>18</sup>

### ***Common Footnote to Element 1 of the Crimes of Sexual Slavery***

29. The Common Footnote to Element 1 of the crimes of Sexual Slavery reads:

It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to 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.

30. This Common Footnote *appears* to provide an understanding of deprivation of liberty which, *prima facie*, extends the crimes of Sexual Slavery to include the lesser servitudes of forced labour, servile status, and trafficking in persons. However, this is not so.

31. In general terms, a footnote is meant to clarify, not detract, from the provision to which it is attached. This, along with the fact that ‘similar deprivation of liberty’ as found in common Element 1 of the crimes of Sexual Slavery is to be understood as a power attaching

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<sup>18</sup> Guideline 3 – Possession is Foundational to Slavery, *Bellagio-Harvard Guidelines on the Legal Parameters of Slavery*, 2012.

to the right of ownership, requires that the Footnote be read in a manner which does not detract from, but clarifies the understanding of ‘similar deprivation of liberty’ consonant with common Element 1 of the crimes of Sexual Slavery (which, it will be recalled is a replica of the Element 1 of Enslavement) and, by virtue of Article 9(3), “be consistent with this Statute”, and thus its definition of the Crime of Enslavement.

32. It should be recognised that the lesser servitudes mentioned in the common Footnote can –if a perpetrator crosses a threshold by exercising powers attaching to the right of ownership– shift from being a case of forced labour, servile status, or trafficking in persons; to being a case of enslavement and thus, within the purview of crimes of Sexual Slavery through its common Element 1.

33. This is so, as the introductory paragraph of Article 1 of the 1956 Supplementary Convention notes that States Parties “shall take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment of [these] institutions and practices”. However, that paragraph continues by stating that the abolition or abandonment of these institutions and practices, should take place “where they still exist and whether or not they are covered by the definition of slavery contained in article 1 of the Slavery Convention signed at Geneva on 25 September 1926”.

34. The 1956 Supplementary Convention thus recognises that these servile statuses (these institutions and practices similar to slavery) should be abandoned or abolished in their own right. However, the Convention also recognises that those institutions and practice set out at Article 1 can also manifest powers attaching to the right of ownership, and when they do, they constitute slavery as defined by the 1926 Slavery Convention (and by extension enslavement within the legal framework of the Court).<sup>19</sup>

35. Therefore, as referenced in the common Footnote, it is only in those “circumstances” - where the powers attaching to the right of ownership are exercised – that the provisions of the 1956 Supplementary Convention will be consistent with common Element 1 of the crimes of Sexual Slavery, and in line with article 9(3) of the *Statute*.

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<sup>19</sup> See League of Nations, *Slavery: Report of the Advisory Committee of Experts*, Third (Extraordinary) Meeting of the Advisory Committee, C.189(I). M.145.1936, VI, 13-14 April 1936, p. 27 and pp. 24-25.

36. Article 7(b) of the 1956 Supplementary Convention defines a person of “servile status” as “a person in the condition or status resulting from any of the institutions or practices mentioned in article 1 of this Convention”. Article 1 of the 1956 Convention sets out, *inter alia*, the provisions related to forced marriage:

(c) Any institution or practice whereby:

(i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or

(ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or

(iii) A woman on the death of her husband is liable to be inherited by another person.

37. Consider the cogent example of the reducing of a person to the servile status of ‘forced marriage’ as set out in Article 1(c) of the 1956 Supplementary Convention. The Court should look to the first sentence of the Footnote attached to common Element 1 of the crimes of Sexual Slavery. The Footnote establishes that a deprivation of liberty may occur, “in some circumstances” which, in fact and in law, includes those circumstances found at Article 1(c) of the 1956 Convention, as these institutions and practices manifest ‘powers attaching to the right of ownership’ and thus constitute slavery/enslavement. In other words, where Article 1(c) of the 1956 Convention is concerned, its provisions are, by their very nature, institutions or practices of slavery, exhibiting classic property manifestations: the *sale* of a bride, the *transfer* of a wife, and the *inheritance* of a widow.

38. As will be discussed in the final Section – Forced Marriage, within the provisions of Article 1(c) are the international crime of forced marriage. Yet, in substance, these crimes have no relation to what transpired at the hands of the LRA.

39. In the *Ongwen* case, the Trial Chamber errs in stating that this “conjugal association” does “not necessarily require the exercise of [sic] ownership over a person”.<sup>20</sup> Rather, the exercise of the powers attaching to the right of ownership is fundamental to this case. How else, in the language of the Trial Chamber, did the “imposition” of this conjugal association transpire? It was imposed through control tantamount to possession, through the exercise of the foundational, and in this case, the fundamental power attaching to the right of ownership. The extent of the control over these girls and women, was so overwhelming, that if it was exercised

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<sup>20</sup> *Prosecutor v Dominic Ongwen*, International Criminal Court, Trial Judgment, 4 February 2021, para. 2750.

over a thing owned, we would recognise it as ‘possession’ in property law. In the case at hand, that control, tantamount to possession, was established in the most abhorrent manner: through sexual violence.

40. Before turning to consider this foundational power attaching to the right of ownership and the manner in which it was exercised by Ongwen and more generally the LRA, it is worth unpacking another power attaching to the right of ownership, which was also manifest in the case at hand. Turning to the so-called domestic ‘chores’ or ‘duties’ required to be undertaken by these girls and women.<sup>21</sup> This was forced labour which, within the coercive environment in which they lived, meant that their labour went beyond a condition “analogous to slavery”,<sup>22</sup> to be, in law, enslavement as manifesting a power attaching to the right of ownership. The power normally associated with ownership in this situation is to be understood as ‘using a person’. Yet, to say that to use a person is to enslave them has no basis in fact or law. Rather, as noted in the 2012 *Bellagio-Harvard Guidelines*: “Using a person may provide evidence of slavery”. However, more is needed. The *Guidelines* continue: “Having established control tantamount to possession; the act of using that person will be an act of slavery”.<sup>23</sup>

### ***Common Element 2 of the Crimes of Sexual Slavery***

41. Whatever the perception of ‘sexual slavery’ may be for the ‘person on the street’; within the framework of the International Criminal Court, the crimes of Sexual Slavery are those instances where a person is enslaved and, in the language of common Element 2, “the perpetrator caused such person or persons to engage in one or more acts of a sexual nature”. This does not require that the crimes of Sexual Slavery be “predominantly a sexual crime”<sup>24</sup>; though the Court may consider that Element 2 should be more than incidental.

42. It might be emphasised here that the 1926 and 1956 Slavery Conventions recognise that slavery is to be suppressed “in all its forms”.<sup>25</sup> Throughout history the form of enslavement under consideration has followed a similar trajectory for women caught up in war and conquest.

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<sup>21</sup> See *Prosecutor v Dominic Ongwen*, International Criminal Court, Trial Judgment, 4 February 2021, para. 2039.

<sup>22</sup> See Preamble Paragraph five, Slavery Convention, 1926.

<sup>23</sup> Guideline 4(b) – Using a person, *Bellagio-Harvard Guidelines on the Legal Parameters of Slavery*, 2012.

<sup>24</sup> *Brima et als.* case, Special Court for Sierra Leone, Appeals Chamber, Judgment, SCSL-2004-16-A, 22 February 2008, para. 195.

<sup>25</sup> See Preamble to both the 1926 Slavery Convention; and the 1956 Slavery Convention (in the plural form).

43. Recognising that enslavement can come in different forms, one must turn to the substance of the relationship in question, rather than what a person may name it. In the *Ongwen* case what is required is a disassociation or unmasking of the form of what Ongwen and others in the LRA termed their co-called ‘wives’ from the substance of that relationship.<sup>26</sup> In so doing, it becomes evident that not only in substance did enslavement take place, but that such enslavement was initiated by a sexual element: through sexual violence, including rape, which placed the imprimatur of overwhelming control, of a type tantamount to possession, on these girls and women and, in so doing, vitiated their freedom and autonomy; that is: deprived them of their liberty. In this manner, Element 2 of the crime of Sexual Slavery, is met and is far from being incidental.

44. Ongwen and other soldiers became *de facto* ‘owners’ of these girls and women by visiting upon them the ultimate means of control tantamount to possession: the violent, non-consensual act of a sexual nature which established, through terror, physical violence, and pain, the exclusivity of *de facto* ownership. Ongwen and others maintained that control over these girls and women by mortal fear, through repeated periodic instances of sexual violence and rape to emphasise their total control in perpetuating a state of continued enslavement.

45. Such control, tantamount to possession, having been established and maintained, any or all of the other powers attaching to the right of ownership were then open to be exercised: the power to use these girls and women, to manage, profit, transfer or dispose of them to the exclusion of any other person. Ongwen and other soldiers exercised exclusive control over these girls and women and ‘used’ them both sexually and for domestic labour purposes. These men exercised, in the words of Blackstone, the right of property over these girls and women, in that they had “sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe”.<sup>27</sup>

46. From the survivors’ perspective, these girls and women were abducted; held for a period of time for unknown reasons (but to ensure, in fact, that they were free of sexually transmitted diseases); brought together with other abductees to be distributed to a soldier; raped, compelled

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<sup>26</sup> See Jean Allain, “When Forced Marriage is Slavery”, *The Law and Slavery: Prohibiting Human Exploitation*, 2015, pp. 466-474; and Jean Allain, “Forced Marriage: Slavery *qua* Enslavement and the Civil War in Sierra Leone”, *Slavery in International Law: Of Human Exploitation and Trafficking*, pp.293-324.

<sup>27</sup> As reproduced in Robin Hickey, “Seeking to Understand the Definition of Slavery” in Jean Allain (ed.), *The Legal Understanding of Slavery: from the Historical to the Contemporary*, 2012, p. 223, fn. 17.

to carry out any activities assigned to them under pain of death. The intensity of control placed on these girls and women was such that if such control was exercised over a thing, we would recognise it as ‘possession’ in property law.

47. From the perspective of the perpetrator – which goes to the element of *mens rea* – these girls and women were, in law, their Sexual Slaves. The limited contact which transpired between Ongwen and others and the girls and women in question was not of a familial or conjugal nature, but rather initiated by the original, then subsequent acts of sexual violence including rape, which created the condition of the crime of Sexual Slavery to exist and persist.

48. As a distinct form of Sexual Slavery, the Court may wish to ascribe a name to this practice of conjugal enslavement. The enslavement which did transpire, was of a sexual nature, and utilised the foundational power attaching to the right of ownership, not by purchase, selling, lending or bartering, but rather of ‘possession’: the exercising of control tantamount to possession which deprived these girls and women of their liberty through sexual violence. If they failed to comply, they die.

### **Forced Marriage**

49. The International Criminal Court, established by its *Statute*, is a product of public international law. The Court will be cognisant that applicable international law is found in the sources of international law, as reflected in Article 38(1) of the Statute of the International Court of Justice. Within this public international law paradigm, the Court applies its own legal framework in accordance with Article 21 of the *Statute*. Within that legal framework, Article 22 of the *Statute* sets out the principle of legality wherein criminal responsibility is only at play where “the conduct in question” was a crime “at the time it takes place”; and such crimes are to be “strictly construed” and “interpreted in favour” of the person appearing before the Court.

50. Whatever the procedural reasons why the concept of ‘forced marriage’, as another “Inhuman Act”, was developed; it should be recognised that hybrid courts and the lower instances of the International Criminal Court failed the principle of legality, as the concept, in the case at hand, has no standing in international law. To say that “there is no requirement that forced marriage [...] should be expressly criminalised in international law”,<sup>28</sup> fails to recognise

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<sup>28</sup> *Prosecutor v Dominic Ongwen*, International Criminal Court, Prosecution Response to ‘Defence Appeal Brief

that the Court is a product of international law and it is for sovereign States to make international law and for judges to reflect that law, including customary international law by virtue of State practice and *opinio juris*.

51. During the United Nations Conference of Plenipotentiaries on the Establishment of the International Criminal Court, the possible crime of forced marriage in times of armed conflict was mooted; however, it was understood and accepted by the Plenipotentiaries to be a “form of sexual slavery”.<sup>29</sup> In coming to this understanding, reliance was placed on a 1998 UN Report, prepared by Gay McDougall which emphasised that:

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, are both in fact and in law forms of slavery and, as such, violations of the peremptory norm prohibiting slavery.<sup>30</sup>

52. In domestic law, the crime of forced marriage is separate and distinct from what transpired at the hands of the LRA and, in fact, it itself has limited purchase amongst States. Even if State’s domestic legislation did cover the crime as reflected in the phenomena as it transpired at the hands of the LRA, it would lack the uniformity or widespread State practice necessary to lift these examples to a level of generality required to create public international law. This is so as, based on limited research, it appears that only 10.5% of UN Members States (19 out of 193 States) have any legislation addressing forced marriage.<sup>31</sup> Of the legislation of these States, none covers the phenomena of ‘forced marriage’ as played out in the *Ongwen* case or by the LRA more generally; and thus, no State practice exists. The same holds for *opinio juris*, as no resolution or consideration emanating from the UN Security Council, UN General Assembly, or the UN Human Rights Council suggests that States consider that there exists a stand-alone, legal obligation, to criminalise the phenomena of ‘forced marriage’ of the type manifest in the *Ongwen* case.<sup>32</sup>

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against the Conviction in the Judgment of 4 February 2021’, 9 November 2021, para. 564.

<sup>29</sup> See Hannah Baumeister, *Sexualised Crimes, Armed Conflict and the Law: The International Criminal Court and the Definitions of Rape and Forced Marriage*, 2018, p. 166.

<sup>30</sup> United Nations, Sub-Commission on Prevention of Discrimination and Protection of Minors, *Contemporary Forms of Slavery: Systematic rape, sexual slavery and slavery-like practices during armed conflict*, Final report submitted by Ms. Gay McDougall, Special Rapporteur, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, para. 8.

In regard to ‘super-normative armour’ afforded to slavery/enslavement, including as a *jus cogens* norm, see Jean Allain, *Slavery in International Law: Of Human Exploitation and Trafficking*, 2013, p. 111; and more generally, Jean Allain “Slavery and its Obligations *Erga Omnes*”, *Australian Yearbook of International Law*, Vol. 36, 2019, pp. 83-124.

<sup>31</sup> See the limited authority here: <https://www.endvawnow.org/en/articles/629-criminalization-of-forced-and-child-marriage.html>; and [https://assets.pewresearch.org/wp-content/uploads/sites/12/2016/09/FT\\_Marriage\\_Age\\_Appendix\\_2016\\_09\\_08.pdf](https://assets.pewresearch.org/wp-content/uploads/sites/12/2016/09/FT_Marriage_Age_Appendix_2016_09_08.pdf).

<sup>32</sup> For the various Resolution and considerations, see United Nations, Security Council, *Women, Peace and*

53. Where an international crime of ‘forced marriage’ *does exist* in applicable law, it is in Article 1(c) of the 1956 Supplementary Convention.

54. Those provisions are reinforced by Article 2 of the 1956 Convention which states:

With a view to bringing to an end the institutions and practices mentioned in article 1 (c) of this Convention, the States Parties undertake to prescribe, where appropriate, suitable minimum ages of marriage, to encourage the use of facilities whereby the consent of both parties to a marriage may be freely expressed in the presence of a competent civil or religious authority, and to encourage the registration of marriages.

55. Those provisions of the 1956 Supplementary Convention are applicable by virtue of Article 21(a) of the *Statute*, as referenced in the Footnote to common Element 1 of the crimes of Sexual Slavery. The 1956 Supplementary Convention itself does not use the term ‘forced marriage’. However, during the negotiations of the 1956 Convention, the provisions of what would become Article 1(c) – that is: the sale of a bride, the transfer of a wife, and the inheritance of a widow – were understood by the negotiators as ‘forced marriage’.<sup>33</sup> As mentioned previously, the three types of ‘forced marriage’ found at Article 1(c) are, in fact, and in law, forms of enslavement, meeting the threshold of common Element 1 of the crimes of Sexual Slavery.

56. The phenomena witnessed in the *Ongwen* case can not constitute the crime of ‘forced marriage’, as that international crime, which is quite narrowly circumscribed, already exists as set out in the 1956 Convention; which the Court is bound to apply by virtue of the 1956 Convention being referenced in the Footnote as found in the *Elements of the Crimes*.

57. However, if the Court was to find that the crime of forced marriage exists as ‘Other Inhuman Acts’ as per Article 7(k) of the *Statute*, then either it is a cumulative ‘super crime’ which also includes other crimes against humanity including at least: enslavement, rape, torture, and forced pregnancy and its Elements of the Crimes. If this is so, then it should be for the States Parties to amend the *Statute* as they have in regard to the Crime of Aggression, so as to acknowledge the gravity of such a super crime.

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*Security*, UN Doc. S/RES/2493, 29 October 2019, first preambular para.; United Nations, General Assembly, *Child, early and forced marriage*, UN Doc. A/RES/75167, 23 December 2020, second preambular para.; and United Nations, Human Rights Council, *Child, early and forced marriage in times of crises, including the COVID-19 pandemic*, UN Doc. A/HRC/RES/48/6, 14 October 2021, second preambular para..

<sup>33</sup> See Jean Allain, *The Slavery Conventions: The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention*, 2008, at pp. 334, 337, and 269. Note the coining of the term ‘servile marriage’ was meant to distinguish it from ‘forced marriage’ as found in domestic legislation. See Jean Allain, *Slavery in International Law: Of Human Exploitation and Trafficking*, 2013, p. 184.



58. Or, in the alternative, if the crime of forced marriage exists as “Other Inhuman Acts”, it does so independently, as a result of its sole, unique, characteristic which is the attributing of (rather than imposing) “conjugal association” to the victims. Taken in isolation, the attributing of conjugal association lacks the gravity to meet the test of ‘similar character’ to those inhuman acts established under Article 7 as Crimes against Humanity. This is not to discount the long-term specific effects on the survivors, but to recognise that those effects are as a result of enslavement, of which control through sexual violence was fundamental.



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Dated this 19th day of December 2021  
At Ferntree Gully, Australia