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Pénale
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**International
Criminal
Court**

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PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala , Presiding Judge
Judge Tomoko Akane
Judge Sergio Gerardo Ugalde Godinez

SITUATION IN UGANDA

**IN THE CASE OF
*THE PROSECUTOR v. JOSEPH KONY***

Public Document

Victims' Concerns on the Document Containing the Charges

Source: Office of Public Counsel for Victims

Document to be notified in accordance with regulation 31 of the Regulations of the Court to:

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I. INTRODUCTION

1. Counsel of the Office of Public Counsel for Victims (the “OPCV”) appointed to represent the victims authorised to participate in the *Kony* case (the “Legal Representatives”),¹ submit the views and concerns of the victims in relation to the Document Containing the Charges (the “DCC”) filed by the Prosecution.²

2. The Legal Representatives recall that the crime of sexual slavery as a crime against humanity and as a war crime are distinct offences under the Rome Statute (the “Statute”), each with specific legal elements and protecting different interests. In the present circumstances, prosecuting sexual violence only as a war crime fails to fully acknowledge and address the harm suffered by the civilians during the attacks perpetrated by the Lord Resistance Army (the “LRA”) and while held in captivity.

3. Upon reviewing the evidence and factual allegations presented by the Prosecution in the DCC, it becomes evident that the conduct described encompasses acts that under the Statute may constitute sexual slavery both as a crime of war and as a crime against humanity. The crime of sexual slavery, whether committed in the context of armed conflict (as a war crime) or in a widespread or systematic attack directed against any civilian population (as a crime against humanity), represents a grave violation of international humanitarian and human rights law.

4. Given the serious nature of the allegations and the potential implications for the Suspect and affected individuals, it is imperative that the legal characterisation of the charged conduct accurately reflects the gravity and nature of the crimes alleged. In this regard, the Prosecution’s choice to characterise the same facts as sexual slavery as a war crime and as enslavement as a crime against humanity does not cure the erroneous characterisation of the relevant conduct. Instead, it creates a misleading perception that certain forms of victimisation are less severe or significant than others. This

¹ See the “Decision on Victim’s Participation in Proceedings Related to the Situation in Uganda” (Pre-Trial Chamber II, Single Judge), [No. ICC-02/04-191](#), 12 March 2012.

² See the “Document Containing the Charges”, [No. ICC-02/04-01/05-474](#), 19 January 2024 (the “DCC”).

approach downplays the gravity of sexual violence and exploitation suffered by individuals within the context of war and non-war situations.

5. According to the Chambers Practice Manual, a defect in the formulation of the charges may be cured prior to the opening of the confirmation hearing – not only in the interest of the victims, but also to ensure that the Suspect is informed in detail of the nature, cause and content of the charges.³ In the alternative, the issue should be addressed by Pre-Trial Chamber II (the “Chamber”) in its determination on the proper legal characterisation of facts when ruling on the confirmation of charges against Mr Kony.

II. PROCEDURAL HISTORY

6. On 8 July 2005, the Pre-Trial Chamber in its previous composition issued the Warrant for the Arrest of Mr Kony.⁴

7. On 10 August 2007, the Single Judge of the former Chamber granted applicants a/0090/06, a/0098/06, a/0112/06, a/0118/06, a/0119/06 and a/0122/06 the status of victims in the Case and applicants a/0101/06 and a/0119/06 the status of victims in the context of the Situation.⁵

8. On 14 March 2008, the Single Judge of the former Chamber granted applicants a/0094/06, a/0095/06, a/0103/06, a/0117/06, a/0120/06, a/0121/06, a/0123/06 and a/0124/06 the status of victims in the Case and applicants a/0065/06, a/0068/06, a/0093/06, a/0096/06, a/0117/06, a/0120/06 and a/0123/06 the status of victims in the context of the Situation.⁶

³ See the [Chambers Practice Manual](#), para. 37.

⁴ See the “Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005” (Pre-Trial Chamber II), [No. ICC-02/04-01/05-53](#), 27 September 2005. A lesser redacted version, [No. ICC-02/04-01/05-456-Anx](#), was notified on 13 March 2023.

⁵ See the “Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06” (Pre-Trial Chamber II), [No. ICC-02/04-101](#) and [No. ICC-02/04-01/05-252](#), 13 August 2007.

⁶ See the “Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06,

9. On 9 February 2009, the Single Judge of the former Chamber appointed Ms Massidda, Principal Counsel of the OPCV as legal representative of a/0065/06, a/0066/06, a/0068/06, a/0088/06, a/0091/06, a/0092/06, a/0093/06, a/0096/06, a/0102/06, a/0115/06, a/0125/06, a/0126/06, a/0115/07, a/0117/07 and a/0118/07, granted the status of victims in the context of the Situation; and Ms Pellet, Counsel of the OPCV, as legal representative of a/0090/06, a/0094/06, a/0095/06, a/0098/06, a/0103/06, a/0112/06, a/0118/06, a/0121/06, a/0122/06, a/0124/06, a/0076/07, a/0077/07, a/0078/07, a/0081/07, a/0082/07, a/0084/07, a/0085/07, a/0090/07, a/0091/07, a/0092/07, a/0093/07, a/0094/07, a/0095/07, a/0096/07, a/0097/07, a/0098/07, a/0099/07, a/0100/07, a/0101/07, a/0102/07, a/0103/07, a/0105/07, a/0106/07, a/0107/07, a/0112/07 and a/0123/07, granted the status of victims of the Case.⁷

10. On 15 February 2008, the Single Judge of the former Chamber appointed Ms Massidda, as legal representative of victim a/0119/06 (admitted both in the Situation and in the Case).⁸

11. On 10 March 2009, said Chamber concluded that the case against *Mr Kony et al.* is admissible before the International Criminal Court (the “Court” or the “ICC”),⁹ which was confirmed by the Appeals Chamber on 16 September 2009.¹⁰

a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06” (Pre-Trial Chamber II), [No. ICC-02/04-125](#), 14 March 2008.

⁷ See the “Decision on legal representation of Victims a/0065/06, a/0066/06, a/0068/06, a/0088/06, a/0090/06 to a/0096/06, a/0098/06, a/0102/06, a/0103/06, a/0112/06, a/0115/06, a/0117/06, a/0118/06, a/0120/06 to a/0126/06, a/0076/07 to a/0078/07, a/0081/07, a/0082/07, a/0084/07, a/0085/07, a/0090/07 to a/0103/07, a/105/07 to a/0108/07, a/0112/07, a/0115/07, a/0117/07, a/0118/07 and a/0123/07”, [No. ICC-02/04-176](#) (Pre-Trial Chamber II), 9 February 2009.

⁸ See the “Decision on legal representation of Victims a/0090/06, a/0098/06, a/0101/06 a/0112/06, a/0118/06, a/0119/06 and a/0122/06” (Pre-Trial Chamber II), [No. ICC-02/04-01/05-267](#), 15 February 2008.

⁹ See the “Decision on the admissibility of the case under article 19(1) of the Statute” (Pre-Trial Chamber II), [No. ICC-02/04-01/05-377](#), 10 March 2009.

¹⁰ See the “Judgment on the appeal of the Defence against the ‘Decision on the admissibility of the case under article 19 (1) of the Statute’ of 10 March 2009” (Appeals Chamber), [No. ICC-02/04-01/05-408 OA3](#), 16 September 2009.

12. On 9 March 2012, the Single Judge of the Chamber appointed the OPCV as the legal representative of all victims and victim applicants pending the appointment of a common legal representative in the Situation.¹¹

13. On 23 November 2023, ruling on a Prosecution's request,¹² the Chamber found that there is grounds to hold a confirmation of charges hearing in the absence of Mr Kony, pending further steps to be taken by the Prosecution and the Registry.¹³

14. On 19 January 2024, the Prosecution filed the "Document Containing the Charges" (the "DCC").¹⁴

15. Mr Kony is charged with 36 counts which, *inter alia*, include: (i) enslavement as a crime against humanity (counts 10, 15 and 30) pursuant to articles 7(1)(c) and 25(3)(a) and 25(3)(b) of the Statute for acts committed around Lwala Girls School, the IDP camps of Pajule, Abia, Odek, Pagak, Lukodi and Abok, in northern Uganda, and the then-Sudan;¹⁵ and (ii) sexual slavery as a war crime (counts 27 and 36) pursuant to articles 8(2)(e)(vi) and 25(3)(a) and 25(3)(b) of the Rome Statute of at least hundreds of girls and women in northern Uganda and the then-Sudan between July 2002 and 31 December 2005.¹⁶

III. SUBMISSIONS

16. The Legal Representatives endorse the Prosecution's endeavour to broaden the original scope of Mr Kony's liability outlined in the Warrant of Arrest. They commend the emphasis placed in the DCC on the suffering of women and children at the hands

¹¹ See the "Decision on Victim's Participation in Proceedings Related to the Situation in Uganda" (Pre-Trial Chamber II), [No. ICC-02/04-191](#), 12 March 2012.

¹² See the "Public Redacted Version of the 'Prosecution's Request to Hold a Hearing on the Confirmation of Charges against Joseph Kony in his Absence'" (Pre-Trial Chamber II), [No. ICC-02/04-01/05-446-Red](#), 24 November 2022.

¹³ See the "Decision on the Prosecution's request to hold a confirmation of charges hearing in the *Kony* in the suspect's absence" (Pre-Trial Chamber II), [No. ICC-02/04-01/05-466](#), 23 November 2023, p. 24.

¹⁴ See the DCC, *supra* note 2.

¹⁵ *Idem*, pp. 28, 29, and 31.

¹⁶ *Idem*, pp. 31-32.

of the LRA, considering it a crucial step towards recognising the full extent of the victimisation suffered by thousands of individuals in Northern Uganda during the period indicated in the charges.

17. Nonetheless, the Legal Representatives convey the victims' concerns on the Prosecution's choice to charge the crime of sexual slavery only as war crime and not as crime against humanity. In fact, this decision prevents to fully recognise the extent of the harm suffered by the victims while held in captivity in the LRA. In addition, the Prosecution's characterisation as crime against humanity of enslavement of the same facts underpinning the war crime of sexual slavery¹⁷ creates a misleading perception that certain forms of victimisation are less severe or significant than others. This approach downplays the gravity of sexual violence and exploitation suffered by individuals within the context of war and non-war situations.

18. The legal interests protected by each crime can only be discerned by reference to the elements of that specific crime. When the crimes have materially distinct elements, the interests protected are necessarily different and being charged or convicted for only one of these crimes will therefore not be reflective of the full extent of the victimisation and culpability of a defendant. Whether and to what extent a crime may be fully subsumed in another crime can only be answered by reference to the elements of each crime. If these elements require proof of a fact not required by the other, cumulative charging (and convictions) are permissible.¹⁸ This approach strikes a careful balance between the need to reflect the full liability of a defendant while safeguarding their rights and ensuring that the person is not being unlawfully punished.¹⁹

¹⁷ See Counts 10 and 15 of the DCC, *supra* note 2, in particular paras. 94-105, and 129-133.

¹⁸ See the "Judgment on the appeal of Mr Dominic Ongwen against the decision of Trial Chamber IX of 6 May 2021 entitled 'Sentence'", (Appeals Chamber), [No. ICC-02/04-01/15-2023 A2](#), 15 December 2022, para. 133 (the "*Ongwen* Appeal Sentencing Judgment"). See also, the "Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled 'Trial Judgment'" (Appeals Chamber), [No. ICC-02/04-01/15-2022-Red A](#), 15 December 2022 (the "*Ongwen* Appeal Judgment"), paras. 1635-1636.

¹⁹ *Ibid.*

1. The determination of the legal characterisation of facts ultimately rests with the Chamber

19. It is for the relevant Chamber to ultimately determine the legal characterisation of the facts presented by the Prosecution in the DCC.²⁰ Whether a proposed change in the legal characterisation of the facts would result in a mere modification of that characterisation or an amendment, addition or substitution of a charge required a case-by-case analysis.

20. An “*amendment*” to the charges involves modifications or additions to the specific legal offenses or allegations presented against a defendant. This may include adjustments to the wording of charges, the inclusion of new charges, or the removal of existing charges. On the other hand, a “*change in the legal characterisation of the facts*” refers to alterations in how the underlying facts of a case are interpreted or understood within the framework of the law. This can involve re-evaluating the legal significance or implications of certain factual elements, without modifying the specific charges themselves. In summary, while an amendment to the charges involves adjustments to the specific legal allegations, a change in the legal characterisation of the facts pertains to revisions in how those facts are legally understood or interpreted.²¹

21. Accordingly, in previous instances, the Pre-Trial Chamber proceeded *proprio motu* to recharacterise the facts as described in the document containing the charges – without the need of adjourning the confirmation proceedings and resorting to article 61(7)(c)(ii) of the Statute. In the *Lubanga* case, the Prosecution charged the defendant with enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities *in the context of an armed conflict not of an international*

²⁰ See the “Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo” (Pre-Trial Chamber II), [No. ICC-01/05-01/08-14-tENG](#), 17 July 2008, para. 25.

²¹ See the “Second Corrigendum to ‘Minority opinion on the “Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court” of 17 July 2009’” (Trial Chamber I), [No. ICC-01/04-01/06-2069-Anx1](#), 31 July 2009, paras. 17-18.

character, a war crime punishable under article 8(2)(e)(vii) of the Statute. Pre-Trial Chamber I however recharacterised the armed conflict in Ituri as an international one, due to Uganda's presence as an occupying force. As a result, the Chamber substituted the crime charged by the Prosecution under article 8(2)(e)(vii) with a different one – enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities *in the context of an international armed conflict* – under article 8(2)(b)(xxvi). Pre-Trial Chamber I found that because both articles criminalise the same behaviour, it was not necessary to adjourn the hearing and to request the Prosecutor to amend the charges.²²

22. Similarly, in the *Bemba et al.* case, the Prosecutor had charged Mr Arido, *inter alia*, as direct or indirect co-perpetrator of offences against the administration of justice. Yet, Pre-Trial Chamber II confirmed some charges relating to Mr Arido based on direct perpetration.²³ The Appeals Chamber clarified that since the Pre-Trial Chamber remained within the mode of liability of commission under article 25(3)(a) of the Statute, it was not necessary to adjourn the confirmation hearing and request the Prosecutor to consider amending the charge pursuant to article 61(7)(c)(ii).²⁴

23. In the present circumstances, upon reviewing the evidence and factual allegations presented by the Prosecution in the DCC, it is evident that the conduct described in counts 27 and 36 encompasses acts that under the Statute may constitute sexual slavery both as a crime of war and as a crime against humanity.²⁵ The alleged facts strongly suggest an additional legal characterisation. This implies that, while the underlying facts remain the same, there is a possibility of changing the legal

²² See the “Decision on the confirmation of charges” (Pre-Trial Chamber I), [No. ICC-01/04-01/06-803-tEN](#), 29 January 2007, para. 204.

²³ See the “Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute” (Pre-Trial Chamber II), [No. ICC-01/05-01/13-749](#), 11 November 2014, paras. 36; 51-52.

²⁴ See the “Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled ‘Judgment pursuant to Article 74 of the Statute’” (Appeals Chamber), [No. ICC-01/05-01/13-2275-Red A A2 A3 A4 A5](#), 8 March 2018, para. 185.

²⁵ See the DCC, *supra* note 2, paras. 94-105, 129-133, and pp. 31-32.

framework under which the conduct is analysed and classified without expanding or modifying the scope of the alleged conduct. The Legal Representatives posit that it is in the inherent power of the Chamber in ensuring the fair conduct of the proceedings to review the alleged conduct and recharacterise the charges as crime of sexual slavery as a war crime and as a crime against humanity under article 7(1)(g) of the Statute.

24. The cumulative charging of the crime of sexual slavery as a war crime and as a crime against humanity would not require additional investigations nor significant changes in the DCC. In fact, the recharacterisation sought does not alter the substance of the charges or the underlying conduct alleged, but it will only affect the legal framework under which the Suspect is prosecuted, and as a result, the possible penalties imposed if convicted. Lastly, it would not cause delays in the proceedings and will ensure fair labelling so that the extent of the victimisation is fully captured while also making certain that the Suspect is properly informed of the charges against him.

25. To conclude, the Legal Representatives recall that, pursuant to the Chambers Practice Manual, the Pre-Trial Chamber may *proprio motu* remedy defects in the formulation of the charges prior to the opening of the confirmation hearing, by instructing the Prosecutor to make the necessary adjustments. In the present circumstances, this approach would ensure not only that the full victimisation is properly reflected in the DCC, but would also allow for the Suspect to be timely informed of the nature, cause and content of the charges in accordance with article 67(1)(a) of the Statute.

2. The DCC must reflect the different context in which identical criminal conducts were put into place and the different legal interests protected

26. The underlying acts of the crime of sexual slavery under article 7(1)(g)-2 and article 8(2)(e)(vi)-2 of the Statute are identical,²⁶ both refers to the following criminal conduct:

“ 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 ”.

27. Although the fundamental acts constituting the crime of sexual slavery under article 7(1)(g) and article 8(2)(e)(vi) of the Statute are the same, their distinctiveness as separate crimes arises from their unique contextual elements. These contextual differences, in turn, result in the protection of different interests through the prosecution of each type of crime. The Appeals Chamber held that *“the inclusion of the contextual elements as constitutive elements of the crimes allows the identification of the legal interests protected by each provision”* and *“given the materially distinct contextual elements contained”* they *“protect different legal interests”*.²⁷

28. Prosecuting sexual slavery as a crime against humanity aims to protect the fundamental dignity of individuals by condemning and punishing acts of sexual violence committed as part of a widespread or systematic attack against a civilian population. This legal framework is particularly concerned with ensuring the protection of civilians during peacetime and addressing situations where sexual slavery is used as a tool of oppression or control against civilian populations.

29. Prosecuting sexual slavery as a war crime serves to uphold the principles of international humanitarian law which prohibit acts of sexual violence against persons

²⁶ See the [Elements of Crimes](#), article 7(1)(g)-2 (Crime against humanity of sexual slavery) and article 8(2)(e)(vi)-2 (War crime of sexual slavery).

²⁷ See the *Ongwen* Appeal Judgment, *supra* note 18, para. 1656.

taking no active part in hostilities during armed conflicts. This legal framework aims to protect individuals, including civilians and prisoners of war, from acts of sexual violence perpetrated during armed conflicts. It also emphasises the special vulnerability of individuals in situations of armed conflict and seeks to hold perpetrators accountable for violating their rights under international law.

30. Therefore, while both article 7(1)(g) and article 8(2)(e)(vi) of the Statute seek to address acts of sexual violence, they protect different interests and are prosecuted within separate legal context. By pursuing charges of sexual slavery under different legal frameworks, the Court acknowledges the diverse circumstances in which victims have suffered harm. Cumulative charging allows for a comprehensive approach to accountability by ensuring that perpetrators are held responsible for the full range of their actions. By recognising the same conduct under multiple legal categories, the Court can address the various dimensions and contexts in which the crime occurred, providing a more complete understanding of the harm inflicted. This has significant implications for the rights of victims and serves the general interests of justice by recognising different types of prejudice, providing access to tailored forms of redress, enhancing accountability and prevention efforts, and promoting international legal standards.

31. Furthermore, the Legal Representatives recall that, in the *Ongwen* case, the relevant conduct was indeed cumulative charged as sexual slavery as both a war crime and a crime against humanity.²⁸ The approach was found to be legally sound by the Appeals Chamber.²⁹ However, the Prosecution fails to offer a reasonable explanation for departing from this precedent, particularly considering the extensive overlap in the factual allegations against Mr Ongwen and Mr Kony. In this regard, the Legal Representatives also note that the Prosecution – based on the same underlying facts –

²⁸ See the “Document Containing the Charges”, [No. ICC-02/04-01/15-375-AnxA-Red](#), 22 December 2015, pp. 45-46.

²⁹ See the *Ongwen* Appeal Judgment, *supra* note 18, paras. 1635-1636. See also, the *Ongwen* Appeal Sentencing Judgment, *supra* note 18, para. 133.

charges in the DCC the crimes of murder, attempted murder, torture, persecution, rape, and forced pregnancy, as both war crimes and crimes against humanity.³⁰

32. The Legal Representatives underline that the practice of cumulative charging is permitted before the Court, as endorsed in the *Ntaganda* case,³¹ and recently upheld in the *Ongwen* case by the Appeals Chamber which observed that:

“the test for cumulative convictions, as articulated in the Delalić et al. Case and confirmed by the Appeals Chamber in the Bemba et al. Appeal Judgment, finds its rationale in the need to reflect the full culpability of an accused person, given that each provision which has a ‘materially distinct’ element protects different legal interests. What the legal interests protected by each crime are, can only be discerned by reference to the elements of that specific crime. When two or more crimes have materially distinct elements, the interests protected are necessarily different, and a conviction for only one of these crimes will therefore not be reflective of the full extent of the culpability of an accused person. Furthermore, the question of whether and to what extent a crime may be fully subsumed in another crime can only be answered by reference to the elements of each crime as well. If these elements require proof of a fact not required by the other, cumulative convictions are permissible”.³²

33. Given the similarities between the *Kony* case and the *Ongwen* case – and the finding on sexual slavery already entered by Trial Chamber IX in the latter case and confirmed by the Appeals Chamber³³ – it is in the interest of victims that the crime of

³⁰ See the DCC, *supra* note 2, pp. 26-32.

³¹ See the “Judgment on the appeal of Mr Bosco Ntaganda against the decision of Trial Chamber VI of 7 November 2019 entitled ‘Sentencing judgment’” (Appeals Chamber), [No. ICC-01/04-02/06-2667-Red](#), 30 March 2021, paras. 131-132 which refers to the “Judgment” (Trial Chamber VI), [No. ICC-01/04-02/06-2359](#), 8 July 2019, para. 1202: “[t]he Chamber agrees with trial chambers at this Court that cumulative convictions are permissible under the Court’s framework. The Chamber can enter multiple convictions under different provisions of the Statute for the same conduct only if each statutory provision at stake has a ‘materially distinct’ element not contained in the other, i.e. an element which requires proof of a fact not required by the other. It is the legal elements of each statutory provision and not the acts and/or omissions of the accused that must be considered when applying the aforementioned test. Further, for the purpose of this determination, all elements, including the contextual elements, should be taken into account. Where the offences are not materially distinct, only a conviction under the more specific provision should be entered as the more specific offence subsumes the less specific one”.

³² See the *Ongwen* Appeal Judgment, *supra* note 18, paras. 1635-1636 (footnotes omitted).

³³ See the “Trial Judgment” (Trial Chamber IX), [No. ICC-02/04-01/15-1762-Red](#), 4 February 2021, para. 2715, which refers to sexual slavery as “a specific form of the crime of ‘enslavement’ penalising the perpetrator’s restriction or control of the victim’s sexual autonomy while held in the state of enslavement.”

sexual slavery is cumulatively charged as crime against humanity and war crime, to ensure the recognition of the full extent of their harm and suffering. In addition, by failing to characterise sexual slavery as a crime against humanity, the Prosecution may inadvertently limit the scope of accountability for the Suspect. Such a narrow categorisation overlooks the systemic and widespread nature of sexual violence as a tool of oppression and control, thereby diminishing the culpability of the individual responsible for orchestrating or condoning these heinous acts.

34. On this aspect, the Legal Representatives conclude by recalling that a basic principle of statutory interpretation presumes that *“the legislator does nothing in vain and that the court must endeavour to give significance to every word of a statutory instrument. This also implicates the principle of fair labelling, and how the proper characterisation of the evil committed, that is to say, calling the crime by its true name, is part of the justice sought by the victims”*.³⁴

3. Enslavement and sexual slavery are distinct crimes under the Statute

35. The Legal Representatives note that the Prosecution charges the crime against humanity of enslavement in relation to the same facts relied upon to charge the war crime of sexual slavery.

36. This approach does not cure the erroneous legal characterisation of the facts discussed *supra*. While the protected interests of enslavement and sexual slavery may overlap to a certain degree – as both involve the perpetrator exercising powers attaching to the right of ownership over one or more persons and depriving such persons of their liberty – the crime of sexual slavery includes the *additional element* that the victim is also forced to engage in at least one act of a sexual nature, as reflected in their respective legal elements.³⁵

³⁴ *Idem*, para. 2722.

³⁵ See the [Elements of Crimes](#), article 7(1)(c) – Crime against humanity of enslavement: *“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”* (footnotes omitted).

37. In this sense, the crimes of sexual slavery and enslavement have elements that are materially distinct.³⁶ As a comparative analysis of the different interests protected by similar crimes – like sexual slavery and rape – the Appeals Chamber in the *Ongwen* case considered that “*while the protected interests may overlap to a certain degree, the fundamental nature of the crime of sexual slavery is reducing a person to a servile status, and depriving him or her of his or her liberty and sexual autonomy, whereas for the crime of rape it is the invasion of a sexual nature, of a person’s body, and the attack on his or her sexual autonomy. Indeed, these differences are expressed in the legal elements of the crimes of rape and sexual slavery*”.³⁷

38. In addition, the Preparatory Works show that the drafters clearly intended to include in the Statute enslavement and sexual slavery as distinct crimes against humanity.³⁸ In 1996, some delegations expressed the view that the crime of enslavement required further clarification and several proposals referred to enslavement, including slavery-related practices and forced labour; or the establishment or maintenance over persons of a status of slavery, servitude or forced labour.³⁹ At that stage sexual crimes were mainly criminalised under the umbrella of ‘rape’.⁴⁰

See also, the [Elements of Crimes](#), article 7(1)(g)-2 – Crime against humanity of sexual slavery: “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”. See further, the [Elements of Crimes](#), article 8(2)(e)(vi)-2 – War crime of sexual slavery: “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” (footnotes omitted).

³⁶ See the [Elements of Crimes](#), article 7(1)(c) and article 7(1)(g)-2.

³⁷ See the *Ongwen* Appeal Judgment, *supra* note 18, para. 1678.

³⁸ See e.g. BASSIOUNI (M. C.), “Enslavement as an International Crime”, in AMBOS (K.) (ed.), *Rome Statute of the International Criminal Court: Article by Article Commentary*, 4th ed., 2022, Beck, Hart, Nomos, p. 207.

³⁹ See the *Summary of the Proceedings of the Preparatory Committee During the Period 25 March-12 April 1996*, [UN Doc. A/AC.249/1](#), 7 May 1996, p. 18.

⁴⁰ *Idem*, p. 19.

39. The crime of sexual slavery did not appear in the draft Statute until December 1997. During the 1995 *Ad Hoc* Committee discussions of the Draft Statute, some delegations called for the inclusion of rape and “*other similar offences*” in any elaboration of war crimes and crimes against humanity falling under the jurisdiction of the Court.⁴¹ The subsequent negotiations in 1996 and early 1997 saw many different delegations struggling with how to identify and list these “*other similar offences*”.⁴² There were various proposals to add crimes of sexual violence, either in the text or in footnotes, into the war crime of outrages on personal dignity, into the war crime of violence to the life, health and physical or mental well-being of persons, or to list rape and other sexual violence crimes in a separate category apart from other crimes. Many delegations felt that the separate listing was warranted, as they were concerned that listing sexual violence crimes as “*outrages on personal dignity*” would represent a step backward, and send the outdated and potentially harmful message that these violent, physical crimes were to be evaluated based on the harm done to the victim’s honour, modesty or chastity.⁴³

40. A breakthrough came at the December 1997 negotiations, when delegations widely supported a proposal to further delineate the list of sexual violence crimes. During said session, war crimes were again discussed and a proposal was put forward to include under the listing of “*other serious violations of the laws and customs applicable in international armed conflict*” a list of sexual violence crimes separate from the listing for the crime of “*outrages on personal dignity*”. This new list included “*committing rape, sexual slavery, enforced prostitution, enforced pregnancy, enforced sterilization, and other*

⁴¹ See the *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, Fiftieth Session* (6 September 1995), [UN Doc. A/50/22](#), para. 76.

⁴² See OOSTERVELD (V.), “Sexual Slavery and the International Criminal Court: Advancing International Law”, *Michigan Journal of International Law*, vol. 25, 2004, p. 612.

⁴³ *Idem*, pp. 612-613. See also, footnote 31 which states that “[d]elegates were aware of the criticism of such a categorisation made by various academics”, referring to as e.g., GARDAM (J.), “The Law of Armed Conflict: A Gendered Regime?”, in DALLMEYER (D. G.) (ed.), *Reconceiving Reality: Women and International Law*, Studies in Transnational Legal Policy, vol. 25, 1993, p. 171; COPLEON (R.), “Surfacing Gender: Re-Engraving Crimes Against Women In Humanitarian Law”, *Hastings Women’s Law Journal*, vol. 5, 1994, p. 243; and GARDAM (J.), “Women and the Law of Armed Conflict: Why the Silence?”, *International and Comparative Law Quarterly*, vol. 46, 1997, p. 55.

sexual violence amounting to a grave breach of the Geneva Conventions". Said list was replicated in the section for *"other serious violations of the laws and customs applicable in armed conflicts not of an international character"*, albeit with a final reference to Article 3 common to the four Geneva Conventions instead of grave breaches.⁴⁴

41. The vast majority of delegations stated their support for the new list, with a small number of delegations preferring other language. In this regard, it is worth noting that the Holy See's proposal, to delete the reference to *"sexual slavery, enforced prostitution, enforced pregnancy"* in the list and add instead a separate subsection listing *"enslavement or any other kind of involuntary servitude that emerges from the theatre of war or armed conflict"*⁴⁵ was not adopted.⁴⁶

42. The March 1998 negotiations did not revisit the sexual violence crimes and the listing of *"rape, sexual slavery, enforced prostitution, enforced pregnancy, enforced sterilization, and other sexual violence"* was adopted without debate.⁴⁷ The Preparatory Works demonstrate that delegates addressed the overlap of, or difference between, the crimes of enslavement and sexual slavery. And that a consensus was reached on the fact that it was important for advancing international law to recognise and name, within the ICC Statute, violations such as sexual slavery that were clearly crimes under customary international law but that had not been previously enumerated.⁴⁸

⁴⁴ See OOSTERVELD (V.), *op. cit. supra* note 42, p. 613 at footnote 33, referring to the *Decisions Taken by the Preparatory Committee at its Session Held 1 to 12 December 1997*, [UN Doc. A/AC.249/1997/L.9/Rev.I](#), Preparatory Committee on the Establishment of an International Criminal Court, 1997, p. 14: "Agreement was also reached in these negotiations to exclude 'rape, enforced prostitution and other sexual violence of comparable gravity' from the listing of grave breaches, in order to simply replicate the language of the Geneva Conventions for the crime of 'wilfully causing great suffering, or serious injury to body or health.' This was considered a consequential change stemming from the inclusion of the detailed list".

⁴⁵ See OOSTERVELD (V.), *op. cit. supra* note 42, which refers to the proposal submitted by the Holy See, UN Doc. A/AC.249/1997/WG.I/DP.12, Preparatory Committee on the Establishment of an International Criminal Court, 1997. See also in the same vein, MAHMOOD (F.), "Prosecuting Human Trafficking for the Purpose of Sexual Exploitation under Article 7 of the Rome Statute: Enslavement or Sexual Slavery?", *Journal of Trafficking and Human Exploitation*, vol. 1, 2019, p. 50.

⁴⁶ See STEAINS (C.), "Gender Issues", in LEE (R. S.) (ed.), *The International Criminal Court: The Making Of The Rome Statute – Issues, Negotiations, Results*, Kluwer Law International, 1999, pp. 357, and 365-66.

⁴⁷ See OOSTERVELD (V.), *op. cit. supra* note 42, p. 614.

⁴⁸ *Idem*, p. 623 and footnotes 39-44; and 47-51, referring to, *inter alia*, the Vienna Declaration and Programme of Action, [UN Doc. A/CONF.157/23](#), 12 July 1993 at para. 38: "Violations of the human rights

43. Academics and nongovernmental organisations also supported the separate listing of enslavement and sexual slavery.⁴⁹ Bassiouni had long proposed the inclusion of the specific form of enslavement of “*sexual bondage*” in the statute of an international criminal court.⁵⁰ Askin also argued that it was appropriate to list sexual slavery as a separate crime, noting that enslaving persons to perform sexual services must be an international crime just as enslaving persons to perform other services is a crime, and therefore reference to sexual slavery rather than simply enslavement more accurately identifies and appropriately characterises the nature of the crime.⁵¹

44. The importance of listing both crimes within the Statute was also emphasised by Argibay, who insisted that there may be circumstances in which enslavement and sexual slavery charges would both be laid, with each capturing different interests or elements of the violation:

“Where control of sexuality is a factor in enslavement, the crime of sexual slavery can also be charged separately. Both sexual slavery and enslavement should be charging options because both crimes may be applicable as their elements and the interests they protect are distinct. Sexual slavery recognizes the specific nature of the form of enslavement and ensures that it will be given the distinct attention it deserves. Moreover, victims of the crime of sexual slavery may need somewhat different forms of protective measures or redress than victims of other forms of slavery”.⁵²

of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law. All violations of this kind, including in particular, murder, systematic rape, sexual slavery and forced pregnancy, require a particularly effective response”; and the Report of the Fourth World Conference on Women, [UN Doc. A/CONF.177/20](#), 1995, at para. 114: “Other acts of violence against women include violation of the human rights of women in situations of armed conflict, in particular murder, systematic rape, sexual slavery and forced pregnancy”.

⁴⁹ See OOSTERVELD (V.), *op. cit. supra* note 42, p. 624.

⁵⁰ See BASSIOUNI (M. C.), *Draft International Criminal Code And Draft Statute For An International Criminal Tribunal*, Martinus Nijhoff Publishers, 1987, p. 147.

⁵¹ See ASKIN (K. D.), “Women and International Humanitarian Law”, in ASKIN (K. D.) & KOENIG (D. M.) (eds.), *Women And International Human Rights Law*, Brill, 2000, p. 83.

⁵² See ARGIBAY (C. M.), “Sexual Slavery and the ‘Comfort Women’ of World War II”, *Berkeley Journal of International Law*, vol. 21, 2003, p. 386. See also, OOSTERVELD (V.), *op. cit. supra* note 42, footnote 96, which notes that at the International Criminal Tribunal for the Former Yugoslavia, a Trial Chamber also noted that “[t]he setting out of the violations in separate sub-paragraphs of the ICC Statute is not to be interpreted as meaning, for example, that sexual slavery is not a form of enslavement. This separation is to be explained by the fact that the sexual violence violations were considered best to be grouped together”. See ICTY, *Prosecutor v.*

45. The importance of enumerating sexual slavery and enslavement as two distinct and separate crimes under the Statute is further reinforced when examining the definition and development of each crime. First, slavery and the slave trade were amongst the earliest violations of human rights to be recognised as crimes under international law, and the subject of a treaty when the 1926 Slavery Convention was adopted.⁵³ “*Slavery*” is defined in article 1(1) of the 1926 Slavery Convention as the “*status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised*”. While slavery and the slave trade in their traditional forms continue, a wide variety of slavery-like practices such as servitude and forced labour and trafficking, particularly the involvement of women and children, have also developed.⁵⁴ International law has therefore evolved to address these new forms of slavery.⁵⁵

46. Consequently, the drafters of the Statute intended to recognise the particular gravity of enslavement when it encompasses acts of a sexual nature by including a separate crime of sexual slavery under article 7 taking into account the major changes in the international law community’s approach to crimes of sexual violence,⁵⁶ as well

Kunarac et al., Case No. IT-96-23-T & IT 96-23/1-T, [Judgment](#) (Trial Chamber), 22 February 2001, footnote 1333.

⁵³ See Article 2 of the [Slavery Convention](#), signed in Geneva on 25 September 1926, which commits States “[t]o bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms” and “[t]o prevent and suppress the slave trade”.

⁵⁴ See AMBOS (K.), BRAGA DA SILVA (R.), HAYES (N.), POWDERLY (J.), STAHN (C.), and VAN DEN HERIK (L. J.), “Article 7 – Crimes against humanity”, in AMBOS (K.) (ed.), *Rome Statute of the International Criminal Court: Article by Article Commentary*, 4th ed., 2022, Beck, Hart, Nomos, pp. 179-180.

⁵⁵ See the [Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery](#), adopted by an Economic and Social Council resolution 608(XXI) of 30 April 1956; [Convention concerning Forced or Compulsory Labour](#) (Convention No. 29), adopted 28 June 1930; [Convention concerning the Abolition of Forced Labour](#) (Convention No. 105), adopted 25 June 1957. Further, the prohibition of slavery is also found in provisions of general human rights instruments. See Article 4 of the [Universal Declaration of Human Rights](#), proclaimed by the United Nations General Assembly in Paris on 10 December 1948, General Assembly resolution 217A; Article 4(1) of the [European Convention on Human Rights](#), signed on 4 November 1950; Article 8 of the [International Covenant on Civil and Political Rights](#), adopted by General Assembly resolution 2200A (XXI) of 16 December 1966; Article 6(1) of the [American Convention on Human Rights](#) adopted at the Inter-American Specialized Conference on Human Rights at San José on 22 November 1969; and Article 5 of the [African Charter on Human and Peoples' Rights](#), adopted on 1 June 1981.

⁵⁶ See AMBOS (K.), BRAGA DA SILVA (R.), HAYES (N.), POWDERLY (J.), STAHN (C.), and VAN DEN HERIK (L. J.), *op. cit. supra* note 54, p. 200.

as the prevalence and need to punish sexual and gender-based violence, particularly those against women.⁵⁷ The reports of widespread rape and other sexual abuse committed in the former Yugoslavia and Rwanda, and pressure from civil society led the Prosecutor of both *ad hoc* Tribunals to bring charges of rape and other sexual violence crimes.⁵⁸ At the meeting held on 13 July 1998, the crime against humanity of enslavement was discussed as an umbrella provision focusing on the right of ownership of a person and the exercise of such power in the course of trafficking in persons,⁵⁹ whereas several delegations and NGOs observers advocated for the rape, sexual slavery, enforced prostitution, enforced pregnancy, mass rape and other forms of sexual and gender-based persecution being specifically listed as war crimes and crimes against humanity.⁶⁰

47. In light of the Preparatory Works it can be concluded that the drafters of the Statute clearly intended to criminalise both enslavement and sexual slavery as crimes against humanity, recognising the specific different conducts and the need to include an accurate and specific listing of the kinds of serious crimes that occur in today's world, such as sexual slavery. Therefore, the attempt of the Prosecution to subsume the crime of sexual slavery into the crime of enslavement does not seem in line with the intention of the drafters.

⁵⁷ See the [Vienna Declaration and Programme of Action](#), adopted by the World Conference on Human Rights on 25 June 1993, para. 38; and the [Declaration on the Elimination of Violence against Women](#), adopted by General Assembly resolution 48/104 on 20 December 1993.

⁵⁸ See AMBOS (K.), BRAGA DA SILVA (R.), HAYES (N.), POWDERLY (J.), STAHN (C.), and VAN DEN HERIK (L. J.), *op. cit. supra* note 54, p. 201. It was noted that the *Akayesu* case was the first judgment finding the defendant criminally responsible for the crime of rape and qualifying it as a crime against humanity. See ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Chamber, [Judgment](#), 2 September 1998.

⁵⁹ See the *Summary Records of the plenary meetings and of the meetings of the Committee of the Whole* (15 June-17 July 1998), [UN Doc. A/CONF.183/13 \(Vol. II\)](#), United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, p. 332 at para. 74 (Representative of Jordan).

⁶⁰ *Idem*, p. 68 at paras. 65 (Representative of Canada); and p. 120 at para. 83 (Observer for the Asian Centre for Women's Human Rights).

48. In particular, the Legal Representative submit that the material facts pleaded in the DCC already support the cumulative charge of sexual slavery as a war crime and as a crime against humanity as follows.

(i) Counts 1-14: Crimes committed in the attacks on IDP camps and Lwala Girls School

49. With respect to the “[c]rimes committed in the Attacks on IDP camps and Lwala Girls School”, **paragraph 25** states that “[s]ome abducted girls were taken to KONY, who chose two to become his ‘wives’ (see below at paras. 129-133)”⁶¹ “whilst others were distributed to other LRA commanders to serve in the households of LRA fighters (see below at paras. 94-105)”.⁶² These facts are currently charged as enslavement (count 10). The Legal Representatives submit that *sexual slavery as a crime against humanity* pursuant to article 7(1)(g) is an additional suitable legal characterisation for these pleaded facts.

(ii) Counts 15-29: Crimes against children and women abducted and integrated into the LRA

50. Regarding “*crimes against children and women abducted and integrated into the LRA*”, the facts in **paragraphs 94-105** relating to “*at least hundreds of girls and women*” are currently only characterised under count 15 as enslavement as a crime against humanity pursuant to article 7(1)(c) of the Statute, and count 27 as sexual slavery as a war crime pursuant to article 8(2)(e)(vi) of the Statute. The Legal Representatives submit that *sexual slavery as a crime against humanity* pursuant to article 7(1)(g) is an additional suitable legal characterisation for these pleaded facts. In this context, the victims recount the events they suffered, highlighting that following their abduction, they were forced to endure acts of sexual violence. Thus, the defining aspect of their experience is not merely the state of enslavement, but rather the deplorable treatment as ‘sex slaves’.

⁶¹ See *infra*, para. 0.

⁶² See *infra*, para. 50.

(iii) Counts 30-36: Crimes directly perpetrated by KONY

Regarding the “[c]rimes directly perpetrated by KONY”, the facts in **paragraphs 129-133** relating to a “*young woman*” are currently only characterised under count 30 as enslavement as a crime against humanity pursuant to article 7(1)(c) of the Statute, and count 36 as sexual slavery as a war crime pursuant to article 8(2)(e)(vi) of the Statute. The Legal Representatives submit that *sexual slavery as a crime against humanity* pursuant to article 7(1)(g) is a further, suitable legal characterisation for these facts.

FOR THE FOREGOING REASONS, the Legal Representatives respectfully request the Chamber to remedy the defect in the DCC by instructing the Prosecutor to make the necessary adjustments pleading sexual slavery as a war crime and a crime against humanity. In the alternative, the Legal Representatives respectfully request the Chamber to consider the matter in its determination on the proper legal characterisation of facts at the confirmation of charges hearing.



Paolina Massidda



Sarah Pellet

Dated this 27th day of February 2024

At The Hague, The Netherlands