The Interpretation of Slavery before the International Criminal Court: Reconciling Legal Borders?

Sara Palacios-Arapiles
ESRC Doctoral Researcher, School of Law, University of Nottingham, Nottingham, UK
Sara.Arapiles@nottingham.ac.uk

Abstract

This article examines the interpretation of the definition of slavery/enslavement by the International Criminal Court (ICC) in the *Ongwen* case (2021) and its application to the facts of the case at hand. This examination is warranted because *Ongwen* represents the first case in which the ICC was tasked with deciding whether the crime of enslavement had been committed. This article illustrates that the ICC has been outward-looking, finding that judgments of other courts largely featured in the reasoning of the ICC when interpreting slavery. The detailed study in this article further reveals that, either directly or indirectly, the ICC more specifically drew on the judgment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Kunarac* case. The article shows that, in doing so, the ICC reconciled legal borders by incorporating in its decision elements of general international law, international human rights law, and international humanitarian law instruments to inform its understanding of slavery/enslavement. The article highlights that the ICC contributed to norm consolidation globally.

Keywords

slavery – enslavement – ICC – Ongwen – Rome Statute – 1926 Slavery Convention

1 Introduction

Hundreds of civilians, including men, women, and children, were abducted by fighters of the Lord's Resistance Army (LRA) during the attacks on various Internally Displaced Person (IDP) camps in Northern Uganda between 2003

and 2004.[1] During their captivity, the LRA fighters, *inter alia*, restricted their movement (through violence, coercion, and deception), subjected them to forced labour, and physically and psychologically abused them. The period during which the abducted civilians were subjected to such treatment ranged from one day to years. In relation to those facts, the principal question placed before the Trial Chamber of the International Criminal Court (ICC) was whether they constituted enslavement. At this juncture, it is important to note that the definition of enslavement in Art. 7(2)(c) of the 1998 Rome Statute of the ICC (Rome Statute)[2] draws from the definition of slavery set forth in Art. 1(1) of the 1926 Slavery Convention.[3] Both instruments define 'enslavement' and 'slavery', respectively, as the exercise of 'any or all of the powers attaching to the right of ownership' over a person. Upon the assessment of the evidence submitted to it, the ICC Trial Chamber, in a judgment of 4 February 2021 – the *Ongwen* case[4] – found that by abducting civilians and placing them in the situation described above, the abductees had been subjected to enslavement within the meaning of the Rome Statute. This represents the first case in which the ICC was tasked with deciding whether the crime of enslavement had been committed, which therefore warrants its examination in the present article.

If the same question posed to the ICC had been asked to a different court or stakeholder, the outcome would have probably been different. For instance, the European Court of Human Rights (ECtHR), if asked that question in 2005, may have concluded that such phenomena did not reach the threshold of slavery to the extent that the LRA fighters did not exercise a 'genuine right of legal ownership' over the abductees.[5] This was in fact the ECtHR's understanding of the definition of slavery in *Siliadin v France* (2005),[6] the first case

1 These include attacks on: Pajule IDP camp in October 2003, Odek IDP camp in April 2004, Lukodi IDP camp in May 2004, and Abok IDP camp in June 2004.

2 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 ('Rome Statute').

3 Slavery Convention (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253 ('1926 Slavery Convention').

4 *Prosecutor v Dominic Ongwen* (*Trial Chamber IX, Trial Judgment*) ICC-02/04-01/15 (4 February 2021) ('*Ongwen* ICC Trial Judgment').

5 In *Siliadin v France* (ECtHR) App 73316/01 (26 July 2005), at para. 122, the ECtHR noted that being held in slavery 'in the proper sense' requires the exercise of a 'genuine right of legal ownership' over the person.

6 On a critical analysis of the *Siliadin* case, see R.J. Scott, 'Under Color of Law: *Siliadin v France* and the Dynamics of Enslavement in Historical Perspective' in J. Allain (ed.), *The Legal Understanding of Slavery: From the Historical to the Contemporary* (OUP 2012); A. Nicholson, 'Reflections on *Siliadin v. France*: Slavery and Legal Definition' (2010) 14 (5) The International Journal of Human Rights 705.

in which the ECtHR addressed a claim based exclusively on Art. 4(1) of the European Convention on Human Rights (ECHR),[7] which provides 'no one shall be held in slavery or servitude'. In later jurisprudence, the ECtHR removed the requirement of 'legal ownership'.[8] However, by relying on its earlier position in *Siliadin*, national asylum courts in various European jurisdictions have increasingly started to interpret 'legal ownership' over people as the *sine qua non* of slavery. For instance, in *MST and Others* (2016), the United Kingdom (UK) Upper Tribunal Immigration and Asylum Chamber (UTIAC), considering that Eritrean law does not allow for the ownership of people, held that the obligation to perform the Eritrean Military/National Service Programme cannot be described as amounting to the exercise of a 'genuine right of legal ownership' over individuals subject to it.[9] On this basis, the UTIAC reached a negative finding on slavery. Despite the UTIAC overlooking the ECtHR's revisited understanding of the definition of slavery, courts in Switzerland and Germany have adhered to the UTIAC's interpretation of slavery in *MST and Others* at face value.[10] Moreover, *MST and Others* interpreted that permanence, i.e., a lifelong

7 COE 'Convention for the Protection of Human Rights and Fundamental Freedoms' (signed 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (ECHR).

8 In *Rantsev v Cyprus and Russia* (ECtHR) App 25965/04 (7 January 2010), at para. 276 and *M. and Others v Italy and Bulgaria* (ECtHR) App 40020/03 (17 December 2012), at para. 149, the ECtHR referred to its earlier position in *Siliadin*, however, it changed the language. It removed the requirement of 'legal ownership' and merely referred to the 'exercise of a genuine right of ownership'. In this respect, the Inter-American Court of Human Rights (IACtHR), in *Trabajadores de la Hacienda Brasil Verde v Brasil* (*Judgment*) IACtHR Serie C No. 12.066 (20 October 2016), at para. 264, emphasized that, in the *Rantsev* case, the ECtHR departed from its earlier reasoning in *Siliadin* to recognize that the traditional concept of slavery has evolved to encompass various forms of slavery based on 'the exercise of any or all of the powers attaching to the right of ownership'. For a detailed discussion of *Rantsev*, see generally J. Allain, '*Rantsev v Cyprus and Russia*: The European Court of Human Rights and Trafficking as Slavery' (2010) 10 (3) Human Rights Law Review 546.

9 *MST and Others* (*national service – risk categories*) *Eritrea* CG [2016] UKUT 00443 (IAC) ('*MST and Others*'), at para. 405. On a detailed discussion, see S. Palacios-Arapiles, 'The Eritrean Military/National Service Programme: Slavery and the Notion of Persecution in Refugee Status Determination' (2021) 10 (2): 28 Laws, at 10–14 and 22–26.

10 See Federal Administrative Court (Switzerland) Case E-5022/2017 (10 July 2018), at para. 6.1.4; Administrative Court of Gießen (Germany) Case 6 K 8852/17.GI. A (12 June 2020) (the latter judgment cited the former case, which in turn relied on *MST and Others*). Most recently, the Higher Administrative Court of Hamburg (Germany) Case 4 Bf 106/20.A (27 October 2021) at para. 108, citing *Siliadin*, argued that because ownership rights are not exercised over Eritrean conscripts, the situation under which they are placed cannot be considered to constitute slavery. While the Higher Administrative Court of Hamburg did not cite *MST and Others*, in other passages it drew on the judgment of the Administrative

situation, must be present for a situation to qualify as servitude,[11] a claim that has been reproduced in the jurisprudence of the above cited national courts.[12] Because the civilians abducted by the LRA were not held permanently under LRA's captivity, these asylum courts would have further excluded their situation from the category of slavery.

Antislavery organizations, some scholars, and the public more generally, for their part, may just label the phenomena in Northern Uganda as 'modern slavery' without making any distinction between the different practices covered by such term, namely slavery, servitude, institutions and practices similar to slavery, forced labour, and human trafficking, to name but a few.[13] Despite efforts to bring together those practices under a single umbrella term,[14] they remain conceptually distinct terms in international law. This distinction is also present within new domestic legislative trends on 'modern slavery', particularly the 2018 Australia Modern Slavery Act and the 2015 UK Modern Slavery Act, which construe the proscribed conducts thereof differently (e.g., slavery, servitude, slavery-like conditions, forced or compulsory labour, human trafficking,

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Court of Gießen cited above which in turn (indirectly) based its interpretation on *MST and Others*.

11 *MST and Others*, at para. 405. For a detailed discussion, see Palacios-Arapiles, 'The Eritrean Military/National Service Programme: Slavery and the Notion of Persecution in Refugee Status Determination', at 10–14 and 26–29.

12 See Higher Administrative Court of Hamburg (Germany), Case 4 Bf 106/20.A, 27 October 2021, at para. 108; Administrative Court of Gießen (Germany), Case 6 K 8852/17.GI. A, 12 June 2020; Federal Administrative Court (Switzerland), Case E-5022/2017, 10 July 2018, at paras 6.1.3. and 6.1.4. On a detailed discussion of the latter case, see Palacios-Arapiles, 'The Eritrean Military/National Service Programme: Slavery and the Notion of Persecution in Refugee Status Determination', at 18–22.

13 For instance, in a 2017 Report of the International Labour Organization (ILO) and the Walk Free Foundation (in partnership with the International Organization for Migration), the term 'modern slavery' covered a set of specific practices including 'forced labour, debt bondage, forced marriage, other slavery and slavery like practices, and human trafficking'. ILO, 'Global Estimates of Modern Slavery: Forced Labour and Forced Marriage' (2017), at 9. On scholars favouring the language of 'modern slavery', see e.g., K. Bales, *Understanding Global Slavery: A Reader* (University of California Press 2005), at 9; T. Landman, 'Measuring Modern Slavery: Law, Human Rights, and New Forms of Data' (2020) 42 (2) Human Rights Quarterly 303.

14 On critics of the expanded use of the term 'modern slavery', see e.g., A. Bunting and J. Quirk, 'Contemporary Slavery as More Than Rhetorical Strategy? The Politics and Ideology of a New Political Cause' in A. Bunting and J. Quirk (eds), *Contemporary Slavery: Popular Rhetoric and Political Practice* (UBC Press 2017), at 10–17. See also J. Allain, 'The International Legal Regime of Slavery and Human Exploitation and its Obfuscation by the Term of Art: "Slavery-like Practice"' (2012) 10 Cahiers de la recherche sur les droits fondamentaux 27.

and child labour).[15] Accordingly, national and international courts must make judgments within the definitional limits of each of them separately. The language of 'modern slavery' can be criticized for contributing towards the erroneous belief that slavery only belongs to the past, while on the contrary, as McGeehan rightly notes, 'slavery survived its abolition'.[16] Such terminology creates an unhelpful old/modern dichotomy, which risks construing the definition of slavery as confined exclusively to the concept of *de jure* chattel slavery, i.e., a lifelong legal status. As Quirk argues, it would be 'misleading' to endorse such an 'overly static image' of slavery,[17] which neither today, nor in the past has been its only image. Throughout history, slavery has indeed manifested itself in forms other than *de jure* chattel slavery.[18]

Clarity of normative definitions becomes fundamental, particularly where a *jus cogens* norm, such as the prohibition of slavery, is concerned.[19] This imposes a further obligation on interpreters to attain a uniform interpretation, applicable in all contexts.[20] In contrast to human rights treaties, the 1926 Slavery Convention has not created any mechanism tasked with supervising the application of the Convention. Instead, it conferred the power to resolve matters on the interpretation or application of the Convention to the International Court of Justice (ICJ), but only in the case of an inter-State dispute.[21] However, no State Party has ever submitted an inter-State request to settle a dispute under the 1926 Slavery Convention, and thus, the ICJ has not

15 See Modern Slavery Act 2018, No. 153, 2018, Section 4; Modern Slavery Act 2015, CHAPTER 30, Part 1, Offences.

16 N.L. McGeehan, 'Misunderstood and Neglected: The Marginalisation of Slavery in International Law' (2012) 16 (3) The International Journal of Human Rights 436, at 436.

17 J. Quirk, 'The Anti-Slavery Project: Linking the Historical and Contemporary' (2006) 28 (3) Human Rights Quarterly 567, at 572.

18 Therefore, it would be erroneous to construe 'old' slavery as chattel slavery or transatlantic slavery only, and to take *de jure* chattel slavery as the definitive benchmark. Ibid., at 579–580. On a similar discussion, see K. Schwarz and A. Nicholson, 'Collapsing the Boundaries Between *De Jure* and *De Facto* Slavery: The Foundations of Slavery Beyond the Transatlantic Frame' (2020) 21 Human Rights Review 391.

19 On *jus cogens* norms, see generally U. Linderfalk, *Understanding Jus Cogens in International Law and International Legal Discourse* (Edward Elgar 2020).

20 See generally U. Linderfalk, 'Navigating the Legal Landscape between the General and the Specific: General Concepts as Tools of Legal Reasoning' (2017) 19 International Community Law Review 302. According to the High Court of Australia, its *jus cogens* nature reinforces the seriousness of slavery and hence 'the need to define it very carefully and precisely'. The *Queen v Tang* [2008] HCA 39 (28 August 2008), at para. 111.

21 While Art. 8 of the 1926 Slavery Convention conferred that power to the extinguished Permanent Court of International Justice, the Protocol Amending the Slavery Convention (entered into force 7 December 1953) 182 UNTS 51 transferred that power to the ICJ.

yet had the opportunity to pronounce on the matter.[22] In 1956, the 1926 slavery definition was replicated in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956 Supplementary Convention), but this treaty similarly entrusted the ICJ with the competence to resolve inter-State disputes, and no such dispute has arisen yet.[23] International and regional human rights instruments, while prohibiting slavery, do not define it. As noted above, the Rome Statute reproduced the 1926 slavery definition under the name 'enslavement' in its Art. 7(2)(c). Thus, strictly speaking, the ICC is the only supra-national Court competent to provide an international authoritative interpretation of the definition of enslavement/slavery.[24] This makes the analysis of the ICC's interpretation of enslavement in the *Ongwen* case even more crucial.

This article provides a detailed study of *Ongwen*'s interpretation and application of the slavery definition. Slavery being prohibited in several legal instruments is a concept subject to the interpretation of different judicial bodies and decision-makers, so this article examines the extent to which the ICC may potentially contribute towards achieving a coherent and uniform interpretation. At the outset, it should be noted that, while *Ongwen* is the first case in which the ICC pronounced on the crime of enslavement, the ICC had engaged with the definition of this crime in two previous judgments, namely *Ntaganda* (rendered in 2019)[25] and *Katanga* (rendered in 2014).[26] None of the latter cases dealt with the crime of enslavement *per se*; they instead concerned the crime of 'sexual slavery', *inter alia*. Sexual slavery, unlike enslavement, is not defined in the Rome Statute.[27] Nevertheless, in the *Ntaganda* and *Katanga* cases, the

22 Although not in the context of an inter-State dispute in relation to the 1926 Slavery Convention, the ICJ has held that the protection from slavery is an *erga omnes* obligation. See *Barcelona Traction, Light and Power Company, Limited* (*Belgium v Spain*) *Second Phase* (5 February 1970), at 32, para. 33.

23 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (adopted 7 September 1956, entered into force 30 April 1957) 226 UNTS 3 ('1956 Supplementary Convention'), at Art. 7(a).

24 Ostensibly, the African Court on Human and Peoples' Rights could also provide a supra-national binding interpretation (albeit at regional level) of the provisions of the 1926 Slavery Convention as it has jurisdiction to deal with all cases and disputes submitted to it regarding the interpretation and application of any relevant human rights instrument ratified by the concerned States.

25 *Prosecutor v Bosco Ntaganda* (*Trial Chamber VI*) ICC-01/04-02/06 (8 July 2019) ('*Ntaganda* ICC Trial Chamber').

26 *Prosecutor v Germain Katanga* (*Trial Chamber II*) ICC-01/04-01/07-3436 (7 March 2014) ('*Katanga* ICC Trial Chamber').

27 Sexual slavery is as a crime against humanity under Art. 7(1)(g) of the Rome Statute as well as a war crime under Art. 8(2)(b)(viii) and Art. 8(2)I(vi) of the Rome Statute.

ICC Trial Chamber's determination of the slavery element of sexual *slavery* was based on the 'exercise of any or all of the powers attaching to the right of ownership', and therefore, it was considered instructive in *Ongwen* for the purposes of interpreting the definition of enslavement. In the words of the ICC Trial Chamber, sexual slavery 'is a specific form of enslavement, qualified by the additional fact that the victim is also caused to engage in at least one act of a sexual nature'.[28] If we remove the sexual element from the crime of sexual slavery, slavery remains and so does its definition.[29] On this basis, the terms 'slavery' and 'enslavement' in this article, unless otherwise specified, are used interchangeably to denote the same phenomenon.

This article is only concerned with the material element and not with the contextual element of the crime (i.e., widespread or systematic attack directed against any civilian population, or an internal or international armed conflict), so the discussion is restricted to the definition of enslavement.[30] As the author has argued elsewhere, a phenomenon of slavery needs not to be committed in a widespread or systematic manner, nor in the context of an armed conflict, to fulfil the definitional criteria of enslavement.[31] Furthermore, the ICC has applied the same legal definition of enslavement irrespective of the context in which it had been committed, which, as Linderfalk argues, is 'perfectly coherent' with the categorization of a norm, in this case the prohibition of slavery, as *jus cogens*.[32] An analysis of the *mens rea* of enslavement, that is, the perpetrator(s)' intentional exercise of the crime, is also beyond the scope of this article.

Section 2 of this article examines the interpretation and application of the definition of enslavement by the ICC Trial Chamber in the *Ongwen* case. Divided into four subsections, Section 2 first focuses on the definition of slavery (Section 2.1), to then discuss factors that are relevant to assessing whether the definitional threshold of slavery is met (Section 2.2). Duration being one of these factors, the article examines whether or not it needs to be permanent

28 *Ongwen* ICC Trial Judgment, at para. 3051.

29 On an analysis of the crime of sexual slavery, see generally P.V. Sellers and J.G. Kestenbaum, 'Sexual Slavery and Customary International Law' (2020) 90 Book Chapters.

30 If enslavement or sexual slavery are committed as part of a widespread or systematic attack directed against the civilian population, they would reach the threshold of a crime against humanity; while if sexual slavery takes place in the context of an internal or an international armed conflict, it will constitute a war crime. If these crimes are not committed within any of those contexts, they still constitute enslavement or sexual slavery.

31 Palacios-Arapiles, 'The Eritrean Military/National Service Programme: Slavery and the Notion of Persecution in Refugee Status Determination', at 29.

32 Linderfalk, 'Navigating the Legal Landscape between the General and the Specific: General Concepts as Tools of Legal Reasoning', at 319.

(Section 2.3). The article also refers to factors that are not strictly required to satisfy the definition of slavery (Section 2.4). The analysis in Section 2 finds that the ICC extensively drew on the work of other international and hybrid courts and tribunals to inform its reasoning. It shows that these other courts and tribunals have developed a very robust and consistent interpretation of slavery and, by upholding it, the ICC contributed to norm consolidation globally. The analysis also draws parallels, where appropriate, between the ICC's interpretation of slavery and the meaning of slavery in general international law to further illustrate consistencies that simply cannot be ignored by other national or international interpreters. Section 3 further unravels the legal sources on which the ICC based its own interpretation of slavery. The detailed analysis uncovers that, by largely relying (either directly or indirectly) on the judgment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Kunarac* case,[33] the ICC Trial Chamber incorporated in its decision elements of general international law, international human rights law, and international humanitarian law instruments to inform its understanding of slavery. Section 4 concludes by highlighting the jurisprudential value of the ICC pronouncements on slavery.

2 *Ongwen*: Slavery through the Lens of the International Criminal Court

In the course of the attacks on various IDP camps in Northern Uganda between 2003 and 2004, LRA fighters abducted hundreds of civilians, including men, women, and children. Following their abduction, the civilians were forced to carry looted items away from the IDP camps, including food, clothes, cooking utensils, medicines, money, and livestock under threat of harm and sometimes while tied together. A few of them were also forced to carry injured LRA fighters and other heavy loads. Some of the abductees were forced to walk barefoot or not fully clothed through the bush for long distances and were sometimes beaten by the LRA fighters as a means of punishment or intimidation or to make them walk faster. By looting from the IDP camps, the LRA supplied themselves with items needed for their own subsistence. Between 2002 and 2005, over one hundred women and girls were also abducted and further 'distributed' to members of the Sinia brigade (one of the four LRA brigades),

33 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Judgment) IT-96-23 & IT-96-23/1-A (22 February 2001) ('*Kunarac* ICTY Trial Chamber').

who placed them in their respective households and forced them to perform different domestic duties.[34] Younger abducted girls, referred to as 'ting tings' by their captors, initially joined the LRA's households as domestic servants until they were considered mature enough to become their 'wives'. Furthermore, members of the Sinia brigade regularly forced the abducted women and girls who were 'distributed' to them into sexual intercourse. Resisting or failing to perform the tasks assigned to them led to physical punishment.

The abductees, both male and female, were under (armed) guard to ensure that they did not escape. They were also threatened with beatings or death to prevent their escape. To illustrate death threats and ultimately discourage them from escaping, LRA fighters forced some of the abductees to kill or beat other abductees for attempting escape or breaking rules, or forced them to watch others being killed. Attempted escape and disobedience were punished with death at times, and in other cases with severe beatings. The period during which the abductees were kept in captivity varied from a few days, or even a day, to nearly 13 years. Some of the abductees were eventually released,[35] while a few of them managed to escape or were rescued by the Uganda People's Defence Forces in the weeks or months after their abduction. In other cases, the abductees, particularly the younger ones, were forced to integrate into the LRA as soldiers to strengthen the LRA's military capability.

In relation to the foregoing material facts and circumstances, the principal question placed before the ICC Trial Chamber was whether such acts represented an 'exercise of any or all of the powers attaching to the right of ownership' over the abductees, terms that, as prefaced earlier, correspond to the definition of enslavement under Art. 7(2)(c) of the Rome Statute. It is this definition to which this article turns now.

2.1 *The Definition of Enslavement/Slavery in the Rome Statute*

In the analysis of the applicable law, the ICC Trial Chamber dealt with the crimes of 'enslavement' and 'sexual slavery' in two different sections. This goes in line with the Rome Statute, which lists 'enslavement' as a crime against humanity,[36] separate from the crime of 'sexual slavery', which is listed both as a crime against humanity and a war crime (either of an international or internal

34 A few women and girls were abducted earlier. For instance, a 15-year-old child was abducted in August 1996 and escaped in July 2004, while another 15-year-old child was abducted in February 1998 and escaped in September 2002.

35 Some of the abductees were released after a day or few days of their abduction, particularly older abductees and female abductees who were already mothers.

36 Rome Statute, at Art. 7(1)(c).

character).[37] Despite (rightly) dealing with both crimes in two separate sections, the ICC Trial Chamber affirmed that the crime of sexual slavery, whether as a crime against humanity or a war crime, is a specific form of enslavement, consisting of the 'restriction or control of the victim's sexual autonomy' (sexual element) while held in enslavement (slavery element).[38] In other words, the crime of sexual slavery is committed when (i) the definition of enslavement is fulfilled and (ii) the person is further forced to engage in one or more acts of a sexual nature.[39] Consequently, where the first element of sexual slavery (i.e., enslavement) both as a crime against humanity and as a war crime was concerned, the ICC Trial Chamber referred back to the section in which it had dealt with the definition of enslavement.

Where enslavement was concerned, the ICC Trial Chamber started off with the enslavement definition in Art. 7(2)(c) of the Rome Statute which reads: 'the exercise of any or all of the powers attaching to the right of ownership over a person'.[40] The ICC Trial Chamber next consulted the ICC Elements of Crimes.[41] These were adopted in 2002 to provide assistance to the ICC in the interpretation and application of the provisions pertaining to genocide, crimes against humanity, and war crimes, in a manner consistent with the Rome Statute. The ICC Trial Chamber specifically reproduced the first paragraph of Art. 7(1)(c) of the ICC Elements of Crimes, which elaborates on the definition of enslavement.[42] As the Chamber noted, it sets forth 'a non-exhaustive list' of the various *forms* in which powers attaching to the right of ownership over a person may be exercised: '[The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, *such as*] by purchasing,

37 Ibid., at Art. 7(1)(g), Art. 8(2)(b)(xxii), and Art. 8(2)(e)(vi).

38 *Ongwen* ICC Trial Judgment, at para. 2715; see also para. 3051.

39 As the ICC Trial Chamber held, 'insofar as the definition of sexual slavery is met, the same facts are not further considered as enslavement'. Ibid., at para. 3086. That is, 'the concurrence of [sexual slavery and enslavement] is not permissible'. Ibid., at para. 3051.

40 Ibid., at para. 2711.

41 Elements of Crimes (9 September 2002) Doc ICC-ASP/1/3 (Pt. II-B) ('ICC Elements of Crimes').

42 Allain has considered the drafting process of the provisions of the ICC Elements of Crimes, showing that sexual slavery was not construed as a separate crime, but as a form of enslavement, that is, as slavery 'plus a sexual element'. See J. Allain, *Slavery in International Law: Of Human Exploitation and Trafficking* (Nijhoff 2012), at 276–279. Consequently, the first material element of the crime of sexual slavery (i.e., slavery), both as a crime against humanity and as a war crime, reproduces the material element of enslavement enshrined in the first paragraph of Art. 7(1)(c) ICC Elements of Crimes – that is, the definition of enslavement. See Elements of Crimes, Art. 7 (1)(g)-2, Art. 8(2)(b) (xxii)-2, and Art. 8(2)(e) (vi)-2 ICC.

selling, lending or bartering such a person or persons, or by imposing on them a *similar* deprivation of liberty' (emphasis added).[43] Although it is already denoted by the words 'such as' and 'similar', the ICC Trial Chamber deemed necessary to clarify that the forms of powers attaching to the right of ownership listed in Art. 7(1)(c) of the ICC Elements of Crimes were not to be considered exhaustive.[44] In the earlier case of *Katanga*, the ICC Trial Chamber had similarly stressed its non-exhaustive nature noting, furthermore, that powers attaching to the right of ownership 'may take many forms'.[45] It then observed that such powers 'must be construed as the use, enjoyment and disposal of a person who is *regarded* as property, by placing him or her in a situation of dependence which entails his or her deprivation of any form of autonomy' (emphasis added).[46]

While the language of the above extract does not reproduce the exact wording of Art. 7(1)(c) of the ICC Elements of Crimes, this does not imply that it is at variance with the latter. If not readily apparent, in *Katanga*, the ICC Trial Chamber went further in stating that forms of powers attaching to the right of ownership also include 'the use, enjoyment and disposal of a person', which are broader concepts than 'purchasing, selling, lending or bartering'. In other words, the Chamber, after having referred to the forms that the ICC Elements of Crimes enumerate, (simply) added more examples. Thus, the ICC non-exhaustive list of forms of powers attaching to the right of ownership include: purchasing, selling, lending, bartering, using, enjoying, or disposing a person, *or* imposing on them a similar deprivation of liberty/autonomy (to the

43 *Ongwen* ICC Trial Judgment, at para. 2711. The substance of this provision has been reproduced in domestic legislation. For instance, Art. 607 bis (2)(10) of the Spanish Criminal Code (as amended by *Ley Orgánica 15/2003*) stipulates that slavery shall mean a situation whereby 'all or any of the powers attaching to the right of ownership, such as buying, selling, lending, or bartering, are exercised over a person, including in a *de facto* manner' (translated from the Spanish). For similar examples, see Allain, *Slavery in International Law: Of Human Exploitation and Trafficking*, at 124–125.

44 *Ongwen* ICC Trial Judgment, at para. 2711.

45 *Katanga* ICC Trial Chamber, at para. 975.

46 Ibid. For a comprehensive analysis of the forms that powers attaching to the right of ownership may take, see Research Network on the Legal Parameters of Slavery, *Bellagio-Harvard Guidelines on the Legal Parameters of Slavery*, 2010–2011. The principal investigator of the research project leading to the *Bellagio-Harvard Guidelines*, Jean Allain, has further clarified how the exercise of any or all of the powers attaching to the right of ownership over a person manifests in practice. See e.g., J. Allain, 'Contemporary Slavery and Its Definition in Law' in A. Bunting (ed.), *Contemporary Slavery: Popular Rhetoric and Political Practice* (UBC Press 2017), at 37–44.

purchasing, selling, etc.).[47] Legal ownership over a person is clearly absent in both cases; the phrase 'regarded as property' in *Katanga* specifically speaks of *de facto* ownership as opposed to a legal right of ownership.

With respect to the phrase 'similar deprivation of liberty', the ICC Trial Chamber adopted the following understanding in *Ongwen*:

> Imposition of similar deprivation of liberty may take various forms – it may cover situations in which the victims may not have been physically confined, but were otherwise unable to leave as they would have nowhere else to go and fear for their lives.[48]

In doing so, the ICC Trial Chamber reproduced its earlier verdict in the *Ntaganda* case which, for its part, had reproduced verbatim a pronouncement of the Special Court of Sierra Leone (SCSL) in the *Taylor* Trial Judgment.[49] The pronouncement in *Taylor*, in turn, drew from *Kunarac*, where the ICTY Trial Chamber, notwithstanding the door of the place where the victims were kept was left open on some occasions, found that they were 'psychologically unable to leave, as they would have had nowhere to go had they attempted to flee [and] were also aware of the risks involved if they were re-captured'.[50]

In *Katanga*, drawing also on the *Taylor* Trial Judgment[51] (which, as stated above, relied on the *Kunarac* Trial Judgment), the ICC Trial Chamber had similarly reasoned that,

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47 Economically exploiting and consuming a person are two further examples of powers attaching to the right of ownership listed in *Prosecutor v Kaing Guek Eav alias Duch* (*Supreme Court Chamber ECCC*) 001/18-07-2007-ECCC/SC (3 February 2012) ('*Duch* ECCC Appeal Judgment'), at para. 156.

48 *Ongwen* ICC Trial Judgment, at para. 2713. In a footnote to an earlier passage, the ICC Trial Chamber recalled that attached to Art. 7(1)(c) of the ICC Elements of Crimes is a footnote that states: '[i]t is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the [1956 Supplementary Convention]. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children'. Ibid., at para. 2711, footnote 7152.

49 *Ntaganda* ICC Trial Chamber, at para. 952 citing *Prosecutor v Charles Ghankay Taylor* (*Trial Chamber II Judgment*) SCSL-03-01-T (18 May 2012) ('*Taylor* SCSL Trial Judgment'), at para. 420. The SCSL Trial Chamber had previously included the above excerpt in *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (*Trial Chamber Judgment*) SCSL-04-15-T (2 March 2009) ('*Sesay* SCSL Trial Judgment'), at para. 16, and in *Prosecutor v Alex Tamba Brimam Brima Bazzy Kamara and Santigie Borbor Kanu* (*Trial Chamber II Judgment*) SCSL-04-16-T (20 June 2007) ('*Brima* SCSL Trial Judgment'), at para. 709.

50 *Kunarac* ICTY Trial Chamber, at para. 750.

51 *Katanga* ICC Trial Judgment, at footnote 2301.

> [i]mposition of deprivation of liberty may take various forms and the Chamber will also consider, in its analysis of [the exercise of powers attaching to the right of ownership], the subjective nature of such deprivation, that is, the person's perception of his or her situation as well as his or her reasonable fear.[52]

The victims' accounts in *Katanga* are illustrative in this respect. One of the women 'found herself alone' at the military camp where she was left, 'confined to a house and afraid to go out in case her real ethnic origin was discovered, and she was killed'.[53] She 'saw no means of escape, as she was convinced that she would be recaptured and killed'.[54] Eventually, she escaped thanks to the help of another woman who obtained 'permission from her "husband" [captor] to leave the camp temporarily'.[55] Similarly, another woman, though she 'wanted to escape' from the military camp where she had been placed, 'was afraid to disobey her commander's orders' and 'feared' the man whom she had been compelled to marry.[56] The ICC Trial Chamber emphasized that she was 'entirely under his control'.[57] In respect to this woman, the Chamber stated that 'when she felt that the circumstances had become favourable and the conditions were right', she escaped.[58] Another of the victims noted that 'it was only a lapse in the combatants' vigilance that allowed her to escape'.[59]

In *Ongwen*, the abductees were not physically restrained either, instead they lived in the *bush* under guard, which according to the proven facts was oftentimes intermittent. One of the testimonies that the ICC Trial Chamber considered to be credible said, 'you are *like* a prisoner, and *every now and then* you will be guarded' (emphasis added).[60] The abducted civilians lived under a coercive environment characterized by threats of physical violence or death, to ensure they did not escape. In the ICC Trial Chamber's view, such coercive environment was 'a more specific expression of the general system of control that existed in the LRA to ensure obedience by its members'.[61] In relation to the abducted women and girls, the ICC Trial Chamber generally remarked that

52 Ibid., at para. 977.
53 Ibid., at para. 1015.
54 Ibid.
55 Ibid.
56 Ibid., at paras 1002 and 1004.
57 Ibid., at para. 1008.
58 Ibid., at para. 1005.
59 Ibid., at para. 1009.
60 *Ongwen* ICC Trial Judgment, at para. 1344.
61 Ibid., at para. 2183.

they were unable to resist or disobey due to force, threat of force, and because of their 'dependence on the [LRA] members for survival'.[62] By a way of example, a woman noted that, once, she was called into a LRA fighter's tent, and that she could not refuse to have sex with him because: 'I felt my whole life was in his hand'.[63]

Another measure to discourage escaping was giving the abductees negative or false information about life outside the LRA. That is, deception. For instance, the LRA fighters told a woman that 'in the bush there was no escape', and that 'if someone tried to escape they would be killed'.[64] Another of the abducted women was made to believe that if she escaped, the government soldiers or civilians would catch her and kill her, or that she would be caught by the Holy and killed. She was also asked not to think about her home otherwise her legs would swell, and she would die. Her detailed account of the threats and the effect that these had on her was considered of 'great value to the analysis of the Chamber'.[65] The following testimony illustrates well the effect that such threats or fraud had on the abductees. A woman assigned to a LRA group that was being followed by government soldiers started running towards the forest after being hit by fire; shortly after she fainted. She was 'extremely scared' of the government soldiers so, when she regained consciousness, she walked in the direction she thought her LRA group was.[66] Similarly, to prevent the escape of the abductees who were forced to join the LRA as soldiers, the LRA fighters told them that they would be killed by government soldiers if they escaped and further prevented them from obtaining information through public radio or broadcast.[67]

As the foregoing discussion shows, the imposition of a 'similar deprivation of liberty' is not restricted to physical deprivation of liberty. Instead, the person's liberty or autonomy can be restricted through threats of force or death, coercion, and even deception or fraud. As Allain clearly explains it, slavery 'is ultimately about control'; control that 'deprives a person, in a significant manner, of their individual liberty or autonomy'.[68] Ultimately this control enables

62 Ibid., at para. 218.
63 Ibid., at para. 2057.
64 Ibid., at para. 2187.
65 Ibid., at para. 2184.
66 She was eventually rescued by the government soldiers and given medical attention. Ibid., at para. 2091.
67 Ibid., at paras 132 and 999–1004.
68 Allain, *Slavery in International Law: Of Human Exploitation and Trafficking*, at 219–220. See also Allain, 'Contemporary Slavery and Its Definition in Law', at 37–44.

the "slaveholder" to, *inter alia*, enjoy, exploit, dispose, and/or use the "slave" at their whim.

Before turning to the next section, it is worth mentioning that a similar reading of what would constitute powers attaching to the right of ownership exists in general international law. In the context of the drafting process of the 1956 Supplementary Convention which, as stated in the introduction to this article, replicated the 1926 slavery definition, the then UN Secretary-General presented a report in which he enumerated the following non-exhaustive examples/forms of powers attaching to the right of ownership: (i) the ability to make a person an 'object of a purchase'; (ii) the ability to use a person and the person's labour in 'an absolute manner'; (iii) the entitlement to the products of the person's labour 'without any compensation commensurate to the value of the labour'; (iv) the capacity to transfer a person; (v) the impossibility of ending the situation of slavery 'by the will of the individual subject to it'; (vi) the transmissibility of one's own situation to the descendants.[69] Allain has rightly pointed out that the forms of powers attaching to the right of ownership enumerated in the ICC Elements of Crimes ('purchasing, selling, lending or bartering'), 'are in line with those put forward by the [UN] Secretary-General'; though he observed that the latter provided further examples, for instance with regard to the second (i.e., the ability to use a person and their labour) and third (i.e., the entitlement to the products of someone's labour without compensation) examples.[70] It should be added here that those two examples, however, are reflected in the *Katanga* case (the use and enjoyment of a person). In relation to the phrase 'similar deprivation of liberty' discussed above, it resembles the fifth example set out in the report of the former UN Secretary-General insomuch as the ICC Trial Chamber construed it as a situation in which the enslaved person is unable to leave at their own will.[71]

2.2 *Factors or Indicia that Are Indicative of Slavery*

Proceeding with its analysis of the applicable law, the ICC Trial Chamber enumerated factors or *indicia* that reveal the exercise of any or all of the powers

69 UN ECOSOC 'Slavery, the Slave Trade, and Other Forms of Servitude, Report of the Secretary-General' (27 January 1953) UN Doc E/2357, at 27–28. The characteristics set out by the UN Secretary-General were considered of legal value for the interpretation and application of the phrase 'powers attaching to the right of ownership' by the High Court of Australia in *The Queen v Tang*, at para 26.

70 Allain, *Slavery in International Law: Of Human Exploitation and Trafficking*, at 275–276.

71 On a detailed discussion of the phrase 'similar deprivation of liberty', see ibid., at 270–285.

attaching to the right of ownership over a person, i.e., factors that indicate the existence of slavery:

> (i) control or restrictions of someone's movement and, more generally, measures taken to prevent or deter escape; (ii) control of physical environment; (iii) psychological control or pressure; (iv) force, threat of force or coercion; (v) duration of the exercise of powers attaching to the right of ownership; (vi) assertion of exclusivity; (vii) subjection to cruel treatment and abuse; (viii) control of sexuality; (ix) forced labour or subjecting the person to servile status; and (x) the person's vulnerability and the socio-economic conditions in which the power is exerted.[72]

Attached to the above list is a footnote that cited various judgments. The footnote first cited the two previous judgments in which the ICC Trial Chamber had dealt with 'sexual slavery', namely *Ntaganda* (2019) and *Katanga* (2014).[73] If compared to these earlier cases, we see that the *Ongwen*'s list of factors or *indicia* associated with the exercise of any or all of the powers attaching to the right of ownership has not introduced any substantive change. For a better understanding of the discussion that now follows, the factors spelled out by the ICC Trial Chamber in *Ntaganda* and *Katanga* are reproduced below by reference to each of the cases separately:

NTAGANDA: control of the victim's movement, the nature of the physical environment, psychological control, measures taken to prevent or deter escape, use of force or threats of use of force or other forms of physical or mental coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality, forced labour, and the victim's vulnerability.[74]

KATANGA: detention or captivity and their respective duration; restrictions on freedom to come and go or on any freedom of choice or movement; and, more generally, any measure taken to prevent or deter any attempt at escape. The use of threats, force or other forms of physical or mental coercion, the exaction of forced labour, the exertion of psychological pressure, the victim's vulnerability and the socioeconomic

72 *Ongwen* ICC Trial Judgment, at para. 2712.

73 Ibid., at footnote 7153.

74 *Ntaganda* ICC Trial Judgment, at para. 952.

> conditions in which the power is exerted may also be taken into account.[75]

First, a comparation between the first, third, and fourth factor in the *Ongwen*'s list of factual indicators of slavery (reproduced earlier) and their counterparts in the *Ntaganda* and *Katanga* cases reveals a few minor differences which, however, do not alter their meaning. In *Ongwen*, the ICC Trial Chamber first referred to 'control or restrictions of someone's movement'. In *Ntaganda*, the Chamber only used the word 'control' (but not 'restrictions'), while in *Katanga* it only referred to 'restrictions' on freedom of movement. Similarly, in *Katanga*, the ICC Trial Chamber initially referred to 'psychological pressure' and later in *Ntaganda* to 'phycological control', while factor number three in the *Ongwen*'s list incorporated both concepts, i.e., 'psychological control or pressure'. As regards the fourth factor in *Ongwen*, namely 'force, threat of force or coercion', the cases of *Ntaganda* and *Katanga* went further in clarifying that coercion could be 'physical or mental'. Second, the phrase 'subjecting the person to servile status' alongside (but separated by the disjunctive 'or') forced labour within factor number nine is an addition of the *Ongwen* case. In *Ntaganda* and *Katanga*, the ICC Trial Chamber had only referred to 'forced labour'. At this juncture, it is important to note that 'servile status' means, according to the 1956 Supplementary Convention,[76] the 'condition or status' resulting from subjecting a person to any of the 'institutions or practices similar to slavery'. These include: serfdom, debt bondage, servile marriage, and child trafficking.[77] Forced labour is defined in a separate legal instrument – the 1930 Forced Labour Convention (No. 29) – as work or service 'exacted from any person under the threat of a penalty and for which the person has not offered himself or herself voluntarily'.[78] Therefore, while 'slavery', 'forced labour', and 'institutions or practices similar to slavery' are three different legal categories, they are not mutually exclusive. The two latter categories, if coupled (together or separately) with other factors, may qualify as slavery. Lastly, there are some factors or *indicia* of slavery that were mentioned in only one of the two cases prior to

75 *Katanga* ICC Trial Judgment, at para. 976.

76 The ICC Elements of Crimes refer, on several occasions, to 'servile status as defined in the [1956] Supplementary Convention'; and this is acknowledged by the ICC Trial Chamber in *Ongwen* ICC Trial Judgment, at para. 2711, footnote 7152. Therefore, it is to be understood that, for the ICC Trial Chamber, the meaning of 'servile status' corresponds to that in the 1956 Supplementary Convention.

77 1956 Supplementary Convention, at Art. 1 and Art. 7(b).

78 ILO 'Convention No. 29 concerning Forced or Compulsory Labour' (adopted 28 June 1930, entered into force 1 May 1932) 39 UNTS 55, at Art. 1(1).

Ongwen, but not in both. For instance, 'assertion of exclusivity' and 'subjection to cruel treatment and abuse' appeared in *Ntaganda* but not in *Katanga*. The opposite applies to 'the socio-economic conditions in which the power is exerted'; this factor appeared in *Katanga* but not in *Ntaganda*. In addition, there are two factors that the ICC Trial Chamber did not mention in *Ongwen* or *Ntaganda,* but which were part of its earlier judgment in *Katanga*. These are '[d]etention or captivity' and 'restrictions [...] on any freedom of choice'.

The (minor) differences discussed in the foregoing paragraph should not be seen as a sign of inconsistency or conflict between the various judgments rendered by the ICC Trial Chamber. While in *Ongwen*, the ICC Trial Chamber noted that the factors or *indicia* of powers attaching to the right of ownership 'include' those cited earlier, in *Katanga*, it used the terms 'may include',[79] and in *Ntaganda* 'such as',[80] immediately before listing them. The language employed in the latter judgments reveals the non-exhaustive nature of the factors listed therein. Furthermore, in *Ntaganda*, before turning to enumerate the *indicia* of slavery, the Chamber explicitly noted that '[t]here is no exhaustive list of situations or circumstances which reflect the exercise of a power of ownership'.[81] This understanding is further supported by the manner in which the ICC Trial Chamber has applied its interpretation of 'powers attaching to the right of ownership' to the specific facts of each case. As explained below, despite making positive findings on slavery, not all the factors considered indicative of such powers up front (in the Chamber's analysis of the applicable law) were present.

In *Ongwen*, having assessed the facts of the case at hand (discussed at the beginning of Section 2 of this article), the ICC Trial Chamber found that in relation to both the civilians abducted from the IDP camps and the women and girls abducted and distributed to members of the LRA, the LRA fighters had: 'deprived [them] of their personal liberty'; 'restricted and dictated their movement',[82] including by threats, physical restraints or armed guard; 'subjected [them] to forced labour'; and 'physically and psychologically abused them'.[83] On the basis of these findings, the ICC Trial Chamber concluded that the LRA fighters had 'exercised powers attaching to the right of ownership over the abductees by imposing on them a deprivation of liberty similar to [purchasing, selling,

79 *Katanga* ICC Trial Judgment, at para. 976.

80 *Ntaganda* ICC Trial Judgment, at para. 952.

81 Ibid.

82 In relation to the civilians abducted from the Pajule IDP camp, the ICC Trial Chamber added that the LRA fighters also 'subjected them to measures aimed at preventing their scape'. *Ongwen* ICC Trial Judgment, at para. 2840.

83 Ibid., at paras 2840, 2896, 2949, 2995, 3046, 3053, 3083 and 3087.

lending or bartering]'.[84] Accordingly, the Chamber found that the definition of enslavement pursuant to Art. 7(1)(c) of the Rome Statute was met. Regarding the abducted women and girls, the ICC Trial Chamber further found that, parallel to the exercise of powers attaching to the right of ownership, Sinia brigade members perpetrated acts of sexual nature (particularly acts of rape) over some of them. Accordingly, the Chamber found that, with respect to that group, the second element of *sexual* slavery, i.e., that the victims were caused 'to engage in one or more acts of sexual nature', was also met,[85] making positive findings on sexual slavery.[86]

As noted above, the Chamber determined that the form in which powers attaching to the right of ownership manifested in the present case was 'similar to' purchasing, selling, lending or bartering a person. In other words, by placing the abductees in the situation described, their individual liberty had been restricted as if they had been made an object of purchase, sale, loan, or barter.

In both *Ntaganda* and *Katanga*, the ICC Trial Chamber's application of the first material element of sexual *slavery*, i.e., 'the exercise of any or all of the powers attaching to the right of ownership', followed a similar pattern to that in *Ongwen*. Likewise, not all the factual indicators of slavery discussed earlier needed to be present to find a case of slavery. In *Katanga*, the ICC Trial Chamber was tasked with deciding whether sexual slavery had been committed over various women following the attack of 24 February 2003 on the village of Bogoro in the Democratic Republic of the Congo (DRC) by the Ngiti militia. Based on the evidence placed before the ICC Trial Chamber, the Chamber found that one of the women had been held at a camp of the Ngiti militia for 'over a year and a half',[87] where she 'was forced to carry out household chores',[88] 'did not have freedom of movement, nor was she able to decide where she lived', was forced to become the 'wife' of a man, and 'was constantly compelled to perform sexual acts'.[89] Another woman was found to have been captured by Ngiti

84 Ibid.

85 Ibid., at paras 3047 and 3083. Insofar as the definition of enslavement was met, the Chamber also found that the first element of sexual *slavery* as a crime against humanity (pursuant to Art. 7(1)(g) Rome Statute) and a war crime (pursuant to Art. 8(2)(e)(vi) Rome Statute) was met.

86 As the ICC Trial Chamber noted, 'sexual slavery and enslavement cannot concur on the basis of the same facts', thus when the definition of sexual slavery was met, the same facts were not further considered as enslavement. Ibid., at paras 3086 and 3051.

87 *Katanga* ICC Trial Chamber, at paras 1007 and 1072.

88 These included *inter alia* assisting the wives of members of the Ngiti militia in their daily activities. Ibid., at para. 1002.

89 Ibid., at para. 1007.

combatants and taken to a military camp 'for about a month', where she was 'consigned' to one of the commander's bodyguards and compelled to 'remain available' to him. She was 'raped' on numerous occasions,[90] compelled to perform various household chores,[91] '[t]hreatened with death', and 'deprived of all freedom of movement' (by being kept 'under constant surveillance') and 'autonomy'.[92] Lastly, the Chamber found that another woman had been held at a military camp 'for about three months'[93] where she was forced to marry two combatants, who 'ensured that she could not escape'.[94] She was forced to have sexual intercourse with both 'husbands', which in her words, was 'the only task assigned to her',[95] and 'deprived of all freedom of movement'.[96] On her way to the camp, she was also forced to carry items for the combatants. Eventually, the three women managed to escape from their respective captors (in the manner explained in Section 2.1 above).[97] In the light of the foregoing evidence, the ICC Trial Chamber was satisfied that 'powers attaching to the right of ownership' had been exercised over the three women, and thus concluded that the first element of sexual *slavery*, i.e., slavery, was fulfilled. The women having been caused to engage in acts of sexual nature, the ICC Trial Chamber further found the second material element of *sexual* slavery to be fulfilled.[98]

More recently, in the *Ntaganda* case, the ICC Trial Chamber was tasked once again with answering the same question as in the previous case. The ICC Trial Chamber, for instance, found that soldiers of the *Union des Patriotes Congolais/Forces Patriotiques pour la Libération du Congo* (UPC/FPLC) had 'exercised some of the powers attaching to the right of ownership' over a woman who, after her abduction in February 2003, was forced to cook and fetch water for

90 Ibid., at para. 1009. It was further established that 'she was regarded as a woman available for the sexual gratification' of her captors. Ibid., at para. 1012.

91 The ICC Trial Chamber added that she performed household chores 'despite sustaining a leg wound […] out of fear of retaliation'. Ibid., at para. 1009.

92 Ibid., at paras 1009 and 1013.

93 Ibid., at paras 1015 and 1019.

94 These combatants 'disagreed over who would have [her], before deciding to share her as their wife'. Ibid., at para. 1014. The ICC Trial Chamber noted that one of the combatants 'even controlled her daily life to such a degree that he wanted the only activity she performed to be sexual intercourse with him'. Ibid., at para. 1015.

95 Ibid., at para. 1016.

96 Ibid., at para. 1018.

97 Ibid., at paras 1005, 1009 and 1015.

98 The ICC Trial Chamber also heard evidence from witnesses claiming that other seven women, two of whom 'escaped death', were taken to Ngiti occupied locations where they were subjected to a similar fate. The Chamber also found them to have been sexually enslaved by Ngiti combatants. Ibid., at para. 1021.

the UPC/FPLC soldiers, raped by them, and made to carry a double mattress from one city (Buli) to another (Kobu).[99] In Kobu, she was brought to the place of an UPC/FPLC commander who raped her and told her to come to his house in the city of Bunia 'or she would be killed' by the UPC/FPLC soldiers if she stayed.[100] While 'she did not want to', she obeyed due to fear of being killed.[101] On their way to Bunia, she was again forced to carry the same mattress that she carried before. After spending *one* day at the commander's house in Bunia, she was 'sent away by the commander's wife'.[102] On this basis, the Chamber also considered this commander to have 'exercised powers attaching to the right of ownership' over this woman. Similar findings were made with regard to an eleven-year-old girl. The evidence that the ICC Trial Chamber received showed that this girl had been captured by a commander who transferred her to another location and forced her to have 'sexual relationships' with him. Her captivity lasted, according to the ICC Trial Chamber, for 'several days or even weeks'.[103] Considering particularly the age of the victim, the ICC Trial Chamber concluded that said commander had 'exercised powers attaching to the right of ownership' over this girl. In relation to both the women and the girl, the Chamber further determined that powers attaching to the right of ownership (i.e., slavery) had been exercised parallel to acts of sexual nature, thereby making positive findings on sexual slavery.[104]

Let us now return to the footnote in the *Ongwen* case (referred to above) where the ICC Trial Chamber cited the legal sources from which the *indicia* of slavery drew from. The ICC Trial Chamber, after citing its own jurisprudence (i.e., *Ntaganda* and *Katanga*), added 'similarly' and subsequently cited relevant excerpts from judgments rendered by other international and hybrid criminal courts and tribunals.[105] These included: the 2012 judgment of the SCSL Trial Chamber in the *Taylor* case; the 2010 judgment of the Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC) in the *Duch*

99 *Ntaganda* ICC Trial Judgment, at paras 959 and 631.

100 Ibid., at para. 631.

101 Ibid., at paras 631 and 959.

102 Ibid., at para. 960.

103 Ibid., at para. 961.

104 The ICC Trial Chamber also made positive findings on slavery with respect to other women placed in similar circumstances. Bosco Ntaganda, on appeal, submitted that it was unreasonable for the ICC Trial Chamber to find that sexual slavery had occurred in relation to some of the women, which the ICC Appeals Chamber firmly rejected. *Prosecutor v Bosco Ntaganda* (*Appeals Chamber*) ICC-01/04-02/06 A A2 (30 Marcy 2021), at paras 822–856.

105 *Ongwen* ICC Trial Judgment, at footnote 7153. The ICC Trial Chamber did not reproduce the excerpts but instead referred to the paragraphs in which these where contained.

case;[106] the 2009 judgment of the SCSL Trial Chamber in the *Sesay* case; and the 2002 judgment of the ICTY Appeals Chamber in the *Kunarac* case.[107] A close examination of the excerpts that the ICC Trial Chamber cited shows – as will be explained below – that the factual indicators or *indicia* of slavery enumerated in *Ongwen* (and also those listed in *Ntaganda* and *Katanga*) drew from the ICTY Trial Judgment in the *Kunarac* case.

The *Katanga* case was the first instance in which the ICC Trial Chamber spelled out factors indicative of slavery, meaning that it could not rely on its own jurisprudence on that matter. In *Katanga*, therefore, the ICC Trial Chamber decided to look externally, beyond its legal boundaries, to inform its understanding of 'the exercise of any or all of the powers attaching to the right of ownership over a person'. The Chamber specifically cited, with approval, relevant passages from the cases mentioned above (except for the *Duch* case)[108] and, besides the ICTY Appeals Judgment in *Kunarac*, it also cited approvingly the ICTY Trial Judgment.[109] Thereafter, in *Ntaganda*, the ICC Trial Chamber first quoted the ICTY Appeals Judgment in *Kunarac*, and then, by way of adding 'see also', it cited its previous verdict in *Katanga* followed by the cases of *Sesay* and *Taylor*.[110] All the excerpts cited by the ICC Trial Chamber from the judgments referred to above (i.e., *Taylor* Trial Judgment, *Sesay* Trial Judgment, *Duch* Trial Judgment, and *Kunarac* Appeals Judgment) had in turn reproduced verbatim an excerpt from the *Kunarac* Trial Judgment (paragraph 543) where the ICTY Trial Chamber, in determining whether slavery had been committed, took into consideration the following factors:

> [C]ontrol of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.[111]

106 *Prosecutor v Kaing Guek Eav alias Duch* (*Trial Chamber* ECCC) 001/18-07-2007/ECCC/TC (26 July 2010) ('*Duch* ECCC Trial Judgment'), at para. 342.

107 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (*Appeal Judgment*) IT-96-23 & IT-96-23/1-A (12 June 2002) ('*Kunarac* ICTY Appeals Judgment'), at para. 119.

108 Unlike the cases of *Taylor* and *Sesay*, which dealt with both sexual slavery and enslavement, the *Duch* case only concerned enslavement. This may be reason why the ICC Trial Chamber has only cited the *Duch* case in *Ongwen* but not in its earlier judgments in *Ntaganda* and *Katanga* (which dealt only with sexual slavery).

109 *Katanga* ICC Trial Judgment, at footnote 2299.

110 *Ntaganda* ICC Trial Judgment, at footnote 2737.

111 *Kunarac* ICTY Trial Judgment, at para. 543.

In replicating the above factors, the ICTY Appeals Chamber held that the question of whether a particular phenomenon constitutes slavery 'will depend on the operation of the factors or *indicia* of enslavement identified by the [ICTY] Trial Chamber'.[112]

Observing that it was cited approvingly on appeal by the ICTY Appeals Chamber, the SCSL Trial Chamber replicated the above excerpt in the *Taylor* and *Sesay* cases when dealing with both enslavement and the slavery element of sexual *slavery*.[113] In doing so, the SCSL Trial Chamber emphasized that the endorsed *Kunarac*'s list of *indicia* of slavery was 'by no means exhaustive'.[114] In the *Duch* case, the ECCC Trial Chamber also reprinted the above factors (although it cited them from the ICTY Appeals Judgment rather than the ICTY Trial Judgment).[115] On appeal, the ECCC Supreme Court Chamber endorsed the ECCC Trial Chamber's verdict in that respect.[116] While the ICC jurisprudence on slavery has cited the ECCC Trial Judgment in *Duch* but not the *Duch* Appeal Judgment, it is nevertheless worth noting that the latter judgment held that *Kunarac* and *Sesay* (which, at the time, represented the only judgments that had pronounced on the meaning of 'powers attaching to the right of ownership') 'confirm[ed] verbatim the fundamental definition of slavery first articulated under the [1926] Slavery Convention as the applicable definition under customary international law'.[117] According to the *Duch* Appeal Judgment, the exercise of powers attaching to the right of ownership 'requires a substantial degree of control over the victim', rather than ownership in the legal sense.[118]

After citing the judgments discussed above, the footnote in *Ongwen* lastly added 'see also' and quoted a decision rendered by the Inter-American Court

112 *Kunarac* ICTY Appeals Judgment, at para. 119.

113 *Taylor* SCSL Trial Judgment, at paras 447 and 420; *Sesay* SCSL Trial Judgment, at paras 199 and 160.

114 As acknowledged by the SCSL Trial Chamber, this consideration drew from the *Kunarac* case. *Taylor* SCSL Trial Judgment, at para. 420, footnote 1034. See also ibid., at para. 447, and *Sesay* SCSL Trial Judgment, at para. 160.

115 *Duch* ECCC Trial Judgment, at para. 342.

116 The ECCC Supreme Court Chamber remarked that the *indicia* of powers attaching to the right of ownership 'help distinguish enslavement from other international crimes'. *Duch* ECCC Appeal Judgment, at para. 154. It added that in seeking to determine whether slavery exists, a Chamber has to identify such *indicia*, that is, 'facts pointing to the victim being reduced to a commodity, such that the person is an object of "enjoyment of possession"; that she or he can be used (for example, for sexual purposes); economically exploited; consumed (for purposes of organ harvesting, for example); and ultimately disposed of'. Ibid., at para. 156.

117 Ibid., at footnote. 262.

118 Ibid., at para. 156.

of Human Rights (IACtHR) in *Trabajadores de la Hacienda Brasil Verde v Brazil* (2016).[119] The ICC Trial Chamber specifically cited a passage in which the IACtHR had cited with approval paragraph 542 of the *Kunarac* Trial Judgment, which read:

> [I]ndications of enslavement include [...] restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking.[120]

The ICC Trial Chamber, in its jurisprudence, has thus merged the above factors or *indicia* of slavery (paragraph 542) and those set out in paragraph 543 of the *Kunarac* Trial Judgment,[121] which, as discussed above, is the passage that the SCSL and the ECCC opted to reproduce.[122] This explains the minor differences considered at the beginning of this section when comparing the *Ongwen* case to the *Ntaganda* and *Katanga* cases.

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119 *Ongwen* ICC Trial Judgment, at footnote 7153. *Trabajadores de la Hacienda Brasil Verde v Brasil* Series C No. 318 (20 October 2016), at para. 272.

120 *Kunarac* ICTY Trial Judgment, at para. 542.

121 The ICTY Trial Chamber in *Kunarac* did not intend to draw any distinction between the factors spelled out at para. 542 and those at para. 543. Having elaborated upon the indications of enslavement as it did at para. 542, the ICTY Trial Chamber started para. 543 as follows: '[t]he Trial Chamber is therefore in general agreement with the factors put forward by the Prosecutor, to be taken into consideration in determining whether enslavement was committed'. It then added '[t]hese are' and thereafter spelled them out.

122 While in their respective analyses of the applicable law, the ECCC and the SCSL only reproduced the factors or *indicia* of slavery set out in para. 543 of the *Kunarac* Trial Judgment, these Courts also embraced some of the factors referred to in its para. 452 when applying the definition of slavery. For instance, the SCSL Trial Chamber, in *Sesay*, explained that to control the victim's movement, the civilians were made to believe that 'if they escaped they would meet certain death at the hands of the enemy', something that the SCSL Trial Chamber described as a fear-based manipulation (and which relates to the factor of deception mentioned in *Kunarac* Trial Judgment, at para. 542). *Sesay* SCSL Trial Chamber, at para. 1325.

For instance, it was discussed earlier that in comparison with the *Ongwen*'s list of *indicia* of slavery, *Ntaganda* and *Katanga* used the words 'physical or mental' before the word 'coercion', thus making it clear that coercion does not necessarily entail physical force. Regardless, mental coercion and deception featured in the reasoning of the ICC Trial Chamber in *Ongwen* when assessing the evidence related to slavery. This is consonant with the explanation given by the ICTY Trial Chamber at *Kunarac*'s paragraph 542, where it referred to 'other forms of coercion' beyond threat or use of force, while further adding 'deception or false promises'. Additionally, while in *Ntaganda* the ICC Trial Chamber referred to 'control of the victim's movement' (as the ICTY Trial Chamber did at paragraph 453), in *Ongwen* and *Katanga*, it did not only speak of 'control' but also of 'restrictions' of freedom of movement, similar to paragraph 542 of the *Kunarac* Trial Judgment. It may also be recalled that in *Ongwen* and *Katanga* (but not in *Ntaganda*), the ICC Trial Chamber included within the list of *indicia* of slavery the victim's 'vulnerability and the socioeconomic conditions in which the power is exerted', and that 'detention or captivity' and 'restrictions [...] on any freedom of choice' appeared in *Katanga* but not in the other two cases. These factors appear to be "borrowed" from paragraph 542 of the *Kunarac* Trial Judgment. If compared to *Kunarac*, it can be safely concluded that 'subjecting a person to servile status' is the only factor that the ICC Trial Chamber has contributed itself to the list of factors or *indicia* relevant to assessing whether the threshold of slavery is met.[123]

2.3 *The Duration of the Exercise of Powers Attaching to the Right of Ownership*

As discussed in the foregoing section, the duration of the exercise of powers attaching to the right of ownership is one of the factors that may indicate that slavery is present. While acknowledging this, the ICC Trial Chamber, in *Ongwen*, further clarified that '[t]he law [...] does not establish a minimum period of enslavement'.[124] Once more, the ICC Trial Chamber incorporated external legal materials in its reasoning, including the Trial Judgments *Taylor* and *Sesay*, respectively, as well as the Appeals Judgment *Kunarac*.[125]

Drawing on the Appeals Judgment *Kunarac*, the SCSL Trial Chamber in both *Taylor* and *Sesay*, similar to the ICC Trial Chamber, held that '[t]here is

123 *Ongwen* ICC Trial Judgment, at para. 2712. Yet, this factor was already mentioned by the SCSL Trial Chamber in *Taylor* SCSL Trial Judgment, at para. 420 and *Brima* Trial Judgment, at para. 709.

124 *Ongwen* ICC Trial Judgment, at para. 2714.

125 Ibid., at footnote 7157.

no requisite duration of the relationship between the [a]ccused and the victim which must exist in order to establish enslavement', although the duration '*may* be relevant in determining the quality of the relationship' (emphasis added).[126] In *Kunarac*, the ICTY Appeals Chamber had specifically noted,

> [t]he Appellants contend that another element of the crime of enslavement requires the victims to be enslaved for an indefinite or at least for a prolonged period of time. The Trial Chamber found that the duration of the detention is another factor that can be considered but that its importance will depend on the existence of other indications of enslavement. The Appeals Chamber upholds this finding and observes that the duration of the enslavement is not an element of the crime. The question turns on the *quality of the relationship between the accused and the victim*. A number of factors determine that quality. One of them is the duration of the relationship. The Appeals Chamber considers that the period of time, which is appropriate, will depend on the particular circumstances of each case (emphasis added).[127]

In upholding the ICTY Trial Chamber's verdict,[128] the ICTY Appeals Chamber thus attached greater significance to the quality of the relationship between the "slave" and the "slaveholder", than to the duration of such relationship.

In line with this reasoning, the ICC Trial Chamber made positive findings on slavery notwithstanding the differences in the duration of the relationship between the abducted civilians and the LRA fighters (which, as discussed earlier, varied from one day to nearly 13 years), and despite finding that some of the abducted civilians were eventually released. The Chamber actually considered that the fact that some of the abductees were occasionally released by their captors (some even the day after their abduction)[129] was an 'indication that they were constrained and could not leave of their own choice'.[130] This further reinforced its finding on slavery with respect to this group. When it

126 *Taylor* SCSL Trial Judgment, at para. 447; *Sesay* SCSL Trial Judgment, at para. 200.

127 *Kunarac* Appeals Judgment, at para. 121.

128 The ICTY Trial Chamber explicitly held: 'The duration of the suspected exercise of powers attaching to the right of ownership is another factor that may be considered when determining whether someone was enslaved; however, its importance in any given case will depend on the existence of other indications of enslavement'. *Kunarac* Appeals Judgment, at para. 542.

129 In this respect, the ICC Trial Chamber highlighted that such a scenario was the exception and not the rule. *Ongwen* ICC Trial Judgment, at para. 2196.

130 Ibid.

comes to slavery, the ICC Trial Chamber also made no distinction between the abductees who were rescued or managed to escape, and those who remained with the LRA. For instance, a woman who had been assigned to the LRA sick-bay was able to 'escape' (after about five years with the LRA) at one instance in which she was sent to collect food.[131] Despite having the possibility to escape and considering other factors, the ICC Trial Chamber similarly found that she had been held in slavery.

It may also be recalled that, in *Katanga*, the three victims managed to escape after a year and a half, a month, and three months of being held in slavery respectively;[132] and in *Ntaganda*, one of the women was 'sent away' from her captor's place after spending *one* day there, while the girl was held in slavery for days or weeks.[133] Quite clearly, in measuring whether a situation reaches the threshold of slavery, the relevance does not lie on the permanent duration of the relationship between the "slave" and the "master", but on the quality of it. Such quality is determined by the factors or *indicia* of slavery (discussed in Section 2.2), and not by the duration of the exercise of powers attaching to the right of ownership alone.

The ICC Trial Chamber's understanding of the duration of slavery is consistent with the negotiations of the drafters of the legal definition of slavery. First, during the drafting process of Art. 1(1) of the 1926 Slavery Convention, Albrecht Gohr, who acted as the Chair of the Temporary Slavery Commission (which was formed in 1924 for the establishment of the 1926 Slavery Convention), initially included the following terms within the draft definition of slavery: '[a person] who is complied to serve such other person or group of persons for an undetermined time'.[134] This proposal spoke of 'undetermined time', as opposed to a specific period of slavery or a permanent duration.[135] Second, as discussed earlier, during the drafting process of the 1956 Supplementary Convention,

131 Ibid., at paras 2086–2087.

132 *Katanga* ICC Trial Judgment, at paras 1007, 1009 and 1015.

133 *Ntaganda* ICC Trial Judgment, at paras 960 and 961.

134 As cited in J. Allain, *The Law and Slavery: Prohibiting Human Exploitation* (Brill Nijhoff 2015), at 402. This draft definition built upon the 1925 British Draft Protocol against Slavery and the Slave Trade, and was welcomed, for instance, by Lord Oliver and Lord Earl Buxton. UK Parliament, 'Draft Convention on Slavery', HL Deb Volume 62 1503–1544 (16 December 1925), https://api.parliament.uk/historic-hansard/lords/1925/dec/16/draft-convention-on-slavery (accessed 9 August 2022).

135 While the government of the Union of South Africa observed that the term slavery 'also seems to imply a *permanent* status or condition of a person whose natural freedom is taken away', the inclusion of 'permanence' was not taken on board, since no reference to permanence is found in the 1926 Slavery Convention (emphasis in the original). Allain, *The Law and Slavery: Prohibiting Human Exploitation*, at 433.

the then UN Secretary-General enumerated six (non-exhaustive) examples or forms of powers attaching to the right of ownership. The fifth example specifically stated that slavery 'is permanent, that is to say, it cannot be terminated by the will of the individual subject to it'.[136] Although the UN Secretary-General used the word 'permanent', from the explanation he gave, it becomes clear that permanence translates into a situation in which the person subjected to it cannot terminate it by his or her own will. This speaks of the quality of the situation under which the person finds him or herself, rather than of a permanent condition.

The ICC Trial Chamber has reached a remarkably close understanding to that of the UN Secretary-General. As stated in the previous section, in *Ongwen*, the ICC Trial Chamber referred to the impossibility of "slaves" 'leav[ing] of their own choice'.[137] In *Katanga*, the Chamber similarly determined that 'the notion of servitude [slavery] relates first and foremost to the impossibility of the victim's changing his or her condition'.[138]

2.4 *Factors that Are Not Required to Satisfy the Definition of Slavery*

Having set out the factors or *indicia* that may be associated with the 'exercise of any or all of the powers attaching to the right of ownership over a person', i.e., slavery, the ICC Trial Chamber engaged in the opposite exercise. It turned to specify three factors which, in the ICC Trial Chamber's view, are not required to fulfil the definitional criteria of slavery, though their presence may be indicative of the existence of slavery.

First, the ICC Trial Chamber (in *Ongwen*) underlined that 'enslavement [is] satisfied without any additional ill-treatment' than the one intrinsic to the factors previously identified by the Chamber as indicators of slavery.[139] The factors or *indicia* set out in the *Ongwen* case already included 'subjection to

136 UN ECOSOC 'Slavery, the Slave Trade, and Other Forms of Servitude, Report of the Secretary-General', at 27–28.

137 *Ongwen* ICC Trial Judgment, at para. 2196.

138 *Katanga* ICC Trial Chamber, at para. 976. While the ICC Trial Chamber used the word servitude, it is to be assumed that it meant to say slavery to the extent that the Rome Statute does not know of the crime of servitude, and the Chamber used the word 'servitude' in the context of elaborating upon the meaning of 'powers attaching to the right of ownership'. The ECtHR, in *C.N. and V. v France* (ECtHR) App 67724/09 (11 October 2012), at para. 92, elaborated upon the meaning of permanence within a situation of servitude. Building upon its previous legal reasoning in *Siliadin* and *Rantsev*, the ECtHR held that: 'the fundamental distinguishing feature between servitude and forced or compulsory labour within the meaning of [Art. 4(1) ECHR] lies in the victim's *feeling* that their condition is permanent and that the situation is unlikely to change' (emphasis added).

139 *Ongwen* ICC Trial Judgment, at para. 2713. These factors are discussed in Section 2.2.

cruel treatment and abuse', so it sounds reasonable not to require more than such treatment to satisfy the definition of enslavement. Furthermore, it might be recalled that while 'cruel treatment and abuse' also appeared in *Ntaganda*, this factor was not mentioned in the *Katanga*'s list of *indicia* of slavery. This, together with the ICC Trial Chamber's established position that not all factors or *indicia* identified as indicative of slavery need to be met for a phenomenon to qualify as slavery, suggest that 'cruel treatment' is not an indispensable or essential factor of slavery. This consideration is further underpinned by the legal sources that the ICC Trial Chamber quoted to reach the determination that no additional ill-treatment was required to meet the definitional threshold of slavery. The ICC Trial Chamber, once again, looked elsewhere, beyond its own legal borders, to inform its interpretation of slavery. It cited relevant excerpts from the *Duch* Trial Judgment and the *Kunarac* Appeals Judgment,[140] which in turn cited and reproduced respectively the following passage form *Pohl et al.*, a case heard at the International Military Tribunal at Nuremberg in 1947:

> Slavery may exist even without torture. Slaves may be well fed, well clothed, and comfortably housed, but they are still slaves if without lawful process they are deprived of their freedom by forceful restraint. We might eliminate all proof of ill-treatment, overlook the starvation, beatings, and other barbarous acts, but the admitted fact of slavery – compulsory uncompensated labour – would still remain. There is no such thing as benevolent slavery. Involuntary servitude, even if tempered by humane treatment, is still slavery.[141]

The ICTY Trial Chamber in *Kunarac* and the SCSL Trial Chamber in *Sesay* have equally deemed the above excerpt of legal value.[142] The considerations

140 The ICC Trial Chamber, using the word 'similarly', cited paragraph 344 of the *Duch* ECCC Trial Judgment, and paragraph 123 of the *Kunarac* ICTY Appeals Judgment. *Ongwen* ICC Trial Judgment, at footnote 7155.

141 Judge Michael A. Musmanno, in its Concurring Opinion, noted that: '[e]ven in the ancient days of slavery, the master was jealous of his slave's comfort and care because in him he had an investment'. *United States v Oswald Pohl et al.* (3 November 1947), at 1098. This exemplifies very well that to the extent that "masters" benefit from "slaves", they may (to a certain degree) look after them so as to be able to continue benefiting from them and/or their labour.

142 *Kunarac* ICTY Trial Judgment, at para. 525; *Sesay* Trial Chamber, at para. 203. The Economic Community of West African States (ECOWAS) Court of Justice in *Hadijatou Mani Koraou v The Republic of Niger* ECW/CCJ/JUD/06/08 (27 October 2008), at para. 79,

therein are also consonant with the *travaux préparatoires* of the 1926 Slavery Convention. During the negotiations leading to the 1926 Slavery Convention, some delegates made references to incidents of slavery including cases where 'girls [were] well and sufficiently clothed and fed, and treated well'.[143]

Secondly, the ICC Trial Chamber held that '[a] commercial transaction is also not required' for a phenomenon to satisfy the definition of enslavement.[144] As a basis for making this determination, the ICC Trial Chamber cited its previous judgments in *Ntaganda* and *Katanga*.[145] These judgments, for their part, followed on previous pronouncements in *Taylor* and *Brima*,[146] where the SCSL Trial Chamber had determined that 'any payment or exchange' was not required to establish the exercise of powers attaching to the right of ownership over a person.[147] In doing so, the SCSL Trial Chamber relied on a 2000 Report of the former UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Wartime,[148] particularly the following excerpt:

> The Special Rapporteur understands that based on customary law interpretations of the crime of slavery, and thus sexual slavery, there are no requirements of any payment or exchange; of any physical restraint, detention or confinement for any set or particular length of time; nor is there a requirement of legal disenfranchisement. Nonetheless, these and other factors may be taken into account in determining whether a status or condition of slavery exists.[149]

In other parts of the report, the UN Special Rapporteur cited the judgment of the ICTY in *Kunarac*, though not in this particular instance. In *Kunarac*, the ICTY

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similarly attached significance to it when clarifying the applicable law with respect to slavery, underlining that such passage from the *Pohl et al.* case is 'now well-established'.

143 Temporary Slavery Commission, 'Minutes of the Second Session Held at Geneva, from 13 to 25 July 1925' Document No. C.426.M.157 (1 September 1925).

144 *Ongwen* ICC Trial Judgment, at para. 2713.

145 Ibid., at footnote 7155.

146 *Ntaganda* ICC Trial Judgment, at footnote 2738; *Katanga* ICC Trial Judgment, at footnote 2300.

147 *Brima* SCSL Trial Judgment, at para. 709; *Taylor* SCSL Trial Judgment, at para. 420.

148 After having cited the *Brima* and *Taylor* cases, the ICC Trial Chamber, by way of adding 'see also', cited this 2000 Report as well. *Ntaganda* ICC Trial Judgment, at footnote 2738; *Katanga* ICC Trial Judgment, at footnote 2300.

149 UN ECOSOC, 'Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict: Update to the Final Report Submitted by Ms. Gay J. McDougall, Special Rapporteur' UN Doc E/CN.4/Sub.2/2000/21 (6 June 2000), at para 50.

Trial Chamber held that the '"acquisition" or "disposal" of someone for monetary or other compensation, is not a requirement for enslavement', but that doing so is a 'primer example' of the exercise of powers attaching to the right of ownership over someone.[150] Given the similarities between the *Kunarac*'s considerations and the above excerpt from the UN Special Rapporteur, it thus may be assumed that the latter drew from the *Kunarac* case. If this holds true, then, the UN Special Rapporteur considered the *Kunarac*'s interpretation of slavery as 'customary law'. Some other passages of her report seem to support this understanding.

In assessing whether slavery exists, neither the ICC nor other international and hybrid criminal courts and tribunals have attached significance to the presence of a 'commercial transaction'. As the UN Commission of Inquiry on Human Rights in Eritrea rightly described it, the victims of enslavement in 'Germany during the Second World War, in Cambodia during the Khmer Rouge regime, and in the former Yugoslavia and Sierra Leone in the 1990s [...] [were] not bought and sold on an open market'.[151] It may be added here: and yet, the International Military Tribunal at Nuremberg, the ECCC, the ICTY, and the SCSL made positive findings on slavery.

Thirdly, in the manner already discussed in Section 2.1, the ICC Trial Chamber considered that deprivation of liberty does not have to be physical for slavery to exist.[152] In line with this interpretation, as shown earlier, the Chamber had considered threats, mental coercion, and deception as means of deprivation of liberty in cases of slavery.

3 Unravelling the International Criminal Court's Interpretation of Slavery

Most of the discussion in Section 2 has taking us back to the *Kunarac* case. The ICC Trial Chamber, either by relying on the *Kunarac* Trial or Appeals Judgments, or by drawing on jurisprudence that in turn had relied (directly or indirectly) upon the *Kunarac* judgment(s), has embraced *Kunarac*'s interpretation of slavery. The events giving rise to the *Kunarac* case occurred in the area of Foča in Bosnia and Herzegovina between April 1992 and February 1993. During that time, commanders of the Bosnian Serb Army held Bosnian Muslim women in

150 *Kunarac* ICTY Trial Judgment, at para. 542.

151 UN HRC, 'Detailed Findings of the Commission of Inquiry on Human Rights in Eritrea' UN Doc A/HRC/32/CPR.1 (8 June 2016), at para. 223.

152 *Ongwen* ICC Trial Judgment, at para. 2713.

captivity, subjected them to repeated rapes, torture and other mistreatments, and compelled them to perform household chores.[153] The accused were found guilty of the crimes against humanity of enslavement and rape, *inter alia*. The ICTY Statute (1993) does not define 'enslavement', thus, the first issue that the ICTY Trial Chamber had to consider was the definition.[154] To define this crime, the ICTY Trial Chamber found it necessary 'to look to various sources that deal with the same or similar subject matter, including international humanitarian law and human rights law'.[155] Accordingly, as will be shown, general international law, international criminal law, international humanitarian law, and human rights law featured in the reasoning of the ICTY when defining and interpreting slavery.

To begin with, the ICTY Trial Chamber referred to the slavery definition in Art. 1(1) of the 1926 Slavery Convention, which, in the words of the Trial Chamber, 'proved to be abiding'.[156] It is worth reiterating that Art. 1(1) of the 1926 Slavery Convention defines slavery as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'. Immediately after, the ICTY Trial Chamber consulted Art. 5 of the 1926 Slavery Convention,[157] by which States Parties had pledged to 'prevent compulsory or forced labour from developing into conditions analogous to slavery'. This provision appears to imply that, already in 1926, as Stoyanova explains, the concepts of slavery and forced labour entailed distinguishing features to the extent that one (forced labour) can 'degenerate' into the other (slavery).[158] The ICTY Trial Chamber further recalled that, shortly after the adoption of the 1926 Slavery Convention, the International Labour Organization (ILO) adopted the 1930 Forced Labour Convention (No. 29), which contains the definition of 'forced or compulsory labour'.[159] The regulation of slavery and forced labour in different international instruments and under different definitions further

153 As described in the charges against the accused, some of the victims 'were also beaten, threatened, psychologically oppressed, and kept in constant fear'. *Kunarac* ICTY Trial Judgment, at 308, para. 11.4.

154 Enslavement is listed as a crime against humanity under UNSC 'Statute of the International Criminal Tribunal for the Former Yugoslavia' UNSC Res 827 (1993) (25 May 1993) SCOR 48th Year 29 (as amended 7 July 2009 by Res 1877), at Art. 5(c), although this crime remains undefined under this Statute.

155 *Kunarac* ICTY Trial Judgment, at para. 518.

156 Ibid., at para. 519.

157 Ibid.

158 V. Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (CUP 2017), at 200.

159 *Kunarac* ICTY Trial Chamber, at para. 519.

substantiates the argument that, in international law, both concepts are different and refer to distinct (yet similar) factual circumstances. The reference to Art. 5 of the 1926 Slavery Convention and to the definition of forced labour in the 1930 Forced Labour Convention (No. 29) by ICTY Trial Chamber, suggests that, for the ICTY Trial Chamber, the fragmentation of slavery and forced labor as two different legal categories in international law is clear.[160]

Importantly, the ICTY Trial Chamber observed that the definition of slavery in Art. 1(1) of the 1926 Slavery Convention had reached the status of customary international law.[161] According to the ICTY Trial Chamber, such observation (which was upheld by the ICTY Appeals Chamber on appeal)[162] was evidenced by 'the almost universal acceptance' of the 1926 Slavery Convention and 'subsequent international law developments in this field', in particular the reproduction of the 1926 slavery definition in Art. 7(a) of the 1956 Supplementary Convention.[163] It may be worth noting that, presently, the 1926 slavery definition has been adhered to by 176 States. In a latter passage of the judgment, the ICTY Trial Chamber, by way of a footnote, quoted the definition of enslavement under the Rome Statute.[164] As the Chamber recalled, at the time of the Trial Judgment, the Rome Statute had not entered into force yet. Moreover, Bosnia and Herzegovina had then signed, but not ratified, the Rome Statute.[165] However, this was not a matter of concern for the Chamber as it found that the 1926 slavery definition had acquired the status of customary international law.

Having considered general international law and inferred from it a customary international law definition of slavery, the ICTY Trial Chamber went on to refer to the first codification of enslavement as a crime against humanity. This is found in the Charter of the International Military Tribunal of 1945 (known as the 'Nuremberg Charter'),[166] and shortly after, in terms similar to

160 Various international and regional human rights instruments deal with both concepts (slavery and forced labour) within the same provision but in two separate paragraphs. This further demarcates the distinction between the two legal categories. This legal distinction, however, predates international human rights law, and the 1926 Slavery Convention itself. In a document titled 'Slavery and the Obligation of the League' of 1922, a distinction was already made between 'slavery', 'deb bondage', and 'compulsory labour'. League of Nations, 'The Question of Slavery' League of Nations Doc No. 27439.

161 *Kunarac* ICTY Trial Chamber, at para. 520.

162 *Kunarac* ICTY Appeals Judgment, at para. 124. This verdict was cited with approval by the ECCC in *Duch* ECCC Trial Judgment, at para. 342 and *Duch* ECCC Appeals Judgment, at para. 146.

163 *Kunarac* ICTY Trial Chamber, at para. 520.

164 Ibid., at footnote 1333.

165 Ibid.

166 Ibid., at para. 522.

the Nuremberg Charter, in the Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against the Peace and Against Humanity of 20 Dec 1945 (Control Council Law No. 10).[167] As the ICTY Trial Chamber rightly noted, both texts codified enslavement as a crime against humanity but without defining this crime.[168] In addition, the ICTY Trial Chamber underlined that the Nuremberg judgment 'made no attempt to define [this concept] or to draw a systematic distinction between deportation to slave labour and enslavement'.[169] Having acknowledged these failures, the ICTY cited some excerpts from two cases heard before the Military Tribunal at Nuremberg (under Control Council Law No. 10), namely *Milch* and *Pohl et al.*[170]

The excerpt from the *Pohl et al.* case has been cited earlier in the article (Section 2.4), so it does not need to be quoted in full here. At its simplest, it affirmed that '[s]lavery may exist even without torture', and that slavery is still slavery even if 'tempered by humane treatment'. This consideration seems to have been embraced in the reasoning of the ICTY Trial Chamber. It may be recalled that the ICTY factual indicators of slavery included 'cruel treatment and abuse', however, neither this nor the other indicators were considered determinative.[171] Also, drawing (indirectly) on *Pohl et al.*, the ICC Trial Chamber held that no 'additional ill-treatment' than the one intrinsic to other indicators of slavery was required to reach the threshold of slavery.[172] This, in essence, captures the *Pohl et al.*'s passage. With regard to the *Milch* case, the ICTY Trial Chamber quoted the following passage:

> Slavic Jews who laboured in Germany's war industries [...] were slaves, nothing less – kidnapped, regimented, herded under armed guards, and worked until they died from disease, hunger, exhaustion. [...] As to non-Jewish foreign labour, with few exceptions they were deprived of the basic civil rights of free men; they were deprived of the right to move freely or to choose their place of residence; to live in a household with their families; to rear and educate their children; to marry; to visit public places of their own choosing; to negotiate, either individually or through

167 Ibid., at para. 524.
168 Ibid., at paras 522–523.
169 Ibid., at para. 523.
170 The ICTY Trial Chamber also cited other Control Council Law No. 10 cases in with 'enslavement and related aspects' had been considered, including IG Farben (*US v Carl Krauch and Others*) and Flick (*US v Friedrich Flick and Others*). Ibid., at para. 525, footnote 1273.
171 Ibid., at para. 542.
172 *Ongwen* ICC Trial Judgment, at para. 2713.

> representatives of their own choice, the conditions of their own employment; to organize in trade unions; to exercise free speech or other free expression of opinion; to gather in peaceful assembly; and they were frequently deprived of their right to worship according to their own conscience. All these are the sign-marks of slavery, not free employment under contract.[173]

The ICTY appears to have later discerned factors from the above excerpt as relevant to assessing whether the threshold of slavery had been met, as apparent similarities exist between some of the factors contained in the *Milch*'s excerpt and the ICTY *indicia* of powers attaching to the right of ownership (discussed in Section 2.2 above). Moreover, neither of them is concerned with the ownership of people in the legal sense.

The ICTY Trial Chamber also took into consideration the indictment and judgment of the International Military Tribunal for the Far East (also referred to as the 'Tokyo War Crimes Tribunal'), making similar observations as those made in relation to the Nuremberg judgment. It noted that '[t]he Tokyo judgment also did not systematically distinguish between deportation to slave labour, slave labour and enslavement, nor did it attempt to define them in any detail'.[174] It then cited an excerpt from the Tokyo judgment which stated that, besides 'prisoners of war and civilian internees', the Japanese supplemented their 'source of manpower by recruiting labourers from the native population of occupied territories' through means of 'false promises and by force'.[175] The excerpt added: '[t]hey were all regarded as slave labourers to be used to the limit of their endurance'.[176] This verdict similarly fed into the ICTY's interpretation of slavery, which, as noted earlier, in addition to the 'use of force', included 'deception or false promises' among the relevant factual indicators of slavery.[177] And so, mental coercion and deception also featured in the ICC reasoning.[178]

Having looked at international criminal law, the ICTY Trial Chamber analysed international humanitarian law, specifically the 1977 Additional Protocol II to the Geneva Conventions and the 1949 Geneva Convention IV, both of which it considered of assistance for the purposes of interpreting slavery.[179] Of

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173 *Kunarac* ICTY Trial Chamber, at para. 525.
174 Ibid., at para. 527.
175 Ibid.
176 Ibid.
177 Ibid., at para. 542.
178 *Ongwen* ICC Trial Judgment, at para. 2712; *Ntaganda* ICC Trial Judgment, at para. 952; *Katanga* ICC Trial Judgment, at para. 976.
179 *Kunarac* ICTY Trial Judgment, at para. 528.

particular importance by the ICTY Trial Chamber was Art. 4 of the Additional Protocol II, which prohibits 'at any time and in any place whatsoever [....] slavery and the slave trade in *all their forms*' (emphasis added).[180] By reference to a commentary to the Additional Protocol II, the Trial Chamber explained that the mention of slavery in Art. 4 of the Additional Protocol II is based on Art. 1 of the 1926 Slavery Convention and also 'reiterates the tenor' of Art. 8(1) of the International Covenant on Civil and Political Rights (ICCPR), to the extent that the latter also prohibits slavery and the slave trade 'in all their forms'.[181] The term 'in all its forms', which also appeared in the Preamble and Art. 2(b) of the 1926 Slavery Convention, points to slavery not being confined to a 'legal status' but to also cover *de facto* slavery.[182] Some passages from the ICTY Appeals Chamber further support this understanding:

> The Appeals Chamber accepts the chief thesis of the Trial Chamber that the traditional concept of slavery, as defined in the 1926 Slavery Convention and often referred to as 'chattel slavery', has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership.[183]

The ICTY Appeals Judgment later observed that,

> the law does not know of a 'right of ownership over a person'. Article 1(1) of the 1926 Slavery Convention speaks more guardedly 'of a person over

180 Ibid. It is important to note that Rule 94 of the database on Customary International Humanitarian Law, which also prohibits slavery and the slave trade in all their forms, refers to the 1926 slavery definition and further acknowledges that this definition 'served as the basis for the definition of enslavement' in the Rome Statute. In addition, in international humanitarian law, slavery was already prohibited in the 1863 Lieber Code, which represents the first attempt to codify the laws of armed conflict. The 1863 Lieber Code illustrated key features of the concept of slavery that later become central in Art. 1(1) 1926 Slavery Convention. For instance, the 1863 Lieber Code, at Art. 42, referred to property of 'personality'; as opposed to the legal ownership of a person. It also distinguished slavery from serfdom, specifically, 'slaves' from 'serfs'. The text of the Lieber Code is reprinted in S. Dietrich and J. Toman, *The Laws of Armed Conflicts* (Nijhoff 1988).

181 *Kunarac* ICTY Trial Chamber, at para. 529. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 ('ICCPR').

182 See generally *The Queen v Tang*, at para. 25; J. Allain, 'The Definition of Slavery in International Law' (2009) 52 Howard Law Journal 239, at 244–251.

183 *Kunarac* ICTY Appeals Judgment, at para. 117.

> whom any or all of the powers attaching to the right of ownership are exercised'. That language is to be preferred.[184]

Lastly, the ICTY Trial Chamber considered international human rights law. It first devoted some attention to Art. 8(1) of the ICCPR, which prohibits not only slavery, but also servitude and forced or compulsory labour. Art. 8 of the ICCPR does not define slavery (or the other proscribed conducts), nor had the Human Rights Committee, at the time of *Kunarac*, pronounced on the meaning or scope of slavery in Art. 8.[185] Therefore, the ICTY Trial Chamber turned to analyse the *travaux préparatoires* of Art. 8 of the ICCPR. This shows that while involuntariness is the fundamental feature of forced or compulsory labour, 'slavery and servitude are prohibited even in event of voluntariness'.[186] This consideration fed into the ICTY Trial Chamber's interpretation of slavery, where it stated, at paragraph 542, that,

> [t]he consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions.[187]

The ICTY Appeals Chamber subsequently upheld the Trial Chamber's verdict, sustaining that lack of consent does not have to be proved to satisfy the definition of slavery, since the person being enslaved is unable to take decisions voluntarily, or in other words, has no real choice when taking decisions. In the ICTY Appeals Chamber's view, thus, the 'circumstances that render it

184 Ibid., at para. 118.

185 To date, the Human Rights Committee's pronouncements concerning Art. 8 of the ICCPR have mainly focused on human trafficking, rather than of the proscribed conducts set out in Art. 8 (namely slavery, servitude, and forced or compulsory labour). In doing so, the Human Rights Committee has brought human trafficking within the scope of Art. 8 of the ICCPR. For a detailed discussion see V. Stoyanova, 'United Nations Against Slavery: Unravelling Concepts, Institutions, and Obligations' (2017) 38 MJIL 359, at 397–408; H. Georgia, 'Is Slavery Slipping Through the Cracks of the United Nations Human Rights Committee?' (2020) 19 UNSWLawJlStuS.

186 *Kunarac* ICTY Trial Judgment, at footnote 1303. The ICTY Trial Judgment further noted that the analysis of the *travaux préparatoires* of Art. 8 of the ICCPR showed that slavery implied the destruction of the juridical personality. Due to lack of space in this contribution, the author will discuss this matter in an article to follow.

187 Ibid., at para. 542.

impossible to express consent may be sufficient to presume the absence of consent'.[188] Both the SCSL Trial Chamber and the ECCC Chamber have subscribed to *Kunarac* in this regard.[189] The ICC Trial Chamber, for its part, has likewise not attached significance to whether the victims consented to their condition of enslavement. It may be recalled, for instance, that in *Ongwen*, one of the victims, despite having been left behind in the forest, decided to return with her LRA group due to fear of being killed by government soldiers.[190] Also, some of the abducted women did not refuse to have sex with their "captors" due to fear and because they depended on them for survival.[191]

In addition to Art. 8 of the ICCPR, the *Kunarac* Trial Judgment made reference to regional human rights law. In particular, it mentioned Art. 4 of the ECHR, Art. 6 of the American Convention on Human Rights, and Art. 5 of the African Charter on Human and Peoples' Rights, all of which prohibit slavery. However, similar to the language used in the ICCPR, these regional human rights instruments do not define slavery. At the time of the *Kunarac* Judgments, none of the human rights bodies entrusted with the supervision of the treaties mentioned above had dealt with a slavery case. Only the extinguished European Commission and the ECtHR had, at the time, pronounced on the distinction between 'forced or compulsory labour' and 'servitude' in the cases of *Van Droogenbroeck v Belgium* and *Van der Mussele v Belgium* respectively. Consequently, these cases also formed part of the ICTY Trial Chamber's assessment.[192]

The ICTY Trial Chamber first referred to an excerpt from *Van Droogenbroeck* in which the European Commission had considered that 'servitude embraces the obligation for the "serf" to live on another person's property and the impossibility of altering his condition'.[193] By its own admission, the European Commission was 'chiefly guided' in its interpretation by Art. 1 of the 1956 Supplementary Convention.[194] Under the umbrella term 'institutions and practices similar to slavery', that provision enumerates and separately defines debt bondage, serfdom, servile marriage, and child trafficking. Serfdom is defined as the condition or status of a person who is 'bound to *live* and labour

188 *Kunarac* ICTY Appeals Judgment, at para. 120.

189 *Sesay* SCSL Trial Chamber, at para. 163; *Taylor* SCSL Trial Chamber, at para. 447; *Duch* ECCC Trial Chamber, at para. 344.

190 *Ongwen* ICC Trial Chamber, at para. 2091.

191 Ibid., at para. 218.

192 *Kunarac* ICTY Trial Judgment, at para. 534.

193 Ibid., at para. 534.

194 Ibid. See also *Van Droogenbroeck v Belgium* (ECtHR) App 7906/77 (5 July 1979), at 72, on the admissibility of the application.

on land belonging to another person […] and is *not free to change his status*' (emphasis added), while the other practices and institutions are defined differently, and importantly, none of them include the obligation to live at someone else's place. This may be the reason why only the second part of the European Commission's verdict noted above, i.e., the impossibility to change one's own situation, later featured in the reasoning of the ICTY. This is also the case with the ICC jurisprudence. It bears repeating once more that, in *Katanga*, the ICC Trial Chamber referred to the impossibility of the victims 'changing their condition',[195] while in *Ongwen*, it noted that the victims 'could not leave of their own choice'.[196] Being bound to live at the slaveholder's land, however, was not a factor in the ICC Trial Chamber's evaluation of slavery, nor in that of the ICTY. As discussed earlier, in the judgments rendered by the ICC and the ICTY, the victims were not locked in a particular place, instead, their liberty was restricted by force, threats, and deception.

The ICTY Trial Chamber then consulted *Van der Mussele*, and among other things, observed that the ECtHR construed forced or compulsory labour as work or service performed against the will of the person concerned in line with the 1930 Forced Labour Convention (No. 29). It further remarked that the ECtHR 'rejected' that work or service has to be 'unjust or oppressive' or involve 'unavoidable hardship' to reach the threshold of forced or compulsory labour.[197] This brings us back to the ICTY factual indicators of slavery discussed earlier, which included 'exaction of forced or compulsory labour or service […] often, though not necessarily, involving physical hardship'.[198]

Having conducted such an in-depth analysis to fill the loophole in the definition of enslavement in the ICTY Statute, which is consonant with the principle of systemic integration,[199] the ICTY Trial Chamber determined that enslavement in customary international law consists of 'the exercise of any or all of the powers attaching to the right of ownership over a person'.[200] The ICTY made it clear that such definition speaks of 'powers attaching to the right of ownership' as opposed to legal ownership. The question remains whether the *Kunarac*'s interpretation of slavery has reached the status of customary international law.

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195 *Katanga* ICC Trial Chamber, at para. 976.

196 *Ongwen* ICC Trial Judgment, at para. 2196.

197 *Kunarac* ICTY Trial Judgment, at para. 535.

198 Ibid., at para. 542.

199 Vienna Convention on the Law of Treaties (concluded 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, at Art. 31(3)(c).

200 *Kunarac* ICTY Trial Judgment, at para. 539.

4 Conclusion

This article discussed in depth the ICC's interpretation and application of the definition of enslavement in the *Ongwen* case, which represents the first case in which the ICC pronounced on the crime of enslavement under Art. 7(2)(c) of the Rome Statute. Drawing on judgements of the ICTY, the SCSL, the ECCC, and the IACtHR, the ICC provided its interpretation of the definition of enslavement in the Rome Statute which reads, similarly to the definition in the 1926 Slavery Convention, as the 'exercise of any or all of the powers attaching to the right of ownership over a person'. The international and hybrid courts and tribunals on which the ICC relied have developed a robust and rich body of jurisprudence on the definition of slavery in international law. As this article illustrated, these courts and tribunals are largely consistent in their approach to the definition of slavery, which they have interpreted in harmony with present-day circumstances and evolving understandings.[201] By upholding their interpretation of slavery, the ICC shed light on the factual circumstances that qualify as slavery today and ultimately contributed to norm consolidation globally. The ICC being the only supra-national Court entrusted with supervising a treaty that contains the 1926 definition of slavery, this article argues that *Ongwen* constitutes, at present, the most authoritative interpretation of that definition at the international level.

The emerging asylum jurisprudence referred to in the introduction have reached remarkably inconsistent approaches to those taken in the other judgments discussed throughout this contribution. The asylum courts discussed earlier relied exclusively on 'legal ownership' and 'permanence',[202] while the ICC, drawing rigorously on external legal materials, have made it clear that none of such factors are *sine qua non* of slavery. As the ICC held, the definition of enslavement, and its analogous counterpart in the 1926 Slavery Convention, are not confined to 'legal ownership' (i.e., *de jure* ownership), but they cover the 'exercise of any or all of the powers attaching to the right of ownership'. The exercise of such powers, as discussed in this article, translates into the

201 On dynamic methods of interpretation, see generally G. Gaggioli, 'The strength of evolutionary interpretation in international human rights law', in G. Abi-Saab, *Evolutionary interpretation and international law* (OUP 2019); M. Fitzmaurice, 'Human Rights and General International Law: Interpretation of Human Rights Treaties' in D. Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (OUP 2013), 739–771.

202 The author has argued elsewhere that these national courts bypassed relevant factors that speak of a situation of slavery: S. Palacios-Arapiles, 'European Divergent Approaches to Protection Claims Based on the Eritrean Military/National Service Programme' (2022) 24 (4) International Community Law Review 335.

exercise of a substantial degree of control over people which in turns enable the "slaveholder" to, *inter alia*, enjoy, exploit, dispose, and use the "slave" at their whim. The ICC also clarified that, for a phenomenon to qualify as slavery, it does not need to be permanent or lifelong. This article has further illustrated that such interpretation is consistent with the meaning of slavery in general international law, i.e., the 1926 Slavery Convention and the 1956 Supplementary Convention.

The detailed analysis in this article, furthermore, showed that the ICC Trial Chamber went beyond international criminal law, and incorporated in its decision elements of general international law, international human rights law, and international humanitarian law instruments to inform its understanding of slavery. By relying strongly on *Kunarac*, all these different branches of international law featured in the reasoning of the ICC when interpreting slavery. This further reinforces the argument that the ICC's interpretation of slavery is relevant to legal bodies and decision-makers operating in other areas of law. Failing to take due notice of the important jurisprudential contributions made by the ICC and the other international and hybrid courts and tribunals discussed in this article would contribute to the fragmentation of international law on an issue which, on the contrary, requires a coherent and uniform approach, given that the prohibition of slavery is a *jus cogens* norm.

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