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THE APPEALS CHAMBER

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

SITUATION IN UGANDA

IN THE CASE OF THE PROSECUTOR v. DOMINIC ONGWEN

Public

Amici Curiae Observations on Sexual- and Gender-Based Crimes, Particularly Sexual Slavery, and on Cumulative Convictions Pursuant to Rule 103 of the Rules of Procedure and Evidence

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I. INTRODUCTION

1. Sareta Ashraph, Stephanie Barbour, Kirsten Campbell, Alexandra Lily Kather, Jocelyn Getgen Kestenbaum, Maxine Marcus, Gorana Mlinarević, Valerie Oosterveld, Kathleen Roberts, Susana SáCouto, Jelia Sané and Hyunah Yang ("*amici*") respectfully submit observations[1] on the legal interpretation of sexual slavery and on the permissibility or otherwise of entering cumulative convictions.

II. SUMMARY OF OBSERVATIONS

2. Sexual slavery is not a "form" of enslavement; rather, all acts of a sexual nature, including control over sexuality, sexual integrity and sexual and reproductive autonomy, constitute indicia of the exercise of powers of ownership of enslavement in *all its forms*. Consequently, enslavement as a crime against humanity is not "in the abstract entirely encompassed within sexual slavery."[2] To avoid entering cumulative convictions for separately enumerated crimes that do not each have a distinct element from the other, and to avoid a continuation of a discriminatory application of the law, *amici* suggest that, in the interests of justice, the Appeals Chamber reverse the *Ongwen* Trial Judgment on this point and enter convictions for enslavement rather than sexual slavery under crimes against humanity because conduct criminalised under sexual slavery constitutes criminal conduct already covered by enslavement. *Amici* believe that this would not be detrimental to Dominic Ongwen.

[1] The views expressed herein are those of individual *amici* and do not necessarily reflect the views of their respective institutions. *Amici* are grateful to Magali Maystre and Indira Rosenthal for their comments and suggestions and to Hayley Bronner and Sydney Osterweil-Artson of the Benjamin N. Cardozo School of Law's Benjamin B. Ferencz Human Rights and Atrocity Prevention Clinic for their research assistance.

[2] *Ongwen* Trial Judgment, para. 3051.

III. OBSERVATIONS

A. Legal interpretation of sexual slavery and enslavement

i. The 1926 Slavery Convention defines slavery under international law and contemplates conduct characterised as "sexual slavery"

3. Article 1(1) of the 1926 Convention to Suppress the Slave Trade and Slavery ("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." The 1926 Slavery Convention's *travaux préparatoires*,[3] including the Temporary Slavery Commission Reports, contemplate *acts of a sexual nature* and control of sexuality in *all forms* of slavery.[4] Thus, *amici* offer that the slavery definition in the 1926 Slavery Convention encompasses the exercise of powers of ownership based upon control over enslaved persons, including control over their sexuality.

4. *Amici* submit that the 1926 Slavery Convention intended to include in its definition *inter alia*: systems of concubinage, plaçage and the grooming of "fancy girls"; as well as acts of rape, castration, forced procreation and forced breastfeeding, whenever these practices evinced the exercise of powers of ownership.[5] The UN Special Rapporteur on the issue of systematic rape, sexual slavery and slavery-like

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[3] See Jean Allain, *The Slavery Conventions: The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention*.

[4] League of Nations, *Slavery Convention: Report presented to the Assembly by the Sixth Committee*, A.104.1926.VI, 24 Sept. 1926; League of Nations, *Report of the Temporary Slavery Commission*, Geneva, 25 July 1925, p. 100 ("[T]he duty of the Commission [... is] to make suggestions with a view to [slavery's] entire suppression *in all its forms*.") (emphasis added); League of Nations, *Slavery Convention: Minutes of the Second Session Held at Geneva from July 13th to 25th, 1925*, p. 62 (discussing systems of slavery, such as concubinage, that include acts of a sexual nature as slavery, not sexual slavery). In the *travaux préparatoires*, slavery "in all its forms" means slavery under law, or *de jure* (*i.e.* chattel) slavery, as well as sanctioned by social customs, or *de facto* (*i.e.* domestic) slavery. It also has been used to denote slavery institutions, systems and practices (*i.e.* concubinage), but does not refer to *indicia* or evidence of exercise of powers of ownership (*i.e.* control over sexuality, acts of a sexual nature, or "sexual slavery") as these factors manifest in slavery in many if not all its forms, even in systems associated with forced labour or chattel slavery. See Patricia Viseur Sellers & Jocelyn Getgen Kestenbaum, '"Sexualized Slavery" and Customary International Law', in Sharon Weill et al. (eds.), *The President on Trial: Prosecuting Hissène Habré*, pp. 366-367 (hereafter Sellers & Kestenbaum, '"Sexualized Slavery" and Customary International Law').

[5] See notes 8-16, *infra*, and accompanying text.

practices in armed conflict has recognised that "'sexual' is […] not to denote a separate crime. In all respects and in all circumstances, sexual slavery is slavery."[6] *Amici* offer that the legal understanding of the 1926 Slavery Convention's slavery definition—replicated in the 1956 Supplementary Slavery Convention[7] and in the Rome Statute ("Statute") under enslavement as a crime against humanity—has always encompassed acts of a sexual nature and control over sexuality.

ii. *Acts of a sexual nature, including control over sexuality, sexual integrity and sexual and reproductive autonomy, are inherent in all enslavement institutions, systems and practices*

5. Acts of a sexual nature, including control over sexuality, always have been and continue to be integral to slavery.[8] The international slavery prohibition responded to Trans-Atlantic and East African Slave Trades, *de jure* chattel slavery institutions that inherently included complete proprietorship, including complete sexual proprietorship, over enslaved bodies.[9] Slave owners committed acts of a sexual

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[6] Gay J. McDougall, 'Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-like Practices during Wartime', Final report, U.N. Doc. E/CN.4/Sub.2/1998/13 ("McDougall Report"), para. 30; see also *Kunarac et al.* Trial Judgment, para. 543 (listing "control of sexuality" in determining whether enslavement has been committed). While Jean Allain considers "sexual" to be an adjective to describe a form or type of enslavement, Sellers and Kestenbaum disagree, finding that sexual slavery, or, rather, sexual violence, including attacks on sexual integrity and reproductive autonomy, is indicia of exercise of ownership, or the *actus reus*, of enslavement (defined as slavery) *in all its forms*. Sellers & Kestenbaum, '"Sexualized Slavery" and Customary International Law', p. 366, n.6.

[7] Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 7 Sept. 1956 ("1956 Slavery Convention"), Art. 7(a); U.N. Secretary General, 'Slavery, the Slave Trade, and Other Forms of Servitude', U.N. Doc. E/2357, 27 Jan. 1953, paras 36-37.

[8] *See* Orlando Patterson, *Freedom in the Making of Western Culture*, pp. 50-51 (noting that circa 700 B.C.E., the Greek city-states would capture enemy females in order to replenish the slave population that was overwhelmingly female); Orlando Paterson, 'Trafficking, Gender & Slavery: Past and Present', in Jean Allain (ed.), *The Legal Understanding of Slavery: From the Historical to the Contemporary* (1st ed). In this brief, "slavery" denotes the prohibition and crime under established frameworks of international law, *i.e.* "applicable treaties and the principles and rules of international law" (Statute, Art. 21(1)(b)), and includes both "enslavement" as a crime against humanity (Statute, Art. 7(1)(c)) and "sexual slavery" as a crime against humanity and a war crime (Statute, Arts. 7(1)(g), 8(2)(b)(xxii) and 8(2)(e)(vi)) (sexual slavery includes an additional element of "causing a person to engage in an act or acts of a sexual nature."). "Slavery crimes" includes all aforementioned crimes plus the "slave trade" under established frameworks of international law.

[9] League of Nations, *Temporary Slavery Commission 1925 Report*, p. 87 (At the Temporary Slavery Commission's 17th Meeting, M. Roncagli interrogated: "Was it also certain, as had been said, that the only object of slavery in Africa was to obtain labour? It enslaved the whole material and moral life of

nature against enslaved persons of varied races, ages and genders in myriad ways, including rape, castrations and other genital mutilation, separation of spouses, and forced coupling and procreation.[10] Slaveholders impregnated, raped, sexually mutilated, ordered sexual assaults, conducted sexual medical experiments and forced enslaved lactating women referred to as "wet nurses" to breastfeed white infants.[11] Enslaved men, boys, gender nonconforming and nonbinary persons also endured sexual violence that has been obscured by a narrow, binary gendered lens.[12] Individuals were enslaved as concubines, "fancy girls," pleasure objects, *bardaj* (sexual "kept boy" slaves) or harem eunuchs.[13] *Berdaches* (Native American

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the individual. It could not therefore be concluded that at the present time slavery only existed for the purpose of obtaining labour."). See also Daina Ramey Berry, *The Price for Their Pound of Flesh: The Value of the Enslaved, from Womb to Grave, in the Building of a Nation*, p. 3 (hereafter Ramey Berry, *The Price for Their Pound of Flesh*).

[10] See Peter Kolchin, *American Slavery: 1619–1877*, pp. 124-125; Patricia Viseur Sellers, 'Wartime Female Slavery: Enslavement?', 44 *Cornell Int'l L.J.* 115, pp. 122-123; Donna Wyant Howell, *I Was a Slave: True Life Stories Dictated by Former Slaves in the 1930's, Book Four: The Breeding of Slaves*, pp. 11-12; Dorothy Roberts, *Killing the Black Body*, pp. 27-28; Jessica Millward, 'Wombs of Liberation: Petition, Law and the Black Woman's Body in Maryland, 1780–1858', in Daina Ramey Berry & Leslie Harris (eds.), *Sexuality and Slavery*, pp. 88-98. Slaveholders "bred" children born as slaves through their sexual ownership over enslaved persons. See Ramey Berry, *The Price for Their Pound of Flesh*, pp. 72-73. Slave auctions, for example, would advertise and sell enslaved persons referred to as "breeders" ("breeding wenches" or "bucks") based on perceived or real abilities to reproduce and bear children born into slavery to replenish the slave population and increase slaveowners' wealth and power. See Thomas A. Foster, 'The Sexual Abuse of Black Men Under American Slavery', 20 *J. Hist. Sexuality* 445, pp. 449, 451-458.

[11] See, *e.g.*, Daina Ramey Berry, *Swing the Sickle for the Harvest is Ripe: Gender and Slavery in Antebellum Georgia*, p. 37; Harriet A. Washington, *Medical Apartheid: The Dark History of Medical Experimentation from Colonial Times to the Present*, pp. 64-68, 117-119; Dierdre Cooper Owens, *Medical Bondage: Race, Gender, and the Origins of American Gynecology*, pp. 17, 26; Daina Ramey Berry, *The Price for Their Pound of Flesh*, pp. 3, 72-73, 149-155; Stephanie Jones-Rogers, '"[S]he could … spare one ample breast for the profit of her owner": white mothers and enslaved wet nurses' invisible labor in American slave markets', 38 *Slavery & Abolition* 337, p. 338.

[12] For example, enslaved persons considered to be diminutive or 'runty' might be castrated to prevent the propagation of weak-bodied slaves. See Dorothy Roberts, *Killing the Black Body*, p. 28. See also Patricia Viseur Sellers & Jocelyn Getgen Kestenbaum, 'The International Crimes of Slavery and the Slave Trade: A Feminist Critique', in Valerie Oosterveld et al. (eds.), *Gender and International Criminal Law*, p. 25 (hereafter Sellers & Kestenbaum, 'The International Crimes of Slavery and the Slave Trade: A Feminist Critique').

[13] Suzanne Miers, *Slavery in the Twentieth Century: The Evolution of a Global Problem*, p. 89; Ehud R. Toledano, 'The Imperial Eunuchs of Istanbul: From Africa to the Heart of Islam', 20 *Middle Eastern Stud.* 379, pp. 379-380 (hereafter Toledano, 'The Imperial Eunuchs of Istanbul: From Africa to the Heart of Islam') (Enslavement of concubines constituted "harem-slavery." Gendered and sexualised, harem-slavery included females across racial lines. Ottoman Empire Ethiopian and European girls or young women were enslaved in middle-class harems as concubines. Females from the Caucasus were sold by

"two-spirit" individuals) were captured in war, enslaved, raped and emasculated.[14]

6. Enslavement today resembles past institutions, systems and practices of slavery. Enslaved individuals, including children, have constituted and continue to constitute sexual war booty in conflict.[15] Since 2014, the Islamic State of Iraq and the Levant has engaged in enslavement of persons of religious minorities, including Yazidi, of all genders and ages, which has encompassed acts of a sexual nature, including control over sexuality, sexual integrity and sexual and reproductive autonomy.[16]
7. Thus, *amici* submit that acts of a sexual nature, including control over sexuality, sexual integrity and sexual and reproductive autonomy, always have been and continue to be inherent in all enslavement institutions, systems and practices.

iii. Acts of a sexual nature, including control over sexuality, sexual integrity and sexual and reproductive autonomy, constitute indicia of exercise of ownership powers of enslavement as a crime against humanity

8. *Amici* suggest that the slavery definition under the 1926 Slavery Convention is the basis for the correct legal interpretation of enslavement under the Statute. Accordingly, causing enslaved persons to engage in sexual acts or restraining enslaved persons from engaging in sexual acts (*i.e.* control over sexuality, sexual integrity and sexual and reproductive autonomy) owing to their enslaved status or

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their families hoping that they would enter the Imperial or upper-class harems.); Tiye A. Gordon, *The Fancy Trade and the Commodification of Rape in the Sexual Economy of 19th Century U.S. Slavery*; Orlando Patterson, *Slavery and Social Death*, p. 177 (Adolescents of all genders have been sexual slaves throughout history, including young boys in Greek slavery.); Will Roscoe, *The Zuni Man-Woman*, pp. 5, 22, 28, 144; Alastair Hazell, *The Last Slave Market*, p. 19.

[14] Thomas A. Foster, 'The Sexual Abuse of Black Men Under American Slavery', 20 *J. Hist. Sexuality*, pp. 445-447.

[15] See Orlando Patterson, *Slavery and Social Death*, pp. 106-115; Ehud R. Toledano, 'The Imperial Eunuchs of Istanbul: From Africa to the Heart of Islam', p. 379; Jocelyn Getgen Kestenbaum, 'Disaggregating Slavery and the Slave Trade', 16 *Fl. Int'l U. L. Rev.* (forthcoming 2022), p. 3.

[16] See U.N. Human Rights Council, '"They came to destroy": ISIS Crimes Against the Yazidis', U.N. Doc. A/HRC/32/CRP.2, 15 June 2016, paras 55, 75; Mara Redlich Revkin & Elisabeth Jean Wood, 'The Islamic State's Pattern of Sexual Violence: Ideology and Institutions, Policies and Practices', *J. Global Security Studies*, pp. 1-20.

condition fall within the definition.

9. In *Kunarac et al.*, the ICTY clarified that control of sexuality is a factor or indication to determine whether enslavement occurred, but does not constitute *per se* an element of enslavement under international law.[17] While "acts of a sexual nature" are inherent in—or at times the *raison d'être* of—enslavement, misconceptions of slavery decouple forced labour from sexual violence and control that all enslaved persons must endure.[18] Such decoupling fails to comprehend the nature of enslavement: that sexual violence and control of sexuality are effective manners in which all perpetrators exercise powers of ownership in all slavery practices over all enslaved persons.[19]

10. *Amici* submit that the *Ongwen* Trial Chamber correctly identified control of sexuality as an indicator of the exercise of powers of ownership of enslavement.[20] The *Ongwen* Trial Chamber emphasised systematic practices in which persons of all genders and ages were enslaved, evinced by *inter alia* abductions and forced labour.[21] Moreover, it found that Dominic Ongwen directly and indirectly perpetrated acts of a sexual nature in the context of enslavement.[22]

11. *Amici* submit, however, that the *Ongwen* Trial Chamber's evidentiary and subsequent legal analysis of acts of a sexual nature and control of sexuality in the context of enslavement failed to recognise the sexualized ownership exercised over victims, in particular child-victims,[23] which occurred whether or not they were caused to engage in any act of a sexual nature. It therefore hindered a more accurate

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[17] *Kunarac et al.* Trial Judgment, paras 540, 542-543 (affirmed on appeal in *Kunarac et al.* Appeal Judgment, paras 119, 124). See also *Duch* Trial Judgment, paras 342-346 (exercise of sexual control is part of established international crime of enslavement) (affirmed on appeal in *Duch* Appeal Judgment, paras 119-167).

[18] Sellers & Kestenbaum, 'The International Crimes of Slavery and the Slave Trade: A Feminist Critique', pp. 49-55.

[19] Sellers & Kestenbaum, '"Sexualized Slavery" and Customary International Law', pp. 374-379.

[20] *Ongwen* Trial Judgment, para. 2712.

[21] *Ongwen* Trial Judgment, paras 2803-2805, 2894-2896, 2948, 3083, 3087.

[22] *Ongwen* Trial Judgment, paras 3044-3049, 3081-3084.

[23] Not recognising control of sexuality as indicia of exercise of ownership powers over girl-child *ting tings* occurring without an additional act of sexual nature constitutes gender and age discrimination in the application and interpretation of the law in violation of Article 21(3) of the Statute.

and comprehensive legal interpretation of enslavement, excluding myriad additional acts, even acts of a sexual nature, constituting indicia of enslavement. *Amici* offer that acts of a sexual nature (the conduct legally characterised as forced marriage as an other inhumane act, (sexualised) torture, rape and forced pregnancy) committed against abducted individuals also are indicia of enslavement.[24] Further, *amici* submit that children born to enslaved persons are enslaved.[25]

12. Thus, *amici* submit that the *Ongwen* Trial Chamber erred in the legal characterisation of criminal conduct of sexual slavery as a more "specific form" of enslavement and in finding that enslavement "is in the abstract entirely encompassed within sexual slavery."[26] All acts of a sexual nature, including control of sexuality, are *indicia* of the exercise of powers of ownership of enslavement.

iv. As a separate crime, sexual slavery has been applied discriminatorily, excluding categories of harms and victims, and resulting in adverse distinctions based on gender and age

13. Some international criminal law instruments have enumerated "sexual slavery" as a separate crime from enslavement[27] due to misconceptions of slavery.[28] Advocates at Rome supported enumerating "sexual slavery" because the international community failed to hold perpetrators to account for sexual violence committed in the context of slavery.[29]

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[24] *Ongwen* Trial Judgment, paras 3021-3043, 3056-3062.
[25] *Ongwen* Trial Judgment, paras 207, 2068-2069, 3057.
[26] *Ongwen* Trial Judgment, para. 3051.
[27] Statute, Arts. 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi); SCSL Statute, Art. 2(g).
[28] See, *e.g.*, Kelly D. Askin, 'Women and International Humanitarian Law', in Kelly D. Askin & Dorean M. Koenig (eds.), *Women and Int'l Hum. Rts. L.* 41, p. 48, n.29 (highlighting the way some advocates during the time of the Statute drafting assumed that sexual acts were not already included under enslavement and confusing sexual slavery with, for example, "(en)forced prostitution"). The ICTY explained sexual slavery's absence in its Statute: "The setting out of the violations in separate sub-paragraphs of the ICC Statute is not to be interpreted as meaning, for example, that sexual slavery is not [...] enslavement. This separation is to be explained by the fact that the sexual violence violations were considered best to be grouped together." See *Kunarac et al.* Trial Judgment, para. 541, n. 1333.
[29] *E.g.*, so-called "comfort women" of World War II. See Valerie Oosterveld, 'Sexual Slavery and the International Criminal Court: Advancing International Law', 25 *Mich. Int'l L.J.*, p. 625 ("The arguments in favour of retaining the separate listings of the crimes of enslavement and sexual slavery—that sexual

14. In this context, "sexual slavery" has been used to legally characterise heteronormative male-on-female rapes,[30] omitting myriad other sexual violence acts and exercise of control over sexuality that also are indicia of enslavement. The consequent effect is discrimination against categories of victims based on, *inter alia*, gender and age.[31] *Amici* submit that sexual slavery's separate enumeration was never intended to exclude categories of enslavement victims or certain conduct in violation of the principle of non-discrimination.

15. The ICC Elements of Crimes distinguish "sexual slavery" from "enslavement" by requiring additional proof that the perpetrator caused the victim to engage *in an act* of a sexual nature.[32] Although ICC trial chambers in *Katanga* and *Ntaganda* found that the decisive factor for sexual slavery is the exercise of ownership powers over a person's sexual autonomy[33] and that "there is no exhaustive list of situations or circumstances" that delimit how ownership powers are exercised,[34] they have limited "acts of a sexual nature" to acts of rape.[35]

16. The restrictive approach taken to sexual slavery in the above-mentioned ICC cases failed to consider victims' experiences of sexual acts other than heteronormative male-on-female rapes because they do not resemble rape. In this way, these cases

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slavery is a prevalent contemporary crime warranting express recognition, that [it] was sufficiently established in existing law, that listing the crime increases the gender-sensitivity of the Rome Statute, and that sexual slavery is conceptually distinct from certain other forms of enslavement or slavery-like practices—proved persuasive for delegates, and both crimes remained in the [ICC] Statute.").

[30] See *Ntaganda* Trial Judgment, paras 955, 975 (affirmed on appeal in *Ntaganda* Appeal Judgment, paras 856, 1027, 1144). See also *Katanga* Trial Judgment, paras 990, 1000, 1008, 1011-1013, 1018, 1022 (rapes as the "caused acts"); *Ngudjolo Chui* Trial Judgment, paras 76, 101, 107 (charges dismissed on other grounds); *Duch* Trial Judgment, para. 362; *Taylor* Trial Judgment, paras 422, 426-427; *Sesay et al.* Trial Judgment, paras 1293-1294.

[31] *Ntaganda* Trial Judgment, paras 955-957, 959-961, 977-980; *Katanga* Trial Judgment, paras 1000-1019 (recounting evidence of "acts" as repeated rapes); *Taylor* Appeal Judgment, paras 264-277, 289, 297 (artificially separating the use of females as sexual (conjugal) and domestic slaves for "housework").

[32] Compare ICC Elements of Crimes of Article 7(1)(c)-2 of the Statute with Articles 7(1)(g)-2, 8(2)(b)(xxii)-2 and 8(2)(e)(vi)-2 of the Statute.

[33] See *Ntaganda* Trial Judgment, paras 960, 1204; *Katanga* Trial Judgment, paras 975, 981, 1013.

[34] *Ntaganda* Trial Judgment, para. 952.

[35] See *Ntaganda* Trial Judgment, paras 955, 975 (affirmed on appeal in *Ntaganda* Appeal Judgment, paras 856, 1027, 1144). See also rapes as the "caused acts" in *Katanga* Trial Judgment, paras 1008, 1011-1013, 1018, 1022; and in *Ngudjolo Chui* Trial Judgment, paras 76, 101, 107 (charges dismissed on other grounds).

also failed to address the consequent multiple physical and psychological harms created by the acts of a sexual nature, including loss of control of sexuality, attacks on sexual integrity and denial of sexual and reproductive autonomy.[36] *Amici* offer that, under Article 7 of the Statute, these indicia constitute exercise of ownership powers for both enslavement and sexual slavery.

17. *Amici* submit that enumerating sexual slavery *and* enslavement separates out some acts from the broader category of enslavement, leading to the erroneous interpretation that enslavement "is […] entirely encompassed within sexual slavery"[37] when allegations include acts of a sexual nature.[38] *Amici* offer that, in accordance with the established framework of international law, the conduct criminalised by the Statute under "sexual slavery" constitutes criminal conduct already covered by the crime of enslavement.[39] In other words, when sexual autonomy and sexual integrity are subjugated to ownership, enslavement exists.[40]
18. *Amici* further offer that, in the *Ongwen* case as well, sexual slavery as a separate crime has been applied restrictively, leading to a discriminatory result. According to the facts, Dominic Ongwen directly or indirectly perpetrated acts of a sexual nature and control of sexuality against all enslaved persons. For example, enslaved boy-child soldiers (though solely legally characterised as conscripted) were forced to rape; the enslaved girl-child *ting tings* were subjected to the exercise of sexualised

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[36] Further, dividing acts into sexual slavery and enslavement engenders a discriminatory application of sexual slavery by presuming and requiring that the victims are female and perpetrators are male. See *Katanga* Trial Judgment, paras 973-978. See also Sellers & Kestenbaum, '"Sexualized Slavery" and Customary International Law'; Alexandra Adams, 'Sexual Slavery: Do We Need This Crime in Addition to Enslavement? ', 29 *Crim. L. Forum* 279-323, p. 282.

[37] *Ongwen* Trial Judgment, para. 3051.

[38] *Ongwen* Trial Judgment, paras 2715-2716 (analysis of the applicable law), 3051 (legal findings that sexual slavery is a specific form of enslavement).

[39] See also *Taylor* Trial Judgment, para. 427 (The *Taylor* Trial Chamber opined that sexual slavery, misconstrued as 'forced marriage' "constitutes a form of enslavement in that the perpetrator exercised the powers attaching to the right of ownership over their 'bush wives' and imposed on them a deprivation of liberty, causing them to engage in sexual acts as well as other acts. [...] All of these forced acts, both sexual and non-sexual acts, fall within the definition of enslavement".); *Sesay et al.* Trial Judgment, para. 156.

[40] See McDougall Report, para. 46. See also International Committee of the Red Cross, 'Study on Customary International Humanitarian Law', Practice Related to Rule 94: Slavery and Slave Trade.

ownership, including through forced checking of the onset of menstruation to determine whether they had reached puberty and were "ready" to be raped and groomed to become "wives".[41] Enslaved "wives" were controlled sexually through *inter alia* exclusive sexual relationships and in addition were subjected to rape.[42] Enslaved *ting tings* who later became "wives" were controlled sexually throughout their enslavement whether or not they additionally were subjected to rape.[43]

19. *Amici* submit that, in these examples, Dominic Ongwen directly or indirectly exercised powers of ownership and control over these enslaved persons' sexuality, sexual integrity and sexual and reproductive autonomy, whether or not they were subjected to rape. However, the *Ongwen* Trial Chamber narrowly interpreted sexual slavery by focusing solely on male-on-female rapes in the context of abductions and distributions. Further, *amici* submit that the *Ongwen* Trial Chamber erroneously interpreted enslavement by excluding consideration of the exercise of physical and psychological control over enslaved persons' sexuality as an inherent

[41] *Ongwen* Trial Judgment, paras 2819, 3073 (describing physical and sexual violence to find torture as a crime against humanity and war crime), 2100, 2146 (collecting young girls free of HIV or other diseases), 2249-2250 (checking for breast development and menstruation), 2251 ("if a girl was still very young, she was 'nurtured', 'kept to grow until when she's fit to be given out to a man' [… deciding] that a girl was 'old enough to be given to a man as a wife'".). The girl-child *ting tings* who were not subjected to rape or other "act of a sexual nature" were not characterised as sexually enslaved, nor were they characterised as sexual slaves as war crimes under Article 8. Article 8 provisions are not analogous to enslavement under Article 7 and, therefore, cannot precisely characterise such criminal conduct.

[42] *Ongwen* Trial Judgment, para. 3086. The Statute criminalises enslavement as a crime against humanity but does not criminalise slavery as a war crime. While the Statute does not include slavery (or the slave trade) under Article 8, slavery and the slave trade are war crimes. See Lieber Code (1863), Arts. 42, 58; IMT Charter (Nuremberg) (1945), Art. 6 ("deportation to slave labor"); Allied Control Council Law No. 10 (1945), Art. II(1) ("deportation to slave labor"); 1977 Additional Protocol II, Art. 4(2)(f) ("slavery and the slave trade in all their forms" are and shall remain prohibited); International Committee of the Red Cross, 'Study on Customary International Humanitarian Law', Practice Related to Rule 94: Slavery and Slave Trade.

[43] *Ongwen* Trial Judgment, paras 2272 (the "prohibition of sexual relations with *ting tings*" as "the crucial marker distinguishing the status of *ting ting* from the status of so-called 'wife'."), 3086 (noting that while "Sinia brigade members regularly forced abducted women and girls who had been 'distributed' to them into sexual intercourse is not limited to so-called 'wives', and […] *ting ting* status did not effectively protect abducted girls from sexual abuse, the Chamber nevertheless considers that there existed, systemically, a sub-category of abducted girls in the LRA who were not sexually enslaved, but enslaved.").

part of the exercise of ownership over their entire being.[44]

20. *Amici* offer that this incorrectly narrow understanding of both crimes was also discriminatory on the bases of, *inter alia*, gender and age. In this way the *Ongwen* Trial Chamber reinforced the misconception that enslavement primarily criminalises the general deprivation of liberty, forced labour or violence perpetrated against enslaved persons, while the crime of sexual slavery primarily criminalises rape and rape-like acts in the enslavement of women and girls.
21. Further, requiring some enslaved women and girls to prove additional acts of a sexual nature indicating the exercise of ownership over them in the form of rapes constitutes gender discrimination in the law's interpretation and application in violation of Article 21(3) of the Statute.
22. *Amici* submit that the *Ongwen* Trial Chamber did not err in characterising conduct against enslaved women and girls, including girl-child *ting tings*, who were not raped as enslavement. However, *amici* offer that this correct result was reached for the wrong reasons; it was not because the victims' enslavement excluded rape.[45]
23. Thus, *amici* submit that the *Ongwen* Trial Chamber erred in subsuming enslavement within sexual slavery because the exercise of powers of ownership (*i.e.* slavery) is the element to emphasise, not the act of a sexual nature, which is included as indicia of exercise of ownership powers in all forms of enslavement.
24. *Amici* submit that distinctions between "sexual slavery" and "enslavement" is contradictory to established frameworks of international law since acts of a sexual

[44] *Ongwen* Trial Judgment, para. 3047 (act of a sexual nature constituting exclusively male-on-female rape).

[45] *Ongwen* Trial Judgment, paras 3086, 3073. *Amici* are of the view that, for these women and girls, indicia of enslavement also include control of sexuality, sexual integrity and sexual and reproductive autonomy. However, given the way the Prosecution fragmented the material facts and circumstances into various charges in this case, facts indicating control of sexuality and control over sexual and reproductive autonomy were charged solely as forced marriage as an other inhumane act and as forced pregnancy, but not as enslavement. See, *e.g.*, *Ongwen* Pre-Trial Confirmation of Charges Decision, paras 75, 79, 84, 88, 93, 102. *Amici* are further of the view that male victims of enslavement also had their sexuality, sexual integrity and sexual and reproductive autonomy controlled because, for instance, enslaved men could not choose to engage in any act of a sexual nature or choose to reproduce. However, these facts were not charged in this case under enslavement or any other crime.

nature, including control of sexuality, are indicia of enslavement. Furthermore, *amici* offer that the mischaracterisation and application of these two crimes has resulted in discrimination in contravention of Article 21(3) of the Statute.

B. Cumulative convictions

25. In general, cumulative convictions serve the fundamental purpose of fully reflecting the culpability of an accused.[46] Victims and affected communities of "atrocities that deeply shock the conscience of humanity"[47] have an interest in a full accounting of a convicted person's criminality, not only through making factual findings, but also through entering appropriate convictions that capture the full scope of criminal conduct.

26. First, *amici* submit that the *Ongwen* Trial Chamber did not err, as the Defence contends,[48] in rejecting the relevance of Article 20 of the Statute to cumulative convictions.[49] Article 20 of the Statute deals with the principle of *ne bis in idem*, namely the prohibition of consecutive trials for conduct which formed the basis of crimes for which a person has already been convicted or acquitted, whereas the permissibility or otherwise of entering cumulative convictions is an issue that arises within a single trial.[50] Moreover, the *Ongwen* Trial Chamber correctly noted that nothing in the Statute excludes the permissibility of entering cumulative

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[46] *Kunarac et al.* Appeal Judgment, para. 169 ("multiple convictions serve to describe the full culpability of a particular accused or provide a complete picture of his criminal conduct"); *Duch* Appeal Judgment, para. 330, referring to *Duch* Trial Judgment, para. 560 ("While, however, cumulative convictions will not substantially impinge on the Accused's rights a failure to convict the Accused cumulatively undermines the societal interests in describing 'the full culpability of a particular accused or provid[ing] a complete picture of his criminal conduct'"). This seems particularly important in proceedings, like the ones at the ICC, which allow victims participation.

[47] Statute, Preamble, para. 2.

[48] *Ongwen* Defence Appeal Brief, paras 277-282 (ground 20 of the appeal).

[49] *Ongwen* Trial Judgment, paras 2794-2795.

[50] See also *Bemba et al.* Appeal Judgment, para. 748. Moreover, "attempts to import conclusions from the realm of the *concursus delictorum* practices in some domestic jurisdictions–where […] there are clearer distinctions both in terms of the interplay between different elements and the gravity between offences–can be misleading. […] W]hatever domestic legislatures, courts, and scholars may have decided as to the interplay between the elements of crimes contained in their criminal codes can be irrelevant vis-à-vis international crimes, where different rules and principles apply." See Göran Sluiter, Håkan Friman, Suzannah Linton, Sergey Vasiliev & Salvatore Zappalà (eds.), *International Criminal Procedure*, p. 452.

convictions.[51]

27. Second, *amici* further submit that entering cumulative convictions is permissible under certain conditions and that the correct test for establishing its permissibility has been set out and consistently applied by the appeals chambers of the *ad hoc* tribunals,[52] the SCSL[53] and the ECCC.[54] The established test, articulated by the ICTY Appeals Chamber in *Čelebići*, states that "reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions, lead to the conclusion that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other."[55] Further, "[w]here this test is not met, […] the conviction under the more specific provision should be upheld."[56] This test has been applied by ICC trial chambers[57] and endorsed by the ICC Appeals Chamber.[58]

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[51] *Ongwen* Trial Judgment, para. 2792. This issue is unaddressed in the Statute, the Rules of Procedure and Evidence, and Regulations of the ICC but paragraph 9 of the "General introduction" to the Elements of the Crimes of the ICC states that "[a] particular conduct may constitute one or more crimes."

[52] *Čelebići* Appeal Judgment, paras 412-427. See also, *e.g.*, *Jelisić* Appeal Judgment, paras 78-83; *Kupreškić et al.* Appeal Judgment, paras 385-388, 393-396; *Musema* Appeal Judgment, para. 363-370; *Kunarac et al.* Appeal Judgment, paras 168-174, 178-186, 188-196; *Rutaganda* Appeal Judgment, paras 582-584; *Ntakirutimana and Ntakirutimana* Appeal Judgment, para. 542; *Kordić and Čerkez* Appeal Judgment, paras 1032-1044; *Semanza* Appeal Judgment, paras 368-370; *Naletilić and Martinović* Appeal Judgment, paras 589-591; *Ntagerura et al.* Appeal Judgment, paras 425-427; *Stakić* Appeal Judgment, paras 355-367; *Nahimana et al.* Appeal Judgment, paras 1019-1021, 1025-1027, 1029-1030, 1032, 1034-1036; *Strugar* Appeal Judgment, paras 321-333; *Krajišnik* Appeal Judgment, paras 386-391; *Milošević* Appeal Judgment, para. 39; *Bagosora and Nsengiyumva* Appeal Judgment, paras 413-417, 735-737; *Ntabakuze* Appeal Judgment, paras 260-262; *Gatete* Appeal Judgment, paras 259-264; *Karemera and Ngirumpatse* Appeal Judgment, paras 610, 710-713; *Popović et al.* Appeal Judgment, paras 537-538; *Tolimir* Appeal Judgment, paras 601-602, 605-606, 610, 614-617, 621-622.

[53] *Brima et al.* Appeal Judgment, para. 202; *Fofana and Kondewa* Appeal Judgment, paras 220-226; *Sesay et al.* Appeal Judgment, paras 1190-1194, 1197-1200; *Taylor* Appeal Judgment, paras 577-578.

[54] *Duch* Appeal Judgment, paras 285-336.

[55] *Čelebići* Appeal Judgment, para. 412.

[56] *Čelebići* Appeal Judgment, para. 413.

[57] See, *e.g.*, *Katanga* Trial Judgment, para. 1695; *Bemba* Trial Judgment, paras 745-751; *Ntaganda* Appeal Judgment, paras 1202-1206.

[58] *Ntaganda* Sentencing Appeal Judgment, paras 131-132; *Bemba et al.* Appeal Judgment, para. 750. In the *Bemba et al.* case, the ICC Appeals Chamber found no error in the trial chamber's reliance on the *Čelebići* test for cumulative convictions in "a situation where one offence falls entirely within the ambit of

28. Third, *amici* offer that the *Ongwen* Trial Chamber did not err in applying the *Čelebići* test with respect to cumulative convictions for the same crime enumerated both as a crime against humanity and as a war crime, as well as with respect to rape and sexual slavery as war crimes and crimes against humanity.[59] Applying the test to find that sexual slavery subsumed enslavement as crimes against humanity, however, exacerbates the discriminatory interpretation and application of the law, and results in adverse distinctions in violation of Article 21(3) of the Statute for the reasons explained in Part A, *supra*.[60] As a result, *amici* submit that the *Ongwen* Trial Chamber's correct application of the test produced a discriminatory outcome.
29. Sexual slavery is a more specific offence than enslavement, in that it requires proof that the "[t]he perpetrator caused [the] person or persons to engage in one or more acts of a sexual nature." However, for the reasons explained in Part A, *supra*, *amici* submit that the *Ongwen* Trial Chamber's entering of convictions for this conduct as sexual slavery rather than enslavement as a crime against humanity is the result of its mischaracterisation of the criminal conduct under the wrong crime.[61] Consequently, *amici* submit that the *Ongwen* Trial Chamber's correct application of the test also produced an illogical outcome.
30. Accordingly, *amici* submit that there are cogent reasons in the interests of justice to depart from the applicability of the *Čelebići* test only with respect to enslavement and sexual slavery as crimes against humanity.[62]

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another, and therefore on a *conviction* for the more specific crime is ultimately entered." See also *Bemba et al.* Trial Judgment, paras 950-952, 955. However, the ICC Appeals Chamber did "not dwell on" other situations where cumulative convictions are permitted. See *Bemba et al.* Appeal Judgment, para. 751.

[59] Cumulative convictions were entered for the analogous crimes against humanity and war crimes of sexual slavery, murder, torture, rape, and forced pregnancy. See *Ongwen* Trial Judgment, paras 2874, 2927, 2973, 3062, 3080, 3100. However, the *amici* agree with the Prosecutor that the *Ongwen* Trial Chamber departed from the consistent practice by going beyond the strict application of the *Čelebići* test in one instance but with no impact on its decision. See *Ongwen* Prosecution Response to Defence Appeal Brief, para. 138, referring to *Ongwen* Trial Judgment, para. 2796.

[60] See paras 13-14, 24, *supra*.

[61] See paras 11-12, 19, 22, *supra*. For example, factual findings concerning *ting tings* who became "wives" led solely to a conviction for sexual slavery but not enslavement, whereas factual findings regarding *ting tings* who were not raped, led solely to a conviction for enslavement.

[62] *Aleksovski* Appeal Judgment, paras 108-111 ("Instances of situations where cogent reasons in the interests of justice require a departure from a previous decision include cases where the previous

31. Considering the above, the *amici* submit that the *Ongwen* Trial Chamber should have entered a conviction for enslavement, rather than sexual slavery, as a crime against humanity. *Amici* therefore suggest that, in the interests of justice, the Appeals Chamber reverse the *Ongwen* Trial Judgment on this point and enter convictions for enslavement rather than sexual slavery because conduct criminalised under sexual slavery constitutes criminal conduct already covered by enslavement. *Amici* believe that this would not be detrimental to Dominic Ongwen.

IV. CONCLUSION

32. For the above reasons, *amici* respectfully suggest that the Appeals Chamber: (1) recognise that acts of a sexual nature, including control over sexuality, sexual integrity and sexual and reproductive autonomy, are indicia of enslavement in all its forms; and (2) in the interests of justice, reverse the *Ongwen* Trial Judgment on cumulative convictions only with respect to sexual slavery and enslavement as crimes against humanity and enter convictions for enslavement rather than sexual slavery.

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Dated this 23rd day of December 2021

At The Hague, The Netherlands

decision has been decided on the basis of a wrong legal principle or cases where a previous decision has been given *per incuriam*, that is a judicial decision that has been 'wrongly decided, usually because the judge or judges were ill-informed about the applicable law.' […] The Appeals Chamber will only depart from a previous decision after the most careful consideration has been given to it, both as to the law, including the authorities cited, and the facts. […] Where, in a case before it, the Appeals Chamber is faced with previous decisions that are conflicting, it is obliged to determine which decision it will follow, or whether to depart from both decisions for cogent reasons in the interests of justice.").