

SÁNCHEZ MERA, S. 2023. Fighters, not victims: on victimhood recognition and gender representations in the enslavement charges in the Ongwen case. *International criminal law review* [online], 23(5-6), pages 782-803.
Available from: <https://doi.org/10.1163/15718123-bja10164>

Fighters, not victims: on victimhood recognition and gender representations in the enslavement charges in the Ongwen case.

SÁNCHEZ MERA, S.

2023

© Silvina Sánchez Mera, 2023. Published with license by Koninklijke Brill nv. This is an open access article distributed under the terms of the CC BY 4.0 license.

<https://creativecommons.org/licenses/by/4.0/>



Fighters, Not Victims: On Victimhood Recognition and Gender Representations in the Enslavement Charges in the *Ongwen* Case

Silvina Sánchez Mera | ORCID: 0000-0003-4885-0859

La Trobe Law School, La Trobe University, Bundoora Campus and Kingsbury Drive, Bundoora, VIC 3086, Australia
s.sanchezmera@latrobe.edu.au

Received: 13 May 2023 | Accepted: 21 September 2023 |

Published online: 20 October 2023

Abstract

In the *Ongwen* case, according to the OTP women were abducted to be wives and men to be soldiers, women were forced to work and men forced to fight. The OTP brought enslavement charges for some of these crimes. Absent from the charges was the forced fighting of men. This paper discusses the crime of enslavement in the *Ongwen* case. By combining a doctrinal analysis and a feminist approach, I seek to show how gender representations emerge in the application of the law in detriment of men's victimhood. I argue that the application of the law responds to gender representations in war. Men are not perceived to be victims once they become 'soldiers'. Likewise, for women, the effect is their continuous perception as non-fighters and victims of war. This leads to reinforcing those representations, to lack of acknowledgment of victimhood for men and to reducing the experiences of women.

Keywords

enslavement – forced fighting – gender representations – Ongwen – victimhood recognition

1 Introduction

On the 4th of February 2021, Dominic Ongwen, former Lord's Resistance Army (LRA) commander, was found guilty of an extensive list of crimes at the International Criminal Court (ICC).¹ The case can be considered a milestone for the ICC. Ongwen is the first person to be convicted for crimes he was once victim of.² He is also the first person to have been convicted of these many charges, 61 out of 70 charges.³

While current academic discussions focus on Ongwen himself and his victim-perpetrator status,⁴ the 'spiritual' influence of the LRA and his leader Joseph Kony,⁵ and the systematic sexual abuse on women and girls,⁶ this article focuses on some aspects of the application of the Rome Statute by the Office of the Prosecutor (OTP) and the Chambers in the *Ongwen* case. The focus is not on Ongwen as a person—neither as a former child soldier

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

2 He is a former child soldier, who was integrated into the LRA when he was abducted on his way to school when he was between 10–14 years old. He then survived and rose into the ranks of the LRA becoming a Commander of one of the four brigades, the Sinia Brigade. See *ibid.*

3 ICC, *Prosecutor v Dominic Ongwen*, ICC-02/04-01/15, Trial Chamber IX, Sentence, 6 May 2021 (Ongwen Sentence).

4 F. Strandberg Hassellind, 'The International Criminal Trial as a Site for Contesting Historical and Political Narratives: The Case of Dominic Ongwen', 30(5) *Social & Legal Studies* (2021) 790–809; M. Kersten, 'The Life and Trials of Dominic Ongwen: A JiC Symposium', *Justice in Conflict* (1 February 2021), available online at <https://justiceinconflict.org/2021/02/01/the-life-and-trials-of-dominic-ongwen-a-jic-symposium/> (accessed 10 October 2022); C.F. Moran, 'To Be Responsible for Ourselves: Dominic Ongwen and Defences Before the International Criminal Court', *Opinio Juris* (19 December 2016) available online at <http://opiniojuris.org/2016/12/19/to-be-responsible-for-ourselves-dominic-ongwen-and-defences-before-the-international-criminal-court/> (accessed 10 October 2022).

5 A.-L. Nistor, A. Merrylees and B. Holá, 'Spellbound at the ICC: The Intersection of Spirituality and International Criminal Law', in J. Fraser and B. McGonigle Leyh (eds), *Intersections of Law and Culture at the International Criminal Court* (Edward Elgar, Cheltenham, 2020), pp. 147–168; K. Kiyimba, 'An Analysis of the Epistemic Link between the Catholic Religion and Violence in Uganda's History', 30(1) *Journal for the Study of Religion* (2017) 26–51.

6 S. Kramer, 'Forced Marriage and the Absence of Gang Rape: Explaining Sexual Violence by the Lord's Resistance Army in Northern Uganda', 23(1) *Journal of Politics and Society* (2012) 11–49; J. Annan, C. Blattman, D. Mazurana and K. Carlson, 'Women and Girls at War: Wives, Mothers, and Fighters in the Lord's Resistance Army', *HiCN Working Papers* 63 (Households in Conflict Network, Berlin, 2009); R. Grey, *Prosecuting Sexual and Gender-Based Crimes at the International Criminal Court: Practice, Progress and Potential* (Cambridge University Press, Cambridge, 2019); E. Baines, 'Forced Marriage as a Political Project: Sexual Rules and Relations in the Lord's Resistance Army' 51(3) *Journal of Peace Research* (2014) 405–417.

nor as a perpetrator of the present crimes. Instead, this article looks at how the OTP and the Chambers have addressed the crime of enslavement against civilians abducted by the LRA, the gender representations that emerge (and are reinforced) therein and the consequences for victimhood recognition.

This paper focuses on the charges (and conviction) of enslavement as a crime against humanity as brought by the OTP. The OTP charged enslavement for the forced labour that civilians were subjected to from the moment of their abduction until they arrived on the LRA camp, and for the forced labour women and girls suffered while in the camp, and that related to domestic chores, under gender-based crimes. There is no charge of enslavement for the forced military training and fighting men were subjected to do.

I argue that the application of the Rome Statute by the OTP and the Trial Chamber, regarding the enslavement charges, responds to gender representations in war, representations that are reinforced by their repetition, affecting victimhood recognition. Combining a doctrinal analysis and a feminist approach, I seek to show how gender representations emerge in the application of the law in detriment of men's victimhood. Men are not perceived to be victims once they become 'soldiers'. Likewise, for women, the effect is their continuous perception as non-fighters and victims of war. This leads to reinforcing those representations, to lack of acknowledgment of victimhood for men and reducing the experiences of women.

Crimes against women (and girls) were at the centre of the OTP's focus. Especial attention was given to, as labelled by the OTP, 'gender-based crimes'. This prompts academics to state that the case 'has become one of the most innovative cases on gender-based crimes in the ICC to date'.⁷ Whereas this is a positive aspect, the over focus on women and girls as victims has helped reinforce gender representations. I do not want to dismiss the fact that women (and girls) are disproportionately affected by armed conflict and that their victimisation comes largely at the hands of men. My intention here is to draw attention to some of the consequences, on men, of over-focusing on women as victims.

The paper is structured into six sections. Section 2 starts with an overview of the *Ongwen* case at the ICC and a description of the different charges on enslavement as a crime against humanity as brought by the OTP. It notes the differences between the charges that will be the object of analysis. Section 3 turns to the situation of male abductees in the LRA and shows that their fate in the LRA meet the elements of enslavement as crime against humanity, even though these were not charged. Section 4 looks at international jurisprudence

⁷ Grey, *supra* note 6, p. 171.

and the criminalisation of forced fighting as different offenses of crimes against humanity and war crimes. The aim of this section is to show that forcing someone to fight has been successfully prosecuted as an international crime, including enslavement. Section 5 discusses gender representations in war, specifically 'women are victims, men are soldiers' and shows how the enslavement charges respond and reinforce this representation. The paper concludes that the ICC is sustaining an unequal approach that reinforces representations regarding men and women in war.

2 The Lord's Resistance Army at the International Criminal Court: the *Ongwen* Case

Uganda was the first State party to (self) refer a situation to the ICC.⁸ The country had been the scene of long-lasting armed conflict between the Lord's Resistance Army, an ethnic-religious based group, and the government that started in 1987. The LRA had conducted a guerrilla type warfare against anyone perceived to be a government supporter.⁹ Led by Joseph Kony, the LRA became associated with forced recruitment and abductions. By the 1990s, Internally Displaced People's Camps (IDP) would be raided for 'recruits' and goods. In order to grow their ranks and thus sustain the military campaign, the LRA systematically abducted people, with focus on young and bodily able people irrespective of gender.¹⁰ All abductees were military trained and participated

8 ICC, President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC, ICC (24 January 2004), available online at <https://www.icc-cpi.int/news/icc-president-uganda-refers-situation-concerning-lords-resistance-army-lra-icc> (accessed 18 October 2022).

9 For information and analysis on the LRA, see T. Allen and K. Vlassenroot (eds), *The Lord's Resistance Army: Myth and Reality* (Zed Books, London, 2010); A. Dolnik and H. Butime, *Understanding the Lord's Resistance Army Insurgency* (World Scientific, Singapore, 2017); R. Doom and K. Vlassenroot, 'Kony's Message: A New Koine?The Lord's Resistance Army in Northern Uganda', 98(390) *African Affairs* (1999) 5–36; K. Titeca and T. Costeur, 'An LRA for Everyone: How Different Actors Frame The Lord's Resistance Army', 114(454) *African Affairs* (2015) 92–114; J. Otieno Wasonga, *The International Criminal Court and the Lord's Resistance Army: Enduring Dilemmas of Transitional Justice* (Taylor & Francis, Oxford, 2019).

10 P.N. Pham, E. Stover and P. Vinck, *Abducted: The Lord's Resistance Army and Forced Conscriptation in Northern Uganda: June 2007* (Berkeley-Tulane Initiative for Vulnerable Populations, Berkeley, CA, 2007); C. Blattman and J. Annan, 'On the Nature and Causes of LRA Abduction: What the Abductees Say', in T. Allen and K. Vlassenroot (eds), *The Lord's Resistance Army: Myth and Reality* (Zed Books, London, 2010) 132–155.

in military campaigns. On top of this, women and girls were 'distributed' to commander's households to serve as sexual slaves or 'wives' or 'ting tings'.¹¹

Following the State self-referral, an investigation opened in 2004.¹² The Office of the Prosecutor focused on crimes committed by the LRA and their leadership: Joseph Kony and the Commanders of each of the four brigades the LRA was comprised of. To this date, the only suspect that surrendered to the court was Dominic Ongwen.¹³ Like most members of the LRA, Dominic Ongwen was forcefully integrated into the armed group. He is a former child soldier, having been abducted around the age of 10,¹⁴ who rose the ranks and became Commander of the Sinia Brigade.

By the time of Ongwen's surrender, in 2015, the OTP indicted him with 70 counts that included both war crimes and crimes against humanity from the period of 1 July 2002 to 31 December 2005.¹⁵ These crimes included enslavement as a crime against humanity against intra-party members, making it a first for the ICC. All the 70 charges were confirmed in March 2016 by the Pre-Trial Chamber¹⁶ with the trial starting soon after. On the 4th of February 2021, the ICC Trial Chamber IX rendered its judgement finding Ongwen guilty of 61 crimes committed from 1 July 2002 and 31 December 2005.¹⁷ Ongwen was sentenced to 25 years of imprisonment.¹⁸ His sentence was confirmed on appeal.¹⁹

11 Pre-pubescent girls who would do household chores or babysit babies.

12 ICC, 'Prosecutor of the International Criminal Court Opens an Investigation into Northern Uganda', ICC (24 July 2004), available online at <http://www.icc-cpi.int/news/icc-prosecutor-international-criminal-court-opens-investigation-northern-uganda> (accessed 18 October 2022).

13 Joseph Kony and Vincent Otti remain at large. The ICC terminated the cases against Raska Lukwiya, Okot Odhiambo following their deaths. The Prosecutor v. Joseph Kony et al, Notification Confirming the Death of Raska Lukwiya, ICC-02/04-01/05-270, 02 November 2006; 'ICC Terminates Proceedings against Okot Odhiambo Following Forensic Confirmation of His Passing', ICC (10 September 2015), available online at <http://www.icc-cpi.int/news/icc-terminates-proceedings-against-okot-odhiambo-following-forensic-confirmation-his-passing> (accessed 10 May 2023).

14 Estimations on his exact age at the time of abduction are between 10 and 14.

15 ICC, *Prosecutor v Dominic Ongwen*, ICC-02/04-01/15, Document Containing the Charges (Office of the Prosecutor), 22 December 2015 (Ongwen, Document Containing the Charges).

16 ICC, *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-422-Red, Pre-Trial Chamber II Decision on the confirmation of charges against Dominic Ongwen, 23 March 2016 (Ongwen, Confirmation of Charges).

17 For a complete procedural history See Ongwen Judgement, *supra* note 1, p. 13.

18 Ongwen Sentence, *supra* note 3.

19 ICC, *Prosecutor v Dominic Ongwen*, ICC-02/04-01/15-2023, Appeal Chamber, Appeals Judgement, 15 December 2022.

2.1 *The Enslavement Charges in the Ongwen Case*

Given the extensive list of crimes Ongwen was charged with, the Office of the Prosecutor grouped them into 3 'blocks', the Trial Chamber followed the same approach in the judgement.²⁰ A first block included all crimes committed during LRA attacks to four different Internally Displaced People's camps. A second block encompassed crimes directly perpetrated by Dominic Ongwen, specifically, gender-based crimes committed against seven women. The last block of charges was denominated 'sexual and gender-based crimes and conscription and use on hostilities of children below the age of 15',²¹ and included crimes perpetrated against women and children integrated into the LRA.²² Counts of enslavement, as a crime against humanity,²³ were included in all 3 blocks.²⁴ However, of relevance for the purpose of this article are the enslavement charges in blocks 1 and 3, as these crimes are viewed as crimes committed 'by the LRA'. This section describes the factual charges of these crimes object of analysis in this article, as brought by the OTP and followed by the Trial Chamber.

As per the contextual elements of crimes against humanity, the Trial Chamber was satisfied these were met. The Chamber held that 'the LRA killed, injured and enslaved a large number of civilians in numerous attacks on individual civilians, IDP's camps and other civilian locations', and that this constituted an attack against the civilian population.²⁵ These attacks were not only of a systematic nature as they followed coordinated efforts to target the civilian population of Northern Uganda, but also in furtherance of the LRA policy of growing their ranks through abductions.²⁶

With respect to block 1, four counts of enslavement as crimes against humanity were included. One count for each of the four attacks to the IDP's

²⁰ Ongwen Judgement, *supra* note 1.

²¹ *Ibid*; Ongwen, Confirmation of charges, *supra* note 16.

²² Dominic Ongwen was charged under different modes of liability, such as indirect perpetration and ordering these crimes. See Ongwen, Document Containing the Charges, *supra* note 15; Ongwen Judgement, *supra* note 1.

²³ Under the Rome Statute, enslavement is an underlying offense of crimes against humanity, thus enslavement can only be charged under crimes against humanity, not war crimes. An exception is the crime of sexual slavery which is characterised as both a crime against humanity and a war crime.

²⁴ Ongwen Judgement, *supra* note 1; Ongwen, Document Containing the Charges, *supra* note 15; Ongwen, Confirmation of Charges, *supra* note 16.

²⁵ Ongwen, Judgement, *supra* note 1, para. 2798.

²⁶ *Ibid.*, paras 2799–2804.

camps.²⁷ The OTP submitted that ‘on or about’ the date of attack²⁸ the LRA would abduct the residents and forced them to carry looted goods and wounded fighters back to the LRA camp. For example, in relation to the attack of Pajule camp the OTP stated:

LRA fighters deprived civilians of their liberty by abducting them and placing them under military guard to prevent their escape. LRA fighters abducted hundreds of civilians and made them carry items and other equipment that they had looted from the camp. In doing so, attackers exercised any or all of the powers attaching to the right of ownership over the abductees including by depriving them of their liberty and exacting forced labour, reducing them to a servile status.²⁹

The Trial Chamber found Ongwen guilty of these crimes. The Chamber held that abductees were subjected to forced labour, by being made to carry looted

²⁷ The camps attacked were Pajule (count 8), Odek (count 20), Lukodi (count 33) and Abok (count 46). See Ongwen Confirmation of Charges, *supra* note 16; Ongwen Judgement, *supra* note 1.

²⁸ ‘on or about 10 October 2003, at or near Pajule IDP camp’ (count 8), ‘on or about 29 April 2004, at or near Odek IDP camp’ (count 20), ‘on or about 19 May 2004 at or near Lukodi IDP Camp’ (count 37), ‘on or about 8 June 2004, at or near Abok IDP camp’ (count 49). Ongwen, Document Containing the Charges, *supra* note 15.

²⁹ Ongwen, Document Containing the Charges, *supra* note 15 para. 23. Similarly, in relation to the attack of Odek Camp the OTP stated ‘LRA fighters deprived civilians of their liberty by abducting them and placing them under military guard to prevent their escape. Civilian men, women and children were abducted and forced to carry away the looted food from Odek IDP camp. Children were tied together with ropes and dragged away from their homes. In doing so, attackers exercised any or all of the powers attaching to the right of ownership over the abductees including by depriving them of their liberty and exacting forced labour, reducing them to a servile status.’; with relation to the attack of Lukodi camp it noted ‘LRA fighters deprived civilians of their liberty by abducting them and placing them under military guard to prevent their escape. Men, women and children were abducted, many of whom were forced to carry away looted goods from Lukodi IDP camp. In doing so, attackers exercised any or all of the powers attaching to the right of ownership over the abductees including by depriving them of their liberty and exacting forced labour, reducing them to a servile status.’; lastly with respect to the attack of Abok the OTP said ‘LRA fighters deprived civilians of their liberty by abducting them and placing them under military guard to prevent their escape. Before attacking the camp, LRA fighters abducted a number of camp residents. During the attack, attackers abducted approximately 26 men, women and children and forced them to carry looted goods away from the camp under threat of death. The attackers exercised any or all of the powers attaching to the right of ownership over these abductees including by depriving them of their liberty and exacting forced labour, reducing them to a servile status.’ Ongwen, Document Containing the Charges *supra* note 15, paras 36, 48 and 62.

items, and that measures to prevent their escape were in place, such as military guards and threats of beating and death if they tried to escape.³⁰ Therefore, it concluded that ‘LRA fighters exercised powers attaching to the right of ownership over the abductees by imposing on them a deprivation of liberty similar to those explicitly stated in Article 7(2)(c) of the Statute.’³¹

In relation to block 3, crimes grouped under ‘sexual and gender-based crimes and conscription and use on hostilities of children below the age of 15’, one count of enslavement as crime against humanity committed against women was brought up by the OTP (count 68).³² Unlike the charges in block 1, the ones in block 3 were not necessarily related to IDP’s camps attacks, and included women and girls integrated into the LRA (whether abducted during the attack to IDP’s camps or in other circumstances).

The OTP submitted that ‘[f]rom at least 1 July 2002 until 31 December 2005, in northern Uganda, Dominic Ongwen, Joseph Kony, and Sinia brigade leadership (the “SGBC co-perpetrators”) pursued a common plan to abduct girls and women to serve as domestic servants.’³³ The OTP stated that powers attaching to the right of ownership were exercised by LRA commanders. That women (and girls) were forced to performed different tasks, and that they had no choice but to comply.³⁴ These women and girls were deprived of their liberty, forced to work, and physically and psychologically abused if they refused to do so. The OTP noted:

LRA commanders and fighters, exercised any or all of the powers attaching to the right of ownership over these women and girls. They deprived them of their liberty and exacted forced labour, reducing them to a servile status. The victims had no choice but to submit to rape, enslavement, sexual slavery and become forced wives. Non-compliance with demands for sex and the performance of domestic tasks resulted in severe beatings and other forms of abuse.³⁵

30 Ongwen Judgement, *supra* note 1, paras 2839–2840, 2895–2896, 2948–2949, 2994–2995.

31 *Ibid.*, para. 2840. *Similarly*, paras 2896, 2949, 2995.

32 The OTP also brought up sexual slavery charges, which is slavery. However, because of the division the OTP made, this paper only focuses on the charges of enslavement as brought by the OTP.

33 Ongwen, Document Containing the Charges, *supra* note para. 129.

34 *Ibid.*, para. 131. *See also* paras 129–130.

35 Ongwen, Document Containing the Charges, *supra* note 15, para. 131. *See also* paras 129–130.

The Chamber agreed with the OTP and noted that abducted women and girls were ‘severely beaten for attempting escape or if they failed to perform the work demanded of them.’³⁶ That ‘[t]he women and girls were coerced, due to the physical force used by the Sinia brigade members and due to the threat of punishment for disobedience and their dependence on the Sinia brigade members for survival.’³⁷ This enslavement charge relates then to force labour of women (and girls) as domestic servants while in the LRA. This enslavement charge was categorised, by the OTP, as a gender-based crime.³⁸

The different enslavement charges respond to the OTP’s narrative and focus of the case: the mistreatment of the civilian population in Northern Uganda at the hands of the LRA and, in particular, the fate of women. At the centre of all the enslavement charges is the acknowledgement of the forced labour abductees performed under coercive circumstances. However, as the following sections will show, not all abductees were acknowledged as victims despite their forced labour.

3 The Fate of Male Abductees in the LRA: Does Forced Fighting Meet the Criteria for Enslavement?

The enslavement charges in the *Ongwen* case do not include the forced military training and forced fighting of men (and women) in the LRA. Here I argue that the situation of male abductees in the LRA, particularly as per the OTP’s narrative—their abduction to become fighters—could constitute enslavement under Article 7.1.c of the Rome Statute.

The Rome Statute defines enslavement as ‘the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.’³⁹ In turn, the Element of Crimes indicate that for enslavement to take place the ‘perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.’⁴⁰ ‘Similar deprivation of

36 *Ongwen* Judgement, *supra* note 1, para. 3073.

37 *Ibid*, para. 3080.

38 Count 68, *See Ongwen Document Containing the Charges, supra* note 15; *Ongwen Confirmation of Charges, supra* note 16; and *Ongwen Judgement, supra* note 1.

39 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), Article 7.2.c.

40 Article 7.1.c Elements of Crimes, International Criminal Court.

liberty' may include forced labour or reducing the person to servile status.⁴¹ Forced or compulsory labour has been defined by ILO Convention No 29 as 'all work or service which is extracted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.'⁴² Forced labour can be then an indicia for enslavement, but it is not a crime per se.

The ICC has interpreted the elements of the crime of enslavement in previous cases. In the *Katanga* case, the Trial Chamber held that 'the powers attaching the right of ownership' could take different forms but would deprive the victim of 'any form of autonomy'.⁴³ In *Ongwen*, when analysing the elements of enslavement, the Trial Chamber followed the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Kunarac*, providing a non-exhaustive list of factors that can indicate slavery.⁴⁴ The Chamber noted that the indicia or factors that can show the exercise of ownership over a person could include: (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;

41 The footnote in Article 7.1.c of the Element of Crimes note: It 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 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956.

42 ILO Convention No. 29 Article 2 para. 1. However, not all forms of compulsory labour are prohibited during armed conflicts, some are allowed as long as the persons are remunerated. For example, in international armed conflicts Article 40 of the IVGC establishes that 'Protected persons may be compelled to work only to the same extent as nationals of the Party to the conflict in whose territory they are. If protected persons are of enemy nationality, they may only be compelled to do work which is normally necessary to ensure the feeding, sheltering, clothing, transport and health of human beings and which is not directly related to the conduct of military operations. In the cases mentioned in the two preceding paragraphs, protected persons compelled to work shall have the benefit of the same working conditions and of the same safeguards as national workers, in particular as regards wages, hours of labour, clothing and equipment, previous training and compensation for occupational accidents and diseases.' In turn, Article 5.1.e of APII indicates that people detained 'shall, if made to work, have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population.'

43 ICC, *Prosecutor v Germain Katanga*, ICC-01/04-01/07, Trial Chamber II, Judgement, 7 March 2014 para. 975.

44 ICTY, *Prosecutor v Kunarac et al.*, IT-96-23 and 23/1, Trial Chamber II, Judgement, 22 February 2001, para. 543; ICTY, *Prosecutor v Kunarac et al.*, IT-96-23 and 23/1-A, Appeals Chamber, Appeal Judgement, 12 June 2002 para. 119. See also SCSL, *Prosecutor v Issa Hassan Sessay et al.*, Case No. SCSL-04-15-T, Trial Chamber I, Judgement, 2 March 2009, paras 160, 199 (RUF Judgement).

(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.⁴⁵

Additionally, the ICC held that deprivation of liberty '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 feared for their lives'.⁴⁶ The Trial Chamber examined these aspects regarding the victims of enslavement in all charges brought by the OTP. Of interest here is the examination pertaining to the charge of enslavement in block 3, that had only women (and girls) as the victim group. This charge deals with the fate of abducted women during their stay at the LRA. Enslavement was found to have happened in the *Ongwen* case due to the subjection of forced labour under coercive circumstances. I argue that abducted men integrated into the LRA lived under the same coercive conditions.

The judgement described extensively the LRA as an organisation, the structure of command and the ways to 'ensure capability in military operations'.⁴⁷ Emphasis was given to the LRA's modus operandi. The Trial Chamber noted that '[t]he LRA also became associated with forced recruitment or abductions'.⁴⁸ This applied to women and men; and was the way in which the LRA would maintain and increase their ranks. Most of its members were abductees.⁴⁹ The Chamber also pointed out that abductions were targeted at civilians capable of fighting. Once abducted, the civilians would undergo military training. Several measures were taken to deter and prevent escape, these included initiation rituals, beatings, forcing to kill and threats of death if they tried to escape.⁵⁰ The Chamber noted that the LRA maintained obedience

45 *Ongwen* Judgement, *supra* note 1, para. 2712. Similarly, in *Ntaganda* the Pre-Trial Chamber held that ownership can be shown by a combination of factors such as 'the detention or captivity in which the victim was held and its duration, the limitations to the victim's free movement, measures taken to prevent or deter escape, the use of force, threat of force or coercion, and the personal circumstances of the victim, including his/her vulnerability'. ICC, *Prosecutor v. Bosco Ntaganda*, No. ICC-01/04-02/06-309, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014, para. 275.

46 *Ongwen* Judgement, *supra* note 1, para. 2713. The ICC followed previous jurisprudence of the ICTY and the Special Court of Sierra Leone, see *Kunarac et al.* Trial Judgement, *supra* note 44 para.750; *RUF* Judgement, *supra* note 44, para. 161.

47 *Ongwen* Judgement, *supra* note 1, para. 121 *et seq.*

48 *Ongwen* Judgement, *supra* note 1, para. 7.

49 *Pham et al.*, *supra* note 10, *Blattman and Annan*, *supra* note 10.

50 *Ongwen* Judgement, *supra* note 1, para. 129.

through strict rules, and if broken, abductees were subjected to punishment that ranged from beatings to executions.⁵¹ Further, the Chamber highlighted that LRA members lived in conditions of constant fear:

Sinia members, and LRA members generally, were threatened with death if they attempted escape. On certain occasions, execution of re-captured escapees in fact took place. Dominic Ongwen personally issued threats to LRA members that they would be killed if they attempted to escape and ordered killings of abductees in front of LRA members to illustrate this threat. Members were also threatened that their home areas would be attacked by the LRA if they escaped. A further measure taken to discourage escaping was giving soldiers false or negative information about life outside of the LRA ...⁵²

What this demonstrates then, is the coercive environment abductees, irrespective of gender, lived in while in the LRA.

With respect to the indicia that shows the exercise of the powers attaching to ownership, several can be identified in relation to the abducted men (and boys). A number of different measures to prevent escape were taken (beating, killings, threats); psychological pressure, coercion and threats, cruel treatment, and forced labour were present. The latter as these abductees were forced to fight. The Special Court for Sierra Leone (SCSL) held in the *Revolutionary United Front (RUF)* and *Taylor* cases that to establish forced labour as enslavement, the pertinent consideration is whether 'the relevant persons had no choice as to whether they would work'.⁵³ In the *Ongwen* case, the Trial Chamber noted that 'a considerable number of witnesses, in particular lower ranking insiders, testified categorically that in the LRA, no one could refuse orders'.⁵⁴ For example, witness P-0252 was asked whether he could refuse to participate in an attack, stating that 'You cannot refuse. There is no way out when you are told to go'.⁵⁵ Abducted men turned soldiers could not refuse fighting, their labour (fighting) was forced.

51 *Ibid.*, para. 131.

52 *Ibid.*, para. 132. The Chamber also stated: 'This, even if just a personal perception on the part of the witness, illustrates the constant state of fear and apprehension created by the conditions in which LRA members lived.' para. 1012.

53 SCSL, *Prosecutor v Charles Taylor*, SCSL-03-01-T, Trial Chamber II, Judgement, 18 May 2012 paras 1679–1981, 1694–1695), para. 448 (Taylor Judgement); RUF Judgement, *supra* note 44, para. 202, citing Krnojelac Trial Judgement, para. 359. See also *Prosecutor v. Krnojelac*, Judgement (Appeals Chamber), IT-97-25-A, 17 September 2003, paras 194–195.

54 Ongwen Judgement, *supra* note 1, para. 951.

55 *Ibid.*, para. 954.

Therefore, it could be said that the circumstances in which civilian abductees integrated as fighters into the LRA met the elements of enslavement under Article 7.1.c of the Rome Statute. However, as noted in the previous section, no charges that had male abductees integrated into the LRA and forced to fight were brought up by the OTP, similarly women's fighting roles were not included in the enslavement charges.

4 Forcing Someone to Fight Can Be an International Crime: On International Law and Jurisprudence

As noted, absent from the enslavement charges in the *Ongwen* case is the fact that abductees were forced to fight and forcibly military trained. The ICC has yet to prosecute forced fighting as an international crime. Other international tribunals, however, have successfully prosecuted forced fighting under different offenses. This section traces international jurisprudence on the matter to show that forced fighting has been recognised as a crime and can fall under different categories of international crimes.

Whether forced fighting is considered a crime would depend on the circumstances of the forced labour. Not only is not a crime for State to compel their own nationals to serve in the armed forces, but it is not considered 'forced' labour.⁵⁶ The reasoning behind the exception is to prioritise matters of national defence and sovereignty.⁵⁷ In other circumstances, forcing someone to fight constitutes an autonomous crime. For example, Articles 8.2.a.v and 8.2.b.xv of the Rome Statute criminalise compelling a prisoner of war or civilian to serve in the forces of the hostile power or compelling nationals of the hostile party to take part in war operations against their country as a war crime.

The Rome Statute draws on the Geneva Conventions III and IV that include provisions that protect both civilians and combatants from being compelled to serve in the hostile forces.⁵⁸ In both Conventions, these provisions are

⁵⁶ ILO Convention 29 establishes as an exception of forced labour 'any work or service exacted in virtue of compulsory military service laws for work of a purely military character', ILO Convention 29, *supra* note 38, Article 2.a. Likewise the International Convention on Civil and Political Rights provides in Article 8 a prohibition of forced labour, establishing that 'the term "forced or compulsory labour" shall not include any service of a military character'. International Covenant on Civil and Political Rights, Article 8.3.ii.

⁵⁷ J. Allain, *Slavery in International Law: Of Human Exploitation and Trafficking* (Brill, Leiden, 2012).

⁵⁸ Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III), Article 130; Geneva Convention Relative to the Protection of Civilian Persons in Time of (Geneva Convention IV), Article 147.

considered a grave breach. The 2020 Commentary on the Geneva Convention III notes that the prohibition of compelling a prisoner of war (POW) to serve in the hostile power is 'indirectly linked to Article 50'.⁵⁹ The latter includes an exhaustive list of labour prisoners of war can be employed to do, neither of which is of military character. Of importance here is the fact that coercing a POW to, for example, fight is considered a prohibited labour, and a war crime. Likewise, the same could be said about civilians that belong to the other party to the conflict and are coerced into serving the enemy forces.

The underlying rationale of the provisions is that a State cannot force someone to fight for their country's enemy state and against their own.⁶⁰ It is a matter of respecting allegiances.⁶¹ However, these actions, compelling a prisoner of war or a civilian to serve in the hostile forces, are crimes only in an international armed conflict. There are no similar provisions for non-international armed conflicts.

In non-international armed conflicts where the belligerent parties are either a State against an armed group or the fighting takes place between armed groups, forcing someone to fight for an armed group against their State or against another armed group is not an autonomous crime. This is the situation in the *Ongwen* case, in which the fighting took place between the LRA and the Ugandan Government. In this non-international armed conflict, civilians were abducted and forcefully integrated into the LRA.

A look at international jurisprudence shows a myriad of responses to forcing civilians to fight or undergo activities that could be considered participation in hostilities (albeit not direct fighting). Forcing someone to fight has been prosecuted as crimes against humanity as well as war crimes. The difference between the two lies on the contextual elements of the crimes. Crimes against humanity require a systematic or widespread attack against the civilian population in furtherance of a State or organisational policy, whereas war crimes require the existence of an armed conflict and a nexus of the conduct to such conflict.⁶²

The first international tribunal to address forced participation in the war effort was the International Military Tribunal of Nuremberg. The Nuremberg Tribunal found the accused guilty of deportation for forced labour as crimes

59 Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949. Commentary of 2020, Article 130, paras 5271–5276.

60 O. Triffterer and K. Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3rd Revised edition (Beck/Hart, Munich, 2016)).

61 M Cherif Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (Cambridge University Press, Cambridge, 2011).

62 Rome Statute Articles 7 and 8; ICTY Statute.

against humanity and forced labour as a war crime⁶³ for forcing civilians to join German Legions and Organisations, which had a military nature and contributed to the war effort. The Tribunal stated '[a]ll the civilians so conscripted were forced to work for the German war effort. Civilians were required to register and many of those who registered were forced to join the Todt Organization and the Speer Legion, both of which were semi-military organizations involving some military training.'⁶⁴ Civilians were forced to fight.

Similarly, the ICTY had also successfully prosecuted forcing civilians to contribute to the military effort as a war crime and a crime against humanity. During the conflict in the Former Yugoslavia, cities were raided, and civilians were detained in camps. Several of these detainees were then forced to dig trenches for their captors, often under fire.⁶⁵ This activity directly contributed to the war effort and thus would fall under participation in hostilities.

Broadly, two set of crimes were charged and prosecuted over the forced trench digging: inhumane treatment as a violation of Common Article 3 of the Geneva Conventions (war crime) and persecution as a crime against humanity.⁶⁶ The tribunal considered that forcing civilians to do hazardous labour that involved active participation in hostilities was a war crime. Further, because these acts were directed at subjugating the Bosnian Muslim population, they also amounted to persecution as a crime against humanity.

So far, the only tribunal that has prosecuted forcing civilians to fight as enslavement as a crime against humanity has been the Special Court of Sierra Leone. The establishment of the SCSL was aimed at dealing with the crimes of a decade long civil war in the country. As a hybrid court, the jurisdiction of the

63 Article 6.b and c of the Nuremberg Charter reads '(b) WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or *deportation to slave labour* or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity; (c) CRIMES AGAINST HUMANITY: namely, murder, extermination, *enslavement*, *deportation*, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the, jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated.'(emphasis added).

64 International Military Tribunal for Nuremberg, Judgement and Sentence, 1 October 1946 (Nuremberg Judgement), p. 62.

65 ICTY, *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2-T, Trial Chamber, Judgement, 26 February 2001, para. 10 (Kordic and Cerkez, Judgement).

66 ICTY, *Prosecutor vs Blaskic*, Case No. IT-95-14, Trial Chamber, Judgement, March 3, 2000; Kordic and Cerkez, Judgement, *supra* note 65; ICTY, *Prosecutor v. Aleksovski*, Case No.: IT-95-14/1-T Trial Chamber, Judgement, 25 June 1999.

SCSL not only included international crimes, but also domestic ones relevant to the conflict.⁶⁷ The SCSL dealt with crimes committed by all parties to the conflict. The main armed group fighting the government was the RUF.

One of the characteristics of the RUF was the mistreatment of the civilian population. Amongst the harmful acts, civilians were abducted and forced to work. Some were sent to diamond mines, others were trained and sent to fight.⁶⁸ The SCSL found that on arrival to the camp, the rebels (RUF members) 'would register the names of the recruits and place them in platoons'. They would then undergo military training ranging from physical exercise to guerrilla tactic and use of different weapons.⁶⁹ Once they 'graduated' they were sent to front lines to engage in combat.⁷⁰ The Court, when referring to the attack to Freetown, stated 'many among their ranks (RUF) were civilians who were forcibly recruited and trained'.⁷¹ These civilians actively participating in combat committed crimes as well. Both situations, the forced military training and forced mining, were charged and successfully prosecuted as the crime against humanity of enslavement.

International jurisprudence shows that forcing someone to fight can be prosecuted as international crimes provided the elements of those crimes are met. Forcing someone to fight was considered forced labour and prosecuted as war crimes and crimes against humanity under different offenses that included deportation, inhumane treatment, persecution and enslavement. The *Ongwen* case significantly resembles the *RUF* case at the SCSL. Both conflicts were of non-international character, and in both the armed group abducted civilians to forced them to fight, and in both cases the prosecutors dealt with intra-party crimes. Yet, in the *Ongwen* case, male abductees were not recognised as victims of crimes.

5 On Gender Representations and the Enslavement Charges in the *Ongwen* Case

The previous section has shown that forcing someone to fight has been successfully prosecuted under different (international) crimes by some international tribunals, including enslavement as a crime against humanity.

67 However, no one was indicted for domestic crimes at the SCSL.

68 RUF Judgement, *supra* note 44, paras 1260, 1382, 1414, 1434, 1487. See also Taylor Judgement, *supra* note 53, paras 1679–1981, 1694–1695.

69 RUF Judgement, *supra* note 44 para. 1262; See also Taylor Judgement, *supra* note 53.

70 RUF Judgement, *supra* note 44, para. 1265.

71 *Ibid.*, para. 1513.

I have also argued that the treatment, military training, fighting and circumstances in which male abductees lived in the LRA met the criteria for enslavement as a crime against humanity. Nevertheless, the enslavement charges did not include them nor any other charge was brought to cover the situation of male abductees in the LRA.

While there are always considerations of prosecutorial discretion in the charging and prosecution of crimes, I argue however that the way in which the enslavement charges were brought by the OTP reflect gender representations in war, in particular the representation that 'women are victims and men are soldiers' that are then reinforced by the Trial Chamber. This affects the application of the Rome Statute in detriment of men, who are overlooked as victims once they become 'soldiers', while women's representation as victims displaces their fighting roles. The fact that a person is individualised as a fighter, strips away victimhood and instead turns the person into the criminal, leaving no space for nuance. Three characteristics of the charges, as brought by the OTP, support this view: the victims, the temporal scope of the enslavement charges in block 1 and the type of work considered forced labour.

With respect to the victims, one of the main differences between the enslavement charges in block 1 and the enslavement charge in block 3 is the victim group. The enslavement charges in block 1 have 'women, men and children' as victims. This means everyone targeted by the LRA during the attacks to the IDP camps. Conversely, the enslavement charge in block 3 only has women (and girls) as its victims. Thus, while everyone is considered a victim of enslavement in block 1, only women are considered victims of enslavement in block 3.

The other important distinction between the enslavement charges in block 1 and the enslavement charge in block 3 is the temporal scope of the crimes, as considered by the OTP. The charges in block 1 have a *constrained* period of time and recognise the situation of the abductees *up until their arrival* to the LRA camp. For example, in relation to the attack on Pajule, the OTP submitted that 'Dominic Ongwen is charged with enslavement as a crime against humanity, pursuant to Article 7(1)(c) of the Statute, *on or about 10 October 2003, at or near Pajule IDP camp*' (emphasis added).⁷² The same occurs with the other three

⁷² Ongwen, Document Containing the Charges, *supra* note 15; Ongwen Judgement, *supra* note 1, para. 2838.

counts of enslavement in block 1.⁷³ Consequently, according to these charges, people were enslaved for about a day.

The temporal scope of the count of enslavement in block 3 is very different. For this count the OTP stated 'Ongwen is charged with enslavement as a crime against humanity, pursuant to Article 7(1)(c) of the Statute, *from at least 1 July 2002 until 31 December 2005*' (emphasis added).⁷⁴ This latter temporal scope responds to the temporal jurisdiction of the case at the ICC. This means that enslavement, for the charge in block 3, is a continuum. In other words, enslavement charges in block 1 recognised the fate of all abductees up until their arrival to the LRA camp, while the charge in block 3 recognised the fate of women *during their stay* in the LRA, thus once integrated into the LRA.

According to the OTP (and the Trial Chamber), the LRA abducted residents from the IDP's camps and, as noted previously, forced them to carry loot and wounded fighters to the LRA camp. Once at the LRA camp, some were released, but the young ones and bodily able were not.⁷⁵ They were forcefully integrated into the LRA. Following the OTP's narrative of the case, men integrated into the LRA were turned into fighters and women were distributed as wives.⁷⁶

What is interesting is that slavery is a continuous crime.⁷⁷ This means that the enslavement does not cease because, for example, the nature of the work changes. Enslavement ceases when the victim is released, escapes or dies. Consequently, those abductees from the IDP's camps that were forcibly integrated into the LRA would have remained 'enslaved'. However, this aspect was only acknowledged for women, not men. There are no enslavement charges committed against men while staying in the LRA, they all relate to women (and girls).

In both cases (enslavement in block 1 and 3), the nature of labour these civilians were forced to perform and that was recognised as 'forced labour' by

73 'Under Count 20, Dominic Ongwen is charged with enslavement as a crime against humanity, pursuant to Article 7(1)(c) of the Statute, on or about 29 April 2004, at or near Odek IDP camp'; 'Under Count 33, Dominic Ongwen is charged with enslavement as a crime against humanity, pursuant to Article 7(1)(c) of the Statute, on or about 19 May 2004, at or near Lukodi IDP camp'; 'Under Count 46, Dominic Ongwen is charged with enslavement as a crime against humanity, pursuant to Article 7(1)(c) of the Statute, on or about 8 June 2004, at or near Abok IDP camp' Ongwen, Judgement, *supra* note 1, paras 2894, 2947, 2993. See also Ongwen, Document Containing the Charges, *supra* note 15; Ongwen, Confirmation of Charges *supra* note 16.

74 Ongwen Judgement, *supra* note 1, para. 3085. See also, Ongwen, Document Containing the charges, *supra* note 15; Ongwen, Confirmation of Charges, *supra* note 16.

75 Ongwen Judgement, *supra* note 1, para. 176.

76 *Ibid.*, paras 129, 212, 214.

77 Triffterer and Ambos, *supra* note 60. See also Taylor Judgement, *supra* note 53, para. 118.

the OTP and the Trial Chamber, was of non-military character. For the victims in the block 1, the forced labour included carrying looted items and wounded soldiers. For the women integrated into the LRA the forced labour included domestic chores, such as fetching water, cooking, carrying items, doing laundry, and babysitting. The acknowledgement by the ICC that forced domestic labour constitutes enslavement and stressing its gendered dimensions are issues to be praised and can be considered one of the 'lights' in the *Ongwen* case. This type of activity is traditionally viewed as a 'women' activity. Thus, by highlighting the gender dimension the OTP and the Chambers are recognising how war can impact women differently. Nevertheless, it can also help reinforce representation of women as victims by completely disregarding women's fighting roles in the LRA.

In the *Ongwen* case, 'fighting' is not being viewed as 'labour' but instead operates to exclude potential victimhood status or to reinforce representations, specifically regarding women's passivity and men as soldiers. Women have been traditionally viewed and represented as objects of protection who lack agency.⁷⁸ This leads to a minimisation of their roles as fighters⁷⁹ or dismissing them completely. Although this traditional understanding, that women do not fight, has been challenged by feminist research and women's roles as fighters documented,⁸⁰ this gender representation still permeates analysis and practice.

78 J. Gardam, 'Women and the Law of Armed Conflict: Why the Silence?', 46 *The International and Comparative Law Quarterly* (1997) 55–80; J. Gardam, 'An Alien's Encounter with the Law of Armed Conflict', in N. Naffine and R.J. Owens (eds), *Sexing the subject of law* (LBC Information Services, Kew, 1997), pp. 233–250; A. Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge University Press, Cambridge, 2003); H.M. Kinsella, 'Gendering Grotius: Sex and Sex Difference in the Laws of War', 34 *Political Theory* (2006) 161–191; H.M. Kinsella, *The Image before the Weapon: A Critical History of the Distinction between Combatant and Civilian* (Cornell University Press, Ithaca, NY, 2011); R.C. Carpenter, *Innocent Women and Children: Gender, Norms and the Protection of Civilians* (Taylor & Francis, Oxford, 2006).

79 The Chamber stated 'There is ample evidence of the LRA abducting persons in Northern Uganda, and of the integration of the abductees into the LRA as fighters. Although there is evidence of female LRA members participating in military training and operations, including combat, the evidence discussed below indicates that the role of fighter was primarily intended for male abductees.' *Ongwen* Judgement, *supra* note 1, para. 894.

80 D. Mazurana, 'Women, Girls, and Non-State Armed Opposition Groups' in Carol Cohn and Cynthia H Enloe (eds), *Women and Wars: Contested Histories, Uncertain Futures* (Wiley, New York, NY, 2012), pp. 146–168; C.O.N. Moser, *Victims, Perpetrators or Actors?: Gender, Armed Conflict and Political Violence* (Zed Books, London, 2001); M. Alison, 'Women as Agents of Political Violence: Gendering Security', 35 *Security Dialogue* (2004) 447–463; M. Alison, 'Cogs in the Wheel? Women in the Liberation Tigers of Tamil Eelam', 6 *Civil Wars* (2003) 37–54; E.J. Friedman and I.A. Luciak, 'After the Revolution: Gender and Democracy

During trial, several witnesses accounted for women participation in fighting.⁸¹ Further, as Dolnik and Butime state '[b]y allowing women to participate in combat operations, the group is in a position to harness all its human resources.'⁸² All new abductees in the LRA would go through training irrespective of gender.⁸³ This indicates that, despite a perception of women as non-fighters, and their continuous reference as 'wives', their roles were fluid and they did contribute to the war effort as well. Yet, the OTP and the Chamber stressed that women were abducted to 'force them to serve in Sinia brigade as so-called 'wives' of members of Sinia brigade, and as domestic servants.'⁸⁴ By dismissing women's fighting roles, their victimhood is asserted. Likewise, by emphasising men's fighting roles their victimhood is negated.

Lastly, the OTP categorised the enslavement charges in block 3 as gender crimes. The Rome Statute was the first international criminal law convention to define 'gender'.⁸⁵ The Statute provides that 'the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does

in El Salvador, Nicaragua, and Guatemala', 66 *The Journal of Politics* (2004) 1328–1330; E.J. Wood, 'Armed Groups and Sexual Violence: When Is Wartime Rape Rare?', 37 *Politics & Society* (2009) 131–161.

- 81 Ongwen Judgement, *supra* note 1, paras 166, 266, 270, 417. There is even an account of a female fighter raping a female, which was not brought up as rape by the OTP. 'During the attack in the camp, a female LRA attacker raped, a civilian resident of the camp, with a comb and a stick used for cooking, while the victim's husband was forced to watch. The rape was committed with such force that started to bleed.' Ongwen Judgement, *supra* note 1, para. 166.
- 82 A. Dolnik and H. Butime, *Understanding the Lord's Resistance Army Insurgency* (World Scientific, Singapore, 2017), p. 209.
- 83 'They received us in the barracks, they cleaned and washed our wounds, until our wounds where healed they kept us well. They then started recruiting us into the armed forces by training us ... Then they gave us guns ... (Informant 10). M. Gustavsson, J. Oruut and B. Rubenson, 'Girl Soldiers with Lord's Resistance Army in Uganda Fighting for Survival: Experiences of Young Women Abducted by LRA', 15 *Children's Geographies* (2017) 690–702, p. 695. 'After training in military tactics and use of weaponry, girls participate in front-line combat, with some holding command positions within the LRA.' S. McKay, 'Girls as "Weapons of Terror" in Northern Uganda and Sierra Leonean Rebel Fighting Forces', 28 *Studies in Conflict & Terrorism* (2005) 385–397, p. 390.
- 84 Ongwen Judgement, *supra* note 1, para. 212.
- 85 For a discussion on this topic See: Grey, *supra* note 6; V. Oosterveld, 'The Definition of Gender in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice', 18 *Harvard Human Rights Journal* (2005) 55–84; V. Oosterveld, 'Constructive Ambiguity and the Meaning of "Gender" for the International Criminal Court', 16 *International Feminist Journal of Politics* (2014) 563–580; I. Rosenthal, V. Oosterveld and S. SáCouto (eds), 'What Is "Gender" in International Criminal Law?' in *Gender and International Criminal Law* (Oxford University Press, Oxford, 2022), chapter 1.

not indicate any meaning different from the above.⁸⁶ In 2014 the OTP published its Policy on Gender in which it interprets and understands the definition of gender. In the Policy, the OTP ‘acknowledges the social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys.’⁸⁷ The Policy also defines gender-based crimes as ‘those committed against persons, whether male or female, because of their sex and/or socially constructed gender roles.’⁸⁸ If, according to the OTP, women were abducted to become ‘wives’ and domestic servants and men were abducted to become soldiers, then not only the crimes committed against women are gender-based crimes, but also those committed against men, as both of these respond to traditional understanding of gender roles. Yet, the fate of men in the LRA was not considered criminal by the OTP nor the Trial Chamber.⁸⁹ Gender-based crimes in the *Ongwen* case are synonymous with crimes against women. This reinforces women’s representations as victims and men’s representation as perpetrators.

6 Conclusion

At the ICC, forcing someone to fight is yet to be considered enslavement, or any other international crime. Arguable, the *Ongwen* case was, in this regard, a lost opportunity. Dominic Ongwen was charged with (and found guilty of) several counts on enslavement as crime against humanity. The factual charges differ between the ones in block 1 and the one in block 3. The four counts of enslavement in block 1 include the period in which abductees, men, women, and children, were made to carry items and wounded soldiers from the IDP camp to the LRA camp. The one in block 3 include the domestic labour women were forced to do while staying in the LRA. The exclusion of men as victims of enslavement (in block 3) is due to men being represented only as fighters, and therefore as perpetrators. In turn, women’s fighting roles have been dismissed and they are only represented as victims.

The enslavement charges in the *Ongwen* case, show how gender representations in war impact victimhood recognition at the ICC. Men are not

86 Rome Statute, Article 7.3.

87 ICC, Policy Paper on Sexual and Gender-based Crimes, June 2014, p. 3.

88 *Ibid.*

89 Except for the conscription, enlistment, and use of children below the age of 15 to actively participate in hostilities, a crime that was charged and of which Ongwen was found guilty of. However, this crime only protects younger children.

considered victims once they become fighters, women in turn are considered victims at the expense of their fighting roles. The LRA increased their ranks through abductions. All abductees in the LRA were subjected to mistreatment, threats of death if they tried to escape and physical punishment when disobeying orders. The environment in which they were in was coercive. They were all forced to work, including military training, and fighting. Despite that enslavement is a continuous crime, that forcing a civilian to fight can be an international crime, as supported by international jurisprudence, and that the elements of enslavement were met with relation to men in the *Ongwen* case; men's fate in the LRA was not object of the enslavement charges. The charges that had men as victims were limited in time, up until the moment they were forced to become fighters. For women, enslavement appears as a continuum but only had some aspect of the forced labour women endured recognised. Their fighting roles were not included in the charges.

The OTP held that men were abducted to become fighters and women to become 'wives'. But the OTP only made the latter a gender-based crime, ignoring men's gendered dimension. Grey has stated that 'the inclusion of gender-based crimes in the ICC's legal framework did not guarantee that these crimes would be effectively investigated and prosecuted in practice.'⁹⁰ Heathcote et al have warned that international criminal law structural bias 'places individuals and harms into specific gendered categories'.⁹¹ This can be seen in the *Ongwen* case with respect to the enslavement charges. The ICC's approach to the crime of enslavement in this case sustains an unequal protection that leads to the reinforcement of gender representations, in particular the role of men and women in war.

90 Grey, *supra* note 6, p. 3.

91 G. Heathcote, S. Bertotti, E. Jones and S.A. Labenski, *The Law of War and Peace: A Gender Analysis Volume 1* (Zed Books, London, 2021), p. 185.