

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-02/04-01/15 A
Date: 14 November 2021

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

**Request for Leave to File an *Amici Curiae* Brief on Forced Marriage
Pursuant to Rule 103 of the Rules of Procedure and Evidence**

Source: Erin Baines
Anne-Marie de Brouwer
Annie Bunting
Eefje de Volder
Kathleen M. Maloney
Melanie O'Brien
Osai Ojigho
Valerie Oosterveld
Indira Rosenthal

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

The Office of the Prosecutor

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Mr Krispus Ayena Odongo

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Ms Beth Lyons

Legal Representatives of the Victims

Mr Joseph Akwenyu Manoba

Mr Francisco Cox

Ms Paolina Massidda

REGISTRY

Registrar

Mr Peter Lewis

I. INTRODUCTION

1. Erin Baines, Anne-Marie de Brouwer, Annie Bunting, Eefje de Volder, Kathleen M. Maloney, Melanie O'Brien, Osai Ojigho, Valerie Oosterveld, and Indira Rosenthal¹ (the "Applicants") request leave to submit *amici curiae* observations in their personal capacity² on the merits of some of the legal questions presented in the Appeals Chamber's order of 25 October 2021 ("Order")³ and pursuant to Rule 103 of the Rules of Procedure and Evidence ("Rules").

II. EXPERTISE

2. The nine Applicants are highly qualified scholars and/or practitioners with expertise on sexual and gender-based crimes under international criminal law, particularly with respect to forced marriage. A number of the Applicants have published extensively on the international criminal law topics of forced marriage, sexual and gender-based crimes, and gender-sensitive analysis, and others have practice experience on these themes. A summary of the expertise of each Applicant is provided in Appendix 1.

III. SUMMARY OF OBSERVATIONS

3. The Applicants propose to assist the Appeals Chamber as *amici curiae* by offering observations on the legal interpretation of the crime against humanity of 'other inhumane acts' (forced marriage) as indicated under paragraph 19(b) of the Order. In particular, the Applicants will focus on the following matters: 1) the history of recognition of forced marriage under the crime against humanity of 'other inhumane acts'; 2) the distinction of forced marriage as an 'other inhumane act' from other crimes recognized in article 7(1) of the Rome Statute; 3) the elements of

¹ Listed in alphabetical order.

² The views expressed herein are those of individual *amici* and do not necessarily reflect the views of their respective institutions. The Applicants are grateful to Magali Maystre for her comments and suggestions on this submission.

³ Order inviting expressions of interest as *amici curiae* in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence), 25 October 2021.

forced marriage as an ‘other inhumane act’; 4) the categorization of an ‘other inhumane act (forced marriage) as a continuing crime; 5) and considerations related to the legal interpretation of forced marriage that arise at the sentencing and reparations phases.

4. On the first theme, the Defence has appealed Mr. Ongwen's conviction of the crime against humanity of other inhumane acts (forced marriage) on the grounds that, *inter alia*, the Pre-Trial Chamber and/or the Trial Chamber added a “new” crime to article 7(1)(k) of the Rome Statute.⁴ In essence, this is a *nullum crimen sine lege* argument. The Applicants will provide the Appeals Chamber with an informed analysis of why the category of forced marriage as an ‘other inhumane act’ should not be viewed as a “new” crime added to article 7(1)(k) of the Rome Statute. The Applicants will trace the history of the inclusion of forced marriage in the residual and non-exhaustive crimes against humanity category of ‘other inhumane acts’. The Applicants will discuss the jurisprudence on forced marriage from the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the International Criminal Court, including their consideration of the principle of *nullum crimen sine lege*. This explanation will indicate that forced marriage has been considered as an ‘other inhumane act’ within international criminal law in multiple cases against different accused, resulting in convictions relating to factual scenarios dating back more than four decades.
5. On the second theme, the Applicants will provide insight on how the relevant jurisprudence has distinguished the ‘other inhumane act’ of forced marriage from other types of crimes recognized in article 7(1) of the Rome Statute in two ways. First, the Applicants will outline jurisprudence indicating that the distinct nature of forced marriage stems from its relationship with the international human right

⁴ Public Redacted Version of “Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021”, filed on 21 July 2021 as ICC-02/04-01/15-1866-Conf (public with public Annexes A-B, D and confidential Annex C), 19 October 2021, paras 147-149, 975, 978.

to freely and consensually enter into marriage, and international criminal law's extension of that concept to intimate/conjugal relationships in armed conflict, atrocity settings, and oppressive regimes. Second, the Applicants will discuss jurisprudence distinguishing the 'other inhumane act' of forced marriage from other article 7(1) crimes through the constellation of acts and harms that denote forced marriage relationships.

6. On the third theme, the Applicants will analyze the two central elements of forced marriage as an 'other inhumane act': first, the perpetrator must have 'inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act', and second, the act must have been 'of a character similar to any other act referred to in article 7[(1)] of the [Rome] Statute'.⁵ The Applicants will demonstrate that the jurisprudence indicates that forced marriage is correctly classified as an 'other inhumane act', and that it satisfies both requirements. In particular, victims of forced marriage are denied agency to enter into a marriage (or marriage-like relationship) with the free and full consent of both partners. They are forced into a relationship with another person through physical or psychological force, threat of force, or by the perpetrator taking advantage of a coercive environment. Such acts are the hallmarks of 'other inhumane acts'.
7. On the fourth theme, the Applicants will confirm that the 'other inhumane act' of forced marriage is properly categorized as a continuing crime, in line with previous international case law, due to the manner in which it is carried out over time and in multiple locations, including in the factual record of *Ongwen*.
8. On the fifth theme, the Applicants will outline considerations related to the legal interpretation of forced marriage that arise at the sentencing and reparations phases. These include the physical, psychological and societal effects of forced

⁵ Elements of Crimes, Article 7(1)(k): Crime against humanity of other inhumane acts, Elements 1-2.

marriage on the victims and their communities, and the intersection of gender- and youth-based discrimination, and other forms of discrimination, as factors compounding the victims' harms.

IV. RELIEF SOUGHT

9. For the reasons stated above, the Applicants respectfully seek leave to file an *amici curiae* brief expanding on these issues.

Erin Baines

Melanie O'Brien

Anne-Marie de Brouwer

Osai Ojigbo

Annie Bunting

Valerie Oosterveld

Eefje de Volder

Indira Rosenthal

Kathleen M. Maloney

Dated this 14th day of November 2021

At The Hague, The Netherlands