

**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 *Amici Curiae* Submissions on Duress and the Standards
Applicable to Assessing Evidence of Sexual Violence Pursuant to Rule 103 of the Rules
of Procedure and Evidence**

Source: Louise Arimatsu
Adejoké Babington-Ashaye
Kirsten Campbell
Danya Chaikel
Christine Chinkin
Carolyn Edgerton
Priya Gopalan
Gorana Mlinarević
Angela Mudukuti
Cynthia T. Tai

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

The Office of the Prosecutor

Mr Karim A. A. Khan, Prosecutor
Ms Helen Brady

Counsel for the Defence

Mr Krispus Ayena Odongo
Chief Charles Achaleke Taku
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. Louise Arimatsu, Adejoké Babington-Ashaye, Kirsten Campbell, Danya Chaikel, Christine Chinkin, Carolyn Edgerton, Priya Gopalan, Gorana Mlinarević, Angela Mudukuti, and Cynthia Tai¹ (the “Applicants”) request leave to submit observations in their personal capacity on the merits of two specific legal questions presented in the Appeals Chamber’s order of 25 October 2021 (“Order”).² The Applicants make their collective request pursuant to rule 103 of the Rules of Procedure and Evidence (“Rules”).

II. EXPERTISE

2. The Applicants are highly qualified scholars and/or practitioners of international criminal law, international humanitarian law, international human rights law, and/or related fields of international law. The Applicants have published on the legal issues under review namely duress and the standards applicable to assessing sexual violence evidence, and/or contributed to the development of international criminal law and practice, and/or contributed to the jurisprudence of the International Criminal Court and *ad hoc* international criminal tribunals on these issues, including through the submission of *amicus curiae* briefs. The proposed observations are based on the Applicants’ expertise as legal scholars and/or practitioners with internationally recognised gender expertise. 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 focused observations on the following issues within the scope of paragraphs 19(a) and 19(b)(ii) of the Appeals Chamber’s Order: (1) duress and; (2) the standards applicable to assessing sexual violence evidence. The Applicants propose to submit a holistic legal interpretation and understanding of the matters under consideration in accordance with article 21(3) of the Rome Statute.

¹ Listed in alphabetical order.

² 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.

A. Grounds for Excluding Criminal Responsibility under Article 31(1)(d) of the Rome Statute

4. The Applicants propose to submit a legal interpretation of article 31(1)(d) of the Rome Statute on the defence of duress, and the requisite burden and standard of proof to be applied. In particular, the Applicants will offer observations informed by a gendered analysis and an interpretation of international criminal law that addresses the distinctions between duress and necessity, the lines of which are ambiguous in article 31(1)(d) of the Rome Statute. The proposed observations will clarify the legal characteristics of duress as a complete defence, a justification, or an excuse to sexual and gender-based crimes.
5. The Applicants will provide the Appeals Chamber with a totality of legal perspectives on this issue, including a gendered analysis of the defence of duress from national criminal law to international criminal law jurisprudence. The Applicants will also submit an analysis of whether duress can be divorced from a contextual assessment of the circumstances under which the armed conflict or widespread or systematic attack occurred. The Applicants will provide an informed gender analysis of whether duress is applicable to sexual and gender-based crimes in circumstances where the conduct of the accused contributed to the creation of an environment where such crimes were sustained and/or normalized.

B. Sexual and Gender-Based Crimes: The Standards Applicable to Assessing Evidence of Sexual Violence

6. The Applicants propose to further assist the Appeals Chamber by offering observations on international legal standards applicable to assessing sexual violence evidence, in light of article 21(3) of the Rome Statute, namely, to support the Appeals Chamber in ensuring consistency with internationally recognised human rights standards without any adverse distinction on discriminatory grounds. The Applicants will provide an analysis of the relevant international jurisprudence and the “applicable treaties and the principles and rules of international law” as per article 21(1)(b) of the Statute, with particular reference to non-discrimination on gender grounds.
7. The Applicants will offer observations on whether there are exceptional evidentiary standards for assessing sexual violence evidence. The Applicants will set out the appropriate evidentiary standards in accordance with rule 63(2) of the Rules. Specifically, the Applicants’ analysis will confirm that there are no exceptional evidentiary standards for

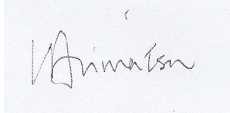
assessing sexual violence evidence. Instead, as with evidence of all Rome Statute crimes, evidence of sexual violence should be evaluated contextually in light of the totality of the evidence. Moreover, the submission will demonstrate that circumstances in which the sexual violence occurred are of equal significance for evidentiary consideration. In this regard, the Applicants will outline three essential issues regarding the assessment of sexual violence evidence: (1) the application of non-discriminatory standards; (2) the importance of a contextual evaluation; and (3) the appropriate criteria for evaluating sexual violence evidence.

8. First, the Applicants will offer observations on the assessment of sexual violence evidence according to the same standards that are applied to evidence of other crimes without making presumptions that sexual violence evidence is inherently unreliable. The Applicants will consider whether any such presumption of inherent unreliability is consistent with the purpose of rules 70-72 of the Rules which aim to prohibit a discriminatory evaluation of sexual violence evidence. The Applicants will confirm that such a presumption is contrary to established international jurisprudence demonstrating that minor inconsistencies linked to the nature and impact of sexual violence are insufficient to undermine a victim's account.
9. Second, the Applicants will address the principle that sexual violence evidence, like all evidence, should be evaluated in light of the totality of the evidence. The submission will outline how to ensure that the evidence is not assessed in isolation but rather in the context in which it occurred, such as during an armed conflict or widespread or systematic attack, and in relation to other crimes committed in that context. The Applicants will demonstrate the importance of evaluating sexual violence evidence within the geographical and temporal scope of the case. This contextual approach is also consistent with jurisprudence from other international(ised) criminal courts and tribunals as the Applicants will demonstrate.
10. Lastly, the Applicants will offer an analysis of the appropriate criteria for assessing sexual violence evidence, as established in international jurisprudence, to ensure that discriminatory stereotypes are not applied to the assessment of such evidence. The Applicants will address how such discriminatory stereotypes include those relating to gender, age, race, colour, language, religion, politics, or other status and/or an intersection of multiple discriminatory stereotypes. The brief will consider how removing

discriminatory gender stereotypes and misconceptions can contribute to the accurate assessment of sexual violence evidence.

IV. RELIEF SOUGHT

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



Louise Arimatsu



Adejoké Babington-Ashaye



Kirsten Campbell



Danya Chaikel



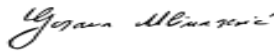
Christine Chinkin



Carolyn Edgerton



Priya Gopalan



Gorana Mlinarević



Angela Mudukuti



Cynthia T. Tai

Dated this 14th day of November 2021

At The Hague, The Netherlands