

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No. ICC-02/04-01/15 A
Date: 15 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* Submission on Sexual- and Gender-Based Crimes, Particularly Sexual Slavery, and on Cumulative Convictions, Pursuant to Rule 103 of the Rules of Procedure and Evidence

Source: Sareta Ashraph
Stephanie Barbour
Kirsten Campbell
Alexandra Lily Kather
Jocelyn Getgen Kestenbaum
Maxine Marcus
Gorana Mlinarević
Valerie Oosterveld
Kathleen Roberts
Susana SáCouto
Jelia Sané
Hyunah Yang

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. Sareta Ashraph, Stephanie Barbour, Kirsten Campbell, Alexandra Lily Kather, Jocelyn Getgen Kestenbaum, Maxine Marcus, Gorana Mlinarević, Valerie Oosterveld, Kathleen Roberts, Susana SáCouto, Jelja Sané and Hyunah Yang (“Applicants”) respectfully request leave to submit *amici curiae* observations in their personal capacities¹ on legal questions raised in paragraph 19(b)(i) and (c) of the Appeals Chamber’s order dated 25 October 2021 (“Order”),² pursuant to rule 103 of the Rules of Procedure and Evidence.

II. EXPERTISE

2. The twelve Applicants are highly qualified scholars and practitioners of international law with the requisite expertise to address legal questions in the Order pertaining to sexual- and gender-based crimes, in particular the crimes against humanity of enslavement and sexual slavery, the war crime of sexual slavery, and cumulative convictions. They have published on the above-mentioned issues, contributed to the development of international criminal law and practice, and/or contributed to the jurisprudence of the *ad hoc* international criminal tribunals on these issues. In addition, many of the Applicants have contributed to *amicus curiae* submissions on these issues before international and domestic jurisdictions. Please see Appendix 1 for a summary of each Applicant’s expertise.

III. SUMMARY OF OBSERVATIONS

3. The Applicants seek to provide the Appeals Chamber with focused observations on the legal interpretation of the crime of sexual slavery³ and on the permissibility or otherwise of entering cumulative convictions⁴ as they relate to the concurrence of: (i) sexual slavery as a crime against humanity under Article 7(1)(g) and as a war

¹ The views expressed herein are those of individual Applicants and do not necessarily reflect the views of their respective institutions unless expressly mentioned in Appendix 1. The Applicants are grateful to Magali Maystre for her comments and suggestions on this submission.

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.

³ Order, para. 19(b)(i).

⁴ Order, para. 19(c).

crime under Article 8(2)(e)(vi); (ii) enslavement and sexual slavery as crimes against humanity under Article 7(1)(c) and (g); and (iii) rape, sexual slavery and other forms of sexual violence as crimes against humanity under Article 7(1)(g) and war crimes under Article 8(2)(e)(vi) of the Rome Statute (“Statute”).

A. Legal interpretation of sexual slavery

4. The Applicants will assist the Appeals Chamber as *amici curiae* in determining the legal interpretation applicable to sexual- and gender-based crimes, and in particular sexual slavery, in accordance with the Court’s obligations under Article 21(3) of the Statute, namely, consistency with internationally recognized human rights and without adverse distinction on discriminatory grounds, including gender, race, age and other status. The Applicants will provide an analysis of human rights standards relevant to sexual slavery, with particular reference to non-discrimination on gender grounds in international instruments and jurisprudence.
5. The Applicants will address the elements and law applicable to sexual slavery as a crime against humanity and as a war crime, pursuant to Articles 7(1)(g) and 8(2)(e)(vi), and in accordance with Article 21(3) of the Statute, particularly with respect to the intersecting grounds of gender, race, age and other status.
6. Specifically, the Applicants will assist the Appeals Chamber in examining the Trial Chamber’s conclusion in its analysis of the applicable law with respect to sexual slavery, in light of the Court’s jurisprudence and the “established framework of international law.”⁵ The submission will address the legal relationship between sexual slavery and enslavement and the extent to which these legal characterizations include all enslaved persons and the full range of criminal conduct perpetrated against enslaved persons.
7. The Applicants will submit observations on the legal characterization of sexual- and gender-based crimes as perpetrated through sexual slavery and enslavement. The Applicants will address such legal characterization in accordance with Article

⁵ The phrase “established framework of international law,” while jurisdictionally used in relation to Article 8 of the Statute, is here understood in reference to “applicable treaties and the principles and rules of international law” as per Article 21(1)(b) of the Statute.

21(3) of the Statute to assist the Court in fully reflecting the criminality of accused persons, including the full range of criminal conduct against enslaved persons, without distinction as to gender or age.

8. The Applicants will assist the Appeals Chamber in determining whether the Trial Chamber's legal interpretation of the Statute with regard to enslavement and sexual slavery crimes is in accordance with the "established framework of international law." To that extent, the Applicants also will offer a review of the scope of conduct underpinning the crimes of sexual slavery and enslavement under relevant international law jurisprudence in accordance with Article 21(3).

B. Permissibility or otherwise of entering cumulative convictions

9. The Applicants will assist the Appeals Chamber by outlining the legal test established and applied consistently by other international criminal tribunals for entering cumulative convictions. In this regard, the Applicants will submit a review of the legal drafting history of Article 7(1)(c) and (g) and Article 8(2)(e)(vi) of the Statute, relevant jurisprudence, the "established framework of international law," and intersectional gender- and age-competent policy considerations to assist with the application of the established test.
10. The proposed submission will consider the purpose and permissibility of entering cumulative convictions, particularly in relation to the concurrence of enslavement and sexual slavery, and *vis-à-vis* other cognizable sexual and gender-based crimes. In this respect, the Applicants will assist the Appeals Chamber in considering the ways in which Article 21(3) of the Statute is pertinent to determining issues of concurrence.
11. Further, the proposed submission will address the Defense's arguments referred to in the Appeals Chamber's Order on whether Article 20 of the Statute provides guidance on issues of concurrence.⁶ The Applicants will address the principle of *ne bis in idem* and whether it operates with respect to issues of concurrence against the

⁶ Order, para. 17; 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 277-282 (ground 20 of the appeal).

same accused in the same proceeding for the sexual and gender-based crimes outlined above.⁷

12. Finally, the Applicants will, based on gender- and age-competent analyses, assist the Appeals Chamber in addressing sexual slavery conduct, the legal characterizations of the criminal conduct, and the purpose and permissibility or otherwise of cumulative convictions. By providing the Court with a review of relevant jurisprudence and the “established framework of international law,” the proposed submissions will address the range of criminal conduct inherent in the enslavement of persons, especially children, and the gender-based nature of this crime.

IV. RELIEF SOUGHT

13. For the reasons stated above, the Applicants respectfully seek leave to submit observations as *amici curiae* to the Appeals Chamber.



Jocelyn Getgen Kestenbaum, Associate Professor of Clinical Law,
Benjamin N. Cardozo School of Law
on behalf of the abovementioned named Applicants

Dated this 15th day of November 2021

At The Hague, The Netherlands

⁷ Public redacted version of “Prosecution Response to ‘Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021’ (ICC-02/04-01/15-1866-Conf),” 21 October 2021, ICC-02/04-01/15-1882-Conf (Public with public Annexes A, B and public redacted Annex C), 9 November 2021, para. 141.