

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

THE APPEALS CHAMBER

Before: Judge Luz del Carmen Ibáñez Carranza, President
Judge Piotr Hofmański
Judge Solomy Balungi Bossa
Judge Reine Alapini-Gansou

SITUATION IN UGANDA

IN THE CASE OF *THE PROSECUTOR v. DOMINIC ONGWEN*

Public

**Request by Professor Jean Allain
for Leave to Submit Observations
on the issue of Sexual and Gender-based Crimes**

Source: Professor Jean Allain, Monash University,
Castan Centre for Human Rights Law

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

M. Peter Lewis

Introduction

1. Pursuant to the Order of the Appeals Chamber dated 25 October 2021, the following expression of interest as *amicus curiae* seeks leave to submit observations on the merits of the legal questions related to sexual and gender-based crimes – specifically the crimes of sexual slavery and forced marriage – in judicial proceedings before the Appeals Chamber of the International Criminal Court in the case of *The Prosecutor v. Dominic Ongwen*.

Applicant

Particular expertise on legal issues of sexual and gender-based crimes

1. My name is Jean Allain, I am a Professor in Law at Monash University, Australia, where I am a Member of the Castan Centre for Human Rights Law.

2. I am a qualified scholar in international law, having received my doctorate in international law from the Graduate Institute for International Studies, University of Geneva. In 1996-1997, I clerked for Antonio Cassese, the first President of the International Criminal Tribunal for the former Yugoslavia (ICTY); later I acted as a Research Assistance for the Defence in the *Celebici* case; and was invited by the Office of the Prosecutor, within its *Guest Lecture Series*, to speak on the crimes of enslavement and sexual slavery in both 2007 and 2018.

3. I am a leading expert on issues of enslavement and other forms of exploitation in international law. From 2017 to 2021, I held a concurrent position as the Chair in International Law at the Wilberforce Institute for the Study of Slavery and Emancipation, University of Hull, UK; as well as, from 2015-2019, the position of Special Adviser, Anti-Slavery International, the world's oldest human rights organisation.

4. My expertise in the legal interpretation of sexual and gender-based crimes flows from my work on human exploitation. I produced the *travaux préparatoires* of the 1926 Slavery Convention and the 1956 Supplementary Convention, as *The Slavery Conventions*, with M. Nijhoff in 2008. In 2012, I edited *The Legal Understanding of Slavery* with Oxford University Press; in 2013, I published *Slavery in International Law* with M. Nijhoff / Brill, which includes chapters devoted to the crimes of enslavement (including sexual slavery) and forced marriage. In 2015, I published *The Law and Slavery* with Brill, a back-catalogue of papers which also includes a chapter on enslavement and sexual slavery and another on forced marriage.

Lines of Argument

Main lines of argument: legal interpretation of sexual and gender-based crimes

5. What follows is the main lines of argument to be included in an *amicus curiae* to be submitted before the Appeals Chamber in regard to area b. Sexual and gender-based crimes; and more specifically: (i) the crimes of sexual slavery and forced marriage. I do not propose to speak to forced pregnancy, an issue I have not published on.

Sexual Slavery

6. That ‘Sexual Slavery’, with the framework of the International Criminal Court, is to be understood as constituting the crime of ‘Enslavement’ of a sexual nature. Both Sexual Slavery and Enslavement share common Element 1 of their respective *Elements of the Crimes* (including a common footnote).

7. That ‘sexual’ is an adjective which describes a form of enslavement. That form is set out in common Element 2 of the *Elements of the Crimes* of ‘sexual slavery’. The line of argument which will be developed sets out the manner in which sexual slavery should be read: that the ‘one or more acts of a sexual nature’ is key to the establishment and perpetuation of sexual slavery in instances of the phenomena of ‘forced marriage’ which this Court has considered.

8. That the crime of Enslavement, as defined within the Statute of the International Criminal Court is, in substance, the same as ‘slavery’ as first set out in the 1926 Slavery Convention and later in the 1956 Supplementary Slavery Convention: ‘the exercise of any or all of the powers attaching to the right of ownership over a person’. Both of these instruments recognise and are meant to address slavery ‘in all its forms’, including that of the phenomena of ‘forced marriage’.

9. That to date, the International Criminal Court has relied on the jurisprudence first developed by the ICTY to consider the crime of enslavement by means of a number of indicia. Those indicia have been the basis for the findings of cases of enslavement within the Court. In 2016, the Inter-American Court of Human Rights went beyond speaking of indicia as a means of identifying cases of enslavement and instead conceptualised slavery. The line of argument which will be developed will consider this conceptualisation as a means of ensuring the principle of legal certainty around the application of Element 1 of the crime of sexual slavery.

10. That the line of argument developed will demonstrate how Element 1 of the crimes of sexual slavery (be it as a crime against humanity or a war crime) can be read so as to be internally consistent; while setting out an understanding of the circumstances in which ‘similar deprivations of liberty’ such as forced labour, ‘servile statuses’ as defined by the 1956 Supplementary Convention, and trafficking in persons, may be understood so as to ensure the principle of legality is respected in regard to the crime of sexual slavery.

11. That, having set out the above lines of argument, and having taken into consideration the jurisprudence and relevant material from this Court, the observations to be presented, as *amicus curiae* will provide context and analysis as to the crime of sexual slavery.

Forced Marriage

12. That a legal interpretation of the crime of ‘forced marriage’ within the framework of the International Criminal Court should find that such a crime lacks the *opinio juris* or state practice necessary to establish it as a stand-alone crime. While three international legal instruments concluded between 1962-1979 speak of the need to have free and full consent to marry; provisions which pre-date these are the first-ever consideration of marriage in international law. The 1956 Supplementary Slavery Convention establishes the international crimes grouped together under what may be termed ‘servile marriages’, that is: provisions related to ‘bride purchase’, ‘wife transfer’, and ‘widow inheritance’.¹ As will be shown, each of these meet the legal threshold of enslavement as set out in Element 1 of the crime of sexual slavery under the jurisdiction of the International Criminal Court.

13. That the origins of the legal interpretation of the international crime of ‘forced marriage’ should be understood as having emerged as a result of a procedural matter, a type of ‘cumulative convictions’ issue such as the Appeals Chamber is now seeking observations upon. In the *Brima* case, the Special Court for Sierra Leone dealt with duplicity in regard to the crime against humanity of ‘sexual slavery and any other form of sexual violence’ and, as a result, felt compelled to develop the stand-alone concept of forced marriage.²

¹ See Articles 1 and 2, Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956. Note that this Convention is mentioned in the footnote to Element 1 of both Sexual Slavery and Enslavement.

² See *The Prosecutor v. Brima, et als.*, SCSL-04-16-T, Special Court for Sierra Leone, 20 June 2007, available at: <https://www.refworld.org/cases,SCSL,467fba742.html>, p. 46.

14. That the line of argument which will be developed in considering ‘forced marriage’ will focus on the substance of the relationship at hand: enslavement. It will show that in such cases men have dominion over the women *they* designate as their ‘wives’. Rather than taking as a starting point the designation which the perpetrator has hoisted on his victim, consideration should be given to the type of control – and especially that of a sexual nature – which is exercised in a manner which is tantamount to possession, and then which allows for the various other powers attaching to the rights of ownership to be engaged in cases of ‘forced marriage’.

15. That the phenomena of ‘forced marriage’ is a gender-based crime which was not contemplated at the time of the conclusion of the Rome Statute of the International Criminal Court. The phenomena should be understood as a form of ‘sexual slavery’ wherein rape and sexual violence are utilised as a means of establishing and continued to exercise control throughout the process of the sexual enslavement.



Jean Allain
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Dated this 14th day of November 2021
At Ferntree Gully, Australia