

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

**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 Solomony Balungi Bossa
Judge Reine Alapini-Gansou
Judge Gocha Lordkipanidze

SITUATION IN UGANDA

IN THE CASE OF THE PROSECUTOR v. DOMINIC ONGWEN

Public Document

**Request for leave to submit observations pursuant to Rule 103(1) of the Rules of Procedure
and Evidence**

Source: Professor Bonita Meyersfeld and the Southern African Litigation Centre
Trust

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 Victims

Mr Joseph Akwenyu Manoba

Mr Francisco Cox

Ms Paoline Massida

REGISTRY

Registrar

Mr Peter Lewis

I. Object of the Request

- 1 This request by Professor Bonita Meyersfeld and the Southern African Human Rights Litigation Centre Trust (“SALC”) for leave to submit Amicus Curiae Observations is filed pursuant to the order of the Appeals Chamber entitled ‘Order inviting expressions of interest as *amici curiae* in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence)’ dated 25 October 2021 (ICC-02/04-01/15 A).

II. Expertise of the Authors

- 2 Professor **Bonita Meyersfeld** (J.S.D. Yale; LL.M. Yale) is an associate professor at the University of the Witwatersrand in Johannesburg, South Africa, the former director of the Wits Centre for Applied Legal Studies, and an advocate at the Johannesburg Bar. Bonita Meyersfeld is the author of the following publications relevant to the legal questions presented: *Domestic Violence in International Law* (Hart /Bloomsbury Publishing; 2010 1st ed., Oxford); ‘Forced and Servile Marriage: A Proposal for Law Reform in the Commonwealth’ in the *Commonwealth Law Bulletin* (2011); ‘Implementing the Rome Statute in Africa: Potential and problems of the prosecution of gender crimes in Africa in accordance with the Rome Statute’ in *Power and Prosecution: Challenges and Opportunities for^[1] International Criminal Justice in Sub-Saharan Africa* edited by Ambos, K. and Maunganidze, O.A. (Göttingen Studies in Criminal Law and Justice, 2012); ‘A Gender Perspective on the Relationship between Humanitarian Law and International Human Rights Law’ in *Convergence and Conflicts of Human Rights and International Humanitarian Law in Military Operations* edited by De Wet, E. and Kleffner, J. (Pretoria University Press, 2014); and ‘The Application of the Principles of State Responsibility in International Law to Systemic Intimate Violence’ in *Home Made Violence* edited by De Vido, S. and Candiottio, L. (Mimesis, 2016). In 2011 she was invited to submit expert written submission to Commonwealth Law Ministers on forced and servile marriage. She was a parliamentary legal officer in the UK House of Lords where she was a drafter of the UK legislation on forced marriage. Bonita Meyersfeld was appointed Chevalier de l’Ordre national du Mérite (Knight of the National Order of Merit) by the President of France in

honour of her work in human rights and gender-based violence. Bonita Meyersfeld has appeared in the Constitutional Court, the Supreme Court of Appeals and the High Court of South Africa, in matters relating to international law and gender-based violence.

- 3 SALC is a non-governmental organisation that promotes human rights and the rule of law in Southern Africa. SALC conducts strategic litigation in matters of international criminal justice and the protection of human rights in numerous African jurisdictions. SALC's international criminal justice programme aims at ensuring that Southern African states are aware of, and act in compliance with their legal obligations, including those under the Rome Statute. SALC compelled the Government of South Africa to arrest President Al-Bashir when he visited the country for an African Union Summit in 2015. SALC was admitted as *amicus curiae* by the PTC II in the case of *the Prosecutor v Omar Hassan Ahmad Al-Bashir (Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir)*.¹ SALC was an applicant in the *Torture Docket* case², where the Constitutional Court of South Africa established the scope of the principle of universal jurisdiction for the investigation and prosecution of international crimes. SALC was a litigant in *Democratic Alliance v Minister of International Relations and Cooperation and Others* where SALC submitted that South Africa's instrument of withdrawal from the ICC was unconstitutional. SALC has litigated matters that resulted in precedent cases on the protection of sexual and reproductive rights in various jurisdictions including Namibia, Zimbabwe, Tanzania and Lesotho.³ SALC has prosecuted police perpetrators of sexual violence in Malawi and has supported litigation to ensure police accountability for sexual violence in Malawi and Nigeria.

III. Summary of Observations

¹ *Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir*, 6 July 2017, ICC-02/05-01/09-302.

² *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre*, Constitutional Court of South Africa 2015 (1) SA 315 (CC).

³ Namibia: *Government of the Republic of Namibia v LM* (SA 49-2012) [2014] NASC (3 November 2014); Zimbabwe: *Mapingure v Minister of Home Affairs & Others* (SC 22 of 2014, Civil Appeal SC 406 of 2012) [2014] ZWSC 22 (24 March 2014); Tanzania: *Attorney General v Rebeca Z. Gyumi* (Civil Appeal No.204 of 2017) [2019] TZCA 348 (23 October 2019); Lesotho: *Mokhele and Others v Commander, Lesotho Defence Force and Others* (CIV/APN/442/16) [2018] LSHC 2 (14 February 2018).

- 4 **Principle of distinction:** Forced marriage, sexual slavery and forced pregnancy (“**SGB crimes**”) are distinct, cognisable crimes, each having materially different elements not contained in the other. While sexual violence is a common element of SGB crimes, their material elements – the *actus reus*, the *mens rea*, and, most importantly, the harm – are all different. Therefore, the Trial Chamber’s interpretation of the constitutive elements of the SGB crimes, and the concurrent convictions, is correct.

- 5 **Forced marriage is a cognisable crime.** According to Article 21(1) of the Statute, the Court may apply sources of law beyond the Statute itself, including treaties, established principles of the international law of armed conflict, and general principles of law derived from national laws of legal systems. Forced marriage has been recognised as a cognisable crime by, *inter alia*, the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia.

- 6 **The constitutive elements of forced marriage** that distinguish it from other SGB crimes, including rape, is, *inter alia*, the element of a non-consensual conjugal relationship (“**conjuality**”), which includes the element of ownership. Conjuality has both an internal and external component. The internal component is the constant dehumanisation of the victim in having to take on a role as a ‘wife’ and to act as a willing participant. This constitutes a constant annihilation of the victim’s identity. The external component relates to the perception by the families and communities of the forced ‘wives’. Although forced marriage is moored in violence and coercion, forced wives are often seen as complicit in their situation and thus as committing an act of betrayal. This leads to ostracization that extends beyond the termination of the forced marriage.

- 7 **The constitutive elements of sexual slavery** include confinement and rape and the deprivation of autonomy for the purposes of performance of an array of sexual services. While forced marriage entails a form of ownership, it occurs within the context of conjuality. Sexual slavery is pure commodification of the slave. This demands a dehumanisation and objectification that inhere in all forms of slavery. It is the combination of commodification, bondage and sexual violence, that create the cognisable crime of sexual

slavery. The fact that forced conjugality includes rape and sexual violence, does not mean that a forced wife is necessarily or always a sexual slave. The conflation of the two elides the defining contours of each crime, the harm that occurs, and the interests they violate.

- 8 **As regards forced pregnancy**, the harm inheres in the state of pregnancy in coerced and forced confinement. The removal of choice constitutes a denial of the victims' reproductive autonomy and health, a harm that is different from the harm that inheres in other SGB crimes. Where a woman is forced into marriage and is forced to be pregnant, there are two separate violations that occur. Simply because there is one act of confinement does not negate the fact that there are two separate violations occurring, the one relating to conjugality and the other relating to the condition of being pregnant.

- 9 **The evidence required** in respect of SGB crimes requires proof of facts that are specific to each particular crime. Evidence that proves SGB crimes, consistent with Rules 63, 70, 71 includes: (i) witness testimony; (ii) context or patterns of conduct; and (iii) reports by third parties of SGB crimes that fall outside of the confines of the charges against the accused. Evidence of third parties about SGB crimes committed by other perpetrators within the same leadership is not hearsay but corroborative evidence. For the most part, SGB crimes occur in private and are masked by the normalisation of sexual violence and the subordination of women. The scale and institutionalised nature of these crimes are proved by the commonality of the allegations. It is therefore permissible and proper to rely on uncharged evidence to corroborate a witness' testimony. The probative value of such evidence, in the case of SGB crimes, outweighs any potential prejudice to an accused.



Prof Dr Bonita Meyersfeld



Anneke Meerkotter on behalf of SALC

Dated 15 November 2021

Johannesburg, South Africa