Cour
Pénale
Internationale

International
Criminal
Court

Original: English

No. ICC-02/04-01/15 A
Date: 23 December 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

Amici curiae observations submitted by Prof. Bonita Meyersfeld and the Southern African Litigation Centre Trust pursuant to rule 103 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

Others
Dr. Mohammad Hadi Kerosene

Professor Bonita Meyersfeld and the Southern African Litigation Centre Trust

Felicity Gerry QC, Wayne Jordash QC, Ben Douglas-Jones QC, Anna McNeil, Philippa Southwell, Dr. Beatrice Krebs and Jennifer Keene-McCann

Ms Ardila, Mariana; Ms Fernández-Paredes, Teresa; Ms Ibáñez, María Cecilia; Ms Kravetz, Daniela; Ms SáCouto, Susana; Ms Seoane, Dalila

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

Dr. Rosemary Grey, Global Justice Center (GJC); Amnesty International (AI), Women's Initiatives for Gender Justice (WIGJ)

NIMJ - National Institute of Military Justice

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

Tina Minkowitz, Robert D. Fleischner

Public International Law & Policy Group

Justice Francis M. Ssekandi
Professor Erin Baines, Professor Kamari M. Clarke, Professor Mark A. Drumbl

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

Dr. Paul Behrens, University of Edinburg

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

Association of Defence Counsel Practicing before the International Courts and Tribunals (ADC-ICT)

Prof. Dr. Mario H. Braakman
Mr. Arpit Batra

Warner ten Kate

REGISTRY

Registrar
Mr Peter Lewis

Introduction

1. Forced marriage, sexual slavery and forced pregnancy ("**SGB crimes**") are distinct, cognisable crimes. Each crime has materially distinct elements not contained within the statutory definition of the other. It is possible, therefore, to have concurrent charges and convictions for such crimes where there is common conduct. As submitted in these observations, the material elements of all SGB crimes – the *actus reus*, the *mens rea*, and, most importantly, the harm – are different.
2. Based on this premise, these observations make the following assertions: (i) each SGB crime may not be subsumed by the other; and (ii) the evidence needed to prove the distinct material elements of each crime is specialised given the psycho-social and cultural imperatives implicated in SGB crimes.
3. We do not focus on all the elements of each SGB crime but only on those that distinguish it from other SGB crimes. These observations comprise two parts. The first identifies the specific elements of each SGB crimes that differentiates it from the other and how this should be legally interpreted. The second part addresses the question of evidence.

Part 1: SGB crimes have materially distinct elements

The distinguishing element and harm of forced marriage

4. Forced marriage is a distinct, cognisable crime in terms of Article 7(1)(k) of the Rome Statute of the International Criminal Court ("**the Statute**").[1] The definitional elements of forced marriage constitute "inhumane acts" in terms of Article 7(1)(k) of the Statute. Inhumanity is linked to the harm caused by the conduct.[2] The Extraordinary Chambers in the Courts of Cambodia ("**ECCC**") identified factors relevant to the determination of inhumanity, including "the nature of the act or omission, the context in which it occurred, the personal circumstances

[1] The Defence argues that forced marriage is not a cognisable crime under the Rome Statute. Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021, 19 October 2021, ICC-02/04-01/15-1866-Red (with public annexes A, B and confidential annex C; original confidential version filed on 21 July 2021, ICC-02/04-01/15-1866-Conf) ("**Appeal Brief**") para. 978.
[2] Elements of Crime, Article 7(1)(k); *Prosecutor v Tadic*, International Criminal Tribunal for the former Yugoslavia ("**ICTY**") Trial Chamber Judgment, IT-94-1-T, 7 May 1997, para. 729. See also International Law Commission, Report of the International Law Commission on the work of its forty-eight session (6 May-26 July 1996), Commentary on Article 18 of the Draft Code of Crimes against the Peace and Security of Mankind, para. 17, p. 50.

of the victim, as well as the impact of the act upon the victim".[3] With respect to the crime of forced marriage, the Special Court for Sierra Leone ("**SCSL**") developed the following definition:

> "forced marriage involves a perpetrator compelling a person by force or threat of force, through the words or conduct of the perpetrator or those associated with him, into a forced conjugal association with another person resulting in great suffering, or serious physical or mental injury on the part of the victim."[4]

5. The key distinguishing factor of forced marriage is the imposition of the conjugal association on an unwilling participant that results in an unwanted and involuntary assumption of duties and obligations akin to a marriage under ordinary circumstances.[5] Conjugality may include: (i) some form of ownership or control by, or belonging to, a person who identifies as a 'husband'; (ii) gender-based violence; and (iii) the imposition of domestic duties.
6. The harm of conjugality has both internal and external components. By "internal", we mean the impact of the harm on the body and mind of the victim by the perpetrator. By "external", we mean the harm that occurs as a result of the communal ostracization that often occurs after the victim is released from the "forced marriage". The combination of the external and internal harm comprises "great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act".[6]
7. The internal component of the harm of forced marriage is devastating. It is not only about enduring sexual assault or performing domestic duties; it is about the need for a constant theatrical pretence that one does this willingly.[7] The victim faces the constant dehumanisation in having to take on a role of "wife" and to act as a willing participant in the conjugality. There is an unrelenting demand to perform in direct opposition to the way one feels. This constitutes a constant annihilation of the victim's identity, autonomy and self-worth. Such harm has been

[3] *Prosecutor v Nuon Chea and Khieu Samphan*, ECCC, Trial Chamber, Judgment, Case 002/01, 7 August 2014, para. 438.
[4] *Prosecutor v Brima, Kamera and Kanu*, SCSL, Appeals Chamber, Judgment, SCSL-04-16-T, 22 February 2008, ("***AFRC*, Appeals Chamber Judgment**") para. 195. For a discussion of the SCSL's approach to forced marriage see V Oosterveld, "Lessons from the Special Court for Sierra Leone on the Prosecution of Gender-Based Crimes" (2009) 17 *American University Journal of Gender, Social Policy & the Law* 407, pp. 414–24.
[5] *AFRC*, Appeals Chamber Judgment, paras. 190-195.
[6] Elements of Crime, Article 7(1)(k).
[7] See *Prosecutor v Brima, Kamara and Kanu*, SCSL, SCSL-2004-16-A, Appeal Brief of the Prosecution, 14 September 2007, para. 614; see also the use of the terminology of "husband" and "wife" in quotation marks by the Appeals Chamber in *AFRC*, Appeal Chamber judgment, para. 195.

described as "moral injury";[8] the victim is denied the right to evidence her feelings of fear, shame, hatred and pain.

8. The external component: Although forced marriage is moored in violence and coercion, victims 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, negatively impacting a person's ability to reintegrate into society and thereby prolonging their mental trauma.[9] The SCSL recognised the trauma of becoming "'wives' which resulted in them being ostracised from their communities. In cases where they became pregnant from the forced marriage, both they and their children suffered long-term social stigmatisation."[10]
9. The values violated by the crime of forced marriage may include individual autonomy, the right to self-determination, the right to life, health, and human dignity.[11] These confirm the gravity of the crime as envisaged by Article 7(1)(k).

The distinguishing element and harm of sexual slavery

10. The elements of sexual slavery are the combination of (i) enslavement or reducing a person to a servile status (which usually includes enforced confinement) as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956; (ii) sexual assault; (iii) commodification or ownership; and (iv) service or servitude.
11. Sexual slavery comprises a system that is akin to a service provision. Sexual slavery usually is established by the leadership of an organisation to service armed forces.[12] The enslavement is either secretly ordered or wilfully permitted.[13] Wilfully allowing sexual slavery constitutes the crime of sexual slavery in violation of the United Nations Security Council Resolution 1325, which calls on "all parties to armed conflict to take special measures to protect women and

[8] Prosecutor v *Brima, Kamera and Kanu*, SCSL, Trial Chamber, SCSL-2004-16-T, Dissenting Opinion Justice Doherty, para. 48, p. 591. ("***AFRC* Doherty Dissenting Opinion**").
[9] *AFRC* Doherty Dissenting Opinion, para. 48; *AFRC* Appeals Chamber Judgment, paras. 199.
[10] *AFRC* Appeals Chamber Judgment, para. 199.
[11] For a violation of the individual autonomy and right to self-determination see N Jain, "Forced marriage as a crime against humanity: Problems of definition and prosecution" 2008 (6) *Journal of International Criminal Justice* 1013, p. 1031.
[12] International Commission of Jurists, *Comfort Women, and Unfinished Ordeal, Report of a Mission*, by Ustinia Dolgopol and Snehal Paranjape, 1994, https://www.icj.org/wp-content/uploads/1994/01/Japan-comfort-women-fact-finding-report-1994-eng.pdf ("**ICJ Report**"), pp. 25 and 104.
[13] ICJ Report, p. 26.

girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict."[14]

12. The "comfort stations" established by the Japanese military during WWII, were designed for the purpose of consoling soldiers as a type of living barracks: "Life in the comfort stations was unmitigated misery for these women. They were confined in cubicles of three feet by five feet, where long queues of soldiers violated them day and night. The women were heavily guarded, and could not leave the comfort stations. The security surrounding the comfort stations made it impossible for them to escape."[15]
13. The essence of this harm is the combination of being reduced to an object and forced to endure the unique violence of sexual assault, the latter invading a victim's personhood and sexual autonomy and the value placed by society on sex. Sexual slavery comprises a lack of control over one's sexual autonomy, sexual health and personhood. The SCSL in the Taylor Trial judgment identified sexual slavery as a continuing crime.[16]
14. Sexual slavery includes victims being "used as sex slaves, handed from owner to owner."[17] This entails 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 distinguishing element and harm of forced pregnancy

15. The distinctive harm of forced pregnancy inheres in (i) the state of forced to be pregnant (ii) a coerced and forced confinement; and (iii) the risk of ostracization once released from captivity.
16. The key distinctive component of the crime of forced pregnancy is the violation of a woman's reproductive health and autonomy. It is not only a question of denying a woman's right to be pregnant. It is also about denying a woman the right to determine the *way* in which she may choose to be pregnant. This includes a woman's approach to her physical and mental health during the pregnancy and her right to access healthcare that will prevent miscarriages or stillbirths. It also violates the right to exercise culturally specific customs relating to pregnancy.

[14] United Nations Security Council, Resolution 1325 (2000), UN Doc. S/Res/1325, 31 October 2000, para. 10.
[15] ICJ Report, p. 15.
[16] *Prosecutor v. Taylor*, SCSL, Trial Chamber II, Judgement, SCSL-03-01-T, 18 May 2012, paras. 119, 1018.
[17] Press Release, SCSL, Office of the Prosecutor, Prosecutor Hollis Hails the Historic Conviction of Charles Taylor, Special Court for Sierra Leone, 26 April 2012, available at http://www.rscsl.org/Documents/Press/OTP/prosecutor-042612.pdf (last accessed: 22 December 2021).

17. There is also a deep trauma in having to carry, give birth to, and nurture a child conceived from violence. The act of the rape, and the attendant fear, violation and humiliation, continue throughout the period of the pregnancy and may continue after the child is born. Many victims are forced to face a seemingly irreconcilable dyad: on the one hand there may be love for and joy in the child; on the other hand, that child and the pregnancy are a constant reminder and product of an act of hatred and not love.[18] Reconciling the two emotions may lead to long-term trauma, despair and psychological and mental harm. In this way, forced pregnancy is different from sexual slavery and forced marriage. Therefore, the fact that sexual slavery, forced marriage and forced pregnancy may all involve rape and captivity, the continued imposition of pregnancy is a distinct harm that is not consumed by any of the other crimes.
18. Forced pregnancy engages the right to health. The risks that occur through pregnancy and childbirth in a humanitarian crisis, are exponentially higher than under ordinary circumstances, which might result in stillbirth, miscarriages, infertility, and other long term injury to women's reproductive and sexual organs.[19] From a generational point of view, the stigmatisation of the victim by the community as bearing the child of an enemy may cause mental suffering of the victim and the child.[20] Such stigmatization may have long term consequences such as preventing communal integration, familial acceptance and marriage.[21] Such a scenario might result in a scenario where families and communities are torn apart.[22]
19. The nuances of the crime of forced pregnancy are evident from an array of human rights treaties.[23] The Maputo Protocol ("**the Protocol**") is an important counter to the Defence's

[18] Carmela Buehler, *War Crimes, Crimes Against Humanity and Genocide: The Crime of Forced Pregnancy in the Nascent System of Supranational Criminal* Law, 18 *NEMESIS* (2002) 158, p. 166.
[19] See A Kotsadam, G Østby, "Armed Conflict and Maternal Mortality: A Micro-Level Analysis of Sub-Saharan Africa, 1989–2013." *Social Science & Medicine* 239:112526; A Schwarz,*Das völkerrechtliche Sexualstrafrecht: Sexualisierte und geschlechtsbezogene Gewalt vor dem Internationalen Strafgerichtshof* (Dunker & Humblot, Berlin, 2019) p. 256 ("**Schwarz**").
[20] United Nations Security Council, Conflict-Related Sexual Violence: Report of the Secretary-General, UN Doc. S/2019/280, para. 20; R Grey, "The ICC's First 'Forced Pregnancy' Case in Historical Perspective", 15 *J. OF INT'L CRIM. JUST.* (2017) 905, 907. See also B Nowrojee, *Shattered Lives: Sexual Violence During the Rwandan Genocide and Its Aftermath*, (Human Rights Watch, New York, 1996) pp. 75-80.
[21] R Carpenter, "Surfacing Children: Limitations of Genocidal Rape Discourse", *22 HUM. RTS. Q. 428*, p.435 (2000).
[22] Schwarz, pp. 256-257.
[23] See Article 6(1) of the International Convention on Civil and Political Rights; Article 3 of the Universal Declaration of Human Rights; Article 16(1)(e) of the Convention on the Elimination of All Forms of Discrimination; International Conference on Population and Development Programme of Action, 13 September 1994, para. 7.3; United Nations, 'Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995, UN Doc. A/CONF.177/20/Rev.1, Annex I, Beijing Declaration (Beijing Declaration), para. 29; see also Beijing Declaration, Annex II, Platform for Action, para. 95.

assertion that the criminalisation of forced pregnancy is incompatible with national law.[24] Article 14 of the Protocol sets out a list of reproductive rights and autonomy such as the right to decide whether to have children, the number of children and the spacing of children.[25] As a state party to the Protocol, Uganda has an international law obligation to take appropriate measures to "protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus."[26] Article 14 of the Protocol requires states to issue legislation and take necessary measures to provide for women's right to terminate pregnancies resulting from sexual assault, rape and incest.[27] In addition, "states are required to ensure that the legal frameworks in place facilitate access to medical abortion when the pregnancy poses a threat to the health of the pregnant mother" and that health must be interpreted to include physical, mental, social well-being.[28]

20. Moreover, the crime of forced pregnancy applies only if it occurs within the context of a widespread or systematic attack or armed conflict.[29] The elements of the international crime of forced pregnancy are distinct from the conduct involved in the prohibition of abortion. A domestic law prohibiting abortion will not satisfy those elements and, therefore, do not amount to forced pregnancy under the ICC Statute.[30] Consequently, the jurisprudence of the Chamber regarding the scope of forced pregnancy will not impact national legislation in Uganda.

Assessment of the distinctive elements of each SGB crime

21. While forced marriage entails a form of ownership, it occurs within the context of conjugality. The combination of "belonging" in the guise of a traditional and sanctioned "marriage" which creates a specific harm and suffering is a distinguishing feature of forced marriage. Sexual slavery is pure commodification of the human. The fact that forced conjugality may include sexual violence, does not mean that a victim of forced marriage is necessarily or always a sex

[24] Appeal Brief, para. 962.
[25] Article 14(1) of the Maputo Protocol.
[26] Article 14(2)(c) of the Maputo Protocol.
[27] African Commission on Human and Peoples' Rights, General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14.2 (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2014), paras. 37, 43.
[28] Ibid, para. 38.
[29] See Article 7(1)(g), (f), Article 8(2)(b)(xxii), Article 8(2)(e)(vi) of the Statute.
[30] See O Triffterer, K Ambos, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (C.H. Beck, Munich, 2015), Article 7, para. 140.

slave. The harm that occurs, and the interests they violate are different. Sexual slavery generally implies that the victim is assaulted by several men. This is one of the factors that distinguishes sexual slavery from forced marriage. However, it is not necessary that in cases of sexual slavery there has to be a multitude of men. The trend, however, is that the system of sexual slavery is designed to service the sexual needs of men and not to play the role of a wife in a sham conjugal relationship.

22. As regards forced pregnancy, the removal of choice constitutes a denial of the victim's 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.

Cumulative charges

23. Because of the distinctive nature of SGB crimes, it is both proper and permissible to have cumulative charges and convictions for such crimes. This is in keeping with the principle that multiple criminal convictions entered under different statutory provisions but based on the same conduct, are permissible if each statutory provision involved has a materially distinct element not contained in the other.[31]

24. Ultimately the principle of concurrence is this: if the four corners of one crime, and the facts underlying it, fall completely within the borders of another crime, and the facts underlying it, then there is impermissible concurrence. If the overlap does not result in the one crime completely subsuming the other, then there is permissible concurrence, even if there are elements that overlap. That is why the defence is wrong when it critiques the Trial Chamber for failing to analyse whether the crime against humanity of "forced marriage as an 'other inhumane act' is subsidiary to the crime against humanity of sexual slavery".[32]

25. The same logic applies to the principle of consumption. SGB crimes all protect distinct interests. To suggest otherwise, is to assume that any violation of women *qua* women

[31] *Prosecutor v Delalic and others*, ICTY, Trial Chamber, Judgment, ICTY-96-21-T, 16 November 1998 ("***Delalić***"), para. 412; For cumulative convictions within the crime against humanity see *Prosecutor v Kordic and Cerkez*, ICTY, Appeals Chamber, Judgment, IT-95-14/2-A, 17 December 2004, paras. 1039-1044.
[32] Appeal Brief, para. 286.

implicates only one interest. This, respectfully, is a patriarchal and outdated notion that women are reducible to their sex only and that any violation linked thereto, protects only one interest.

Part 2: Evidence

26. Evidence must be considered holistically, contextually and with understanding of the specific ways in which SGB crimes manifest.[33] Under Article 69(3) of the Statute, the Court has the authority to request the submission of all evidence that it considers necessary for the determination of the truth. In this context, consideration must be given to the following: (i) SGB crimes often take place in private, where the only witnesses are the victim and the accused; (ii) as opposed to acts of torture or genocide, for example, SGB crimes often replicate structures of society that occur during times of peace, such as marriage, sexual relations and pregnancy; and (iii) the nature of the crimes are deeply personal and traumatic for victims, who may carry a (misplaced) sense of shame and accountability for the harm.
27. SGB crimes are unlike many other crimes of conflict that affect men, for example, being held as a prisoner of war, in that there is no pre-existing social antagonism that demeans men in the same way that it does women. These factors tend to draw a veil between the crime and available evidence. It is therefore necessary, in order to establish the truth of SGB crimes, that the evidence discussed below be admissible.
28. This is in keeping with the authority of the Court to request the submission of all evidence that it considers necessary for the determination of the truth.[34] For the reasons discussed below, any prejudice to the accused in the utilisation of the evidence proposed below, does not outweigh the probative value of the evidence.[35]

Considerations relevant to the testimony of victims of SGB crimes

29. It is recognised that inherently personal, sensitive and intimate interests that are violated by SGB crimes, demand a more nuanced use of regular principles of evidence than those that pertain to other offences.[36] There are three general principles relating to the admissibility,

[33] *Prosecutor v Ongwen*, ICC, Trial Chamber, Judgement, ICC-02/04-01/15, 4 February 2021, ("**Trial Chamber Judgment**") para. 227.
[34] B Meyersfeld, *Domestic Violence and International Law* (Hart Publishing, Oxford and Portland, 2010) p. 270.
[35] Appeal Brief, para. 47.
[36] I Bantekas, *International Criminal Law* (Hart Publishing, Oxford, 2010) ("**Bantekas**") p. 163.

probative value, weight and reliability of evidence of SGB crimes and to the determination of whether an element has been proved beyond reasonable doubt.

30. Neurological responses to SGB crimes: Victims of gender-based violence may have scattered and delayed recollection of specific details. In general, there are three responses to danger: flight, fight and freeze. The body automatically adopts one of these reactions, depending on the circumstances and risks involved. In the case of gender-based violence, it is common for victims to report that they froze, became numb, or shut down during the encounter. This usually entails the suppression of memory, which is neurologically necessary in order to survive of the incidents of the crime.

31. Memory: As a result of this neurological response, victims of SGB crimes may often give testimony that lacks some details and/or that may be inconsistent. In this regard, the Trial Chamber was, respectfully, correct.[37] For example, a victim may recall a particular smell or colour or sight, but not necessarily the dates of the incidents or the faces of the perpetrators. It is important for the Court to incorporate the neurological understanding of SGB crimes in its assessment of the testimony of victims of these crimes. The approach of the Trial Chamber in this respect is correct.[38] As long as there is overall coherence between the testimony of a witness and other evidence presented to the Court, contradictions or inconsistencies should not devalue such testimony.

32. Witness demeanour: The Court should take into account the fact that it is often very difficult for witnesses of SGB crimes to talk about the deeply personal information that characterises these crimes. In general, discussions of sex and gender are private and not the subject of public discourse. This may be exacerbated for some victims where the legal counsel, judges or participants in the trial are men. This is so for two reasons. The first relates to the potential cultural approbation of discussing sex or reproductive issues with men. The second is because the perpetrator/s of the crime in the case of SGB crimes generally are male, leading to a universal fear of men.

33. These factors coalesce to make it extremely difficult for victims to speak about the crime. For this reason, victim witnesses may refrain from looking people in the eye when giving testimony; they may look down and speak softly; they may use language that is euphemistic

[37] Trial Chamber Judgment, para. 258.
[38] Trial Chamber Judgment, para. 256.

or vague. According to traditional rules of evidence, this type of conduct is associated with unreliable witnesses. In the case of SGB crimes, however, such conduct may in fact *confirm* the truthfulness and reliability of the witness.

Categories of evidence

34. There are three categories of evidence that may be admissible to prove SGB crimes: (i) direct evidence; (ii) indirect evidence; and (iii) contextual evidence. The standards applicable to assessing such evidence are contained in basic rules of evidence and include: admissibility, probative value, credibility and reliability.

35. Direct evidence includes (i) the testimony of the individual victims of the crime committed by the accused against that victim; and (ii) the testimony of those who witnessed the crime being committed by the accused against the victim. This testimony has the highest probative value and should be afforded considerable weight.

36. Indirect evidence includes the testimony of those who were victims of similar crimes. Such evidence demonstrates the pattern of conduct. While this approach is used for all international crimes, it is particularly important in respect of SGB crimes because of the privacy, silencing and normalisation of SGB crimes.[39] SGB crimes may be opaque because of pre-existing fault-lines of discrimination against, and stereotyping of, women, their sexuality and their position in society. Silencing is a particularly common component regarding SGB crimes. In the South African case of *Levenstein v Estate of the Late Sidney Lewis Frankel*, dealing the sexual abuse of children by their tennis coach, the Constitutional Court held as follows:[40]

> "Of pivotal importance to the case before us is this: that the systemic sexual exploitation of woman and children depends on secrecy, fear and shame. Too often, survivors are stifled by fear of their abusers and the possible responses from their communities if they disclose that they had been sexually assaulted. This is exacerbated by the fact that the sexual perpetrator… is in a position of authority and power over them. They are threatened and shamed into silence. These characteristics of sexual violence often make it feel and seem impossible for victims to report what happened to friends and loved ones — let alone state officials."

[39] Trial Chamber Judgment, para. 2097.
[40] *Levenstein & Others v Estate of the Late Sidney Lewis Frankel & Others* [2018] ZACC 16; 2018 (8) BCLR 921 (CC); 2018 (2) SACR 283 (CC), para. 56.

37. Indirect evidence, therefore, is important to demonstrate the nuances of harm that SGB crimes cause. The Trial Chamber, therefore, was correct in considering the accumulation of "consistent and mutually corroborating accounts of the seven women."[41]
38. In particular, indirect evidence from the following sources is admissible:
    38.1. Testimony of *other* victims of similar crimes perpetrated by the accused is charged;
    38.2. Testimony of victims of similar crimes perpetrated by people under the accused's command;
    38.3. Testimony of victims of the same crimes but not committed either by the accused or by those under his command but by the armed forces in general or by other leaders of the forces. Such evidence is relevant to the systemic component of the charge. In this way, the testimony of a few, which testimony demonstrates a pattern, is admissible evidence, reliable and probative, for the purposes of showing that the acts occurred within a systemic context. Therefore, the evidence pertaining to SGB crimes committed by Kony and the LRA, have probative value in that they corroborate the testimony of victims of SGB crimes committed by the Appellant.
39. The accumulation of this testimony has considerable weight in cases of SGB crimes; it shows a pattern of conduct that *affirms* and *confirms* the testimony of a victim or witness. The common accounts add to the veracity of the direct evidence of the individual victim-witness, especially where there is a not an eye witness to the crime, which is often the case with SGB crimes
40. Contextual evidence corroborates individual crimes and the systemic nature of such crimes. Such evidence is uncontentious. The Elements of Crimes confirms that the "Existence of intent and knowledge can be inferred from relevant facts and circumstances."[42] The Tokyo War Crimes Tribunal heard evidence, orally or by affidavit, from witnesses who testified in detail to atrocities committed in all aspects of the war on a scale so vast, yet all following so common a pattern, that it was impossible to escape the conclusion that the events occurred under the sanction of the Japanese leaders.[43]

[41] Trial Chamber Judgment, para. 2041.
[42] Elements of Crimes, General introduction, para. 1.
[43] ICJ Report, p. 26.

41. The same considerations are particularly relevant to SGB crimes. International tribunals, for example, concur that "in egregious and sustained situations of armed conflict and where rapes take part on a large scale, the non-consent of the victim and the actus reus of the offence may validly be adduced through circumstantial evidence."[44]
42. For example, the Trial Chamber referred to the fact that the "notion of 'marriage' and the role of 'wife' are further elucidated by an abundance of evidence."[45] Such evidence demonstrates the context of the repeated and commonplace commission of such crimes. Therefore, while the defence challenges the Trial Chamber's assessment relating to SGB crimes,[46] it also accepts the importance of contextual evidence.[47] Such evidence is also important for determining, understanding, and attributing accountability for, the nuances of SGB crimes.
43. Contextual evidence may include reports of NGOs and international organisations; and stories of communities affected by the conflict. Such evidence speaks more generally to the operation of the accused's organisation, which in turn demonstrated the existence of a widespread or systematic attack.[48]
44. Given the overall nuance of SGB crimes, it is important to have specialised expert testimony about gender-based discrimination and how such may affect the way in which victims experience, relate and endure the violence. The weight afforded to each of these sources of evidence differs. Generally, the weight a court should afford to these sources of evidence decreases commensurately with the distance between the accused, the crime, the victim, and the proximity of the witness.

Probative value of evidence of uncharged crimes

45. In the *Seselj* case, the ICTY accepted that uncharged conduct may be admissible in order to corroborate facts that are part of the indictment.[49] Evidence of uncharged conduct may also be an important indicator of a "pattern of conduct", which in turn is an important factor in proving

[44] Bantekas, p. 163.
[45] Trial Chamber Judgment, para. 2215.
[46] Appeal Brief, paras. 947-959.
[47] Appeal Brief, para. 97.
[48] Trial Chamber Judgment, para. 2096.
[49] *Prosecutor v Seselj*, ICTY, Appeals Chamber, Decision on Appeal against the Trial Chamber's Oral Decision of 9 January 2008, IT-03-67-AR73.7, 11 March 2008, paras. 23-24; *See also Prosecutor v. Bagosora et al*, ICTR, Trial Chamber, Decision on Admissibility of Proposed Testimony of Witness DBY, ICTR-98-41-T, 18 September 2003, para.37

the accused's state of mind at the relevant time of the offence.[50] In this context, the ICTY Trial Chamber held in the *Popovic* case that uncharged evidence may be of high probative value to proving the perpetrator's knowledge, intent and "pattern of conduct during the relevant time period" if the conduct in questions is in proximate in place and time to the charged events.[51] In the *Kvocka* case, the ICTY Trial Chamber admitted the testimony of two victims of sexual assault relating to criminal conduct that was not charged as relevant to determine a pattern of conduct.[52] In this regard, the Trial Chamber was respectfully correct in considering "the testimonies of those women whose personal experience, while not falling within the charges, nevertheless provides corroboration to the above testimonies."[53]

46. **Probative value of third party reports:** As set out by the Trial Chamber in the *Katanga* case, the probative value of evidence is determined by the "reliability of the exhibit and the measure by which an item of evidence is likely to influence the determination of a particular issue in the case."[54] In this context, the Trial Chamber held that reports by the United Nations may have probative value if the identity of the author/s and the sources of information are provided.[55] The Trial Chamber further qualified reports emanating from "independent observers who were direct observers of the facts being reported (…) to be *prima facie* reliable".[56] Similarly, reports by independent non-governmental organisations or governmental bodies of third states may be considered as "*prima facie* reliable if they provide sufficient guarantees of non-partisanship and impartiality."[57] Sufficient information on the sources and the methodology used to gather and analyse evidence are crucial to assess the reliability of the content in the reports.[58]

---

[50] *Prosecutor v Kunarac*, ICTY, Trial Chamber, Judgment, IT-96-23-T & IT-96-23/1-T, 22 February 2001 ("***Kunarac***"), paras. 589, 591; *Prosecutor v Kupreskic*, ICTY, Appeals Chamber, Judgment, IT-95-16-A, 23 October 2001, para. 321.
[51] *Prosecutor v Popovic et al.*, ICTY, Trial Chamber II, Decision on Motion to reopen the prosecution case, 9 May 2008, IT-05-88-T, para. 33.
[52] *Prosecutor v Kvocka et al*, ICTY, Trial Chamber, Judgement, IT-98-30/1-T, 2 November 2001, paras. 105, 547, 554, 556; See also *Prosecutor v Bemba*, ICC, Appeals Chamber, Judgment, ICC-01-5-01/08 A, 8 June 2018, para. 117 where the Appeals Chamber held that evidence which falls outside the scope of Article 74(2) of the Statute does "not amount to an error".
[53] Trial Chamber Judgment, para. 2216.
[54] *Prosecutor v Katanga*, ICC, Trial Chamber II, Decision on the Prosecutor's Bar Table Motions, ICC-01/04/-01/07, 17 December 2010 ("***Katanga***") para. 20.
[55] Ibid, para. 29.
[56] Ibid. para. 29.
[57] Ibid, para. 30.
[58] Ibid.

47. On this basis, reports by the UN or NGOs may have probative value. As sexual and gender-based crimes are crimes that occur mostly in private and are often taboo subjects, the probative value of such reports may be both corroborative of individual acts of SGB crimes against individual victims; and such may be evidence of patterns of conduct that constitute contextual evidence.

Evidence outside the temporal and geographic scope of the charge

48. Evidence of crimes committed by the accused, which fall outside of the temporal and/or geographical scope of the charges, may be relevant contextual evidence that corroborates or augments the evidence of direct and indirect witnesses about individual crimes and the widespread or systematic nature of such crimes.[59]
49. Moreover, many SGB crimes operate on a continuum and may not have a definitive beginning and end. It is therefore not fatal to the verdict that the Court considered evidence that fell outside the timeframe of the case.

Evidence relating to consent

50. Consent is the voluntary, uninhibited exercise of an individual's free will. The Defence asserts that the Trial Chamber failed to conduct a factual assessment about the lack of consent of each victim relating to the crime against humanity of forced pregnancy.[60]
51. While the prosecutor might bear the burden of proving that there was no consent to the actus reus of the offence,[61] consent cannot be inferred in coercive circumstances.[62] As held by the Appeals Chamber of the International Criminal Tribunal for Rwanda ("**ICTR**") in *Gacumbitsi*, "[t]he Prosecution can prove non-consent beyond reasonable doubt by proving the existence of coercive circumstances under which meaningful consent is not possible."[63] In the case of SGB crimes, consent cannot be inferred from words or conduct under situations that undermine the victim's ability to give voluntary and genuine consent, nor by silence or lack of resistance.[64]

[59] This was challenged by the Defence, Appeal Brief, para. 622.
[60] Appeal Brief, para. 970.
[61] See *Kunarac*, paras. 460, 463-464.
[62] See Rule 70(a) of the Rules of Procedure and Evidence; see also Trial Chamber Judgment, para. 2725.
[63] *Prosecutor v Gacumbitsi*, ICTR, Appeals Chamber, Judgment, ICTR-2001-64-A, 7 July 2006 ("***Gacumbitsi***") para. 155; See *Kunarac*, paras. 644-647; *Prosecutor v Furundzija*, ICTY, Trial Chamber, Judgment, IT-95-17/1-T, 10 December 1998, para. 271;
[64] Rule 70(b) of the Rules of Procedure and Evidence; see also Bantekas, p. 163.

Where an individual must choose between beatings, death or another form of harm, such as extreme food deprivation, her "choice" to consent to all elements of the crime of forced marriage is obviated and the criminality of the act is not expunged by her apparent consent or acceptance of the status quo. Such circumstances may vitiate consent.[65] In this context, the usefulness of the requirement of having to prove non-consent has to be questioned. As former ICTY Judge Schomburg pointed out with reference to the *Gacumbitsi* Appeal, "[a] definition of sexual violence that includes non-consent unnecessarily points to the behaviour of the victim and ultimately contradicts itself."[66] The element of non-consent, which derives from national laws applying to sexual violence in times of peace, cannot simply be transferred to international crimes such as crimes against humanity or war crimes.[67]

Conclusion

52. This case presents an opportunity for the Appeals Chamber to sculpt international criminal law and principles of evidence to the contours of sexual and gender-based crimes. These crimes cannot be collapsed into a traditionalist perception that all crimes against women are reduced to sex. The truth is that, for the first time, international criminal law is being responsive to the way in which women experience conflict, violence and war. "Inhumanity" is not homogenous or gender neutral. If the system of international criminal justice is to be responsive to, and address, SGB crimes, the elements of the crimes, the applicable rules of evidence, the protected interest and the ensuing harm, must be approaches with empathy, insight and expertise.

Prof Dr Bonita Meyersfeld

Atilla Kisla on behalf of SALC

Dated 23 December 2021

Johannesburg, South Africa

[65] See *Kunarac*, paras. 644-647; *Prosecutor v Furundzija*, ICTY, Trial Chamber, Judgment, IT-95-17/1-T, 10 December 1998, para. 271; *Gacumbitsi*, para. 155.
[66] W Schomburg & I Peterson. "Genuine Consent to Sexual Violence Under International Criminal Law." 101 (1) *The American Journal of International Law* (2007) 121, pp. 138-140.
[67] See ibid.