

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: **ICC-02/04-01/15**

Date: **15 October 2019**

TRIAL CHAMBER IX

Before:

**Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Raul C. Pangalangan**

SITUATION IN UGANDA

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

**PUBLIC
with Confidential Annex A

Defence Bar Table Motion**

Source: Defence for Dominic Ongwen

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:**The Office of the Prosecutor**

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I. INTRODUCTION

1. The Defence for Dominic Ongwen ('Defence') requests Trial Chamber IX ('Chamber') to submit into evidence the 470 items identified in Confidential Annex A to this filing 'from the bar table' pursuant to Article 69(4).
2. Several categories of material are included in the annex such as emails, maps and witness statements. The Defence notes that in this case by its assessment, hundreds of items have been submitted through witnesses. Also submitted are publicly available researched articles, relevant pages of published material, intelligence briefing notes and reports, UPDF reports, Government of Uganda official reports, official documents. Additionally, a wide variety of material such as correspondences and publicly available material is also submitted. The proposed evidence is relevant and has probative value as indicated in Confidential Annex A and in arguments in the present filing and should be submitted into evidence.

II. CONFIDENTIALITY

3. Pursuant to Regulations 23*bis* of the Regulations of the Court, Annex A is submitted as confidential as it refers to the contents of confidential evidence. A public redacted version of Confidential Annex A shall not be filed unless ordered by the Chamber.

III. BACKGROUND

4. On August 21, 2019, the Trial Chamber issued an order setting a dateline of 30 September for all evidentiary filings in the case.¹
5. On the 22 August 2019, the Defence filed a motion seeking clarification regarding the dateline for evidentiary filing.²
6. On 10 September 2019, the Chamber granted in part, the defence motion and extended the date for the filing of the Bar Table Motion by fifteen additional days which fall on 15 October 2019.³

¹ Ongwen, Order Setting a Deadline for Evidence Related Requests, ICC-02/04-01/15-1570, 21 August 2019.

² Motion for clarification regarding Trial Chamber IX's 'Order Setting a Deadline for Evidence Related Requests'.

³ Decision on the Defence Request for Variation of 30 September Deadline 10 September 2019, para. 9.

IV. SUBMISSIONS

7. The Defence highlights one submission in Annex A in yellow.⁴ It notes that this item was originally submitted into evidence by the Prosecution, but withdrawn because the Prosecution did not supply an English translation. The Defence requests the document remain submitted and that the Defence provide said translation in due course.
8. Furthermore, while some items in the list do not contain English translations, the Defence endeavours to have all translations completed before the close of the case.

A. Law

9. The Chamber ruled in its Initial Directions on the Conduct of the Proceedings that participants may submit evidence “in writing through a ‘bar table’ application.”⁵
10. Article 69(4) of the Statute provides that: The Court may rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.
11. Previous jurisprudence has interpreted this provision as providing three criteria for admissibility. First, the proposed evidence must have prima facie relevance to the issues at trial.⁶ Second, it must have “probative value”, which has been interpreted as “tending to prove or disprove the material issue or fact in question” which, in turn, requires “indicia of reliability including authenticity, that are sufficient in the circumstances in accordance with generally accepted legal principles.”⁷ The indicia need not establish “definitive proof of reliability but rather prima facie proof based on sufficient indicia.”⁸ Third, any potential

⁴ See item 175 on page 25 of Confidential Annex A.

⁵ ICC-02/04-01/15-497, para.27. The Trial Chamber in Gbagbo and Blé Goudé has also held that Parties may submit evidence from the bar table, without producing it by or through a witness (ICC-02/11-01/15-498-AnxA, para.43). It held that “in general, [...] a rule that documents can only be submitted ‘through a witness’ has no basis in the Statute or the Rules and does not form part of the Court’s applicable law” (ICC-02/11-01/15-573Red, para.9). *See also* ICC-01/04-01/06-1399-Corr, paras.22, 42; ICC-01/04-01/06-1981; ICC-01/04-01/07-2635; ICC-01/04-01/07-1665, para.100; ICC-01/09-01/11-135, para.13; ICC-01/05-01/08-2012-Conf; ICC01/05-01/08-2299-Red.

⁶ ICC-01/04-01/06-1399-Corr, para.27; ICC-01/04-01/07-2635, section B; ICC-01/05-01/08-2012-Red, paras.13-14; ICC-01/05-01/08-2299-Red, para.8; ICC-01/09-01/11-1353, para.15

⁷ ICC-01/04-01/06-1399-Corr, paras.28-30; ICC-01/04-01/07-2635, section C; ICC-01/05-01/08-2012-Red, paras.13, 15; ICC-01/09-01/11-1353, para.15. The Ruto and Sang Trial Chamber held that definitive proof of reliability is not required at this stage, but rather prima facie proof based on sufficient indicia; *see* ICC-01/0901/11-1353, para.15.

⁸ *Id.*

prejudice to the fairness of the trial caused by the evidence must be weighed against its probative value.⁹

B. Request

12. Confidential Annex A to this filing contains a table of item that forms the subject of this request. Specific notes containing the relevance and probative value of specific items are placed within the tables. The general topics of relevance and probative value are discussed below, namely, 1) documents directly related to the Article 31(1)(a) and (d) defences 2) the Parliamentary Hansards of Uganda, and 3) correspondence about Mr Ongwen's family life.

i. Medical research documents related to the Article 31(1)(a) and (d) defences

13. The Defence requests the submission of research documents related to the Defence's Article 31(1)(a) and (d) defence's. These items are listed in Confidential Annex A and found in Defence Level 0015 and PCV Level 0001 of eCourt. The items contain the phrase "See Section IV(B)(i) of the main filing" in the column related to relevance and probative value.¹⁰
14. Almost all of these items were used in the writing of the expert reports by UGA-D26-P-0041 and UGA-D26-P-0042. These items are relevant and probative to the Article 31(1)(a) and (d) defences. Some of these items shall be discussed during their testimony, but to expedite their testimony because of the limitations the Chamber has given,¹¹ many of these documents are requested for submission through this bar table motion.

ii. Parliamentary Hansards of Uganda

15. The Defence requests the submission of selected Hansards of the Parliament of Uganda. These items are listed in Confidential Annex A and found in Defence Level 0018 of eCourt. The items contain the phrase "See Section IV(B)(ii) of the main filing" in the column related to relevance and probative value.¹²

⁹ ICC-01/04-01/06-1399-Corr, paras.31-32; ICC-01/04-01/07-2635, section D; ICC-01/05-01/08-2012-Red, paras.13, 16-17; ICC-01/05-01/08-2299-Red, para.8; ICC-01/09-01/11-1353, para.16. The Appeals Chamber has ruled that "a Chamber's determination of the relevance or admissibility of evidence be made on an item-by item basis" (ICC-01/05-01/08-1386, para.53).

¹⁰ See items 10-14, 16-32, 34-41 and 469-470 of Confidential Annex A.

¹¹ The Defence refers here to the two day per witness, extended hour programme.

¹² See items 66-104 of Confidential Annex A.

16. These items relate to the establishment of the IPD camps, the relevance of the camps, the thoughts of the elected government officials on the camps throughout the years thereof. It is in addition to the evidence given to the Chamber by UGA-D26-P-0139.

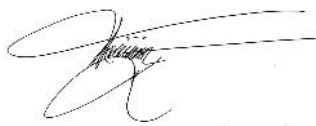
iii. Correspondence about Mr Ongwen's family life

17. The Defence requests the submission of selected correspondence about Mr Ongwen's family. These items are listed in Confidential Annex A and found in Defence Level 0018 of eCourt. The items contain the phrase "See Section IV(B)(iii) of the main filing" in the column related to relevance and probative value.¹³
18. The Defence submits these items as they are relevant to the problems which he has faced to exercise his fundamental right to a family life. The Defence has spent a considerable amount of time and energy attempting to exercise Mr Ongwen's fundamental rights, and these are attempts for Mr Ongwen to regain family relations.

V. RELIEF

19. For the reasons described above, the Defence respectfully requests Trial Chamber IX to:
- a. Submit into evidence the 470 items listed in Confidential Annex A through the bar table.

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 15th day of October, 2019
At The Hague, Netherlands

¹³ See items 121-143 and 145-146 of Confidential Annex A.