

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: **ICC-02/04-01/15**
Date: **26 January 2022**

APPEALS CHAMBER

Before: Judge Luz del Carmen Ibáñez Carranza, Presiding Judge
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
with Confidential Annex A and Public Annex B**

**Defence request for an order to the Prosecution to file specific academic articles in the record
of the case**

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. Pursuant Regulation 23(3) of the Regulations of the Court ('RoC'), the Defence for Dominic Ongwen ('Defence') hereby requests the Appeals Chamber to order the Office of the Prosecutor ('Prosecution') to file annexes to the *Prosecution Response to Amici Curiae observations* ('Prosecution Response').¹
2. Specifically, the Defence notes that an overwhelming number of its cited academic articles found in ICC-02/04-01/15-1952-AnxA ('Table of Authorities'), section 9, do not contain hyperlinks to publicly available versions of the documents.² In some cases, the hyperlinks send the user to an abstract which requests money to purchase the article.³ Finally, two of the academic articles, Aitala and Amati, are not in one of the working languages of the Court.⁴
3. The Prosecution has violated Regulation 23(3) of the RoC and the Defence requests the Appeals Chamber to order the Prosecution to file annexes of the selected academic articles to which it cited in the Prosecution Response in conformity with Regulation 23(3) of the RoC.⁵ The selected items are:
 - a. R. Aitala, *Diritto Internazionale Penale* (Mondadori, 2021) (original language and English translation);
 - b. E. Amati, 'Le Cause di Esclusione della Responsabilità Penale', in E. Amati et al., *Introduzione al Diritto Penale Internazionale*, 4th Ed. (Giappichelli, 2020) (original language and English translation);
 - c. A. Eser and K. Ambos, 'Article 31: Grounds for excluding criminal responsibility' in K. Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4th Ed. (C.H. Beck/Hart/Nomos, 2022);
 - d. A. Coracini and I. Tallgren, 'Article 20: *Ne bis in idem*' in K. Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4th Ed. (C.H. Beck/Hart/Nomos, 2022);

¹ Appeals Chamber, *Prosecution Response to Amici Curiae observations*, [ICC-02/04-01/15-1952](#) and [ICC-02/04-01/15-1952-AnxA](#).

² See section 9 of [ICC-02/04-01/15-1952-AnxA](#).

³ See Bond and Fougere on p. 12 and Joyce on p. 12 of [ICC-02/04-01/15-1952-AnxA](#).

⁴ See Amati on p. 12 of [ICC-02/04-01/15-1952-AnxA](#). The Defence has found the table of contents for this article, and the Defence notes that it is also in Italian. It can be viewed [here](#) on PDF p. 5.

⁵ The Defence only asks for selected items as it has been able to retrieve most of the academic articles through the databases available online, at the internal ICC Library website, with the help of the ICC Library staff retrieving non-online articles and at the Case Western Reserve University Law Library.

- e. J. Powderly and N. Hayes, ‘Article 7: Crimes against humanity’ in K. Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4th Ed. (C.H. Beck/Hart/Nomos, 2022);
 - f. Schabas and McDermott, ‘Article 66: Presumption of Innocence’ in K. Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4th Ed. (C.H. Beck/Hart/Nomos, 2022); and
 - g. C. Stahn, ‘Article 7: Crimes against humanity’ in K. Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4th Ed. (C.H. Beck/Hart/Nomos, 2022).
4. The Defence does not object to the Prosecution filing the academic articles contained in the commentary “Kai Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4th Ed. (C.H. Beck/Hart/Nomos, 2022)” as confidential until such time that the book becomes publicly available on 24 March 2022. The Defence avers that this will fulfil the meaning of Regulation 23(3) of the RoC while still protecting the rights of the editors and publisher.
 5. Finally, while the Defence does not request it, the Defence does not object to the Appeals Chamber expanding the order to include the rest of the missing or inoperative hyperlinks. Many of the commentaries which the Prosecution cites to are commonplace in libraries, and generally available at the ICC Library, even though it is closed.⁶ In conformity with its responsibility to use due diligence, the Defence is in the process of collecting the other academic articles and should have the ones not listed in paragraph 3 around the time of filing this request.
 6. Since the violation is so flagrant, The Defence requests that the Prosecution be ordered to file the selected academic articles on or before Monday, 31 January 2022.

II. CONFIDENTIALITY

7. Pursuant to Regulation 23 *bis*(1) of the RoC, the Defence files Annex A as confidential as it contains email addresses and names of persons deemed confidential under the Counsel’s exception rule to names and email addresses in public filings. A public redacted version is filed concurrently.

⁶ The Defence notes that the ICC Library has been extremely generous in sending copies of requested academic articles to it, which includes an ongoing request to get several of the academic articles referenced in the Prosecution’s Table of Authorities.

III. PROCEDURAL HISTORY

8. On 25 October 2021, the Appeals Chamber issued the *Order inviting expressions of interest as amici curiae in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence)*.⁷ The Appeals Chamber identified three (3) main topics with subsidiary topics on which it desired to receive *amici curiae* observations.
9. On 24 November 2021, the Appeals Chamber granted 18 *amici curiae* the right to file observations on the identified topics in the 25 October 2021 order.⁸ The Appeals Chamber also issued orders as to the length and the due date of the responses from the Parties and Participants.⁹
10. From 18-23 December 2021, the 18 *amici curiae* filed observations before the Appeals Chamber on the topic identified in the *Order inviting expressions of interest as amici curiae in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence)*.
11. On 17 January 2022, the Prosecution filed the *Prosecution Response to Amici Curiae observations*.¹⁰ The response contains one (1) annex, the Table of Authorities.¹¹

IV. APPLICABLE STANDARDS

12. Regulation 23(3) of the RoC states:

Subject to any order of the Chamber, a participant shall file, with each document, copies of any authorities relied upon or, if appropriate, internet links. Participants are not required to file copies of decisions or orders of the Court. Authorities shall be provided in an authorised version together with a translation in at least one of the working languages of the Court if the original is not in one of those languages.¹²

⁷ Appeals Chamber, *Order inviting expressions of interest as amici curiae in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence)*, [ICC-02/04-01/15-1884](#).

⁸ Appeals Chamber, *Decision on the request for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence*, [ICC-02/04-01/15-1914](#).

⁹ *Ibid.*, para. 22.

¹⁰ Appeals Chamber, *Prosecution Response to Amici Curiae observations*, [ICC-02/04-01/15-1952](#) and [ICC-02/04-01/15-1952-AnxA](#).

¹¹ [ICC-02/04-01/15-1952-AnxA](#).

¹² Regulation 23(3) of the RoC.

V. SUBMISSIONS

A. The Prosecution must provide a copy of *Aitala* and *Amati* in a working language of the Court

13. In section 9 of the Table of Authorities, the Prosecution listed *Aitala* and *Amati* as two of its academic articles. *Aitala* is cited to in paragraph 34 (fn. 123). *Amati* is cited to in paragraphs 28 (fn. 92), 33 (fn. 119) and 34 (fns 123 and 126). Noting also that proper hyperlinks are not included in the Table of Authorities, the Defence conducted an internet search of the articles and discovered that said articles are in Italian. While Defence staff speak and read several languages, Italian is not one of them.
14. Regardless of the languages which Defence staff speak or read, Regulation 23(3) of the RoC is clear regarding the obligations of the Prosecution. “Authorities shall be provided in an authorised version **together with a translation in at least one of the working languages of the Court if the original is not in one of those languages.**”¹³ The Defence submits that the Prosecution has violated this regulation and must be ordered to file the original versions and English translations of the *Aitala* and *Amati* academic articles on or before 31 January 2022.

B. The Prosecution must provide copies of the articles cited in the 2022 Kai Ambos commentary

15. The Defence takes note that the Prosecution attempted to hyperlink a majority of the sources cited in the Prosecution Response.¹⁴ Sections 1-8 of the Table of Authorities have hyperlinks or imbedded files of all of the documents listed in these sections, and section 10 has two (2) of the four (4) citations hyperlinked. The Prosecution falls woefully short though in section 9 of the Table of Authorities. The Defence appreciates and understands the hardships caused by the current lockdown protocols across the world and would understand if a few of the academic articles were not hyperlinked or submitted in annexes because of that hardship. But section 9, as described below, falls dismally short of an honest and professional attempt to fulfil the requirements under Regulation 23(3) of the RoC.
16. The Prosecution created five (5) hyperlinks to the 27 citations in section 9 of the Table of Authorities.¹⁵ Notably, two (2) of the hyperlinks open to abstracts to the academic articles and request payment to read the scholarly article.¹⁶ For the two (2) academic articles which request

¹³ Regulation 23(3) of the RoC. [Emphasis added.]

¹⁴ See Table of Authorities, sections 1-8 and 10.

¹⁵ See [ICC-02/04-01/15-1952-AnxA](#), section 9. The articles are Bond and Fougere, Joyce, Pangalangan, Krebs and Grant.

¹⁶ For **Joyce**, the website requests \$25 USD to purchase the article. For **Bond and Fougere**, the website requests €29.95 to purchase the article.

payment, the Defence was able to download the academic articles from the ICC Library through HeinOnline. As such, while the Prosecution is in violation of Regulation 23(3) of the RoC, the Defence does not seek an order from the Appeals Chamber for these academic articles to be filed in the record of the case, even though the Defence does not object to such an order from the Appeals Chamber.

17. Similarly, the Sellers and Kestenbaum articles identified a public domain on which this academic article is published. Again, the Defence was able to retrieve a copy of the article from SSRN without cost. Even though it would have taken less than 30 seconds to follow Regulation 23(3) of the RoC to include a hyperlink to the internet website, the Defence does not seek an order from the Appeals Chamber for this article to be filed in the record of the case as the Prosecution identified a public database on which to retrieve the academic article in the Table of Authorities.
18. For section 9 of the Table of Authorities, the Defence has already been able to retrieve the following academic articles, either through open-source databases, Prosecution hyperlinks, the ICC Library¹⁷ or the Case Western Reserve University Law Library:¹⁸
 - a. Ambos (2013);
 - b. Ambos (2021);
 - c. Bond and Fougere;
 - d. Cassese,
 - e. Grant;
 - f. Joyce;
 - g. Krebs;
 - h. Nortje and Quénivet;
 - i. Pangalangan;
 - j. Pauwelyn;
 - k. Scaliotti;
 - l. Sellers and Kestenbaum;
 - m. Stahn;
 - n. Steains (misspelled as “Steins” in the Table of Authorities);
 - o. Weigend; and

¹⁷ The Defence is grateful to the ICC Librarian and the Library staff who collected and emailed documents to the Defence.

¹⁸ The Defence is grateful to staff at the Judge Ben C. Green Law Library at Case Western Reserve University School of Law who helped the Defence collect five (5) different documents from the Prosecution’s Table of Authorities during a snowstorm in Cleveland, Ohio.

- p. Werle.
19. The Defence has requested the following academic articles from the ICC Library and hopes to receive them by the time of this filing:¹⁹
- a. Aktypis;
 - b. Bernard;
 - c. Cryer *et al.*; and
 - d. Jurovics.
20. While collecting these academic articles entailed hours of work,²⁰ including driving an 86 km roundtrip to a law library in a snowstorm, the Defence notes that many of these commentaries and journals are common in the practice of law at the ICC. Many practitioners have copies of the early Ambos, Cassese, Triffterer, Stahn and Sluiter commentaries on their desks in their (hardly accessible) offices or at the ICC Library (which is inaccessible in person). While it was very annoying to the Defence to collect the large volume of missing academic articles when considering the circumstances of the lockdown procedures across the world, the Defence also understands the predicament when considering the same lockdown procedures for the Prosecution, which is why it does not request the academic articles listed in paragraphs 18-19 above be filed in the record of the case, even though the Defence does not object to such an order.
21. The Defence cannot retrieve the following articles from the ICC Library as the commentary entitled *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4th Edition is not available until 24 March 2022:²¹
- a. Eser and Ambos;
 - b. Coracini and Tallgren;
 - c. Powderly and Hayes;
 - d. Schabas and McDermott; and
 - e. Stahn (2022).

¹⁹ Email from the Defence to the ICC Librarian, *Request for PDF Copies of Selected Material*, sent on 25 January 2022 at 11h09 US EST and email from ICC Librarian to Defence, *Re: Request for PDF Copies of Selected Material*, received on 25 January 2022 at 12h48 US EST. The Defence notes that just before filing, it received the four (4) academic articles listed in paragraph 19 from the ICC Librarian.

²⁰ The difficulty was compounded by the fact that the Prosecution did not put page numbers of the academic articles in the Table of Authorities.

²¹ See Confidential Annex A, which is an email from the ICC Librarian stating that the Ambos 2022 commentary is on order, but is not available. See also Public Annex B. This is a printout of the publishing company's webpage which shows that the Ambos 2022 commentary is not available until 24 March 2022 (last accessed on 25 January 2022).

22. The Prosecution's actions violated Regulation 23(3) of the RoC and Mr Ongwen's right to a fair trial proceeding. With the utmost respect, the Appeals Chamber has the responsibility to ensure that the proceedings before it are conducted fairly with full respect of the rights of Mr Ongwen.²² The seemingly blatant failure of the Prosecution to file copies of these academic articles impedes the Defence's ability to prepare for the hearing scheduled for 14-18 February 2022.
23. The Defence finds the list in paragraph 21 above extremely troublesome. The Prosecution cited to five (5) different academic articles which are not available to the public **or the ICC Library** until 24 March 2022 because the book has not been published.²³ Leave alone the fact that these articles are not available at this time to be scrutinised by legal practitioners or academics, but these academic articles are not available at all.²⁴ The Prosecution's dubious and unprofessional manner in which it uses these articles, yet does not file them on the record of the case pursuant to Regulation 23(3) of the RoC, cannot go unnoticed and unrestrained.
24. The Defence is cognizant that these academic articles are yet to be published, and that the editors and publishing company would not want five (5) of its academic articles publicly available before the publishing date. To protect these rights, the Defence suggests that the Appeals Chamber order the Prosecution to file the academic articles listed in paragraph 21 as confidential. After the publishing date of 24 March 2022, the Prosecution should request to reclassify the documents as public.
25. Finally, while the Defence does not seek a formal reprimand against the Prosecution in this matter, the Defence asks the Appeals Chamber to take note of this aggravating action. As almost every other section of the Table of Authorities was fully hyperlinked, the actions of the Prosecution related to section 9 of the Table of Authorities can only be seen as intentional.
26. As the Prosecution has failed to supply the Parties and Participants with unpublished academic articles, the Defence respectfully the Appeals Chamber to order the Prosecution to file annexes of the academic articles listed in paragraph 21 above on or before 31 January 2022.

²² See Articles 64(2) and 67(1) of the Rome Statute.

²³ *Ibid.*

²⁴ The Defence knows a manner in which the Prosecution could have secured an advance copy of the *Rome Statute of the International Criminal Court: Article-by-Article Commentary, 4th Edition*. Persons who are published authors in the commentary received advance copies of the book in the fall of 2021. Several prosecutors wrote or co-wrote sections of the commentary. The Defence knows that at least one prosecutor working on the *Ongwen case* received an advance copy of this commentary.

VI. REQUESTED RELIEF

27. The Defence for Dominic Ongwen requests the Appeals Chamber to order the Prosecution to file in the record of the case on or before 31 January 2022:
- a. Copies of the originals and translations of the Aitala and Amati academic articles and
 - b. Copies of the academic articles found in the *Rome Statute of the International Criminal Court: Article-by-Article Commentary, 4th Edition*, which are listed above in paragraph 21.

Respectfully submitted,



.....
Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 26th day of January, 2022

At Kampala, Uganda