

ANNEX XL

PUBLIC

From: Trial Chamber IX Communications
Sent: 23 May 2019 13:04
To: [REDACTED] Trial Chamber IX Communications;
Subject: Decision on Prosecution Request regarding the items the Defence intends to use during D-0139's testimony

Dear parties and participants,

The Chamber notes the request by the Prosecution and the response by the Defence.

The Chamber agrees with the Prosecution that the Report produced by the expert witness should form the basis of the content of the witness' testimony.

However, this does not prevent a party questioning the witness from putting items to him or her in order for the witness to comment on them and explore matters related to the report.

Considering the information available to the Chamber at this point in time, the items identified by the Defence seem to be related to the issues contained in the expert report.

The Chamber will not, at this point in time, bar in the abstract the use of any items.

However, this does not prevent the Prosecution to object to the use of an item in a specific manner during the course of the testimony.

As to the concerns expressed by the Prosecution regarding the number of the items and the timing when their potential use was made known, the Chamber notes that the estimated length of the testimony for D-0139 is two days.

This should provide the Prosecution with the possibility for to react to any question or issue which arises during the questioning of the witness.

The Chamber assures that the Prosecution will have the necessary time in order to prepare and conduct its questioning.

Accordingly, no item indicated by the Defence regarding the upcoming testimony of D-0139 will be disallowed at this point in time.

Kind regards,
 Trial Chamber IX

From: [REDACTED]
Sent: 23 May 2019 09:54
To: [REDACTED] Trial Chamber IX Communications; [REDACTED]
Subject: RE: OTP vs Ongwen - DEF List for D-0139

Dear Trial Chamber IX, Prosecution and Legal Representatives,

The Defence notes the Prosecution's alleged issues below and provides the following response:

- 1) **Binder 1** → The Defence makes no comment as the Prosecution does not appear to object to his binder. The Defence notes that it talked to a representative from the Prosecution yesterday afternoon after the first emailed list. Upon request of the Prosecution, the Defence vowed to narrow two of the larger documents in Binder 1 this afternoon.

- 2) **Binder 2** → These are materials relating to the treatment of persons in IDP Camps by UPDF and LDU. These documents directly complement issues outlined in the Expert Report. If my math is correct, the total pages of this binder are 166 pages. Many of the pages are handwritten and ½ empty, all have been in the possession of the Prosecution for over a decade, and I personally read all of these pages in less than two hours on Tuesday. This amount of reading absolutely does not amount to “copious materials”. The Defence intends to use these documents for less than 10 minutes and shall discuss them broadly. Failure to allow the Expert Witness to discuss a topic directly related to his expertise and discussed in the Expert Report violates the Defence’s right to present evidence and would violate Article 67(1)(e) of the Rome Statute.
- 3) **Binder 3** → These items are excerpts of witness testimonies and two Defence witness statements. The Defence statements have been disclosed in a timely fashion to the Prosecution. The placement of witness testimony excerpts on list of materials for witnesses has been used by the Prosecution a lot, and the use of trial transcripts and/or videos was used with its experts. Failure to allow the Defence to use these materials would disallow the Defence to present evidence in the same manner as the Prosecution, directly violating Article 67(1)(e) of the Rome Statute. As with Binder 2, the Defence intends to spend minimal time discussing these documents with the Expert Witness. Finally, and similar to Binder 2, the total amount of pages listed in Binder 3 **is less than 20 pages**. Again, I personally read through these documents on Tuesday and spent less than 20 minutes doing so. The Prosecution’s claim that these are “copious” once again fails.

For the abovementioned reasons, the Prosecution’s complaint about Binders 2 and 3 fails to demonstrate just cause as to why the Defence should not be allowed to ask it Expert Witness about materials which relate to his expert opinion in his Expert Report, and thus its request should be

Very best,

[REDACTED]

From: [REDACTED]
 Sent: 22 May 2019 18:34
 To: [REDACTED] Trial Chamber IX Communications; [REDACTED]
 [REDACTED]
 Subject: RE: OTP vs Ongwen - DEF List for D-0139

The Prosecution submits that an expert’s testimony is meant to be largely contained within his or her report. That report needs to be served on the Chamber and the opposite party in good time. A party cannot escape from the obligation to provide notice of expert evidence by serving a report in good time (as was done in D-0139’s case) and then, immediately before the expert is to testify, providing copious materials (in particular the contents of binders two and three) which are not referred to in that report with the obvious intention of asking the expert to give supplementary testimony concerning their contents. When the Prosecution called its experts it restricted its questioning, and the materials it asked them to comment on, to items which were referred to in their reports, with the exception of the evidential extracts, which were prepared at the express direction of the Chamber, and served on the parties and participants weeks before the experts testified. The Prosecution asks that the Defence should be required do the same. The Defence should not be permitted, absent any exceptional reasons assessed on a case by case basis, to use any other items that do not belong to the above categories.

[REDACTED]

From: [REDACTED]
 Sent: 22 May 2019 17:15
 To: [REDACTED] Trial Chamber IX Communications; [REDACTED]
 [REDACTED]
 Subject: RE: OTP vs Ongwen - DEF List for D-0139

Dear All,

Please forgive me, I forgot to add Binder 3 in the list.

The full version of the documents which the Defence may use in its examination for D-0139 is attached.

Very best,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Wednesday, May 22, 2019 3:05 PM
To: Trial Chamber IX Communications; [REDACTED]
[REDACTED]

Subject: OTP vs Ongwen - DEF List for D-0139

Dear All,

Please find attached the Defence's list of materials it may use during its examination of D-0139 next week. For posterity, Tab 2 of Binder 1 shall be submitted *via* Rule 68(3).

Very best,

[REDACTED]