

ANNEX XXXIII

PUBLIC

From: Trial Chamber IX Communications
Sent: 29 April 2019 09:51
To: [REDACTED]
 [REDACTED] Trial Chamber IX Communications;
Subject: Ruling on Prosecution request to interview Defence witness D-0068

Dear parties,

the Chamber takes note of the Request of the Prosecution regarding the contact request in order to interview D-68. It notes that the contact restriction set out in the familiarisation protocol applies, strictly speaking, only to the calling party (*see*, -504-Anx1, para. 26). However, the Chamber considers that it would be against the intention of the protocol if such restriction does not equally apply to the non-calling party.

The Chamber does not see any imperative reason to allow the Prosecution to interview D-68 at this point in the proceedings. It stresses that the parties should endeavour to organise such requests *inter partes* in such a manner that similar problems will be avoided in the future.

The Chamber notes that the Prosecution submitted that ‘the number of issues about which the Prosecution wishes to ask [the witness] is small’. Under the present circumstances, the Chamber considers it most appropriate that the Prosecution explores any line of questioning during the testimony of the witness.

The Chamber assures the Prosecution that it will have adequate time to question the witness and will receive short breaks – if appropriate – should this be necessary in order to conduct the questioning of D-68.

Accordingly, the request to instruct VWU to attempt contacting D-68 in order to request whether the witness would agree to an interview by the Prosecution is rejected.

Kind regards,
 Trial Chamber IX

From: [REDACTED]
Sent: 26 April 2019 17:26
To: [REDACTED] Trial Chamber IX Communications; [REDACTED]
 [REDACTED]

Subject: RE: Prosecution request to interview Defence witness D-0068

Dear Trial Chamber IX, Prosecution and Legal Representatives,

On behalf of the Defence, I hereby respond to the Prosecution’s request below.

The Prosecution’s request will violate Mr Ongwen’s right to a fair and expeditious trial and it has failed to justify how changing the Defence’s witness line-up is in the interest of justice. The Prosecution waited until 45 days before the witness’s expected testimony date to request an interview with the witness. To

understand the difference in the estimated start date from the email received earlier from the Prosecution, I must include additional information not conveyed earlier.

On **2 April 2019** at around 15h30 in the interior coffee corner, Mr Obhof met with Mr Black to discuss the upcoming witness schedule. The Defence informed the Prosecution that it wished to move witnesses. With the new moves, it placed **D-0068's testimony start-date at 20 May 2019**.

The Prosecution's request to meet with the witness came during the afternoon of Friday, 5 April 2019. It was three days after the Prosecution had constructive knowledge of the issues discussed on 2 April 2019. Taking all things into account, D-0068 was expected to start on 20 May 2019, better written **as 45 days before his testimony**.

Furthermore, D-0068 is a Rule 74 witness. He obtained the age of 18 during the jurisdiction of the Court (2003/4) while he was still in the LRA. Even if the witness agrees to meet with the Prosecution, the witness stated to the Defence he wanted a Rule 74 Counsel before the Court. As such, the Court will need to provide him with a Rule 74 Counsel for any Prosecution interview. With respect, this is not something that can be put together overnight, or even in a week. This will cause delays in the trial and violate Mr Ongwen's fundamental right to an expeditious trial.

Changes in the trial schedule do not come lightly to the Defence. As this witness's testimony date is very near, this again will cause problems with the Defence's scheduling. Witness D-0139 is a university lecturer and field researcher, Witness D-0113 changed meetings with community elders/leaders to testify and Witness [REDACTED] is a serving member of the UPDF. Requiring a change in the witness schedule now would violate Mr Ongwen's right to a fair and expeditious trial as there will be problems with witness scheduling should the date be forcibly changed. Moving Witness D-0068 in the schedule poses an issue, while adding extra time, as written below, is more preferential.

The Prosecution will have its chance to examine the witness on 21 May 2019. As the current projection sits, the trial schedule will not be affected whether the witness ends during the first session of 21 May 2019 or the first session of 23 May 2019. As [REDACTED] noted, *"The number of issues about which the Prosecution wishes to ask is small and the time take will not exceed a single day."* As such, the Prosecution will have its "single day" then. If the Prosecution needs longer than a day, it merely needs to show good cause to the Trial Chamber for an extra session. While D-0113 is listed for a full day of testimony, the Defence estimates that his total examination time should be two sessions. A spill over of one session into the 23rd will not impact the calendar as we could start D-0113 immediately after finishing D-0068.

Finally, the Defence highlights that there is a short "EXTRACT FROM LRA DEFECTORS" (UGA-OTP-0285-0158) about this witness. Information inside this extract, while short, supports the summary of the expected testimony. This extract, in the hands of the Prosecution since 14 October 2018, could have been read, interpreted and acted upon. It gives enough information for an investigator to find with ease more information about this witness.

The Prosecution's request fails to outline specific reasons why it cannot perform its duties without interviewing the witness before his testimony on 20 May 2019. As outlined above, granting the Prosecution's request is not in the interest of justice and would result in an unjustified delay in the proceedings, which would violate Mr Ongwen's right to an expeditious trial. As such, the Trial Chamber should deny the Prosecution's request.

Sincerest regards,

[REDACTED]

From: [REDACTED]
 Sent: 26 April 2019 12:57
 To: Trial Chamber IX Communications; [REDACTED]
 [REDACTED]

Subject: Prosecution request to interview Defence witness D-0068

The Prosecution wishes to engage the Chamber concerning the matter which is dealt with by the emails copied below, namely the possibility of the Prosecution conducting an interview with D-0068.

Upon the Prosecution's request, the Defence have been trying to contact the witness to convey the prosecution's request to interview him. The Defence have been unsuccessful in getting in touch with the witness. The Prosecution now requests the chamber to direct the VWU to attempt to contact D-0068 and convey the prosecution request.

D-0068 is, according to the most recent list provided by the Defence (on 1 April), scheduled to be Defence Witness number 33. That list schedules seven witnesses to be heard before D-0068 is reached. Defence estimates for the examination of these seven witnesses amount to 11/12 days. On this basis D-0068 would be heard in the week beginning 27 May. The Prosecution acknowledges that subsequent discussions between the Prosecution and Defence, most recently on 18 April, have led to an understanding that D-0068 is now most likely to be heard in the week beginning 20 May.

The Defence are right to observe that the request to interview D-0068 came late, being made on 6 April. But the Chamber will note that for about three weeks following the request the Defence were still holding out hope that they might be able to make contact with the witness and convey the Prosecution's request so that it could be acted upon. Had they not done so the Prosecution would have engaged the Chamber earlier.

The Prosecution's position is that the evidence which the Judges receive from D-0068 will more helpful to their task of ascertaining the truth if we are able to interview him before his testimony. The only existing guide to his testimony is a summary of two and a half sides. On the face of that summary he was an escort to the Accused during the charged period and participated in charged attacks.

We believe that there is still time for such an interview to take place. The number of issues about which the Prosecution wishes to ask is small and the time taken will not exceed a single day.

Paragraph 30 of the protocol to decision #339-Anx enables the non-calling party to apply to the Chamber for VWU to be given the task of attempting to contact a witness, if a period of five days after a request has elapsed and if the calling party (as in this case) has been unable to contact the witness. In accordance with that paragraph we request that the Chamber instruct the VWU to attempt to contact the witness and convey the Prosecution's request.

There would, the Prosecution submits, be no prejudice to the Defence if the interview were to take place within the early days of the one month 'quarantine period' before D-0068's testimony begins, or alternatively if that testimony were to be deferred until the week beginning 3 June.

[REDACTED]
 Senior Trial Lawyer

From: [REDACTED]
 Sent: 26 April 2019 11:36
 To: [REDACTED]
 [REDACTED]
 Cc: [REDACTED]
 Subject: RE: Request to interview Defence witness D-0068
 Dear [REDACTED],

Thanks for dealing with this speedily.
We will be raising the matter with the Chamber.
Regards,

■

From: ■
Sent: 26 April 2019 11:34
To: ■
■
Cc: ■
Subject: RE: Request to interview Defence witness D-0068

Dear ■,
I just got off the phone with Counsel. My guess was correct. Counsel stated we would oppose intervention by the VWU at this point as it violates the contact policy employed by the Trial Chamber in 2017.
Very best,

■

From: ■
Sent: 26 April 2019 11:10
To: ■
■
Cc: ■
Subject: RE: Request to interview Defence witness D-0068

Dear ■,
I have to ask counsels today, but I can venture to guess that the defence would oppose this action as it is within the 30-day limit period set forth by the Chamber in 2017 (familiarisation period). I further note that the request to interview the witness was made 2 weeks before the 30-day limit period.
We did attempt to contact and was not fruitful. ■ was called about this well before the email was sent (about not getting in contact with him).
Very best,

■

From: ■
Sent: 26 April 2019 11:04
To: ■
■
Cc: ■
Subject: RE: Request to interview Defence witness D-0068

Dear ■,
I am writing on ■ behalf because he is travelling at the moment.
We understand that the defence team is busy, and we take on board your request for more notice in the future. The fact remains that, in our judgment, the evidence which the Judges receive from D-0068 will more helpful to their task of ascertaining the truth if we are able to interview him before his testimony.
We believe that there is still time for such an interview to take place. And we note that the protocol to #339-Anx enables us, once a period of five days after our request has elapsed, to apply to the Chamber for VWU to be given the task of attempting to contact the witness. Given that some 20 days have now passed since we first contacted you, and your understandable preoccupation with matters which are more urgent for the defence team, we think that this is probably the way to go.
Will you agree to the VWU acting in this way?
Regards

■

From: [REDACTED]
Sent: 26 April 2019 09:33
To: [REDACTED]
Cc: [REDACTED]
Subject: RE: Request to interview Defence witness D-0068

Dear [REDACTED],
 I sorry to say that we were busy with bringing our witnesses for this block and [REDACTED] could not contact him.
 In the future, we kindly ask that we be given at least 2 months' notice for a Protocol 339-Anx request.
 Very best,
 [REDACTED]

From: [REDACTED]
Sent: 26 April 2019 09:13
To: [REDACTED]
Cc: [REDACTED]
Subject: RE: Request to interview Defence witness D-0068

Dear [REDACTED],
 Did you manage to get through to [REDACTED] Would you have any updates regarding D-0068?
 Grateful for any information you can provide.
 Thanks in advance,
 [REDACTED]

From: [REDACTED]
Sent: 23 April 2019 10:09
To: [REDACTED]
Cc: [REDACTED]
Subject: RE: Request to interview Defence witness D-0068

Dear [REDACTED],
 Thank you very much for your email.
 As discussed last week on the phone, [REDACTED] was not able to get in contact with the witness. I just tried calling her now to see if she had any luck with contacting him (especially noting that he is set to testify in 27 days), but I was not able to get through to her. I shall continue to attempt to call her throughout the day.
 Very best,
 [REDACTED]

From: [REDACTED]
Sent: 23 April 2019 09:51
To: [REDACTED]
Cc: [REDACTED]
Subject: RE: Request to interview Defence witness D-0068
 Dear all,
 Could you please provide an update regarding **D-0068** and the request below?
 Best,
 [REDACTED]

From: [REDACTED]
Sent: 05 April 2019 14:49
To: [REDACTED]
 [REDACTED]

Cc: [REDACTED]

Subject: RE: Request to interview Defence witness D-0068

Dear [REDACTED]

Thank you very much for your email.

We'll try. It is rather short notice, but we'll see what we can do.

Very best,

[REDACTED]

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Dedication - Integrity - Respect

From: [REDACTED]

Sent: 05 April 2019 14:32

To: [REDACTED]

[REDACTED]

Cc: [REDACTED]

Subject: Request to interview Defence witness D-0068

Dear all,

In accordance with protocol #339-Anx, we kindly request an interview with Defence witness **D-0068**.

As per the order of appearance, **D-0068** is slated to testify sometime in May 2019. Hence we would be grateful if he could be contacted for consent as early as possible to ensure a timely interview process.

Best, regards,

[REDACTED]

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