

ANNEX V

PUBLIC

[REDACTED]

From: [REDACTED]
Sent: 28 May 2019 15:21
To: Trial Chamber IX Communications; [REDACTED]
[REDACTED]
Subject: OTP vs Ongwen - DEF Submission of Material for D-0139
Attachments: 2019.05.28 - DEF List of Materials to be Submitted - CONF.docx

Dear All,

In accordance with Decision 497, the Defence wishes to submit into evidence the following documents attached to this email in MS Word format.

Binder 1

The Defence notes that while it did not talk directly about all the documents in Binder 1 during the oral part of the testimony, as the material was footnote and discussed in the Expert Report, and the report is treated as oral testimony, the Defence requests submission of all the documents in that list with the exception of Tab 8 (noting that some have already been submitted into evidence with previous witnesses and/or bar table motions). Those documents which have already been submitted are highlighted in **GREEN**.

Binder 2

As with Binder 1, the Defence highlighted documents in the list of Binder 2 which have already been submitted into evidence through other witnesses in **GREEN**. The Defence requests the submission into evidence all documents listed in Binder 2. The Defence notes that Tabs 24, 31, 35, 41 and 45 are not on its List of Evidence. These documents are highlighted in **YELLOW**. As these five documents do not go to any alleged act or conduct of the accused, and as they are similar in nature to 41 other documents either already submitted or being requested for submission in this binder, the Defence respectfully requests that the Chamber allow these materials, on a exceptional basis, to be submitted into evidence and added to the Defence's LoE. Should the Chamber accept this, and since the Defence shall be submitting an update LoE soon, the Defence could add these five documents to its LoE update.

Binder 3

The Defence requests the submission into evidence all documents listed in Binder 3. Even though Tabs 1-10 of Binder 3 are already in evidence, the Defence shall stamp and upload these documents as given in the binder and used in the testimony tomorrow, and send a formal list with the ERNs. Tabs 11 & 12 are already on the Defence's List of Evidence, so it shall not re-file those documents unless requested to do so. The Defence only seeks to rely on the portions highlighted in these statements.

Sincerest regards,

[REDACTED]

From: [REDACTED]
Sent: 28 May 2019 16:23
To: [REDACTED] Trial Chamber IX Communications; [REDACTED]
Subject: RE: OTP vs Ongwen - DEF Submission of Material for D-0139

The Prosecution has no observations in respect of binder 1.

The Prosecution notes that the material contained in Binder 2 is largely testimonial in nature. That is to say that it is material resulting from persons being "questioned in their capacity as witnesses in the context of or in anticipation of legal proceedings" (Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision on Prosecution Rule 68(2) and (3) Requests, 12 November 2015, ICC-01/05-01/13-1478-Red-Corr, para. 32.). The Prosecution submits that the proper avenue for the introduction of such material into proceedings is via rule 68(2) or 68(3). Further, the Prosecution doubts the relevance of the materials contained in binders 2 and 3 which the defence seeks to submit into evidence, particularly material which was not even put to the witness for his comments, but accepts that this is an assessment the Chamber will make at the conclusion of the case.

The Prosecution accepts that no prejudice would be caused by the Chamber permitting items which are not on the Defence List of Evidence to be submitted into evidence now and added to the List of Evidence later.

From: [REDACTED]
Sent: 28 May 2019 15:2
To: Trial Chamber IX Communications; [REDACTED]
Subject: OTP vs Ongwen - DEF Submission of Material for D-0139

Dear All,

In accordance with Decision 497, the Defence wishes to submit into evidence the following documents attached to this email in MS Word format.

Binder 1

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binder and used in the testimony tomorrow, and send a formal list with the ERNs. Tabs 11 & 12 are already on the Defence's List of Evidence, so it shall not re-file those documents unless requested to do so. The Defence only seeks to rely on the portions highlighted in these statements.

Sincerest regards,

A solid black rectangular box used to redact a signature.

[REDACTED]

From: [REDACTED]
Sent: 29 May 2019 12:21
To: [REDACTED] Trial Chamber IX Communications; [REDACTED]
Subject: RE: OTP vs Ongwen - DEF Submission of Material for D-0139

Dear All,

Pursuant to ICC-02/04-01/15-497, para. 28(iii), the Defence replies to the arguments raised by the Prosecution in its email below.

Firstly, the Defence confirmed with Witness D-0139 during his testimony that he read through Binder 2 and Binder 3 (see T-218, p. 60, lines 7-14; p. 62, lines 15-22). With judicial economy in mind, the Defence noted to the Presiding Judge that it would not go through the binders document by document, but ask only about a few specific documents and a few general questions about the binder as a whole, which the Judge confirmed that en masse discussion would be best (see T-218, p. 60, lines 17-24). While not cited in his report, this procedure is akin to that led to the submission of materials with UGA-OTP-P-0446 (see Prosecution email of 22 March 2018 at 14h18 CET, entitled "RE: P-0446: Prosecution's formal submission of evidence" where the Prosecution noted that the Witness confirmed she read all the documents even though not cited in her report). The Defence notes that the material within Binder 2 "has a genuine – and not a pretextual – connection to the [Defence's] examination of that witness." (see Trial Chamber IX email of 27 March 2018 at 09h54 CET, entitled "Decision on Submitted Materials for P-446")

Secondly, as to the testimonial nature of the documents in Binder 2, the Defence does not seek to rely upon the truth of the content therein (similar to documents submitted through P-0200, see Trial Chamber IX email of 8 February 2018, entitled "Decision on Submitted Material for P-200"). As evidenced by the nature and answers of the questions, the Defence used these documents as further examples of complaints by Internment and IDP camp residents, which was directly discussed during his oral testimony and Rule 68(3) testimony). Whether the allegations were ultimately decided true or not true is not at issue, it is whether the complaints noted within the documents are similar to those experienced by D-0139. While the Prosecution notes that these documents were created in anticipation of legal proceedings, these are court documents which enumerates statements of facts, not direct witness testimony.

Thirdly, the Defence notes that two items on the list of documents requested for submission are already submitted into evidence, UGA-OTP-0191-0127 and UGA-OTP-0191-0132. These documents, which are identical in nature to the others in Binder 2 (with the exception of Tab1), were submitted via commentary by UGA-V40-V-0001 (i.e. commentary by an expert witness) (see emailed decision of 23 May 2018, entitled "Decision on Submitted Materials for V-1"). The Defence relies on Trial Chamber IX's previous decision to allow this type of material to be introduced when used by an Expert Witness.

Finally, in terms of relevance, the Defence notes that the relevance of Binder 2 and 3 shall become apparent in the final brief and/or closing statements if not already understood at this time.

Sincerest regards,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Tuesday, May 28, 2019 4:22 PM
To: [REDACTED] Trial Chamber IX Communications; [REDACTED]
Subject: RE: OTP vs Ongwen - DEF Submission of Material for D-0139

The Prosecution has no observations in respect of binder 1.

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Further, the Prosecution doubts the relevance of the materials contained in binders 2 and 3 which the defence seeks to submit into evidence, particularly material which was not even put to the witness for his comments, but accepts that this is an assessment the Chamber will make at the conclusion of the case.

The Prosecution accepts that no prejudice would be caused by the Chamber permitting items which are not on the Defence List of Evidence to be submitted into evidence now and added to the List of Evidence later.

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 To: Trial Chamber IX Communications; [REDACTED]
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Sincerest regards,

[REDACTED]

From: Trial Chamber IX Communications
Sent: 19 July 2019 14:58
To: [REDACTED]; Trial Chamber IX Communications;
Subject: Decision on Submitted Materials for D-139
Attachments: OTP vs Ongwen - DEF Submission of Material for D-0139; RE: OTP vs Ongwen - DEF Submission of Material for D-0139; RE: OTP vs Ongwen - DEF Submission of Material for D-0139
Follow Up Flag: Follow up
Flag Status: Flagged

Dear Counsel and Registry,

The Defence submitted 70 items for formal recognition for D-139, contained in three 'binders' (Email from the Defence, 28 May 2019, at 15:21).

The Prosecution responded on the same day (Email from the Prosecution, 28, May 2019, at 16:23).

The Defence replied via email on 29 May 2019 (Email from the Defence, at 12:21).

Items already recognised as formally submitted

First, the Chamber notes that 10 items are already recognised as formally submitted (UGA-D26-0018-0003; UGA-OTP-0231-0265; UGA-OTP-0231-0271; UGA-OTP-0231-0383; UGA-OTP-0231-0438; UGA-OTP-0191-0083; UGA-OTP-0191-0107; UGA-OTP-0191-0127; UGA-OTP-0191-0132 and UGA-OTP-0191-0154).

Accordingly, these items will not again be recognised as formally submitted (*see*, Initial Directions on the Conduct of the Proceedings, ICC-02/04-01/15-497, Fn 20).

Objections to the items in binder two

The Prosecution objects to some of the items contained in binder 2 which are, according to the Prosecution, testimonial in nature. It submits that these must be introduced via Rule 68(2) of the Rules.

The Chamber notes that the items in question are not purely court documents, as submitted by the Defence, but contain also factual allegations by applications in anticipation for court proceedings (*see for example*, UGA-OTP-0191-0072 at 0079).

However, in its reply the Defence indicates that it does not rely on these documents for the truth of their content but as proof that several persons filed complaints. The Chamber does not see this assertion as a pretext for the submission. Accordingly, as has been ruled in previous cases, even if the items contain parts that are testimonial in nature, no procedural bar exists for the formal recognition of these items.

Items not on the Defence's list of Evidence

Five of the items in question (UGA-OTP-0191-0149; UGA-OTP-0191-0167; UGA-OTP-0191-0180; UGA-OTP-0191-0200 and UGA-OTP-0191-0209) are not on the Defence's List of Evidence. The Defence requests that it be exceptionally allowed to add them should these items be recognised as formally submitted. It argues that these items are of similar nature as others on the list and do not pertain to the conduct of the accused.

In its response, the Prosecution states that the addition of the five items not yet contained on the Defence's List of Evidence and their recognition as formally submitted would not cause any prejudice to the Prosecution.

Considering that the Prosecution does not object, the Chamber, on an exceptional basis, allows that the items in question are added to the Defence's List of Evidence and allows their recognition as formally submitted.

Items in binder 3 that are already evidence

The Defence submits that, although items 1 to 10 are already in evidence it will ‘stamp and upload these documents as given in the binder’.

The Chamber notes that the items in question are all transcript of testimony of witnesses who previously testified before the Chamber.

The Defence does not explain why the process it proposes is necessary. The items are part of the evidence of the case. Accordingly, they will not be recognised as formally submitted.

Both parties make several submissions as to the relevance of some items. As has been explained in the Initial Directions on the Conduct of the Proceedings, the Chamber will consider these factors when deliberating the judgment.

Considering the above, the Chamber recognises as formally submitted the following items:

Binder 1

UGA-D26-0015-1164 (tab 1); UGA-D26-0015-1172 (tab 2); UGA-D26-0018-0429 (tab 4); UGA-D26-0018-2218 (tab 5); UGA-D26-0018-2332 (tab 6); UGA-D26-0018-2445 (tab 7); and

Binder 2

UGA-OTP-0191-0051 (tab 1); UGA-OTP-0191-0054 (tab 2); UGA-OTP-0191-0057 (tab 3); UGA-OTP-0191-0068 (tab 4); UGA-OTP-0191-0072 (tab 5); UGA-OTP-0191-0091 (tab 7); UGA-OTP-0191-0093 (tab 8); UGA-OTP-0191-0096 (tab 9); UGA-OTP-0191-0099 (tab 10); UGA-OTP-0191-0104 (tab 11); UGA-OTP-0191-0112 (tab 13); UGA-OTP-0191-0115 (tab 14); UGA-OTP-0191-0119 (tab 15); UGA-OTP-0191-0122 (tab 16); UGA-OTP-0191-0124 (tab 17); UGA-OTP-0191-0129 (tab 19); UGA-OTP-0191-0135 (tab 21); UGA-OTP-0191-0140 (tab 22); UGA-OTP-0191-0144 (tab 23); UGA-OTP-0191-0149 (tab 24); UGA-OTP-0191-0151 (tab 25); UGA-OTP-0191-0158 (tab 26); UGA-OTP-0191-0160 (tab 28); UGA-OTP-0191-0162 (tab 29); UGA-OTP-0191-0165 (tab 30); UGA-OTP-0191-0167 (tab 31); UGA-OTP-0191-0169 (tab 32); UGA-OTP-0191-0171 (tab 33); UGA-OTP-0191-0176 (tab 34); UGA-OTP-0191-0180 (tab 35); UGA-OTP-0191-0182 (tab 36); UGA-OTP-0191-0187 (tab 37); UGA-OTP-0191-0189 (tab 38); UGA-OTP-0191-0192 (tab 39); UGA-OTP-0191-0195 (tab 40); UGA-OTP-0191-0200 (tab 41); UGA-OTP-0191-0202 (tab 42); UGA-OTP-0191-0205 (tab 43); UGA-OTP-0191-0207 (tab 44); UGA-OTP-0191-0209 (tab 45); UGA-OTP-0191-0213 (tab 46); and UGA-OTP-0226-0002 (tab 47).

Binder 3

UGA-D26-0022-0350 (tab 11) and UGA-D26-0022-0360 (tab 12).

The Registry is directed to proceed in accordance with paragraph 28(v) of the Initial Directions on the Conduct of the Proceedings, ICC-02/04-01/15-497.

Kind regards,
Trial Chamber IX