

**Cour
Pénale
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**International
Criminal
Court**

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

Date: **6 November 2018**

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

Public Redacted Version of “Defence Response to the Prosecution’s Request for Call Data Records and the Cessation of Phone Privileges to D-0006”, filed on 31 October 2018

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') hereby responds to the "Prosecution's Urgent Request for Call Data Records on Communications between the Accused and Defence Witness D-0006" ('Request').¹ The Prosecution asks Trial Chamber IX ('Chamber') to order the disclosure of Mr Ongwen's call data record ('CDR') with D-0006 and the cessation of phone privileges with her until the conclusion of her testimony.
2. The assertions of the Prosecution are nothing short of mere speculation based on one paragraph in an expert report. The Chamber should reject the Request because:
 - a. The scope of the Request is overbroad;
 - b. The procedures enacted by Pre-Trial Chamber II have proven to be effective;
 - c. The Prosecution fails to demonstrate a reasonable suspicion against Mr Ongwen as it did not exhaust its investigative duties before submitting its Request; and
 - d. The appropriate avenue for the Prosecution is to question D-0006 during its examination of her.

II. CONFIDENTIALITY

3. Pursuant to Regulations 23 *bis*(2) of the Regulations of the Court ('RoC'), this request is submitted as confidential as it responds to a confidential filing.
4. Furthermore, [REDACTED].

¹ ICC-02/04-01/15-1383-Conf.

III. SUBMISSIONS

A. The scope of the CDR request is overbroad.

5. The Prosecution requests the CDR between Mr Ongwen and D-0006 from 21 January 2015 to present.² The Prosecution states that the Requests stems from information absent in UGA-D26-0010-0004 and present in UGA-D26-0015-0948.³
6. The Prosecution has failed to demonstrate why, if its inquiries were sparked by the information listed in the paragraph above, it requires the CDR between Mr Ongwen and D-0006 covering nearly four years. This is an exceptional amount of data which the Prosecution states is covered by a fundamental human right (the right to privacy),⁴ especially since the Prosecution's speculation stems from one paragraph in a 36 page report.
7. The Defence shall not speculate itself as to the true motive of the Request, but the amount of data requested from the CDR is disproportionate to the issue raised in the Request. As the Prosecution has not disclosed its true intentions behind the Request, the Chamber should reject the Prosecution's Request.

B. The protocols enacted by Pre-Trial Chamber II work.

8. On 3 August 2015, Pre-Trial Chamber II ('PTC-II') issued the "Decision concerning the restriction of communications of Dominic Ongwen."⁵ In that decision, PTC-II enacted restrictions on Mr Ongwen's telephone contacts "based on information which led to the finding of a reasonable suspicion that there had been attempts by Dominic Ongwen to exercise via [sic] telephone conversations some form of influence on persons who possess information relevant to the case."⁶ This decision was adopted by the Chamber.⁷
9. The restrictions emplaced by PTC-II include active monitoring of all non-privileged phone calls made by Mr Ongwen and the termination of any calls which interfere with the case (*i.e.* discuss

² Request, paras 5 and 11.

³ Request, para. 7.

⁴ Request, para. 8.

⁵ ICC-02/04-01/15-283.

⁶ ICC-02/04-01/15-283, para. 10.

⁷ See ICC-02/04-01/15-450-Conf, para. 4.

case matters) or use what appears to be coded language.⁸ Should Mr Ongwen violate these rules, the Chamber is immediately notified by the Registry.⁹

10. The restrictions employed against Mr Ongwen are, and have been, effective. As the Prosecution noted in the Request, the ICC Detention Centre terminated calls on two separate occasions when it suspected a violation of PTC-II's order.¹⁰ Had another call of Mr Ongwen been terminated for violating the rules set forth by PTC-II, the Chamber would have been notified as such. The Defence does not recall any such notification to the Chamber since 20 May 2016.
11. The Prosecution has failed to demonstrate how these measures, which have worked in the past, are now deficient. The Request is nothing short of mere speculation. To assume that information about the case was discussed by Mr Ongwen on the phone with D-0006 is an assertion that the ICC Detention Centre is not fulfilling the order issued by PTC-II, whereas the material before the Chamber demonstrates otherwise.
12. As such, the Request should be rejected.

C. The Prosecution fails to demonstrate reasonable suspicion as outlined by Pre-Trial Chamber II.

13. Pursuant to the Protocol on the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant ('Protocol'), the Prosecution may request to interview a witness being called by the Defence.¹¹ Both the Prosecution and Defence have availed itself of this provision in the Protocol.¹²
14. In the past, upon learning of the telephone call in question for the 3 August 2015 order of PTC-II, the Prosecution conducted several interviews of persons before presenting its alleged reasonable suspicion and to have Mr Ongwen's phone privileges restricted.¹³ No such investigations happened in this instance, and the Prosecution is grasping at the proverbial straw.

⁸ ICC-02/04-01/15-283, p. 8.

⁹ ICC-02/04-01/15-283, p. 8.

¹⁰ Request, para. 10.

¹¹ ICC-02/04-01/15-339-Anx, paras 26-39.

¹² The Defence interviewed P-0258, P-0240, P-0209 and P-0142. The Defence also request to interview P-0205, but he declined. The Prosecution interviewed D-0105 and D-0085. The Prosecution also requested to interview D-0121 and D-0025, both of whom accepted to be interviewed.

¹³ See UGA-OTP-0237-0029-R01; UGA-OTP-0237-0031-R01; and UGA-OTP-0237-0034-R01.

15. The Prosecution's reasonable suspicion hinges on the presence of information in one paragraph in UGA-D26-0015-0948 and the absence of said information in UGA-D26-0015-0004. A more reasonable and logical explanation for the absence of the information in the first report is that the issue was not thoroughly discussed with Mr Ongwen.
16. The second expert report, UGA-D26-0015-0948, was disclosed to the Prosecution on or about 29 June 2018, almost four months to the day of the Request. The witness statement of D-0006 has been in the possession of the Prosecution since early January 2016. The summary of witness D-0006's anticipated testimony has been in the possession of the Prosecution since 4 June 2018. The Prosecution waited until the 11th hour to raise its claim, a claim which is speculative.
17. The Prosecution had four months within which to request an interview with D-0006 ahead of her testimony and years to do so in the case. The Defence has already gladly entertained a request pursuant to the Protocol when the interview would take place after the one-month no-contact date,¹⁴ and there is no reason to why it would not have done so in relation to D-0006. Instead, the Prosecution waited until after the one-month no-contact date to raise its speculation with the Chamber and Defence. Quite frankly, the Prosecution never raised this as issue in July, August, September or the beginning of October 2018, and thus it is not a true issue.
18. This speculation is further compounded by the Prosecution's complaint to the Chamber about the anticipated testimonies of the witnesses. After the Presiding Judge discussed the Prosecution's complaint in Court on 8 October 2018,¹⁵ the Prosecution specifically sought information related to the summary of D-0006's anticipated testimony.¹⁶ The Defence responded *via* telephone that day, informing the Prosecution that the Defence included all the information which it anticipated to hear from D-0006 and that it would not be filing an updated summary.¹⁷ By its appearance, the Prosecution used the Presiding Judge's discussion on 8 October 2018 as a springboard to file the Request. Had the Prosecution truly taken issue about the speculation raised in the Request, it would have unequivocally acted earlier and availed itself of the Protocol.

¹⁴ The Prosecution interviewed D-0105 on 15 October 2018 as this was the first available date suitable for the witness.

¹⁵ The Defence disputes the interpretation the Prosecution gives for the Presiding Judge's discussion about the Prosecution's complaint. The Defence does not interpret it as a requirement to file updated anticipated testimonies.

¹⁶ Email from the Prosecution to the Defence, "Query about D-0006," received at 11h58 CET on 17 October 2018.

¹⁷ Telephone call from Defence to Prosecution, 17 October 2018, call beginning at 11h58 CET.

19. Finally, the Prosecution states that “information concerning these communications would engage the Accused’s right to privacy and...require a careful balancing of different interests at stake.”¹⁸ Requesting a court-sanctioned violation of one’s right requires more than speculative accusations. If the issue in the Request was a true issue, the Prosecution would have investigated the issue thoroughly during the months of July, August, September and early October 2018 before submitted the Request.
20. The Defence asks the Chamber to reject the Request because the Prosecution has not provided any indicia of reasonable suspicion.

D. The appropriate avenue is to question D-0006 during the examination of the witness.

21. The Prosecution’s request for the CDR of Mr Ongwen’s calls to D-0006 is without merit. Mr Ongwen’s outgoing calls to D-0006 will offer nothing to the Prosecution’s examination of the witness.¹⁹ The frequency with which Mr Ongwen called D-0006 is irrelevant. It is a red herring in what can only be speculated to be a platform in a clandestine attempt to secure the Chamber’s blessing at a later point and request an order for the production of the audios of the recorded conversations.
22. The Prosecution remains at liberty to question D-0006 about the frequency of her contacts with Mr Ongwen and if the issue was discussed during their conversations. The Prosecution is also free to question the witness [REDACTED]. This is the only logical avenue as opposed to the Prosecution Request since the Prosecution failed to avail itself of the Protocol earlier.
23. Furthermore, witnesses D-0041 and D-0042 will also testify before the Chamber. Should the Prosecution feel the need to inquire further about this issue, it can also question those witnesses during their respective examinations.
24. The Defence asks the Chamber to reject the Request as the appropriate avenue is for the Prosecution to question D-0006 about the issue in the Request.

¹⁸ Request, para. 8.

¹⁹ The Defence notes that the ICC-DC does not connect incoming phone calls to Mr Ongwen, and thus there is no incoming CDR related to conversations made between Mr Ongwen and D-0006.

IV. RELIEF

25. For the reasons delineated above, the Defence respectfully requests the Chamber to reject the Request.

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 6th day of November, 2018
At The Hague, Netherlands