

ANNEX XLV

PUBLIC

From: Trial Chamber IX Communications
Sent: 07 November 2018 16:17
To: [REDACTED]

Subject: Request concerning telephone call of 29 October between the accused and D-6

Dear parties,

With regard to the request for reclassification of filing ICC-02/04-01/15-1392-Conf-Exp-Anxl, the Chamber will order the Registry to reclassify the record as 'confidential'. The Defence's argumentation that the filing is 'of no relevance and should be excluded from use during the witness's examination by the parties' is not followed. The document pertains to contacts between D-6 and the accused, and the Prosecution was granted access to it in anticipation that it would be used when questioning D-6 (decision -1388).

In respect of the request that the Chamber review the content of the conversation between the accused and the witness on 29 October 2018 the Chamber decides that this is not necessary at this point in time. The Chamber will ensure that the Prosecution will have the possibility to fully question the witness on the content of the conversation during her testimony. The Chamber stresses that the decision not to review the contents of the telephone conversation might be subject to re-assessment should it receive new information during the witness's testimony or otherwise. It further underlines the possibility to suspend her testimony or to recall her should this be considered necessary.

Kind regards,
 Trial Chamber IX

From: [REDACTED]
Sent: 07 November 2018 11:52
To: Trial Chamber IX Communications
Cc: [REDACTED]

Subject: Defence Response to the Prosecution's Request on 6 November 2018 at 16h23

Dear Trial Chamber IX,

On behalf of Counsel for Dominic Ongwen, I convey the following response to the Prosecution's "Request concerning telephone call of 29 October", received at 16h23 CET on 6 November 2018 *via* email ('Request').

On 6 November 2018 at 16h52 CET, Trial Chamber IX ('Chamber') shortened the deadline to respond to the Request to 12h00 CET on 7 November 2018.

The Chamber should reject the Request as it is unfounded and contains speculative arguments without addressing the requirements to order an invasion into one's fundamental right to privacy.

Firstly, the Prosecution alleges reasonable grounds to believe that Mr Ongwen discussed inappropriate material during his phone call on 29 October 2018, but presents no arguments in support of this allegation. As the Court is aware, Mr Ongwen's non-privileged communications are actively monitored by an Acholi speaker and he can only make non-privileged phone calls to Acholi speaking persons at pre-scheduled times arranged by the Detention Centre twice a week. Mr Ongwen cannot make a telephone call to a non-

privileged Acholi speaking person whenever he desires. The Prosecution fails to appreciate the complexities involved with Mr Ongwen's non-privileged phone calls as a result of Decision 283, and arrives at an uniformed and incorrect speculation when it wrote "[t]here are reasonable grounds to believe that the reason for the making of the call was connected with the Prosecution's concern about improper communications, as expressed in filing #1383". There are no reasonable grounds to believe anything about which the Prosecution speculates in the Request.

Secondly, the Prosecution has no right to assume what is or is not discussed during privileged conversations with Mr Ongwen. It is unprofessional conduct to assume what is or what is not discussed by Counsels during privileged conversations, and this assumption should have no bearing on the Chamber's decision in this matter.

Thirdly, should the Chamber decide the speculative remarks of the Prosecution amount to reasonable suspicion, the Defence invites the Chamber to receive a copy of the audio recording in an *ex parte* manner and make an independent conclusion as to the content. After the Chamber makes an independent determination, and should such determination proves that nothing inappropriate was discussed, the Defence respectfully asks the Chamber to order the Prosecution to make a public apology for the invasion into Mr Ongwen's and the witness's private life.

Fourthly, the Defence asks the Chamber to reject the Prosecution's Request in such that ICC-02/04-01/15-1392-Conf-Exp-Anx1 be reclassified as confidential and be used during the questioning of UGA-D26-P-0006. The document is of no relevance to the case and should be excluded from use during the witness's examination by the Parties.

Finally, the Defence shall be filing this response into the official case record this afternoon.

Sincerest regards,

[REDACTED]

On behalf of Counsel for Dominic Ongwen

From: [REDACTED]
 Sent: 06 November 2018 16:23
 To: Trial Chamber IX Communications; [REDACTED]
 [REDACTED]

Subject: Request concerning telephone call of 29 October

In the light of the telephone data annexed to the Registry's filing (#1392), and the information revealed by the Defence in their email of 09.34 (both received this morning) the Prosecution submits that the sound recording of the telephone call lasting 9 minutes and 47 seconds made by the Accused to D-0006 at 16.41 on 29 October 2018 should be produced by the Detention Centre as a matter of urgency, and that a transcript and translation into English (if another language was spoken at any stage during the course of the call) be prepared.

The Prosecution notes that its filing requesting the provision of the call data (#1383) was notified at 14.04 on Friday 26 October 2018. The Chamber was not sitting on that day. After the intervening weekend Mr Ongwen met his lawyers in the courtroom on Monday 29 October and had the opportunity to learn of the Prosecution's filing, if he had not done so before. The hearings on that day were adjourned at 14.59. It must have been immediately upon returning to the Detention Centre or very shortly thereafter, that the Accused made the call to D-0006.

There are reasonable grounds to believe that the reason for the making of this call was connected with the Prosecution's concerns about improper communications, as expressed in filing #1383.

The Prosecution does not ask to be provided with the sound recording, transcript and translation, at least in the first instance. Following the procedure adopted by the Pre-Trial Chamber in respect of other calls made by the Accused to witnesses in this case (decision #254) the Prosecution submits that the appropriate mechanism is for these materials to be provided *ex parte* to the Chamber alone, and for the Chamber to decide if, and to what extent, these materials need to be provided to the parties and participants in order for D-0006 to be properly questioned.

The Prosecution submits that the short time before D-0006 is expected to testify justifies the making of this request by email. The Prosecution is happy to file a formal Request if the Chamber deems this necessary.

As a separate matter Annex 1 to Registry Filing 1392 is currently classified 'confidential ex parte, only available to the Registry, the Prosecution and the Defence'. The Prosecution proposes that Annex 1 should be reclassified simply as 'confidential', so that both LRV teams also have access to it. Annex 1 contains only the date of phone calls and their duration, nothing more. The Prosecution may use the document during its examination of D-0006. If the Chamber so orders the Prosecution will also resend this email to include the LRVs.

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