

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/04-01/15
Date: 2 November 2018

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN UGANDA

IN THE CASE OF *THE PROSECUTOR v. DOMINIC ONGWEN*

Public

**Decision on Prosecution Request for Detention Centre Call Data Related to the
Accused and D-6**

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

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Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber IX ('Single Judge' and 'Chamber', respectively) of the International Criminal Court ('ICC'), in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Articles 57(3)(a), 61(11) and 64(2) and (6)(a) of the Rome Statute ('Statute') and Regulation 23 *bis* of the Regulations of the Court ('Regulations'), issues the following 'Decision on Prosecution Request for Detention Centre Call Data Related to the Accused and D-6'.

I. Procedural history and relief sought

1. On 26 October 2018, the Office of the Prosecutor ('Prosecution') filed a submission ('Request') requesting that the Chamber:
 - a. order the ICC Detention Centre to file into the record of the case a report relating to communications between witness D-6 and Dominic Ongwen, containing the following data: (i) the date and time of each communication between these two persons from the accused's arrival to the ICC Detention Centre until now; (ii) the duration of each such communication and (iii) whether the contact was initiated by Dominic Ongwen or D-6 ('Call Data').
 - b. order that the accused should not be allowed to communicate with D-6 until the conclusion of her testimony.¹
2. On 31 October 2018,² the defence for Mr Ongwen ('Defence') filed a response opposing the Request in full ('Response').³

II. Applicable law

3. At the outset, the Single Judge considers the Prosecution's reliance on Regulation 92(3) of the Regulations to be misplaced in this context. Recordings, logs and other material derived from non-privileged calls are generally not part of the detention record within the meaning of Regulation 92 of the

¹ Prosecution's Urgent Request for Call Data on Communications between the Accused and Defence Witness D-0006, ICC-02/04-01/15-1383-Conf.

² The response deadline was shortened to this date. Email from the Chamber, 26 October 2018 at 14:32.

³ Defence Response to the Prosecution's Request for Call Data Records and the Cessation of Phone Privileges to D-0006, ICC-02/04-01/15-1387-Conf.

Regulations.⁴ In this regard, the Single Judge notes that D-6 was not one of the persons concerned in the conduct leading to Mr Ongwen’s contact restrictions under Regulation 101 of the Regulations.⁵ Such a request to access Detention Centre call data rather falls under Article 57(3)(a) of the Statute,⁶ applied at trial by virtue of Article 64(6)(a) of the Statute,⁷ and interpreted through the lens of the accused’s right to privacy.⁸

4. The following further considerations guide the Single Judge’s assessment of this matter.

⁴ Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision on Bemba and Arido Defence Requests to Declare Certain Materials Inadmissible, 30 October 2015, ICC-01/05-01/13-1432, para. 13; Pre-Trial Chamber II, *Situation in the Central African Republic*, Decision on the Prosecutor’s “Request for judicial assistance to obtain evidence for investigation under Article 70”, 8 May 2013, ICC-01/05-46 (reclassified 3 February 2014), para. 9.

⁵ Decision concerning the restriction of communications of Dominic Ongwen, 3 August 2015, ICC-02/04-01/15-283 (reclassified as public on 29 September 2015). *See also* Appeals Chamber, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of the Prosecutor against the “Decision on Request 1200 of the Prosecutor for Prohibition and Restrictive Measures Against Mathieu Ngudjolo with Respect to Contacts Both Outside and Inside the Detention Centre”, 9 December 2009, ICC-01/04-01/07-1718, OA 9 (reclassified 4 February 2015), paras 40-41, 49-50; Appeals Chamber, *The Prosecutor v. Mathieu Ngudjolo Chui*, Judgment on the Prosecutor’s appeal against the decision of Trial Chamber II entitled “Judgment pursuant to article 74 of the Statute”, 7 April 2015, ICC-01/04-02/12-271-Corr, A (with three annexes), para. 267; Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision further to the Appeals Chamber judgment of 9 December 2009 and responding to request 1959-Conf-Exp of the Office of the Prosecutor, 10 June 2010, ICC-01/04-01/07-2187-tENG-Red (public translation notified 13 February 2015), paras 40-44 (information founding orders to restrict contacts is considered part of the detention record, noting Regulation 189(c) of the Regulations of the Registry).

⁶ Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, 8 March 2018, ICC-01/05-01/13-2275-Red, A-A5 (*Bemba et al.* AJ) (with three annexes), paras 378-82 (a finding made in the context of transmitting call recordings to the Prosecution). Article 57(3)(a) provides that the Pre-Trial Chamber may ‘[a]t the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation’.

⁷ Article 64(6)(a) provides that a Trial Chamber may, as necessary, ‘[e]xercise any functions of the Pre-Trial Chamber referred to in article 61, paragraph 11’. Article 61(11) of the Statute in turn provides that: ‘Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which, subject to paragraph 9 and to article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings’.

⁸ Article 21(3) of the Statute. *See also* European Convention on Human Rights, 4 November 1950, art. 8(1) (‘[e]veryone has the right to respect for his private and family life, his home and his correspondence’); American Convention on Human Rights, 22 November 1969, art. 11(2) (‘[n]o one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence [...]’); International Covenant on Civil and Political Rights, 16 December 1966, United Nations Treaty Series 14668, art. 17 (‘[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence [...]’).

5. Detained persons benefit from the internationally recognised human right to privacy, though certain limitations necessarily result from the fact that the person concerned is in detention.⁹ Orders interfering with the right to privacy must be made in accordance with the law.¹⁰ Further, in deciding whether an interference with privacy is necessary, the interference must be proportionate to the legitimate aims pursued.¹¹
6. In the ordinary routine of the Detention Centre, a log is maintained of all telephone calls which contains, amongst other information, the caller, the time, date and duration of the call.¹² Detention Centre phone calls are also recorded (subject to certain exceptions),¹³ but the present Request does not concern the contents of any such calls.
7. Transmission of Detention Centre call data to the Prosecution entails an additional intrusion into the accused's privacy, as it expands the scope of individuals with access to this material beyond what is provided for in the regular detention regime.¹⁴ But chambers are vested with the discretion to transmit such information to the Prosecution, including for the purposes of the Prosecution's exercise of its authority to 'establish the truth' within the meaning of Article 54(1) of the Statute and with a view to potentially introducing such recordings as evidence in an ongoing trial.¹⁵

⁹ *Bemba et al.* AJ, ICC-01/05-01/13-2275-Red, para. 372, with reference to United Nations Office of the High Commissioner for Human Rights, "Basic Principles for the Treatment of Prisoners", adopted and proclaimed by UNGA resolution 45/111 of 14 December 1990, A/45/756, art. 5.

¹⁰ *Bemba et al.* AJ, ICC-01/05-01/13-2275-Red, para. 285; European Court of Human Rights (Grand Chamber), *Khoroshenko v. Russia*, 30 June 2015, 41418/04 ('*Khoroshenko*'), para. 110 (with further references therein). See also Human Rights Committee, General Comment 16, 28 September 1988, paras 3, 8 and 10; Inter-American Court of Human Rights, *Case of Tristán Donoso v. Panamá*, Judgment, 27 January 2009, paras 55-57.

¹¹ *Bemba et al.* AJ, ICC-01/05-01/13-2275-Red, para. 331; ECtHR, *Khoroshenko*, 41418/04, para. 118 (with further references therein).

¹² Regulation 173(1) of the Regulations of the Registry.

¹³ See Regulations 174(1)-(2) of the Regulations of the Registry.

¹⁴ See *Bemba et al.* AJ, ICC-01/05-01/13-2275-Red, para. 377.

¹⁵ *Bemba et al.* AJ, ICC-01/05-01/13-2275-Red, para. 380.

III. Analysis and conclusions

8. Preliminarily, the Single Judge agrees with the Defence that the Prosecution did not seek its relief in a timely way.¹⁶ The Single Judge does not consider that this affects whether there is a sufficient factual basis for the relief sought or call into question the Prosecution's motives for seeking the requested call data.¹⁷ But this delay did create an unnecessary degree of urgency. The Prosecution is expected to exercise more diligence when seeking such information, so as to avoid litigation on materials sought to be used with an imminently appearing witness.
9. Additionally, the Defence asks that all filings related to this matter must be kept confidential as D-6 has been granted protective measures.¹⁸ So long as D-6's identifying information is withheld from the public, the Single Judge does not consider that D-6's protective measures justify keeping all aspects of this litigation confidential. The present decision is issued publicly, and the Single Judge directs the parties to prepare public versions of their filings.

A. Call Data

10. The Single Judge will now evaluate whether there is a sufficient basis for the first part of the relief sought, namely the requested Call Data. The Single Judge conducts this assessment in light of the criteria derived from human rights jurisprudence,¹⁹ looking at whether the requested interference with Mr Ongwen's privacy is: (i) in accordance with the law; (ii) necessary and (iii) proportionate.

¹⁶ Response, ICC-02/04-01/15-1387-Conf, paras 16-19.

¹⁷ *Contra* Response, ICC-02/04-01/15-1387-Conf, paras 2(c), 13-20.

¹⁸ Response, ICC-02/04-01/15-1387-Conf, para. 4.

¹⁹ Paragraph 5 above.

11. As for whether the requested interference with Mr Ongwen's privacy rights is 'in accordance with the law', the Single Judge considers that the legal considerations set out in Section II above confirm that there is a sufficient legal basis for the Request.
12. As to the necessity of the Call Data, it is noted that D-6 is going to testify in the near future and has been included on the accused's list of Detention Centre contacts for some time.²⁰ The Prosecution submits that the information sought is relevant to its examination of D-6 in order to investigate and explore 'issues such as the nature of D-0006's relationship with the Accused, the extent of communication between D-0006 and the Accused since his arrival to the ICC Detention Unit and D-0006's motivations to testify'.²¹ The Prosecution cites a second report prepared by Defence mental health experts which contains information - not included in their first report on the same topic - suggesting that the accused may have recently discussed events involving D-6 with Defence expert witnesses.²²
13. The Single Judge is satisfied that these reasons constitute a sufficient showing of necessity for the requested Call Data. In particular, the fact that a second report from Defence mental health experts reflects new information highly specific to D-6 suggests that this person and the accused may have discussed aspects of this case.²³ In order for the Prosecution to consequently ask questions on the nature and extent of D-6's Detention Centre contacts with the accused, it is understandable that some extrinsic information would be needed in order to meaningfully assess the credibility of the answers received.

²⁰ Annex to the Registry's transmission in the record of the case following the Order in document ICC-02/04-01/15-254, 26 June 2015, ICC-02/04-01/15-257-Conf-Exp-Anx.

²¹ Request, ICC-02/04-01/15-1383-Conf, para. 6.

²² Request, ICC-02/04-01/15-1383-Conf, para. 7.

²³ Compare First Report, UGA-D26-0015-0004, with Second Report, UGA-D26-0015-0948, 0960.

14. The Single Judge considers that the Prosecution has a justifiable interest in exploring such matters with D-6 on an informed basis.²⁴ In this regard, the fact that the Registry has not raised any concerns to date about the accused's contacts with D-6 is immaterial²⁵ – the determination at issue is for the Single Judge to make independently on the basis of the information before the Chamber. This said, the Single Judge emphasises that no information to date confirms that anything inappropriate has happened during the accused's telephone contacts with D-6.
15. As for the proportionality of the requested measure, the Single Judge considers the Prosecution's relief sought to be sufficiently proportionate. The Prosecution only seeks information from the Detention Centre between the accused and a single Defence witness. The Call Data requested is prepared in the ordinary course of the operation of the Detention Centre. Significantly, the Prosecution is only requesting data related to telephone calls and not their recorded contents.
16. The Single Judge notes the Defence's argument that the extra information in the expert report does not justify transmitting nearly four years of call data between the accused and D-6.²⁶ However, this argument does not adequately describe the Prosecution's stated purpose for seeking the Call Data. The expert report may be the reason why the Prosecution became interested in the accused's Detention Centre contacts with D-6, but the Prosecution makes it clear that its primary interest is to explore the nature and extent of these contacts.²⁷ Inquiries on this point necessarily implicate the entirety of D-6's Detention Centre contacts with the accused, meaning that the Request cannot be more narrowly tailored than it currently is without defeating the stated goal.

²⁴ *Contra* Response, ICC-02/04-01/15-1387-Conf, paras 21-24 (arguing that Prosecution questioning alone is sufficient).

²⁵ *Contra* Response, ICC-02/04-01/15-1387-Conf, paras 8-12.

²⁶ Response, ICC-02/04-01/15-1387-Conf, paras 5-7.

²⁷ See paragraph 12 above.

17. For these reasons, the Single Judge is satisfied that there is a sufficient legal and factual basis for transmitting the Call Data. The Single Judge grants the first part of the relief sought,²⁸ and will ensure that the Prosecution's subsequent use of the Call Data will be in full conformity with the fair and expeditious conduct of the proceedings.²⁹

B. Prohibition on contact with D-6

18. The second part of the relief sought is for an order that 'that the accused should not be allowed to communicate with D-6 until the conclusion of her testimony'. Pursuant to the witness familiarisation framework in this case, the Defence – and, correspondingly, the accused – are already not allowed to speak with D-6 within one month of her testimony unless doing so is strictly necessary.³⁰ Once D-6 starts the familiarisation process shortly prior to testifying, she cannot be contacted by the calling party until her testimony finishes.³¹ Noting that D-6 is scheduled to testify later this month, the Single Judge considers that these pre-existing and extensive limitations on contact with D-6 sufficiently capture the relief sought by the Prosecution.

19. The Single Judge thus considers that there is no apparent need to alter Mr Ongwen's existing contact restrictions,³² and dismisses this part of the relief sought.

²⁸ In relation to the third part of the relief sought (information on whether contacts were initiated by Dominic Ongwen or D-6), the Defence submission is noted that the Detention Centre does not connect incoming phone calls to Mr Ongwen. Response, ICC-02/04-01/15-1387-Conf, para. 21, n. 19.

²⁹ Article 64(2) of the Statute.

³⁰ Decision on Request for Clarification on Familiarisation Protocol, 2 May 2017, ICC-02/04-01/15-876-Anx1, page 2 (filed in case record 15 June 2017); Decision on Protocols to be Adopted at Trial, 22 July 2016, ICC-02/04-01/15-504 (with two annexes).

³¹ Annex 1 to the Decision on Protocols to be Adopted at Trial, 22 July 2016, ICC-02/04-01/15-504-Anx1, paras 26, 101.

³² See Response, ICC-02/04-01/15-1387-Conf, paras 13-20.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

GRANTS the Request regarding the Call Data;

DISMISSES the remainder of the Request;

ORDERS the Registry to file the Call Data sought by the Prosecution in the case record as soon as possible; and

ORDERS the submitting party to file a public redacted version of the Request (ICC-02/04-01/15-1383-Conf) and Response (ICC-02/04-01/15-1387-Conf) – or request reclassification thereof – within 10 days of notification of the present decision.

Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt, Single Judge

Dated 2 November 2018

At The Hague, The Netherlands