

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-02/04-01/15
Date: 12 November 2019

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

**Prosecution's Response to "Defence Request for Guidance Regarding the
Limitation of Contact with and between D-0041 and D-0042"**

Source: The Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Benjamin Gumpert

Counsel for Dominic Ongwen

Mr Krispus Ayena Odongo
Mr Charles Taku
Ms Beth Lyons

Legal Representatives of Victims

Mr Joseph Akwenyu Manoba
Mr Francisco Cox
Ms Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Section

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. In response to the Defence Request for Guidance Regarding the Limitation of Contact with and between D-0041 and D-0042 (“Request”),¹ the Prosecution submits as follows:

- (1) The Prosecution does not object to D-0041 being present in the Courtroom during D-0042’s testimony and vice versa;
- (2) D-0041 and D-0042 should not be allowed to communicate about the content of the ongoing testimonies with each other or with the Defence from the beginning of the first Defence expert’s testimony until the conclusion of the second Defence expert’s testimony (*i.e.*, 18-22 Nov. 2019);
- (3) from the start of any rebuttal testimony from P-0447 until that testimony concludes (*i.e.*, 25-26 Nov. 2019), D-0041 and D-0042 should not be allowed to communicate about the content of P-0447’s testimony with the Defence; and
- (4) from the start of any rejoinder testimony until that testimony concludes (*i.e.*, 28-29 Nov. 2019), D-0041 and D-0042 should not be allowed to communicate about the content of the ongoing testimony with each other or with the Defence.

Submissions

2. The Prosecution’s position is based on paragraph 37 of the witness familiarisation protocol, adopted by the Chamber, which states that expert witnesses must be reminded not to discuss the evidence they have given or will give.² The Chamber has also previously determined that D-0041 and D-0042 should testify “independently.”³ The Prosecution submits that the independence of their testimonies would be undermined if they are consulting with each other or with the

¹ ICC-02/04-01/15-1659.

² ICC-02/04-01/15-504-Anx1, para. 37.

³ ICC-02/04-01/15-1623, paras. 9-11, p. 9.

Defence during their separate testimonies, in particular since they co-authored the expert reports. Furthermore, the Chamber's determination that P-0447 must not communicate with the Prosecution about the content of the ongoing testimonies during the testimony of D-0041 and D-0042⁴ should apply reciprocally to the Defence mental health experts.

3. For clarity, the Prosecution has indicated below its proposal for how the communication regime should function day-by-day:

-) Monday, 18 November (testimony of first Defence expert): From the start of the testimony of the first Defence expert, no contact about the ongoing testimonies between D-0041 and D-0042 or between either of them and the Defence; the non-testifying witness may be present in the Courtroom;
-) Tuesday, 19 November (testimony of first Defence expert): No contact about the ongoing testimonies between D-0041 and D-0042 or between either of them and the Defence; the non-testifying witness may be present in the Courtroom;
-) Wednesday, 20 November (day off): No contact about the ongoing testimonies between D-0041 and D-0042 or between either of them and the Defence;
-) Thursday, 21 November (testimony of second Defence expert): No contact about the ongoing testimonies between D-0041 and D-0042 or between either of them and the Defence; the non-testifying witness may be present in the Courtroom;
-) Friday, 22 November (testimony of second Defence expert): Until the second Defence expert finishes testifying, no contact about the ongoing testimonies between D-0041 and D-0042 or between either of them and the Defence; the non-testifying witness may be present in the Courtroom;

⁴ ICC-02/04-01/15-1623, para. 18.

-) Weekend of 23-24 November: Assuming that both have concluded their testimony, D-0041 and D-0042 may communicate with each other and the Defence, including in relation to any additional report from P-0447;
-) Monday, 25 November (potential rebuttal testimony of P-0447): From the start of P-0447's testimony, D-0041 and D-0042 may communicate with each other freely but may not discuss the ongoing testimony of P-0447 with the Defence; both may be present in the Courtroom;
-) Tuesday, 26 November (potential rebuttal testimony of P-0447): D-0041 and D-0042 may communicate with each other freely but may not discuss the ongoing testimony of P-0447 with the Defence; both may be present in the Courtroom;
-) Wednesday, 27 November (day off): D-0041 and D-0042 may communicate freely with each other and with the Defence, including in order to consult on whether to bring rejoinder evidence;
-) Thursday, 28 November (potential rejoinder testimony of D-0041 or D-0042): From the start of the rejoinder witness's testimony, no contact about the ongoing testimony between D-0041 and D-0042 or between either of them and the Defence; the non-testifying expert may be present in the Courtroom;
-) Friday, 29 November (potential rejoinder testimony of D-0041 or D-0042): Until the conclusion of the rejoinder witness's testimony, no contact about the ongoing testimony between D-0041 and D-0042 or between either of them and the Defence; the non-testifying expert may be present in the Courtroom.

Conclusion

4. For the reasons set out above, the Prosecution requests that the Chamber apply the above-described communication regime during the upcoming trial session.



Fatou Bensouda, Prosecutor

Dated this 12th day of November 2019
At The Hague, the Netherlands