

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-02/04-01/15**
Date: **14 November 2019**

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN UGANDA

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

Public

**Decision on Defence Request for Guidance Regarding Contacts During the
Testimony of D-0041 and D-0042**

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

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REGISTRY

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Counsel Support Section

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Detention Section

**Victims Participation and Reparations
Section**

Others

Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber IX (‘Single Judge’ and ‘Chamber’, respectively) of the International Criminal Court, in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Article 64(2) and (6) of the Rome Statute, Rule 140(3) of the Rules of Procedure and Evidence, and Regulations 43 and 44 of the Regulations of the Court (the ‘Regulations’), issues the following ‘Decision on Defence Request for Guidance Regarding Contacts During the Testimony of D-0041 and D-0042’.

1. On 1 October 2019, after requests from the Office of the Prosecutor (the ‘Prosecution’)¹ and the Defence,² respectively, the Chamber decided in relation to the testimony of Defence expert witnesses D-0041 and D-0042 (the ‘Defence Experts’), *inter alia*, that they would testify consecutively, that the Prosecution would be allowed to call P-0447 as rebuttal witness, and that the Defence could call D-0041 or D-0042 as rejoinder witness, should it wish to do so.³
2. On 8 November 2019, the Defence, in anticipation of the testimony of the Defence Experts scheduled for the second half of November 2019,⁴ sought guidance from the Chamber in relation to the ‘limitation of contact with and between its Defence Expert Witnesses D-0041 and D-0042’.⁵
3. Specifically, the Defence enquires whether:
 - i) D-0041 and D-0042, respectively, are permitted to be present in the courtroom as non-testifying expert during the testimony of the testifying expert;
 - ii) the Defence is permitted to communicate with the non-testifying expert before, during and after the testimony of the testifying expert;
 - iii) the Defence Experts are permitted to communicate with each other before and after their testimonies;

¹ Prosecution’s request for the Trial Chamber to order the Defence to specify a date for the testimony, 17 September 2019, ICC-02/04-01/15-1596.

² Defence Motion Regarding the Mode of D-41 and D-42’s Testimony, 17 September 2019, ICC-02/04-01/15-1598.

³ Decision on Requests related to the Testimony of Defence Expert Witnesses D-0041 and D-0042, ICC-02/04-01/15-1623 (the ‘Decision on Testimony of D-0041 and D-0042’).

⁴ See Decision on Testimony of D-0041 and D-0042, ICC-02/04-01/15-1623, paras 22-23.

⁵ Defence Request for Guidance Regarding the Limitation of Contact with and between D-0041 and D-0042, ICC-02/04-01/15-1659 (the ‘Request’).

- iv) the potential rejoinder witness is permitted to communicate with the Defence after conclusion of his testimony and before the start of P-0447's rebuttal testimony, and, if so, to which extent; and
 - v) the potential rejoinder witness is permitted to communicate with the other Defence expert witness after the conclusion of their testimonies and before the start of P-0447's rebuttal testimony, and, if so, to which extent.
4. The Prosecution in its response of 12 November 2019 submits that:
- i) it does not object to the non-testifying expert being present in the courtroom during the testimony of the testifying expert;
 - ii) the Defence Experts should not be allowed to communicate with each other or the Defence about the content of the ongoing testimonies from the beginning until the conclusion of both testimonies;
 - iii) the Defence Experts should not be allowed to communicate with the Defence about the content of P-0447's rebuttal testimony while that testimony is ongoing; and
 - iv) the Defence Experts should not be allowed to communicate with each other or the Defence about the content of any rejoinder testimony while that testimony is ongoing.⁶
5. The Prosecution also specifies that the Defence Experts could communicate with each other and the Defence after conclusion of both their testimonies and before the start of any rebuttal testimony, as well as after the conclusion of any rebuttal testimony and before the commencement of a potential rejoinder testimony.⁷

⁶ Prosecution's Response to "Defence Request for Guidance Regarding the Limitation of Contact with and between D-0041 and D-0042", ICC-02/04-01/15-1662 (the 'Prosecution Response'), para. 1.

⁷ Prosecution Response, ICC-02/04-01/15-1662, p. 5.

6. On 12 November 2019, the Defence confirmed that witness D-0041 would testify first, followed by witness D-0042, who would also be the potential rejoinder witness, if one were to be called by the Defence.⁸
7. Having considered the above submissions, and bearing in mind Regulation 44 of the Regulations as well as the protocol on the familiarisation of witnesses,⁹ the Single Judge is of the view that the contacts of the Defence Experts between each other and with the Defence in the course of their upcoming testimonies, as well as during any potential rebuttal and rejoinder testimony, shall be organised as follows:
 - a) D-0042 may be present in the courtroom during the testimony of D-0041;
 - b) D-0041 may be present in the courtroom during the testimony of D-0042;
 - c) from the start of the testimony of D-0041 as the first testifying expert until the conclusion of D-0042 as the second testifying expert, the Defence Experts are not to communicate with each other, or with the Defence, about the content of their ongoing testimonies;
 - d) after the conclusion of both their testimonies, and before the start of a potential rebuttal testimony of P-0447, the Defence Experts may communicate with each other and the Defence, including with regard to any potential new report from P-0447;
 - e) D-0042, as the potential rejoinder witness, may be present in the courtroom during P-0447's potential rebuttal testimony;
 - f) in the course of any potential rebuttal testimony, the Defence Experts are not to communicate with each other, or with the Defence, about the content of that ongoing testimony;
 - g) after the conclusion of any rebuttal testimony, and before the start of a potential rejoinder testimony, the Defence Experts may communicate with each other and the

⁸ Email to Trial Chamber IX Communications, at 14:43.

⁹ See Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, ICC-02/04-01/15-504-Anx1, paras 31, 34, 37.

Defence, including with regard to deciding whether any rejoinder testimony may be required;¹⁰ and

- h) in the course of any potential rejoinder testimony, the Defence Experts are not to communicate with each other, or with the Defence, about the content of that ongoing testimony.
8. The Single Judge further notes that the presence in the courtroom of witness P-0447 as a potential rebuttal witness and his contacts with the Prosecution during the testimony of the Defence Experts were addressed in the Decision on Testimony of D-0041 and D-0042.¹¹

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

DECIDES that the contacts of witnesses D-0041 and D-0042 between each other and with the Defence in the course of their testimonies, as well as during any potential rebuttal and rejoinder evidence, are to be regulated as outlined in paragraph 7 of the present decision.

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


Judge Bertram Schmitt, Single Judge

Dated 14 November 2019

At The Hague, The Netherlands

¹⁰ This bearing in mind at the same time that the Chamber has decided against witness preparation in this case. See Decision on Protocols to be Adopted at Trial, 22 July 2016, ICC-02/04-01/15-504, paras 4-17.

¹¹ See Decision on Testimony of D-0041 and D-0042, ICC-02/04-01/15-1623, para. 20.