

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **23 September 2019**

Date: **2 October 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

Public redacted version of "Prosecution's Response to the "Defence Urgent Request to Order a Medical Examination of Mr. Ongwen", 23 September 2019, ICC-02/04-01/15-1606-Conf

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

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Defence requests that a psychiatric examination of Mr Ongwen be conducted by an expert appointed by the Chamber under article 64(2) of the Statute and rule 135 of the Rules.¹ The purpose of this examination, as per the Defence, is: “[t]o make a diagnosis as to any mental condition or disorder that Mr Ongwen may suffer at the present time that makes him unable to make an informed decision whether or not to testify in his defence”.²

2. The Defence Request should be rejected *in limine* since the deadline for adding witnesses to the Defence’s list of witnesses expired on 4 June 2018. Mr Ongwen’s fitness to testify is currently irrelevant, since the Defence has made no application to add him to the list after the expiry of the deadline.

3. Should the Chamber decide to engage with the merits, the Prosecution requests that the Defence Request be rejected because the Defence has not shown any relevant change in Mr Ongwen’s mental or physical health that would warrant an examination of under Rule 135 to assess his fitness to stand trial.

Procedural Background

4. On 5 December 2016 the Defence requested an adjournment and an assessment of Mr Ongwen’s fitness to stand trial.³ On 6 December 2016, the Chamber issued an oral decision, finding that it has been “presented with insufficient evidence

¹ ICC-02/04-01/15-1595-Conf (“Defence Request), para. 3.

² *Ibid.*

³ ICC-02/04-01/15-620-Conf.

at this time to conclude that Mr Ongwen is unfit; and [...] no adjournment of the trial is therefore justified.⁴

5. On 16 December 2016, the Chamber issued its Decision on the Defence Request to Order a Medical Examination of Dominic Ongwen⁵ (“16 December 2016 Decision”). The Chamber decided that “the available information demonstrates Mr Ongwen’s fitness to stand trial”⁶ and concluded that “a medical examination of Mr Ongwen under Rule 135 [...] to assess his fitness to stand trial is unwarranted.”⁷

6. On 9 January 2019 the Defence made an urgent *ex parte* email request to the Chamber for postponement of the trial for reasons related to the health and safety of the Accused.⁸ On 16 January 2019, the Chamber issued its Decision on Defence Request to Order an Adjournment and a Medical Examination (“16 January 2019 Decision”).⁹ The Chamber found that “[t]he medical situation of the accused has not changed”¹⁰ and did not “find sufficient reason to seek a Rule 135 examination in order to determine the accused’s fitness to stand trial.”¹¹

7. On 16 September 2019, the Defence filed the Defence Request.

Confidentiality

8. This motion is filed confidentially in accordance with regulation 23*bis* of the Regulations of the Court, following the classification chosen by the Defence. A public redacted version of this document will be filed in due course.

⁴ ICC-02/04-01/15-T-26-ENG CT, page 6, line 25 to page 7, lines 1-3.

⁵ ICC-02/04-01/15-637-Red.

⁶ 16 December 2016 Decision, para. 28.

⁷ *Ibid.*

⁸ ICC-02/04-01/15-1405-Conf-AnxA-Red.

⁹ ICC-02/04-01/15-1412.

¹⁰ 16 January 2019 Decision, para. 17.

¹¹ *Id.*, para. 18.

The Defence Request should be dismissed *in limine*

9. The Defence states that “[a]s concerns the timelines of the Request, [...] the legal texts of the Court are silent as to the specific time-limits with respect to the procedures to be followed when requesting a medical examination of an accused under rule 135”.¹² However, the timeliness of the Defence Request does not rest upon rule 135. Rather, the issue underpinning the Defence Request is whether or not Mr Ongwen may belatedly be permitted to testify at all.

10. The deadline for adding witnesses – including the Accused – to the list of witnesses expired one year and three months ago, on 4 June 2018.¹³ The Defence has made no application to add Mr Ongwen to the list after the expiry of the deadline. Hence, the Defence is currently barred from putting Mr Ongwen on the stand and the Defence Request is thus premature. Any litigation about whether Mr Ongwen is fit to testify must logically take place only after the Defence has sought and obtained leave to add Mr Ongwen to the list of witnesses.

11. In light of the above, the Prosecution requests that the Defence Request be dismissed *in limine*.

Submissions on the merits

Mr Ongwen has been repeatedly assessed as fit to stand trial

12. Mr. Ongwen has been repeatedly assessed by this Chamber as being fit to stand trial. In the 16 December 2016 Decision, the Chamber held that: “[o]ther than

¹² Defence Request, para. 4.

¹³ ICC-02/04-01/15-1289, para. 1. See further footnote 1.

the Defence and accused's own assertions that Mr Ongwen does not understand the charges or is (or may be) unfit to stand trial [...] there exists no indication [...] which justify the necessity of a medical examination of Mr Ongwen to assess his fitness to stand trial."¹⁴ The Chamber added that "[o]n the contrary, the record indicates – without the need for the Chamber to engage an expert under Rule 135 of the Rules – that Mr Ongwen has already *demonstrated his capacity to understand the proceedings* before the Court and *meaningfully exercise his fair trial rights*."¹⁵

13. The Chamber concluded that "there exists no available information, [...] which indicates that Mr Ongwen may lack the basic capacities to meaningfully exercise his fair trial rights in the proceedings before the Court and be therefore unfit to stand trial".¹⁶ Rather, the Chamber opined, "the *available information demonstrates Mr Ongwen's fitness to stand trial*."¹⁷ Hence, in these circumstances, "a medical examination of Mr Ongwen under Rule 135 of the Rules to assess his fitness to stand trial is unwarranted."¹⁸

14. After making the above findings, the Chamber has continued to monitor Mr Ongwen, and has continued to find him fit to stand trial. For example, in the 16 January 2019 Decision, the Chamber held that "no facts mentioned in the [Defence's submissions] indicate that the accused is unable to participate effectively in the proceedings. Nothing indicates that the accused does not understand the testimonies of the witnesses, the overall meaning and importance of the proceedings or that he cannot communicate with his counsel."¹⁹

¹⁴ 16 December 2016 Decision, para. 25

¹⁵ *Id.*, para. 26. Emphasis added.

¹⁶ *Id.*, para. 28.

¹⁷ *Ibid.* Emphasis added.

¹⁸ *Ibid.*

¹⁹ 16 January 2019 Decision, para. 16.

15. The Chamber added that “[d]uring the proceedings, [...] the accused called his counsel during the testimony of witnesses in order to instruct them, frequently in reaction to answers provided by the testifying witness.”²⁰ The Chamber was “able to see that the accused reacted to the testimony of witnesses, giving all indications that he followed its content and could process what was being said in court.”²¹ Accordingly, the Chamber did not find sufficient reason to seek a rule 135 examination in order to determine the accused’s fitness to stand trial.²²

The Defence has not shown any relevant change in Mr Ongwen’s mental or physical health

16. Since the Chamber has already found that Mr Ongwen is fit to stand trial, for such a finding to be revisited, the Defence would have to demonstrate a change of factual circumstances. For example, in the 16 January 2019 Decision, the Chamber found that “[t]he Defence’s submission that it is impossible for the accused to present a defence because he cannot participate is *not based on any new fact*.”²³ The Chamber added that “[n]o new facts have been presented in order to justify the necessity of an examination under Rule 135”²⁴ and that “[t]he *medical situation of the accused has not changed*.”²⁵ Precisely the same can be said of the scenario now presented: it is not based on any change in the medical circumstances of Mr Ongwen. This lacuna is fatal to the Defence Request.

17. The Defence claims “there are sufficient indicia suggesting the existence of a medical condition or disorder which may impact on Mr Ongwen’s ability to make

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Id.*, para. 18.

²³ *Id.*, para. 17.

²⁴ *Ibid.*, para. 17.

²⁵ *Ibid.*, para. 17.

such decision, and to understand the significance and consequences of his own testimony.”²⁶ The indicia presented are:

1. The findings in Dr. de Jong’s report;²⁷
2. Information from the ICC-DC Medical Officer provided on 18 February 2019;²⁸ and
3. The potential side-effects of medications prescribed for and taken by Mr. Ongwen.

18. However, as discussed below, none of these proposed indicia constitute a change in facts or circumstances warranting reconsideration of the Chamber’s prior rulings on the Accused’s fitness and the need for a (further) medical examination.

The findings in Dr. de Jong’s report are not “new facts”

19. Before dealing with the merits of the Defence arguments, it is worth recalling the results of Professor de Jong’s examination as recorded in his report of January 7 2017. [REDACTED]

[REDACTED]²⁹ Professor de Jong recorded that Mr Ongwen’s [REDACTED]

[REDACTED]³⁰ These are hardly the characteristics of a person incapable of giving evidence.

²⁶ Defence Request, para. 2.

²⁷ *Id.*, paras. 18- 20.

²⁸ *Id.*, para. 22.

²⁹ ICC-02/04-01/15-702-Conf-AnxII, pages 4-5.

³⁰ *Ibid.*

20. In any case, as acknowledged by the Defence, “[t]he Chamber had access to Dr. de Jong’s report since early 2017 and considered its conclusions for the purposes of its prior determination under article 64(8) (a) of the Statute or rule 135 of the Rules.”³¹ Hence, the findings in the report do not amount to new facts.

21. The Defence claims that the Chamber “has not yet considered Dr. de Jong’s findings on Mr. Ongwen’s mental health in respect of the *new circumstance(s)*, for example, the *possibility of Mr. Ongwen’s testimony*.”³² The contemplation of a particular procedural option by the Accused is not a change of circumstance that requires a new assessment of fitness to stand trial. Indeed, the possibility of the Accused testifying has always been apparent to the Defence. Whether or not he does so is a question of litigation strategy, not medicine, and hence is not a new fact relevant to the issue of fitness. As per this Chamber, to rely on Rule 135 to assess fitness to stand trial “there must be indications suggesting the existence of medical conditions which may impact on the accused’s ability to meaningfully exercise his fair trial rights which the Chamber is unable to resolve without the assistance of one or more medical experts.”³³ Notably, the Chamber has held that “[i]n the absence of any such indication, it must be concluded that that the accused is fit to stand trial.”³⁴

22. In sum, contrary to the Defence’s understanding, a new assessment of fitness to stand trial would only be necessary where Mr Ongwen has had a change in his physical or mental health, which in turn may impact on his capacity to exercise his article 67(1) rights. The fact that the Accused is only now – and long after the

³¹ Defence request, para. 20.

³² *Ibid.* Emphasis added.

³³ 16 December 2016 Decision, para. 12.

³⁴ *Ibid.*

deadline to do so – weighing the possibility of testifying does not amount to a change of circumstances justifying a new assessment of fitness to stand trial.

The information from the ICC-DC Medical officer does not amount to “new facts”

23. The Defence relies in part on information from the ICC-DC Medical Officer provided on 18 February 2018. However, that information has now been superseded by events. Although the Chamber cancelled the 18 February 2019 hearing, the next day the Chamber continued with the testimony of witness D-0032. The Chamber stated at the outset of the proceedings that the recent cancellations of hearings [REDACTED] but [REDACTED] emphasised [REDACTED]

[REDACTED]³⁵ In fact, the trial has proceeded a further seven months with no indication of a significant deterioration in the medical condition of the Accused.

The potential side-effects of medications prescribed for and taken by Mr Ongwen do not amount to “new facts”

24. Speculation about the impact of medication is not a relevant, changed circumstance. In this context, the Prosecution notes firstly, that Mr Ongwen was already taking one of the three medications listed by the Defence, [REDACTED] at the time of his examination by Professor de Jong. At that time he was also taking four other medications³⁶ at least one of which³⁷ had potential side effects similar to those now listed by the Defence.

³⁵ ICC-02/04-01/15-T-199-CONF-ENG ET, page 3, lines 14-18.

³⁶ Divisun, Fluoxetine, Pantoprazole and Cinnarizine: ICC-02/04-01/15-702-Conf-AnxII, page 5

³⁷ Regarding Fluoxetine, see <https://www.nhs.uk/medicines/fluoxetine-prozac/> (Last accessed 23/09/2019. See especially, “Serious side effects”). See further <https://www.drugs.com/fluoxetine.html> (Last accessed 23/09/2019. See especially, “Important information”).

25. Secondly, the Defence has not demonstrated that the medications cited in the Defence Request have, in fact, had any negative impact. Thirdly, even if there was a negative impact, “the accused’s general state of health or specific aspects of his well-being which might impact him negatively and the fact that he is fit to stand trial are not synonymous”.³⁸ In other words, to justify an order pursuant to rule 135 in this context, the Defence would have to provide concrete information that would indicate a change in Mr Ongwen’s health that would in turn affect his capacity to exercise his article 67(1) rights. It has failed to do so.

26. The Defence states that “[m]oreover, Mr. Ongwen’s health is not static.”³⁹ Be that as it may, the Chamber has kept a close eye on Mr Ongwen’s health status. Whenever there was any indication of an issue, it has taken swift action. In the 16 January 2019 Decision the Chamber underlined that it is “aware of the medical condition of the accused and a finding that there is no need to appoint an expert under rule 135 [...] must not be construed as a finding that the accused does not need medical attention.”⁴⁰ The Chamber noted “the accused received and continues to receive ongoing medical treatment”.⁴¹ It further noted “the Regulations [...] mandates the Registrar with taking the appropriate arrangements to protect the accused’s safety and health.”⁴² In light of the above safeguards, the mere possibility of certain medications having potential side-effects does not amount to a new and significant change of circumstances.

³⁸ 16 January 2019 Decision, para. 14. *See also* 16 December 2016 Decision, para. 13 & 18.

³⁹ Defence Request, para. 5.

⁴⁰ 16 January 2019 Decision, para. 18.

⁴¹ *Id.*, para. 19.

⁴² *Ibid.*

Conclusion

27. In light of the above, the Prosecution requests:
- a. Firstly, that the Defence Request be rejected *in limine* since the deadline for adding witnesses to the Defence's list of witnesses expired on 4 June 2018.
 - b. Secondly, should the Chamber decide to engage with the merits, that the Defence Request be rejected because the Defence has not shown any relevant change in Mr Ongwen's mental or physical health that would warrant an examination under Rule 135 to assess his fitness to stand trial.



Fatou Bensouda, Prosecutor

Dated this 23rd day of September 2019

At The Hague, the Netherlands