

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: **3 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 “Defence Urgent Request to Order a Medical Examination of Mr. Ongwen”, filed on 16 September 2019

Source: Defence for Mr. Dominic Ongwen

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

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I. INTRODUCTION

1. Within the terms of rule 135 of the Rules of Procedure and Evidence ('Rules'), Trial Chamber IX ('Chamber') may order a medical examination of Mr. Dominic Ongwen not only for the purposes of its determination under article 64(8)(a) of the Rome Statute ('Statute'),¹ but also for 'any other reason'.²
2. Mr. Ongwen has a right to make a decision whether he will testify or not. Based on the experts' conclusions, there are sufficient indicia suggesting the existence of a medical condition or disorder which may impact on Mr. Ongwen's ability to make such decision, and to understand the significance and consequences of his own testimony. More detailed information in this respect is thus required in order for the Chamber to make a ruling whether Mr. Ongwen is able to meaningfully exercise his article 67(1) fair trial rights, in particular, his right to testify in his own defence under article 67(1)(e) of the Statute.³
3. To this end, the Defence respectfully requests that an impartial 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. The purpose of this examination could be as follows:

To 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.

II. APPLICABLE LAW AND SUBMISSIONS

A. Timing of the Request

4. As concerns the timelines of the Request, the Defence avers that 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 of the Rules.
5. Moreover, Mr. Ongwen's health is not static. The trial and the evidence presented by the Defence evolve and can elicit different reactions. The issue of whether Mr. Ongwen should testify in his

¹ It is still the Defence contention that Mr. Ongwen does not fully understand the nature of the charges against him, which prevents his meaningful participation in the trial, but that is not subject-matter of this motion. The request and annexes are filed as confidential because they discuss strictly information concerning Mr. Ongwen's health.

² *Ongwen*, Decision on the Defence Request to Order a Medical Examination of Dominic Ongwen, [ICC-02/04-01/15-637-Red](#), 16 Dec. 2016 ('**Ongwen First Fitness Decision**'), at para. 29; see rule 135(1) of the Rules; see also rule 135(2) of the Rules, which mandates that the Chamber 'shall place its reasons for any such order on the record'.

³ See article 67(1)(e) of the Statute.

own defence has been raised and requires to be addressed at this point. It is ultimately a matter for Mr. Ongwen, and he alone. The timing of this Request was thus outside the Defence's control or influence. Hence, the urgent nature of this Request.

B. Mr. Ongwen's right to testify in his own defence under article 67(1)(e) of the Statute

6. As already clarified in the jurisprudence of the Court, 'the concept of fitness to stand trial must be viewed as an aspect of the broader notion of fair trial'. It can be defined as 'absence of such medical conditions which would prevent the accused from being able to meaningfully exercise his or her fair trial rights'.⁴
7. The ICC case law is also clear on the relevant capacities which can be discerned as necessary for the meaningful exercise of the article 67(1) fair trial rights. These include the capacity: (i) to understand in detail the nature, cause and content of the charges; (ii) to understand the conduct of the proceedings; (iii) to instruct counsel; (iv) to understand the consequences of the proceedings; and (v) to make a statement.⁵
8. Furthermore, the Trial Chamber I in the *Gbagbo & Blé Goudé* case elaborated on the Pre-Trial Chamber I's catalogue of capacities in the same case, and specified that 'to ascertain fitness to stand trial, an accused must have the capacity to: [...] (iv) testify or give an unsworn statement (should the accused so choose) [...]'.⁶
9. As equally observed by the ICTY Trial Chamber II in the *Strugar* case, 'the appropriate approach to be adopted in determining fitness to stand trial is to evaluate capacity of the accused to exercise his express and implied rights', including the capacity 'to testify'.⁷ This finding was confirmed by the ICTY Appeals Chamber,⁸ and the same approach has been adopted by the ICTR⁹ and the ECCC.¹⁰

⁴ Ongwen First Fitness Decision, para. 7; see also *Gbagbo & Blé Goudé*, Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court, [ICC-02/11-01/11-286-Red](#), 2 Nov. 2012 ('**Gbagbo First Fitness Decision**'), at para. 43; see also *Gbagbo & Blé Goudé*, Decision on the fitness of Laurent Gbagbo to stand trial, [ICC-02/11-01/15-349](#), 27 Nov. 2015 ('**Gbagbo Second Fitness Decision**'), at paras 33, 36.

⁵ Ongwen First Fitness Decision, para. 8; see also *Gbagbo First Fitness Decision*, at para. 65.

⁶ *Gbagbo Second Fitness Decision*, at para. 35.

⁷ *Strugar*, Decision Re the Defence Motion to Terminate Proceedings, [IT-0142-T](#), 26 May 2004, at para. 36.

⁸ *Strugar*, Judgement, [IT-01-42-A](#), 17 July 2008, at para. 55.

⁹ *Karemara et al.*, Decision on Remand Regarding Continuation of Trial, [ICTR-98-44-T](#), 10 Sept. 2009, at para. 18.

¹⁰ *Case 002 (Ieng Thirith)*, Decision on Ieng Thirith's Fitness to Stand Trial, [002/19-09-2007/ECCC/TC](#), 17 Nov. 2011, at para. 27.

10. Similarly, in order to determine whether Mr. Vladimir Kova evi was able to stand trial, the ICTY Trial Chamber I appointed a forensic psychiatrist and a forensic psychologist, and requested them to put, *inter alia*, the following question to Mr. Kova evi :

Ability to testify: Is the Accused **able to understand that he may choose to give testimony himself**, i.e. to answer questions put to him by Defence Counsel on, i.e., his involvement or participation in the crimes for which he is charged, and that questions may also be put to him by the Prosecution and by the Judges, and that his answers can be taken into account when the Judges determine whether he is guilty; **but also that he is entitled not to testify, in which case the Judges will decide the case without the information he might have given?**¹¹

11. Following the case law of the European Court of Human Rights the concept of effective participation is enshrined within the right to fair trial as well.¹² The principle of effective participation established in the *Stanford* case was developed further in the joint cases of *T. v United Kingdom* and *V. v United Kingdom*.¹³ In the case against *T.*, the Grand Chamber found that ‘*T.* showed the signs of post-traumatic stress disorder, involving a constant preoccupation with the events of the offence, a generalised high level of anxiety and poor eating and sleeping patterns. This disorder, combined with the lack of any therapeutic work since the offence, limited his ability to instruct his lawyers and testify adequately in his own defence’.¹⁴
12. As a consequence, the Grand Chamber held that *T.* was unable to participate effectively in the criminal proceedings against him and was thus denied a fair hearing in breach of article 6 §1 of the European Convention on Human Rights.¹⁵
13. The joint cases of *T. v United Kingdom* and *V. v United Kingdom* concerned criminal proceedings against two children who both suffered from a mental disorder and state of emotional disturbance. Nonetheless, the relevant conclusion which can be drawn from the cases is that factors like (i) post-traumatic stress disorder (‘PTSD’); (ii) level of maturity and intellectual capacities; (iii) constant preoccupation with the events of the offence; (iv) high level of anxiety; or (v) poor eating and sleeping habits determine why an accused can be considered ‘unfit to stand trial’.

¹¹ *Kova evi* , Public Version of the Decision on Accused’s Fitness to Enter a Plea and Stand Trial, [IT-01-42/2-I](#), 12 April 2006, at para. 5, subpara. 4. (Bold added).

¹² *Stanford v UK*, [1994] ECtHR, at para. 26.

¹³ *T. v UK*, [1999] ECtHR; *V. v UK*, [1999] ECtHR.

¹⁴ *T. v UK*, [1999] ECtHR, at paras 11, 87, 89.

¹⁵ *T. v UK*, [1999] ECtHR, at para. 89.

14. The German courts recognize also that an accused must be in ‘a state of mental clarity and freedom’ to be able ‘to follow the proceedings, to recognize and appreciate the significance of the proceedings in general and individual procedural acts in particular, and to defend himself [or herself] properly’.¹⁶
15. Moreover, according to the *Deutsches Ärzteblatt International’s* article, ‘fitness for interrogation’¹⁷ should be understood as the ability ‘to understand the meaning of the questions’ by the investigation authorities or courts, and ‘the ability to answer while preserving the party’s freedom of decision and freedom of action’.¹⁸ The journal notes also that ‘[t]he freedom to decide what statements to make, and to decide on their scope and their content, is encompassed in the idea of the capacity for insight – in other words comprehension of the facts and **recognition of the significance of one’s own testimony**’.¹⁹

C. There are sufficient indicia to warrant a medical examination under rule 135 of the Rules

16. As part of its obligations under article 64(2) of the Statute to ensure that the trial is fair, the Chamber has ‘the responsibility to ascertain that an accused is not unfit to stand trial’.²⁰
17. In order for the Chamber to grant a request for medical examination under rule 135 of the Rules to determine the accused’s 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’.²¹

¹⁶ Rothschild, Erdmann and Parzeller (2007), Fitness for Interrogation and Fitness to Stand Trial, 104 *Deutsches Ärzteblatt International* 3029 (**Dtsch Arztebl 2007**), at p. 3, available at: https://www.researchgate.net/publication/291107340_Fitness_to_undergo_interrogation_and_fitness_to_undergo_trial.

¹⁷ ‘Interrogation means that the person performing the interrogation demands, in an official capacity, information or statements from the accused, the witnesses, or experts’, see *Dtsch Arztebl 2007*, at p. 1.

¹⁸ *Dtsch Arztebl 2007*, at p. 1.

¹⁹ *Dtsch Arztebl 2007*, at p. 2; see also §36a Strafprozessordnung (StPO). (Bold added).

²⁰ *Ongwen First Fitness Decision*, at para. 11.

²¹ *Ongwen First Fitness Decision*, at para. 12; see also *Ongwen*, Decision on Defence Request to Order an Adjournment and a Medical Examination, [ICC-02/04-01/15-1412-Red](#) (**Ongwen Second Fitness Decision**), at paras 14-15.

18. On 16 December 2016, the Chamber appointed Dr. de Jong to conduct the psychiatric examination of Mr. Ongwen. Dr. de Jong, *inter alia*, concludes in his report that Mr. Ongwen ‘[REDACTED]’. Dr. de Jong finds also that the defendant ‘[REDACTED]’.²²
19. The factual similarities between the case of *T.*²³ and Mr. Ongwen are striking. First, most salient is the diagnosis of PTSD, and its attendant harmful effects on sleep, anxiety levels, appetite, concentration, etc. In the case of *T.*, the applicant was presented as a child of good or at least average intelligence, showing ‘the signs of posttraumatic disorder, involving a constant preoccupation with the events of the offence, a generalised high level of anxiety and poor eating and sleeping patterns’.²⁴ Dr. de Jong’s diagnosis and identification of symptoms in Mr. Ongwen repeats *T.*’s symptoms.²⁵ Second, *T.* was 10 years old when he committed the offence and 11 years old when the trial happened. In the case of Mr. Ongwen, Dr. de Jong found that ‘[i]t seems likely [...] that he was abducted at 10 years of age’²⁶ and that his complex and prolonged trauma experiences since his early age developed into a severe PTSD.²⁷ Thus, Mr. Ongwen’s mental state and circumstances surrounding his case can be compared to *T.*’s.
20. The 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. However, 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.
21. To this purpose, mental disorders, such as severe PTSD, complex trauma, concentration problems or multiple dissociative disorder symptoms indicate that Mr. Ongwen’s skills to process thoughts and perform various mental activities may be deficient and/or compromised. Mr. Ongwen’s capability to make informed and functional decisions in a specified way may be impaired as well.

²² Dr. de Jong Report, see UGA-D26-0015-0046-R01, at 0050. The Defence notes also that Mr. Ongwen’s difficulties in following the witness testimony were recorded from the inception of this case (see *Ongwen*, Defence Request to Amend the Schedule of the Second Article 56 of the Rome Statute Hearing Pursuant to ICC-02/04-01/15-316, ICC-02/04-01/15-321-Conf, 19 Oct. 2015, para. 14), and more recently, for example (see Transcript of 29 March 2019, ICC-02/04-01/15-T-210-CONF-ENG).

²³ Discussed in paras 11-13, *supra*.

²⁴ *T. v UK*, [1999] ECtHR, at para. 11.

²⁵ Discussed in para. 18, *supra*.

²⁶ Dr. de Jong Report, see UGA-D26-0015-0046-R01, at 0055.

²⁷ Dr. de Jong Report, see UGA-D26-0015-0046-R01, at 0052; see also *T. v UK*, [1999] ECtHR, at para. 87: Where the ECHR held that due to *T.*’s PTSD combined with lack of any therapeutic work since the offence, had limited *T.*’s ability to instruct his lawyers and testify adequately in his own defence.

Both these matters are, in the Defence's view, related to the issue of whether Mr. Ongwen possesses the necessary capacities to meaningfully exercise his right to testify in his defence.

22. Furthermore,[REDACTED].²⁸
23. On the same day, in respect to the same incident and 'evolution of Mr. Ongwen's mental state', the Prosecution sent an e-mail noting that '[s]ince, as per the memorandum, it is Mr. Ongwen's "mental state" that has "evolved" (ICC-02/04-01/15-1449-Conf-AnxII, p. 2), it is imperative that Mr. Ongwen is also examined by a mental health professional'.²⁹
24. The Defence understands also that Mr. Ongwen is [REDACTED].³⁰ [REDACTED].³¹ [REDACTED].³² [REDACTED].
25. The conclusions of Dr. de Jong, ICC-DC Medical Officer and information about [REDACTED] sufficiently indicate that Mr. Ongwen may lack the basic capability to make an informed decision whether to testify or not, and to understand the significance and consequences of such decision. An impartial professional opinion in this respect is thus required in order for the Chamber to make a ruling whether Mr. Ongwen lacks the capacity to meaningfully exercise his right to testify in his defence under article 67(1)(e) of the Statute.
26. In these circumstances, the Defence avers that a medical examination under rule 135 of the Rules to assess Mr. Ongwen's fitness is necessary and warranted.

III. REMEDY SOUGHT

27. For the reasons stated above, the Defence respectfully requests that the Chamber:

ORDER that a psychiatric examination of Mr. Ongwen be conducted with a view to: making 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; *and*

²⁸ **Confidential Annex A**, Report on 'Health Condition of Mr. Dominique Ongwen', para. 6. The Defence has contested and contests the date '01-01-1975' as Mr. Ongwen's date of birth. However, this matter is not a subject-matter of this Request and will be addressed in a separate motion.

²⁹ **Confidential Annex B**, 'No Hearing on 18 February 2019', an email sent on 18 Feb. 2019.

³⁰ [REDACTED].

³¹ [REDACTED].

³² [REDACTED].

APPOINT an impartial expert to conduct the psychiatric examination of Mr. Ongwen.

Respectfully submitted,



.....
Hon. Krispus Ayena Odongo
On behalf of Mr. Dominic Ongwen

Dated this 3rd day of October, 2019