

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 23 September 2019

Date: 4 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 "Victims' response to the 'Defence Urgent Request to Order a Medical Examination of Mr. Ongwen'", 23 September 2019, ICC-02/04-01/15-1607-Conf**

**Source:** Legal Representatives of Victims

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

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Section****Other**

## I. INTRODUCTION

1. The Legal Representatives of Victims (“the LRVs”) hereby respond to the ‘Defence Urgent Request to Order a Medical Examination of Mr Ongwen’ (“Defence Request”), which was filed on 17 September 2019. This filing is made in response pursuant to article 68(3) of the Rome Statute (“the Statute”), regulation 24(2) of the Regulations of the Court (“the Regulations”), and the email sent by Trial Chamber IX (“the Chamber”) on 17 September 2019 which shortened deadlines for responses to 23 September 2019.<sup>1</sup>
2. The LRVs submit that, in substance, the Defence Request amounts to an attempt to relitigate Mr Ongwen’s fitness to stand trial, a matter that has already been determined by the Chamber despite the absence of any new facts,. The LRVs request that the Defence Request be denied.
3. This filing is classified confidential pursuant to regulation 23bis(2) of the Regulations because it responds to a filing which has confidential status. A public redacted version will be filed in due course.

## II. SUBMISSIONS

4. The Defence Request seeks an order under rule 135 of the Rules of Procedure and Evidence (“the RPE”) for the accused to be examined by an impartial expert psychiatrist in order to:

*[m]ake 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.*

### ***A. Relevant background to the defence request***

5. Twice previously the Defence have sought to obtain an order for Mr Ongwen to be assessed by an expert pursuant to rule 135 of the RPE. On each of those

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<sup>1</sup> Email of 17 September 2019 at 5:11 pm.

occasions the Defence expressly addressed its request to the question of whether or not Mr Ongwen was fit to stand trial, alleging that he was not.

6. The first of these requests from the Defence was made on 5 December 2016, on the eve of the commencement of trial (“the First Rule 135 Request”).<sup>2</sup> On 16 December 2016 the Chamber rejected the request for an examination directed to the accused’s fitness to stand trial (“the First Rule 135 Decision”).<sup>3</sup> Most pertinently the Chamber held that:

*...the fact that the Defence requests a medical examination of the accused to determine his fitness to stand trial does not entail, in and of itself, that the Chamber must inevitably accede to such request. Rather, for the Chamber to resort to this measure 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. In the absence of any such indication, it must be concluded that that the accused is fit to stand trial.*<sup>4</sup>

7. The Chamber reviewed the material provided by the Defence in purported support of the First Rule 135 Request, including a report provided by Defence experts. The Chamber concluded that none of that material provided grounds for doubting Mr Ongwen’s fitness to stand trial; but in fact in some respects provided material confirming it.<sup>5</sup> The Chamber therefore found<sup>6</sup> that:

*Other than the Defence and accused’s own assertions that Mr Ongwen does not understand the charges or is (or may be) unfit to stand trial – submissions not even supported by the Experts engaged by the Defence itself – there exists*

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<sup>2</sup> Public Redacted Version of “Defence Request for a Stay of Proceedings and Examination Pursuant to Rule 135 of the Rules of Procedure and Evidence”, filed on 5 December 2016, ICC-02/04-01/15-620-Red, 5 December 2016.

<sup>3</sup> Decision on the Defence Request to Order a Medical Examination of Dominic Ongwen, ICC-02/04-01/15-637-Red, 16 December 2016.

<sup>4</sup> *Ibid.*, para. 12.

<sup>5</sup> *Ibid.*, paras 21-24

<sup>6</sup> *Ibid.*, para. 25.

*no indication in the record of the case which justify the necessity of a medical examination of Mr Ongwen to assess his fitness to stand trial.*

8. However the Chamber did conclude that the material before it raised other concerns relating to Mr Ongwen’s mental health, and made an order under rule 135 of the RPE that an expert examine the accused with a view to ensuring the proper management of his “mental health and safety at the detention centre.”<sup>7</sup> An expert who was acceptable to both the Defence and Prosecution, Dr de Jong, was tasked with undertaking this examination.
9. On 10 January 2019 the Defence, claiming that Mr Ongwen was not sufficiently fit to stand trial, made a second request for the Chamber to order an examination pursuant to rule 135 in order to assess Mr Ongwen’s fitness to stand trial (“the Second Rule 135 Request”).<sup>8</sup> On 16 January 2019 that request was likewise rejected by the Chamber (“the Second Rule 135 Decision”).<sup>9</sup> In doing so the Chamber referred to its previous conclusions on the matter, and emphasized that the Defence had provided no evidence of any change in circumstances:

*The 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. The medical situation of the accused has not changed. This holds especially true considering the report submitted by [Dr de Jong]. No new facts have been presented in order to justify the necessity of an examination under Rule 135.<sup>10</sup>*

10. The Chamber noted that lack of fitness to stand trial does not simply mean having some identified health condition. The question is whether the accused ‘is able to

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<sup>7</sup> *Ibid.*, para.

<sup>8</sup> Public Redacted Version of “Defence Request for a Stay of the Proceedings and for Trial Chamber IX, pursuant to Rule 135 of the Rules of Procedure and Evidence, to Order a Medical Examination of Mr Ongwen”, ICC-02/04-01/15-1405-Red2, 22 January 2019.

<sup>9</sup> Decision on Defence Request to Order an Adjournment and a Medical Examination, ICC-02/04-01/15-1412-Red, 16 January 2019.

<sup>10</sup> *Ibid.*, para. 17.

effectively exercise his fair trial rights and can meaningfully participate in the proceedings before the Court.’<sup>11</sup>

***B. True nature of the relief requested***

11. Having twice been refused an order under rule 135 in order to assess Mr Ongwen’s fitness to stand trial the Defence now purports to request such an order for another purpose. However while the stated purpose relates to Mr Ongwen’s right to testify, it is clear that in reality the Defence Request fundamentally concerned with the question off Mr Ongwen’s fitness to stand trial.

12. The decision by a defendant whether or not to testify at his own trial is one of many decisions that an accused person must make regarding the conduct of his defence. It constitutes an exercise of defence rights, and a form of meaningful participation, the requirements for fitness to stand trial as identified by the Chamber (see above at paragraph 10). In other words, a defendant’s ability to make such a decision – about whether or not to testify – is fundamentally linked to his fitness to stand trial.

13. Indeed, the Defence Request seems to implicitly accept that this question is an aspect of fitness to stand trial. It repeatedly refers to the jurisprudence relating to fitness to stand trial.<sup>12</sup>

14. It is clear then, that in order for a rule 135 order to be made, the Defence must satisfy the same requirements which have already been set out by the Chamber in the First Rule 135 Decision and the Second Rule 135 Decision.

***C. Absence of justification for an expert report on fitness***

15. The Defence Request relies on three factual matters to claim that a rule 135 order is justified. They are: (1) the report of Dr de Jong; (2) the report of a Detention Centre Medical Officer from 18 February 2019; and (3) speculation relating to Mr Ongwen’s medicine regimen. The LRVs submit that none of these constitutes new

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<sup>11</sup> *Ibid.*, para. 14.

<sup>12</sup> Defence Request, paras 6-10.

material such as would justify a departure from the approach in the Chamber's First Rule 135 Decision and Second Rule 135 Decision.

16. The report of Dr de Jong: By the Defence's own admission, the Chamber has had the report of Dr de Jong from "early 2017", well before the Second Rule 135 Decision. Indeed, the Chamber made explicit reference in its Second Rule 135 Decision to Dr de Jong's report. If this document did not call into question Mr Ongwen's ability to make fundamental questions about the conduct of his defence in early 2017 there is equally no reason why it should do so today. In addition, the fact the report is now nearly three years old means that it may no longer even be an accurate indicator of Mr Ongwen's current mental condition.
17. The Detention Centre Medical Officer's report: There is nothing in this document to suggest that Mr Ongwen is unfit to make decisions concerning the conduct of his defence, or that he is for any other reason unfit to stand trial. To the contrary, the document certified that, as at the date it was issued, [REDACTED]  
[REDACTED]  
[REDACTED] Moreover the team undertook to continue to monitor Mr Ongwen's mental and physical state. The LRVs therefore remark that, much like Dr de Jong's report, this document not only fails to justify the Defence Request, it is in any event out of date. [REDACTED]  
[REDACTED] it is not clear why – if their view is to be relied on by the Defence to justify a rule 135 request – a recent report could not be provided. The LRVs invite the Chamber to infer that recent reports are perhaps even more adverse to the Defence's contention that Mr Ongwen lacks fitness to be tried.
18. Mr Ongwen's medicine regimen: Lastly, the Defence relies on its "understanding" of Mr Ongwen's medicine regimen and what the "available information suggests" about its *possible* effects.<sup>13</sup> This is nothing more than generalised speculation. The Defence relies on open source material regarding

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<sup>13</sup> Defence Request, para. 24

possible drug side effects, without any expert material, let alone material specifically directed to the actual observed effects of those medicines *on Mr Ongwen*.

19. The Defence Request therefore provides not a shred of new material which could possibly justify asking the Chamber to modify the approach which it took in its Second Rule 135 Decision. The Defence have attempted to circumvent this difficulty by claiming that old medical evidence has now developed new significance because of a change in “circumstances”, by which they mean that Mr Ongwen must decide whether to testify.
20. However as indicated above, Mr Ongwen’s need to make fundamental decisions about the conduct of his defence is not a new circumstance. No explanation has been given as to why one particular decision affecting his rights and meaningful participation is somehow qualitatively different than any other. Neither has the Defence explained why this issue would only have come to their attention at this time. While the LRVs accept that an accused may have good reasons for not making a final decision on whether to testify until late in his case, the process of considering this question must begin a very long time before that.
21. The LRVs submit that the repeated requests of the Defence, without any attempt to provide current and relevant evidence, is beginning to verge on vexatious. The victims are eager to see the trial brought to a timely conclusion. While the LRVs respect the fundamental importance of ensuring that an accused is fit to stand trial, making repeated requests on this issue *without any factual material in support* does nothing to reflect the seriousness of this question or to further the realisation of Mr Ongwen’s fair trial rights. Instead it serves only to hamper the efficient conduct of the proceedings.



### III. RELIEF SOUGHT

22. For the reasons set out above, the LRVs request that the Chamber deny the Defence Request.

Respectfully submitted,



Joseph Manoba



Francisco Cox

Dated this 23<sup>rd</sup> day of September 2019

At Kampala, Uganda and Santiago, Chile