

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: **ICC-02/04-01/15**
Date: **22 January 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 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”, filed on 10 January 2019

Source: Defence for Dominic Ongwen

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

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(Participation/Reparation)**

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I. INTRODUCTION

1. The Defence respectfully requests a temporary stay of the proceedings in light of the recent events which took place on the International Criminal Court Detention Centre ('ICC-DC') premises [REDACTED].
2. The Defence is asking for a stay of the proceedings to enable its Experts, who have met with Mr Ongwen several times and who are trusted by him, and with whom he can communicate in his native language of Acholi, to examine him in person and make a determination of his current mental state and whether he can meaningfully participate in the current proceedings against him.
3. Mr Ongwen has indicated to the Defence that because of the [REDACTED], he cannot listen and participate in Court.
4. Based on information available to our Experts at this time, it appears to the Experts that Mr Ongwen is not fit to participate in the trial proceedings which are scheduled to start on 14 January 2019.
5. In addition, pursuant to Rule 135 of the Rules of Procedure and Evidence ('RPE'), and by extension Rule 113 of the RPE, the Defence for Dominic Ongwen ('Defence') hereby requests Trial Chamber IX ('Chamber') to order a psychological/psychiatric examination on Mr Ongwen to determine whether Mr Ongwen is fit to continue trial.
6. Pursuant to Rule 135(4) of the RPE, the Defence requests the Chamber to suspend the hearing scheduled to commence on 14 January 2019 until such time that an examination is conducted, and the Chamber can determine Mr Ongwen's fitness to continue trial.

II. CONFIDENTIALITY

7. Pursuant to Regulation 23 *bis*(1) of the of the Regulations of the Court, the Defence files this submission as **Confidential ex parte** Defence only as it deals with privileged information not known to the Parties and Participants. The Defence files concurrently a confidential redacted version.

III. PROCEDURAL HISTORY

8. This is the third time Mr Ongwen [REDACTED]. As partially detailed in the Defence's motion of 5 December 2016, the procedural history is as follows.
9. On 30 March 2016, Mr Ongwen threatened to commit suicide because a phone call to his family in Coorom was disconnected by the ICC-DC for an alleged infraction of his phone restrictions.
10. [REDACTED].¹
11. [REDACTED].²
12. [REDACTED].
13. [REDACTED].
14. On 5 December 2016, the Defence requested a medical examination of Mr Ongwen pursuant to Article 64(8)(a) of the Rome Statute and Rule 135 of the RPE because of an expert report written by Defence experts D26-0041 and D26-0042 ('Experts').³
15. On 16 December 2016, the Chamber denied the Defence request for a medical examination of Mr Ongwen to determine his fitness to stand trial, but still ordered a medical evaluation of Mr Ongwen by Dr Joop T.V.M. de Jong.⁴
16. [REDACTED].⁵
17. On 2 March 2017, Mr Ongwen yelled at UGA-OTP-P-0003 during his testimony.⁶
18. On 19 March 2018, Mr Ongwen yelled at UGA-OTP-P-0446 during her testimony.⁷

¹ ICC-02/04-01/15-549-Conf-Exp, para. 4.

² UGA-D26-0015-0167.

³ ICC-02/04-01/15-620-Conf.

⁴ ICC-02/04-01/15-637-Conf.

⁵ UGA-D26-0015-0046-R01, p. 0049.

⁶ ICC-02/04-01/15-T-45-CONF-ENG, p. 28.

⁷ ICC-02/04-01/15-T-162-CONF-ENG, pp 64-65.

19. On 8 November 2018, Mr Ongwen cried during a hearing when his childhood friend testified about their abduction by the LRA, the torment they went through and the songs they heard in the Yard.⁸
20. [REDACTED].
21. On 9 January 2019, the Defence wrote to the Chamber requesting a postponement of the trial proceedings so its Experts could examine Mr Ongwen.⁹

IV. SUBMISSIONS

1. *Applicable Law*

22. The Defence notes that the Appeals Chamber in Lubanga case has held that proceedings may be stayed where “a fair trial becomes impossible because of breaches of the fundamental rights of the [...] accused by his/her accusers’¹⁰ and where the breaches are such ‘as to make it impossible’ for the accused to make his/her defence ‘within the framework of the rights’ as laid out in the Statute’”.¹¹
23. Rule 135 of the RPE grants the Chamber the power to “order a medical, psychiatric or psychological examination of the accused, under the conditions set forth in rule 113” for any reason.
24. Regulation 103(1) of the Regulations of the Court requires the Registrar to make arrangements “to protect the health and safety of detained persons.”
25. Regulation 103(2) of the Regulations of the Court requires the Registrar to make arrangements “in order to meet the needs of detained persons with disabilities.”
26. [REDACTED].
27. Rule 135(4) of the RPE grants the Chamber the power to suspend the proceedings to allow for a proper medical examination of an accused.

⁸ ICC-02/04-01/15-T-193-ENG, p. 16, ln. 21 to p. 17, ln 23.

⁹ See Confidential Annex A, *Ex Parte* Defence only.

¹⁰ ICC-01/04-01/06-1486, para. 77 (*citing* ICC-01/04-01/06-772, para. 37)

¹¹ ICC-01/04-01/06-1486, para. 78 (*citing* ICC-01/04-01/06-772, para. 39)

2. Case Law - ICC

28. As noted by Pre-Trial Chamber I in *The Prosecutor vs Laurent Gbagbo*, “[n]either the Rome Statute nor the Rule of Procedure and Evidence contain any provision specifically addressing fitness to stand trial.”¹² In its interpretation of the Statute and Rules of Procedure and Evidence, and considering internationally recognised human rights law, Pre-Trial Chamber I decided that fitness to stand trial is inherent in any trial and a fundamental human right.¹³
29. Pre-Trial Chamber I decided that Article 67(1) of the Rome Statute contained “a number of relevant capacities [that] can be discerned which are necessary for the meaningful exercise of these rights.”¹⁴ These capacities include the ability:
- a. To understand in detail the nature, cause and content of the charges;
 - b. To understand the conduct of the proceedings;
 - c. To instruct counsel;
 - d. To understand the consequences of the proceedings; and
 - e. To make a statement.¹⁵
30. Pre-Trial Chamber I stated that “the focus on article 67(1) of the Statute makes it clear that the question before the Chamber is not merely the existence of particular medical conditions, or what their [sic] sources are, but primarily whether these medical conditions affect the capacities of the person concerned to meaningfully exercise his or her fair trial rights.”¹⁶ Pre-Trial Chamber I also noted that it needed to “take into account all the relevant circumstances of each individual case [...] [and] examine whether the negative impact of particular medical conditions can be mitigated by putting in place certain practical arrangements.”¹⁷

¹² ICC-02/11-01/11-286-Red, para. 43.

¹³ See ICC-02/11-01/11-286-Red, paras 44-50.

¹⁴ ICC-02/11-01/11-286-Red, para. 50.

¹⁵ ICC-02/11-01/11-286-Red, para. 50 (citing ICC-02/11-01/11-164-Conf-tENG, para. 39).

¹⁶ ICC-02/11-01/11-286-Red, para. 51 (citing ICC-02/11-01/11-164-Conf-tENG, para. 39; ICTY, Trial Chamber II, *Prosecutor v. Strugar*, IT-01-42-A, “Decision re the Defence Motion to Terminate Proceedings”, 26 May 2004, para. 35; ICTY, Appeals Chamber, *Prosecutor vs Strugar*, IT-01-42-A, “Judgment”, 17 July 2008, para. 61 (‘Strugar AC Judgment’); ECtHR, *S.C. vs The United Kingdom*, Appl. no. 60958/00, “Judgment”, 15 June 2004; *Liebreich vs Germany*, Appl. no. 30443/03, “Decision as to Admissibility”, 8 January 2008; *Timergaliyev vs Russia*, Appl. no. 40631/02, “Judgment”, 14 January 2009; *G. vs France*, Appl. no. 27244/09, 23 May 2012).

¹⁷ ICC-02/11-01/11-286-Red, para. 51 (citing ECtHR, *T. vs The United Kingdom*, Appl. no. 24724/94, “Judgment”, 16 December 1999, paras 84-88; *S.C. vs The United Kingdom*, Appl. no. 60958/00, “Judgment”, 15 June 2004, paras 28-30; *Liebreich vs Germany*, Appl. no. 30443/03, “Decision as to Admissibility”, 8 January 2008; *Timergaliyev vs Russia*, Appl. no. 40631/02, “Judgment”, 14 January 2009, para. 58).

31. Pre-Trial Chamber I decided that the Prosecution's proposal for the standard and burden of proof, namely that the moving party bears the burden of proof to demonstrate that the accused is unfit to stand trial and that the burden of proof is on the "balance of probabilities, were incorrect."¹⁸ Pre-Trial Chamber I declared that "the role of the parties is better seen as assisting the Chamber in the exercise of its obligations."¹⁹ That chamber ruled that the standard of proof, *i.e.* the evidentiary standard, was that "the Chamber is 'satisfied that the accused is unfit to stand trial.'"²⁰ Whilst the Defence agrees with the Chamber's findings on the burden of proof, the Defence asserts the standard defined by the ICTY Appeals Chamber in *Strugar* is better defined and should be adopted by the Chamber.

3. Case Law - ICTY

32. To determine whether a person is fit to stand trial, a court must identify a list of capacities a defendant ought to be able to exercise, and then identify the standard to which those capacities need to be present.

33. The Appeals Chamber at the ICTY endorsed the non-exhaustive list of capacities that a defendant ought to be able to exercise, that is:

- a. to plead;
- b. to understand the nature of the charges;
- c. to understand the course of the proceedings;
- d. to understand the details of the evidence;
- e. to instruct counsel;
- f. to understand the consequences of the proceedings; and
- g. to testify.²¹

34. The Appeals Chamber at the ICTY was satisfied the Trial Chamber had also applied the correct standard, but had expressed it poorly. It rephrased it as:

[T]he applicable legal standard is that of ***meaningful participation*** which allows the accused to exercise his fair trial rights to such a degree that he is able to participate effectively in his trial, and has an understanding of the proceedings.²²

¹⁸ ICC-02/11-01/11-286-Red, para. 56.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Strugar* AC Judgement, para. 55.

4. *Defence's Interpretation as to the Capacity, Standard and Burden for the Chamber to Employ*

35. The Defence sees no reason to depart from the standard employed the Pre-Trial Chamber in *Gbagbo*, except for the additional criteria discussed below.
36. The Defence argues that the fourth capacity in *Strugar*, *to wit*, the capacity to understand the details of the evidence, should be included in the Chamber's determination. The Defence understands that one might argue that this capacity is inherent in the capacity to understand the conduct of proceedings or to instruct counsel, but the Defence maintains this is a separate category which must be given due consideration and weight.
37. Mr Ongwen has the right to have evidence in order to prepare for trial pursuant to Articles 61(3)(b),²³ 64(3)(c) and 67(2) of the Rome Statute and Rules 76(1), 76(3) and 77 of the Rules of Procedure and Evidence. In order for Mr Ongwen to exercise his fair trial right pursuant to Article 67(1)(b), Mr Ongwen must have the capacity to consult and understand the evidence so that he may meaningfully participate in trial through his counsel. The Defence asserts that this is one additional capacity which the Chamber must consider.
38. Furthermore, whilst one might also argue that there is no significant difference between the standard of proof in *Gbagbo* and *Strugar*, the Defence avers that the Chamber should employ the standard of proof from *Strugar*. This standard encapsulates and expresses the meaning the fair trial rights of the Rome Statute in a succinct manner.
39. As for which party bears the burden of proof, the Defence agrees with the *Gbagbo* decision that the Defence does not bear the burden of proof. Rules 113 and 135 of the Rules of Procedure and Evidence are clearly fashioned after the inquisitorial legal system where it is the duty of a chamber to decide, whilst it is the obligation of the parties to assist the trial chamber to make its determination.²⁴

²² *Ibid*, para. 55 (emphasis added).

²³ See Article 64(6)(a) and 61(11).

²⁴ ICC-02/11-01/11-286-Red, para. 56.

5. *Submissions*

40. For nearly the last month, Mr Ongwen has regularly complained of [REDACTED]. Mr Ongwen has reported similar problems before to its Experts and Dr de Jong. Recently, the [REDACTED].
41. [REDACTED].
42. During a search of Mr Ongwen's cell [REDACTED]. In its filing of 9 January 2019, the representatives of the Registrar noted that "Mr Ongwen's [REDACTED] demonstrated a fragile and vulnerable mental state."²⁵
43. The Defence submits that it is impossible for Mr Ongwen to exercise his right to present a defence, in a situation where he has indicated to the Defence that he cannot listen in court and participate in his current state.

V. **REMEDY**

44. For the reasons stated above, the Defence respectfully requests:
 - a. A temporary two-week adjournment of the proceedings so that its Experts can examine Mr Ongwen as soon as possible; and
 - b. An adjournment of the proceedings for the purpose of an additional medical examination to be ordered by Trial Chamber IX pursuant to Rule 135.

²⁵ ICC-02/04-01/15-1403-Conf-Exp, para. 7.

Respectfully submitted,



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

Dated this 22nd day of January, 2019
At London, England