

**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

“Prosecution Response to the “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””, 11 January 2019, ICC-02/04-01/15-1410-Conf

Source: The Office of the Prosecutor

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

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Introduction

1. The Defence Request for a two-week temporary stay of proceedings in order for its own experts to assess whether Dominic Ongwen is fit to stand trial pursuant to Rule 135 of the of the Rules of Procedure and Evidence should be rejected (“Defence Request”).

2. This Chamber has already ruled Dominic Ongwen to be fit to stand trial. It did so in full cognisance of Dominic Ongwen’s [REDACTED]. These are described in the background section below. The [REDACTED] is not a material change in circumstance requiring this issue being revisited. As such the Defence Request should be rejected.

Background

3. On 6 December 2016, this Chamber determined, after speaking to Dominic Ongwen that he was, contrary to the submissions of those representing him, fit to stand trial.¹

4. On the 16 December 2016, in Decision 637, this Chamber confirmed its finding and further set out the legal definition of ‘fitness to stand trial’.² Decision 637 also gave further consideration to the question of Dominic Ongwen’s fitness to stand trial in the light of the Defence expert report. In doing so, the Chamber found that the totality of the record (including the Defence expert report) indicated that Dominic Ongwen had demonstrated his capacity to understand the proceedings before the

¹ ICC-02/04-01/15-637-Conf 16-12-2016 1/19, para 15.

² ICC-02/04-01/15-637-Conf 16-12-2016 1/19, paras 7-10.

Court and meaningfully exercise his fair trial rights.³ The Chamber also concluded that at that time there was “no available information, other than the Defence’s own unsubstantiated last-minute claim, which indicates that Dominic Ongwen may lack the basic capacities to meaningfully exercise his fair trial rights”.⁴

5. Despite this conclusion the Chamber ordered that [REDACTED] examine Dominic Ongwen on behalf of the Chamber for “other reasons” namely to: i) [REDACTED] current at that time and, ii) provide recommendations for treatment.⁵

6. In conformity with that order Professor Joop de Jong, [REDACTED], provided a report to the Chamber dated 7 January 2017.⁶ The Professor examined Dominic Ongwen on a number of occasions. [REDACTED].⁷

7. Having received the report the Chamber has continued with the trial hearings which have now run for two years. During this period the Chamber will have observed that Dominic Ongwen clearly understands the proceedings and the charges against him and seen him consulting with and instructing his counsel on how to conduct his defence. Indeed the Defence Request by its own admission explains that as recently as 8 November 2018, Dominic Ongwen demonstrated his capacity to understand the proceedings.⁸ Moreover, Dominic Ongwen has remained incarcerated in the Detention Unit, where he is regularly examined and reported on by appropriately [REDACTED].

³ ICC-02/04-01/15-637-Conf 16-12-2016 1/19, paras 26.

⁴ ICC-02/04-01/15-637-Conf 16-12-2016 1/19, para 28.

⁵ ICC-02/04-01/15-637-Conf 16-12-2016 1/19, paras 29-31.

⁶ ICC-02/04-01/15-702-Conf-AnxII

⁷ ICC-02/04-01/15-702-Conf-AnxII, page 4.

⁸ ICC-02/04-01/15-1405-Conf-Red+Conf-AnxA-Red, paras 17-19.

8. The Defence Request now repeats the same claim that was made on 5 December 2016 in filing 620, namely that Dominic Ongwen is unfit to stand trial. This time they assert that events over the last month indicate that he “cannot listen in court and participate”. [REDACTED]. They assert that [REDACTED]. They note [REDACTED]. They [REDACTED].⁹ On this basis they ask for the proceedings, which should re-start in three days time, be delayed for two weeks. They assert that this is the time necessary to enable a medical examination to take place pursuant to Rule 135. They submit that this examination should be undertaken by the Defence’s own experts, [REDACTED].

Confidentiality

9. This submission is classified as “Confidential”, however the Prosecution submits that there is no reason why the entirety of this filing cannot be made public. Accordingly, the Prosecutions requests the Chamber to file an unredacted copy of this filing publically.

Submissions

A further medical assessment pursuant to Rule 135 is unjustified

10. The [REDACTED]. The Defence notes [REDACTED].¹⁰ [REDACTED].¹¹ [REDACTED] with the Defence similarly requesting to halt proceedings on grounds that Dominic Ongwen was not fit to stand trial¹². This pattern of behaviour is

⁹ ICC-02/04-01/15-1405-Conf-Red+Conf-AnxA-Red, para 42.

¹⁰ ICC-02/04-01/15-1405-Conf-Red+Conf-AnxA-Red, paras 9-11.

¹¹ ICC-02/04-01/15-1405, paras. 10 and 13.

¹² ICC-02/04-01/15-620, filed on 5 December 2016, a day before the opening of the trial.

therefore nothing new. Indeed these events were known to Professor de Jong when he wrote his report.¹³

11. In his evidence to the Court, Professor Weierstall stated [REDACTED].¹⁴ Professor Mezey, too, spoke of Dominic Ongwen's [REDACTED].¹⁵ The Prosecution does not ask the Chamber to make any finding on these matters. The Prosecution's purpose of highlighting the experts' views here is because they indicate that there are grounds to take a cautious approach to such claims and to require that they are properly evidenced. Such evidence is required in order to distinguish legitimate claims from patterns of behaviour designed to thwart the trial process.

12. The Defence's Request in this instance has failed to provide the Prosecution with such evidence. This is despite Dominic Ongwen being [REDACTED] who have regular contact with him at the Detention Unit. Medical records kept by these professionals have been submitted in evidence. It is these professionals who can give the Trial Chamber the only reliable account of whether there are serious concerns about whether Dominic Ongwen may not now be fit to stand trial and whether it is necessary for him to be examined by an external expert with a view to obtaining an opinion on this matter.

13. The Prosecution has seen no such evidence. If it does exist and is being relied on as a reason for delaying the trial, it must be disclosed to the Prosecution. Failure to allow the Prosecution to receive ~~see~~ and make submissions on any such document would be a failure to abide by the principle of *audi alterem partem*, and obviously adversely affect the Prosecution's ability to assist the Chamber. Moreover, no

¹³ ICC-02/04-01/15-702-Conf-AnxII.

¹⁴ UGA-OTP-0280-0674 at 0688 and 0691.

¹⁵ ICC-02/04-01/15-T-163, pp. 98, ln. 17 – pp. 99, ln. 25; ICC-02/04-01/15-T-163, pp. 25, ln. 24 – pp. 26, ln. 15 and p. 96, lns. 1 – p. 97, ln. 13; UGA-OTP-0280-0786 at 0814-0815, paras. 115-116

considerations of patient confidentiality can be entertained when the patient concerned is seeking to use the material in respect of which confidentiality is asserted, to gain a litigation advantage.

Defence Request for its own experts to conduct medically assess Dominic Ongwen

14. In any event, the Defence's Request that additional medical examination be carried out by its own expert witnesses is wholly inappropriate. The function of Defence experts in this case is to provide the Court with an opinion relating to the state of mind of Dominic Ongwen at the time the crimes were committed. Their testimony is the subject of contention in this case. Moreover, these experts are not Dominic Ongwen's treating physicians. They play no role in his day-to-day medical care and they are based abroad, several thousand kilometres away. The fact that Dominic Ongwen has faith in these experts and can communicate with them in his native language does not transform them from expert witnesses into treating physicians nor justify the requested delay in proceedings. Moreover, if Dominic Ongwen [REDACTED], as suggested by the Defence, common sense would suggest that he receive treatment as soon as possible, not after doctors are flown in from another continent.

Conclusion

15. The Trial Chamber has already made a finding in respect of a previous application by the Defence under Rule 135. Unless the Defence can point to some material change in the circumstances, no application for another assessment pursuant to Rule 135 should be entertained. The Defence has not demonstrated any such change.

16. For the reasons set forth above, the Defence Request should be rejected.



Fatou Bensouda, Prosecutor

Dated this 22nd day of January 2019
At The Hague, The Netherlands