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No.: **ICC-02/04-01/15**
Date: **5 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 Request for Leave to Reply to CLRV, Prosecution and LRV Responses to 'Defence Urgent Request to Order a Medical Examination of Mr. Ongwen'", filed on 26 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. The Defence for Mr. Dominic Ongwen ('Defence') requests leave to reply to the 'CLRV Response to "Defence Urgent Request to Order a Medical Examination of Mr. Ongwen"',[1] 'Prosecution's Response to the "Defence Urgent Request to Order a Medical Examination of Mr. Ongwen"'[2] and 'Victims' response to the "Defence Urgent Request to Order a Medical Examination of Mr. Ongwen"'[3] ('Request for Leave to Reply').

2. Regulation 24(5) of the Regulations of the Court ('RoC') sets out: 'Participants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations. Unless otherwise permitted by the Chamber, a reply must be limited to new issues raised in the response which the replying could not reasonably have anticipated'. Previously, Trial Chamber IX ('Chamber') has ordered the Defence to file a reply, considering that it 'will be assisted by the Defence being able to fully present their views'.[4]

3. The Defence identified two issues in relation to the Prosecution Response, two common issues related to the CLRV Response, Prosecution Response and LRV Response, and one common issue related to the CLRV Response and LRV Response that could not reasonably have been anticipated by the Defence. Alternatively, if the Chamber finds that any of the identified issues were either not new or were reasonably anticipated, the Defence respectfully requests that the Chamber permit a reply in the interests of justice, and fairness and expeditiousness, to assist 'the Chamber in the exercise of its obligation'.[5]

4. This is particularly important because the accused's capacity to make an informed decision whether to testify or not, and to understand the significance and consequences of such a decision is a fundamental fair trial right. Moreover, the Defence points out that the matter at hand is an issue of first impression for the Court, and is of great consequence in this case as well as in respect to procedures generally for mental disabled persons who are accused of crimes.

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[1] *Ongwen*, CLRV Response to "Defence Urgent Request to Order a Medical Examination of Mr. Ongwen", ICC-02/04-01/15-1604-Conf, 23 Sept. 2019 ('**CLRV Response**'). The Defence files this Request for Leave to Reply as confidential because it responds to filings which have confidential status.
[2] *Ongwen*, Prosecution's Response to the "Defence Urgent Request to Order a Medical Examination of Mr. Ongwen", ICC-02/04-01/15-1606-Conf, 23 Sept. 2019 ('**Prosecution Response**').
[3] *Ongwen*, Victims' response to the "Defence Urgent Request to Order a Medical Examination of Mr. Ongwen", ICC-02/04-01/15-1607-Conf, 23 Sept. 2019 ('**LRV Response**').
[4] *Ongwen*, Decision on Defence Request for Leave to Reply to Prosecution and CLRV Responses on the Burden and Standard of Proof Applicable to Articles 31(1)(a) and (d) of the Rome Statute, ICC-02/04-01/15-1455, at para. 5.
[5] *Ongwen*, Decision on the Defence Request to Order a Medical Examination of Dominic Ongwen, ICC-02/04-01/15-637-Red, 16 Dec. 2016, ('**First Fitness Decision**'), at para. 11.

II. SUBMISSIONS

5. *First issue*. The Prosecution submits that the Defence Request should be rejected *in limine* because the deadline for adding witnesses to the Defence's list of witnesses expired on 4 June 2018.[6] First, the Defence recognizes that the deadline for requests to add witnesses to its list of witnesses, and other requests related to evidence, was on 4 June. Recently, the Chamber ruled that 'such requests – even if filed by 30 September 2019 – must still justify why they were filed after the lapse of [4 June] deadline'. Put differently, Mr. Ongwen could still be added to the Defence's list of witnesses and testify in this case, even after the lapse of 4 June and 30 September deadlines, following the Defence's successful application for an extension of time under regulation 35(2) of the RoC.[7] The Defence thus requests leave to reply on this issue to clarify why timing is not an issue under the circumstances.

6. *Second issue*. The Prosecution states that the Defence Request should be rejected because 'none of the proposed indicia constitute *a change in facts or circumstances* warranting a reconsideration of the Chamber's prior rulings'.[8] The Defence submits that the Prosecution applied an incorrect standard when addressing the merits of the Defence Request. Instead, the applicable standard for rule 135 requests is '*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'.[9]

7. Therefore, the Defence is not required to show indicia that would constitute a change in facts and circumstances, but it is required to persuade the Chamber, *with the information and all relevant circumstances provided to it at this point in time*, that there are sufficient indicia to warrant a medical examination under rule 135 of the Rules.[10] The Defence thus requests leave to reply in order to respond and explain why the standard applied by the Prosecution is incorrect.

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[6] Prosecution Response, at paras 2, 27(a).
[7] *Ongwen*, Decision on Defence Request for Variation of the 30 September Deadline, ICC-02/04-01/15-1591, 10 Sept. 2019, paras 5-6; see also Ongwen, Defence Urgent Request to Order a Medical Examination of Mr. Ongwen, ICC-02/04-01/15-1595-Conf, 16 Sept. 2019 ('**Defence Request**'), at para. 5: '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'.
[8] Prosecution Response, at paras 3, 16-18 and 22. (Italics added).
[9] First Fitness Decision, at paras 12-13. (Italics added).
[10] *Ongwen*, Decision on Defence Request to Order an Adjournment and a Medical Examination, ICC-02/04-01/15-1412-Red, 16 Jan. 2019 ('**Second Fitness Decision**'), at para. 15. (Italics added).

8. *Third issue*. The CLRV, Prosecution and LRV portray the Defence Request as re-litigation of its prior two rule 135 requests.[11] In doing so they conflate the 'First Rule 135 Request' to order examination for the purposes of article 64(8)(a) of the Statute, and the 'Second Rule 135 Request' to order medical examination for the purposes of collection of information regarding the state of health under rule 113 of the Rules, with the Defence's 'Current Rule 135 Request' to order examination for 'any other reason(s)'.[12] The Defence reiterates that the present 'for any other reason(s)' request concerns a specific and separate issue of Mr. Ongwen's capacity *to make an informed decision* whether or not testify in his defence, and to understand the significance and consequences of such decision.[13] Neither the 'First Fitness Decision' nor the 'Second Fitness Decision' considered this matter previously.

9. In a similar vein, the CLRV posits that Mr. Ongwen's 'ability to testify cannot possibly be examined in isolation and in a way detached from other mental capacities'.[14] This is a new issue and could not have been reasonably anticipated because the CLRV misunderstands both the Defence Request and the case law on 'the concept of fitness to stand trial', and thus makes premature submissions on Mr. Ongwen's fitness to stand trial. The Defence reiterates that the issue at hand is a rule 135 request for the purpose of making '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'.[15] It is for the Chamber to then determine whether or not Mr. Ongwen is fit to stand trial, as part of its article 64(2) obligations.

10. That said Mr. Ongwen's capacity to make an informed decision whether to testify or not may possibly interrelate or overlap with other relevant capacities which can be discerned as necessary for the meaningful exercise of the article 67(1) fair trial rights. However, it does not mean that this capacity is inseparable from other capacities, or that it can not be impaired and/or compromised by a mental condition or disorder as a stand-alone capacity. For example, in the English case of *R. v Orr*, the Court of Appeal found that 'the appellant had been fit to participate in his trial up to the point of cross examination and thereby implicitly determined that the appellant was no longer able to fully participate in his trial within the 'Pritchard' refined

[11] CLRV Response, at paras 2, 14; Prosecution Response, at paras 12-15; LRVs Response, at paras 2, 5 and 11.
[12] Defence Request, at para. 20.
[13] Defence Request, at paras 1-3.
[14] CLRV Response, at para. 9.
[15] Defence Request, at para. 3.

criteria'.[16] In other words, the defendant's capacity to withstand a cross-examination was considered a separate issue from other capacities, including his capacity to undergo the examination-in-chief.

11. The Defence thus seeks leave to reply in order to explain why the present Request has to be considered separately, and in light of the information and all relevant circumstances provided to the Chamber at this point in trial.

12. *Fourth issue.* The CLRV, Prosecution and LRV state that [REDACTED] are speculation.[17] First, the Defence submits that it is a fact that Mr. Ongwen [REDACTED]. Second, the Defence collected and presented to the Chamber [REDACTED], based on the available open-source information.[18]

13. The Defence recognizes that each person can react to such [REDACTED] in a different and individual way, including Mr. Ongwen. The Defence also agrees with the LRV position that 'the Defence relies on open source material regarding possible [REDACTED], *without any expert material*, let alone material specifically directed to the actual observed [REDACTED] Mr Ongwen'.[19] This is particularly why an impartial professional medical opinion is required.

14. The Chamber, the Defence and parties do not possess the required expertise to either confirm or deny that Mr. Ongwen suffers any of the side-effects, and to what extent. Hence, the Defence requests leave to reply in order to elaborate as to why [REDACTED] is not a speculation, but is rather sufficient indicium warranting a medical examination under rule 135 of the Rules.

15. *Fifth issue.* The CLRV and LRV submit that ordering the medical examination of Mr. Ongwen will be against the fair and expeditious conduct of the proceedings.[20] If the Chamber considers that it can be assisted by expertise from a mental health professional and grants the Defence Request, on this very limited and specific matter, then the Defence maintains that the

[16] R v Orr, [2016] EWCA Crim 889, at para. 29; see also Defence Request, at para. 12, referring to T. v UK [1999] ECtHR, at para. 87: Where the Grand Chamber considered two separate abilities and 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 on his own defence.
[17] CLRV Response, para. 15; Prosecution Response, at para. 24; LRV Response at para. 18.
[18] Defence Request, para. 24.
[19] LRV Response, at para. 18. (Italics added).
[20] CLRV Response, at para. 17; LRV Response, at para. 21.

proceedings should proceed and be concluded in a timely manner.[21] The Defence thus requests leave to reply on this issue to clarify why Mr. Ongwen's medical examination will not be antithetical to the fair and expeditious conduct of the proceedings and prejudicial to the interests of the parties and participants.

III. RELIEF SOUGHT

16. For the reasons described above, the Defence respectfully requests leave to reply to the CLRV Response, Prosecution Response and LRV Response.

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Hon. Krispus Ayena Odongo

On behalf of Mr Dominic Ongwen

Dated this 5th day of October, 2019

[21] Defence Request, at paras 4-5: The Defence emphasized the urgency of its Request, because it also has an interest in resolving this matter in a fair and expeditious manner.