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**International
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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 Redacted Version of ICC-02/04-01/15-1604-Conf

**CLRV Response to “Defence Urgent Request to
Order a Medical Examination of Mr. Ongwen”**

Source: **Office of Public Counsel for 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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I. INTRODUCTION

1. The Common Legal Representative of Victims¹ (the “CLR V”) opposes the “Defence Urgent Request to Order a Medical Examination of Mr. Ongwen” (the “Third Request for medical examination” or the “Third Request”).²

2. The CLR V submits that the Defence’s Request seeking a medical examination to determine if Mr Ongwen suffers a mental condition or disorder, impeding him to make a decision on whether to testify and to understand the consequences of his own testimony is legally flawed and practically unfeasible. Rather, the Third Request *de facto* amounts to a further application for medical examination pursuant to rule 135 of the Rules of Procedure and Evidence (the “Rules”) with the ultimate goal of having Trial Chamber IX (the “Chamber”) re-assess the Accused’s fitness to stand trial. In this regard, the Defence fails to present any new facts that would set aside the legal and factual findings previously made by the Chamber on the matter and could justify a change in the determination of the Chamber.

II. PROCEDURAL BACKGROUND

3. On 5 December 2016, the day before the commencement of the trial, the Defence filed a request for a stay of proceedings and, pursuant to rule 135 of the Rules, medical examination of the Accused (the “First Request for Medical

¹ See the “Decision on contested victims’ applications for participation, legal representation of victims and their procedural rights” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-350, 27 November 2015, p.19; the “Decision on issues concerning victims’ participation” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-369, 15 December 2015, pp. 10-11; the “Second decision on contested victims’ applications for participation and legal representation of victims” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-384, 24 December 2015, pp. 20-22; and the “Decision on the ‘Request for a determination concerning legal aid’ submitted by the legal representatives of victims” (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-445, 26 May 2016, para. 13.

² See the “Defence Urgent Request to Order a Medical Examination of Mr. Ongwen”, No. ICC-02/04-01/15-1595-Conf, 16 September 2019 (the “Third Request for medical examination” or the “Third Request”).

Examination”).³ On 6 December 2016, the Prosecution⁴ and the CLRV⁵ opposed said request. On 6 December 2016, at the opening of the trial, the Chamber rendered an oral decision, finding that Mr Ongwen understands the nature of the charges brought against him (the “Oral Decision Opening the Trial”).⁶

4. On 16 December 2016, the Chamber issued its “Decision on the Defence Request to Order a Medical Examination of Dominic Ongwen” (the “First Decision on Medical Examination”) and found, *inter alia*, that the Accused is fit to stand trial and thus a medical examination under rule 135 of the Rules was unwarranted.⁷

5. On 10 January 2019, as instructed by the Chamber,⁸ the Defence filed another request for a stay of the proceedings and order for a medical examination of Mr Ongwen (the “Second Request for Medical Examination”).⁹ On 11 January 2019, the CLRV,¹⁰ the Legal Representative of the Victims¹¹ and the Prosecution¹² submitted

³ See the “Defence Request for a Stay of the Proceedings and Examinations Pursuant to Rule 135 of the Rules of Procedure and Evidence”, Confidential with Public Annex A and Confidential Annex B, No. ICC-02/04-01/15-620-Conf, 5 December 2016. (the “First Request for Medical Examination”). A public redacted version of the document was filed on the same day, see No. ICC-02/04-01/15-620-Red.

⁴ See the “Prosecution’s Response to the Defence Request for a Stay of Proceedings”, No. ICC-02/04-01/15-624-Conf, 5 December 2016.

⁵ See the email from the CLRV sent on 6 December 2016 at 09:00.

⁶ See the Transcripts of the hearing held on 6 December 2016, No. ICC-02/04-01/15-T-26-ENG CT WT, p. 3, line 5 to p. 7, line 12; and p. 17, line 11 to p. 19 line 15 (the “Oral Decision Opening the Trial”).

⁷ See the “Decision on the Defence Request to Order a Medical Examination of Dominic Ongwen” (Trial Chamber IX), No. ICC-02/04-01/15-637-Conf, 16 December 2016, para. 28 (the “First Decision on Medical Examination”). A public redacted version of the decision was filed on the same day; see No. ICC-02/04-01/15-637-Red.

⁸ See the email sent by the Chamber on 9 January 2019 at 17:45. See also the email sent by the Defence on 9 January 2019 at 16:56.

⁹ See the “Confidential 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, No. ICC-02/04-01/15-1405-Conf-Red, 10 January 2019 (the “Second Request for Medical Examination”).

¹⁰ See the “CLR V Response to ‘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’”, No. ICC-02/04-01/15-1408-Conf, 11 January 2019. A public redacted version of the document was filed on 21 March 2019; see No. ICC-02/04-01/15-1408-Red.

¹¹ See the “Victims’ Response to ‘Confidential 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’”, No. ICC-02/04-01/15-1409-

their responses. On 16 January 2019, the Chamber issued its decision rejecting the Defence's request (the "Second Decision on Medical Examination").¹³

6. On 16 September 2019, the Defence filed the Third Request for medical examination.¹⁴ On 17 September 2019, the Chamber, by e-mail, shortened the deadline for responses to 23 September 2019.¹⁵

III. CONFIDENTIALITY

7. The present submission is filed confidential in accordance with regulation 23bis (2) of the Regulations of the Court, following the classification chosen by the Defence. A public redacted version of this document will be filed in due course.

IV. SUBMISSIONS

8. In the Third Request for medical examination, the Defence claims that there are sufficient indicia suggesting the existence of a medical condition or disorder which may impact on Mr Ongwen's ability to testify; and thus argues that more detailed information is required in order for the Chamber to make a ruling on whether the Accused is able to meaningfully exercise his right to testify under article

Conf, 11 January 2019. A public redacted version of the document was filed on 12 June 2019; see No. ICC-02/04-01/15-1409-Red.

¹² See the "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'", No. ICC-02/04-01/15-1410-Conf, 11 January 2019. A public redacted version of the document was filed on 22 January 2019; see No. ICC-02/04-01/15-1410-Red.

¹³ See the "Decision on Defence Request to Order an Adjournment and a Medical Examination" (Trial Chamber IX), No. ICC-02/04-01/15-1412-Conf, 16 January 2019 (the "Second Decision on Medical Examination"). A public redacted version of the decision was filed on the same day; see No. ICC-02/04-01/15-1412-Red.

¹⁴ See the Third Request for medical examination, *supra* note 2.

¹⁵ See the email of the Chamber sent on 17 September 2019 at 09:12.

67(1)(e) of the Rome Statute.¹⁶ Consequently, the Defence requests a psychiatric examination of Mr. Ongwen pursuant to rule 135 of the Rules.¹⁷

9. The CLRV submits that the relief requested by the Defence is legally flawed and practically unfeasible. Firstly, as admitted by the Defence,¹⁸ the capacity to testify is only one of several capacities constituting the overall fitness of the accused to stand trial and to meaningfully exercise his or her fair trial rights.¹⁹ As a result, these capacities are inseparable from each other and thus must be evaluated holistically in their contexts. The ability to testify cannot possibly be examined in isolation and in a way detached from other mental capacities demonstrating the accused's fitness to stand trial.

10. As acknowledged by the Defence in the Third Request for medical examination,²⁰ the Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (the "ECCC") held that an accused's fitness to stand trial should be determined on whether his or her capacities viewed overall and in a reasonable and common sense manner are at such a level that it is possible for him or her to participate in the proceedings and sufficiently exercise his or her fair trial rights.²¹ In

¹⁶ See the Third Request for medical examination, *supra* note 2, para. 2.

¹⁷ *Idem*, para. 3.

¹⁸ *Ibidem*, para. 7.

¹⁹ See the First Decision on Medical Examination, *supra* note 7, paras. 7-8. The Chamber held that "[a]s observed in the relevant jurisprudence of the Court, the concept of 'fitness to stand trial', while not specifically defined as such by the legal instruments of the Court, 'must be viewed as an aspect of the broader notion of fair trial', which 'is rooted in the idea that whenever the accused is, for reasons of ill health, unable to meaningfully exercise his or her procedural rights, the trial cannot be fair and criminal proceedings must be adjourned until the obstacle ceases to exist'. Correspondingly, a person is to be considered 'fit to stand trial' when he or she possesses the necessary capacities – to such a degree that he or she has an understanding of the essentials of the proceedings – to effectively exercise his or her fair trial rights and, as such, meaningfully participate in the proceedings before the Court against him or her. [...] From the catalogue of fair trial rights contained in Article 67(1) of the Statute the relevant capacities which can be discerned as necessary for the meaningful exercise of these rights include the capacities to understand the charges and the conduct, purpose and possible consequences of the proceedings, instruct counsel in the preparation and conduct of his or her defence, and make a statement".

²⁰ See the Third Request, *supra* note 2, footnote 10.

²¹ See ECCC, Case 002 (Ieng Thirith), Decision on Ieng Thirith's Fitness to Stand Trial (Trial Chamber), 002/19-09-2007/ECCC/TC, 17 November 2011, para. 27.

particular, it indicated that many of these capacities are “*interrelated or overlapping*.”²² Thus, the Trial Chamber assessed Ieng Thirith’s ability to testify in conjunction with her capacity to plead and understand the nature of the charges and the details of the evidence.²³ In another case at the International Criminal Tribunal for the former Yugoslavia (the “ICTY”), Trial Chamber I also ordered that the accused be examined by two experts in relation to his ability to: (a) understand the charges and procedure; (b) instruct his counsel; (c) testify; (d) enter a plea; (e) understand the consequences of a conviction; and (f) his possible treatment.²⁴ Clearly, the ICTY Trial Chamber *did not* single out the accused’s ability to testify for the purpose of medical examination as seemingly argued by the Defence in the Third Request.²⁵

11. Equally, in *the Gbagbo case*, Pre-Trial Chamber I²⁶ and Trial Chamber I²⁷ determined Mr Gbagbo’s fitness to stand trial while assessing his capacity to testify

²² *Idem*, para. 54.

²³ *Ibidem*, paras. 55-57. The ECCC Trial Chamber found that “[...] Professor Campbell opined that IENG Thirith would have difficulty testifying in her own defence and that she did not appear to understand the nature and consequences of the proceedings. [...] By contrast, the Psychiatric Experts noted that, when faced with specific questions as to the meaning of guilt or innocence, IENG Thirith appeared to exhibit some understanding. There was also evidence that she retained some long-term memory and was able to respond to questions. She was able, for instance, to explain the meaning of crimes against humanity and genocide in lay terms and to deny that she was guilty of such charges. The Psychiatric Experts further noted that IENG Thirith, at one stage of the assessment, appeared to show awareness of the consequences of her being found unfit to stand trial. The Psychiatric Experts therefore considered that she possessed some understanding that she was accused and of what she was accused. In consequence, they concluded that IENG Thirith retained some capacity to enter a plea, to understand the charges and the details of the evidence against her, and to testify. [...] The Trial Chamber agrees with the Psychiatric Experts that the Accused IENG Thirith may still possess some capacity to enter a plea, to understand the charges against her, to understand the details of the evidence, and to testify. However, the Accused’s impaired memory will likely impact upon her ability to accurately recall events that occurred between 1975 and 1979. This would need to be weighed by the Chamber when assessing her evidence and credibility were the Accused to testify at trial”.

²⁴ See ICTY, *Prosecutor v. Vladimir Kovačević*, Public Version of the Decision on Accused's Fitness to Enter a Plea and Stand Trial (Trial Chamber I), Case No. IT-01-42/2-1, 12 April 2006, pp. 5 and 8.

²⁵ See the Third Request, *supra* note 2, para. 10.

²⁶ See the “Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court” (Pre-Trial Chamber I), No. ICC-02/11-01/11-286-Red, 2 November 2012, para. 100. The Pre-Trial Chamber found that “[...] Mr Gbagbo is not physically unfit to take part in the proceedings against him. [...] [The Chamber] bases its conclusions on Mr Gbagbo’s mental fitness mainly on the written report and testimony of Dr Lamothe, which establish that Mr Gbagbo possesses the capacities to understand the charges against him, as well as the conduct and the possible consequences of proceedings against him, and is capable of giving instructions to counsel as well as of making a statement”.

²⁷ See the “Decision on the fitness of Laurent Gbagbo to stand trial” (Trial Chamber I), No. ICC-02/11-01/15-349, 27 November 2015, p. 38. The Trial Chamber found that “[...] all three of the Chamber’s

along with his capacity to understand the nature, cause and consequence of the charges and the details of the evidence, and to communicate with and instruct his counsel.

12. The relevant legal standard underpinning these decisions is one of *overall* fitness to stand trial, not *one of the above mentioned capacities* constituting such fitness. Said standard was applied by Pre-Trial Chamber I²⁸ and Trial Chamber I²⁹ in the *Gbagbo case*. In this case, the Chamber also endorsed the position expressed by a Trial Chamber of the ICTY which stated that an accused's ability to participate in his or her trial should be assessed by looking at whether his or her capacities are, *viewed overall*, at such a level that it is possible for him or her to participate in the proceedings and sufficiently exercise his or her rights.³⁰ The same is also true at the

Appointed Experts unanimously conclude that Mr Gbagbo is physically and mentally able to attend and follow the trial proceedings. All three Appointed Experts conclude that Mr Gbagbo has the cognitive capacity to understand the nature, cause and consequence of the charges and the details of the evidence. All three find Mr Gbagbo has the requisite capacities necessary to communicate with and instruct his counsel, and testify or make an unsworn statement on his behalf, should he so choose. [...] In respect of Mr Gbagbo's capacity to instruct counsel in the preparation and conduct of his defence, all three Appointed Experts conclude that Mr Gbagbo is fully able to express himself, exchange with counsel and prepare for and conduct his defence. [...] In light of the above, the Chamber is satisfied that Mr Gbagbo has the requisite capacities to exercise his procedural rights as enumerated under Article 67(1) of the Statute. The Chamber confirms that Mr Gbagbo is fit to stand trial."

²⁸ See the "Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court", *supra* note 26, para. 51. The Pre-Trial Chamber held 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 sources are, but primarily whether these medical conditions affect the capacities of the person concerned to meaningfully exercise his or her fair trial rights. In reaching its overall determination of fitness to stand trial, the Chamber must take into account all the relevant circumstances of each individual case. [...] The Chamber is of the view that the overall capacity required for fitness to stand trial is the same irrespective of the stage of proceedings. [...] [T]he question before the Chamber is not merely the existence of particular medical conditions, or what their sources are, but primarily whether such medical conditions affect the overall ability of Mr Gbagbo to meaningfully exercise his fair trial rights*".

²⁹ See the "Decision on the fitness of Laurent Gbagbo to stand trial", *supra* note 27, p. 36. The Trial Chamber I ruled that "[...] *the Chamber is guided by the notion that: An accused's ability to participate in his trial should be assessed by looking at whether his capacities are, viewed overall and in a reasonable and [common sense] manner, at such a level that it is possible for [him or her] to participate in the proceedings (in some cases with assistance) and sufficiently exercise the identified rights*".

³⁰ See the First Decision on Medical Examination, *supra* note 7, para. 10. See also ICTY, *Prosecutor v. Pavle Strugar*, Judgement (Appeals Chamber), Case No. IT-01-42-A, 17 July 2008, paras. 42 and 55; and ICTY, *Prosecutor v. Vujadin Popović et al*, Public Redacted Version of 30 November 2012 Decision on Request to Terminate Appellate Proceedings in Relation to Milan Gvero (Appeals Chamber), Case No. IT-05-88-A, 16 January 2013, para. 21.

International Residual Mechanism for Criminal Tribunals (the “MICT”)³¹ and the ECCC.³² Consequently, in the Third Request, the Defence fails to establish a proper legal basis for the Chamber to order a medical examination on Mr Ongwen’s ability to testify and understand the consequences of his testimony.

13. In practice, it would also be unfeasible to order such examination. *Arguendo*, even if the Chamber appoints an expert, it would be impossible to determine Mr Ongwen’s ability to testify without analysing his capacity to understand the nature of the charges and the details of the evidence, as well as the conduct of the proceedings and to give instructions to his counsel. Indeed, as held by the ECCC, these capacities are firmly interconnected.³³

14. Therefore, the Third Request *de facto* amounts to another application for medical examination pursuant to rule 135 of the Rules with the ultimate goal of having the Chamber re-assess the Accused’s fitness to stand trial. In this regard, the Chamber already held that [to order a medical examination under said provision] “*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*”.³⁴

15. However, the Third Request does not refer to new information, nor does it indicate the emergence of new medical conditions which may impact on Mr Ongwen’s ability to meaningfully exercise his fair trial rights and effectively participate in the proceedings. Consequently, it appears that the Chamber is already in possession of the necessary information concerning the Accused’s current state of health. Moreover, the fact that [REDACTED] has already been taken into account by

³¹ See MICT, *Prosecutor v. Ratko Mladić*, Public Redacted Version of the ‘Decision on a Motion to Vacate the Trial Judgement and to Stay Proceedings’, filed on 30 April 2018 (Appeals Chamber), Case No. MICT-13-56-A 8 June 2018, pp. 2-4.

³² See the Decision on Ieng Thirith’s Fitness to Stand Trial *supra* note 21, para. 27.

³³ *Idem*, para. 54.

³⁴ See the First Decision on Medical Examination, *supra* note 7, paras. 7-13.

the Chamber in its Second Decision on Medical Examination.³⁵ Additionally, [REDACTED]³⁶ appear speculative and unsubstantiated.

16. As mentioned on an earlier occasion,³⁷ the CLRV submits further that [REDACTED] is of course a matter of concern for the Court. Nonetheless, as previously held by the Chamber, the Accused's general state of health or specific aspects of his well-being impacting him negatively - and the fact that he is fit to stand trial - are not synonymous.³⁸ Thus far, the Defence fails to present any new facts that would set aside the legal and factual findings made by the Chamber in its Oral Decision Opening the Trial and in the First and Second Decisions on Medical Examination.

17. Additionally, the CLRV posits that granting the Request shall be antithetical to the fair and expeditious conduct of the proceedings since an unnecessary medical examination pursuant to rule 135 of the Rules may further prolong the already lengthy trial. This will also in turn be prejudicial to the legitimate interests of the participating victims in this case who have the right to an expeditious trial.

V. CONCLUSION

18. For the foregoing reasons, the Common Legal Representative of the Victims respectfully requests the Chamber to reject the Defence's Third Request for medical examination.

³⁵ See the Second Decision on Medical Examination, *supra* note 13, paras. 15-18.

³⁶ See the Third Request for medical examination, *supra* note 2, para. 24.

³⁷ See the "CLRV Response to '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'", *supra* note 10, para. 12.

³⁸ See the Second Decision on Medical Examination, *supra* note 13, para. 14.

A handwritten signature in black ink, reading "Paolina Massidda". The signature is written in a cursive style and is underlined.

Paolina Massidda
Principal Counsel

Dated this 07th day of October 2019

The Hague, The Netherlands