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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 document ICC-ICC-02/04-01/15-1408-Conf

**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”**

Source: **Office of Public Counsel for Victims**

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

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I. INTRODUCTION

1. The Common Legal Representative of Victims¹ (the “CLRv”) opposes 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” (the “Request”).²

2. The CLRv submits that, in light of the limited information made available to the parties and participants, the matters raised in the Request do not warrant a temporary stay of the proceedings or ordering a medical examination of Mr Ongwen pursuant to Rule 135 of the Rules of Procedure and Evidence (the Rules). In particular, the CLRv submits that the Defence fails to raise any new factual grounds that would set aside the legal and factual findings made by the Trial Chamber (the “Chamber”) in its previous decisions on related matters.

II. PROCEDURAL BACKGROUND

3. On 5 December 2016, the day before the commencement of the trial, the Defence filed the “Request for a Stay of Proceedings and Examinations Pursuant to Rule 135 of the Rules of Procedure and Evidence”(the “First Request for Stay of

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 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, with Confidential Redacted Annex A, 11 January 2019 (the “Request”).

Proceedings”).³ In said Request, the Defence, *inter alia*, asked (i) the Chamber to stop the opening of the trial and; (ii) order a psychiatric and/or psychological examination of Mr Ongwen to ensure that he understands the nature of the charges brought against him and, more broadly, that he is fit to stand trial.⁴ On 6 December 2016, the Prosecution filed its Response opposing the First Request for Stay of Proceedings.⁵ The CLRV also supported the Prosecution’s arguments.⁶

4. On 6 December 2016, at the opening of the trial, the Chamber rendered an oral decision on the First Request for Stay of Proceedings, in which it, *inter alia*, rejected the first part of reliefs requested by the Defence in relation to ordering the halt of the opening of the trial since it found that that Mr Ongwen understands the nature of the charges brought against him (the “Oral Decision Opening the Trial”).⁷

5. On 16 December 2016, the Chamber issued its “Decision on the Defence Request to Order a Medical Examination of Dominic Ongwen” (the “Decision on the Medical Examination”) and found, *inter alia*, that there exists no available information indicating that the accused is unfit to stand trial and thus a medical examination under Rule 135 of the Rules to assess his fitness to stand trial is unwarranted.⁸

6. On 9 January 2019, the Defence made a request via email and on *ex parte* basis to the Chamber seeking, *inter alia*, a temporary stay of the proceedings and, in particular, temporary postponement of the trial hearings scheduled to resume on 14

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, 05 December 2016.

⁴ *Idem.*, para. 80.

⁵ See the “Prosecution’s Response to the Defence Request for a Stay of Proceedings”, No. ICC-02/04-01/15-624-Conf, 05 December 2016.

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

⁷ Transcripts of the hearing of 6 December 2016, 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”).

⁸ See the “Decision on the Defence Request to Order a Medical Examination of Dominic Ongwen”, No. ICC-02/04-01/15-637-Conf, 16 December 2016, para. 28 (the “Decision on the Medical Examination”).

January 2019.⁹ On the same day, the Chamber instructed, *inter alia*, (i) the Defence to file formally its Request by 10 January 2019; and (ii) the other participants to file their responses by 11 January 2019.¹⁰

7. On 10 January 2019, the Defence filed a courtesy copy of its Request.¹¹ Following this, the Prosecution requested via email the Chamber to order the provision of: (i) filing No. ICC-02/04-01/15-1403-Conf-Exp referenced in the Request and (ii) unredacted content of paragraphs 20, 41 and 42 of the Request and paragraph 5 of Confidential Annex A. (the “Prosecution’s Email Request”).¹² The CLRV joined the Prosecution’s Email Request.¹³ The Defence opposed the Prosecution’s Email Request.¹⁴ On the same day, the Chamber issued via email a decision which rejected the first part while granting the second part of the Prosecution’s Email Request.¹⁵ Furthermore, the Chamber instructed the Registry to prepare as soon as possible a confidential redacted version of filing No. ICC-02/04-01/15-1403-Conf-Exp in consultation with the Defence.¹⁶

III. CONFIDENTIALITY

8. The present submission is filed confidential following the classification indicated by the Chamber.

⁹ See the email sent by the Defence on 9 January 2019 at 16:56.

¹⁰ See the email sent by the Chamber on 9 January 2019 at 17:45.

¹¹ See the email sent by the Defence on 10 January 2019 at 15:28.

¹² See the email sent by the Prosecution on 10 January 2019 at 16:58.

¹³ See the email sent by the CLRV on 10 January 2019 at 17:08.

¹⁴ See the email sent by the Defence on 10 January 2019 at 17:19.

¹⁵ See the email sent by the Chamber on 10 January 2019 at 18:13.

¹⁶ *Idem*.

IV. SUBMISSIONS

9. The CLRV submits that, in the Decision on the Medical Examination, the Chamber has already set the legal criteria for entertaining motions seeking stay of proceedings and ordering medical examinations pursuant to Rule 135 of the Rules in order to assess whether the accused is fit to stand trial. The Chamber ruled explicitly that:

[...] As 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. [...] The Chamber observes that the responsibility to ascertain that an accused is not unfit to stand trial lies with the Chamber itself as it is part of its obligations under Article 64(2) of the Statute to ensure that the trial is fair. [...] The Chamber therefore endorses the observation by Pre-Trial Chamber I that the role of the parties in connection to the determination of whether an accused is not unfit to stand trial is 'better seen as assisting the Chamber in the exercise of its obligation'. [...] At the same time, 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. [...] As already clarified in the jurisprudence of the Court and equally observed in the jurisprudence of the ICTY, the question of whether an accused is unfit to stand trial does not concern, in and of itself, whether he or she has particular medical conditions, but whether the accused is able to exercise effectively his fair trial rights in the proceedings against him irrespective of the existence of any such medical condition. In this sense, when the Chamber is satisfied, in light of the available information and consideration of all relevant circumstances, that the accused is able to meaningfully exercise his or her fair trial rights, an inquiry on whether the person suffers from any particular medical

condition is unnecessary for the Chamber to discharge its obligations to ensure that the accused is fit to stand trial.”¹⁷

10. Consequently, the Chamber found that, according to the information before it at the time, *“there exists no available information, other than the Defence’s own unsubstantiated last-minute claim, which indicates that Mr Ongwen may lack the basic capacities to meaningfully exercise his fair trial rights in the proceedings before the Court and be therefore unfit to stand trial. Rather, the available information demonstrates Mr Ongwen’s fitness to stand trial. In these circumstances, a medical examination of Mr Ongwen under Rule 135 of the Rules to assess his fitness to stand trial is unwarranted.”¹⁸*

11. Correspondingly, the CLRV submits that, in light of the limited information made available again at the eve of the re-start of the trial hearings, the matters raised in the Request do neither warrant a temporary stay of the proceedings nor ordering a medical examination of Mr Ongwen pursuant to Rule 135 of the Rules. In particular, the CLRV submits that the Defence fails to demonstrate and substantiate any new factual grounds that would set aside the legal and factual findings made by the Chamber in the Oral Decision Opening the Trial and the Decision on the Medical Examination.

12. The CLRV contends that indeed the recent development concerning Mr Ongwen’s [REDACTED] in the Request is of course a matter of concern for the Court. Yet, the fact that [REDACTED] had already been taken into account by the Chamber when it ruled that he is in fact fit to stand trial and thus a medical examination under Rule 135 of the Rules to assess his fitness to stand trial is not warranted.

13. Hence, the matters raised in the Request do not indicate the emergence of new medical conditions which may impact on Mr Ongwen’s ability to meaningfully exercise his fair trial rights which the Chamber is unable to resolve without the

¹⁷ See the Decision on the Medical Examination, *supra* note 8, paras. 7 – 13.

¹⁸ *Idem*, para. 28.

assistance of medical experts. Consequently, the findings made in the Decision on the Medical Examination must stand undisturbed.

14. Subsequently, the CLRV posits that granting the Request shall not only be antithetical to the fair and expeditious conduct of the proceedings but also prejudicial to the legitimate interest of the participating victims in this case who wish that the trial proceeds expeditiously.

15. Nonetheless, the CLRV is not opposed to a specific psychiatric examination of Mr Ongwen eventually ordered by the Chamber in order to provide specific recommendations on any necessary measure and/or treatment that may be required to address [REDACTED]. In any event, such examination should be conducted prior to the resumption of the evidentiary block scheduled to start on 14 January 2019.

V. CONCLUSION

16. For the foregoing reasons, the Common Legal Representative of the Victims respectfully requests the Chamber to reject the Request.

A handwritten signature in black ink, appearing to read 'Paolina Massidda', with a horizontal line drawn underneath the name.

Paolina Massidda
Principal Counsel

Dated this 20th day of March 2019

The Hague, The Netherlands