

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/04-01/15
Date: 16 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 redacted

**Decision on Defence Request to Order an Adjournment and a Medical
Examination**

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

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**The Office of Public Counsel for
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Amicus Curiae

REGISTRY

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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber IX ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Article 64(2) and 64(6)(e) of the Rome Statute ('Statute') and Rule 135 of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on Defence Request to Order an Adjournment and a Medical Examination'.

A. Procedural History and Submissions

1. On 10 January 2019, the defence for Mr Ongwen ('Defence') filed a request to order an adjournment of the proceedings for a period of two weeks, so that two expert witnesses by the defence ('Defence Experts') can examine the accused, and a further adjournment for an additional medical examination of the accused pursuant to Rule 135 of the Rules ('Request').¹
2. The Defence provides a detailed overview of the medical history of the accused, [REDACTED] since 2016² and [REDACTED], which it states is the result of ongoing medical challenges experienced by the accused.³ Finally, it alleges 'that it is impossible for Mr Ongwen to exercise his right to present a defence', submitting that the accused has indicated that he cannot listen in Court and participate.⁴
3. On 11 January 2019, the Common Legal Representative for Victims,⁵ the Legal Representative for Victims⁶ and the Office of the Prosecutor ('Prosecution')⁷ all submitted a response, all opposing the Request.

¹ 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, ICC-02/04-01/15-1405-Conf-Exp, with confidential *ex parte*, Defence only, Annex, ICC-02/04-01/15-1405-Conf-Exp-AnxA. A confidential, redacted version of the Request and the annex were filed on the same day.

² Request, ICC-02/04-01/15-1405-Conf-Red, paras 8-21.

³ Request, ICC-02/04-01/15-1405-Conf-Red, paras 40-42.

⁴ Request, ICC-02/04-01/15-1405-Conf-Red, para. 43.

⁵ 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", ICC-02/04-01/15-1408-Conf.

4. That same day, the Chamber announced that the two week adjournment requested by the Defence was granted and that the reasons for this determination – contained in the present decision – would follow.⁸

B. Analysis

5. The Chamber will first determine the exact content of the relief sought, as the Defence provides slightly contradictory information in this regard. The title of the Request asks for a ‘stay of proceedings’. Equally, the introduction refers to a stay of proceedings and, in the applicable law section, the Defence refers to jurisprudence regarding a stay of proceedings.⁹ However, in the relief sought the Defence requests ‘an adjournment’.¹⁰
6. The Chamber recalls its prior jurisprudence, as well as that cited by the Defence, which explains that a stay of proceedings is principally linked to a ‘breach of rights’, which has as a consequence that it is impossible for the Defence to exercise their rights and makes a fair trial impossible.¹¹ The Chamber understands the Request not to allege that a right of the accused has been breached but rather, in general terms, to assert that an interruption of the sitting schedule is needed in order to determine whether the accused is in a condition to

⁶ 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”, ICC-02/04-01/15-1409-Conf.

⁷ 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”, ICC-02/04-01/15-1410-Conf.

⁸ Email from Trial Chamber IX Communications, 11 January 2019 at 16:41.

⁹ Request, ICC-02/04-01/15-1405-Conf-Red, paras 1, 2 and 22.

¹⁰ Request, ICC-02/04-01/15-1405-Conf-Red, para. 44.

¹¹ Decision on Defence Request for Findings on Fair Trial Violations Related to the Acholi Translation of the Confirmation Decision, 24 January 2018, ICC-02/04-01/15-1147, para. 14; Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008”, 21 October 2008, ICC-01/04-01/06-1486, OA 13, paras 78-80; Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 13 December 2006, ICC-01/04-01/06-772, OA 4, para. 39.

continue with the proceedings. It will therefore interpret the Request not as a request for a stay of the proceedings, but as a request for an adjournment.¹²

7. The Chamber will first address the request by the Defence to adjourn the hearing in order to enable the Defence Experts to examine the accused¹³ and then address the request to adjourn the proceedings for the purpose of a medical examination pursuant to Rule 135 of the Rules.¹⁴

(i) *Request for a two-week adjournment to facilitate an examination of the accused by the Defence Experts*

8. The Defence requests a two-week adjournment in order for the Defence Experts to examine the accused. The purpose of this examination is not entirely clear from the Request. The Chamber understands this part of the Request in the sense that the adjournment is sought in order to facilitate a medical examination of the accused pursuant to Rule 135 of the Rules, since the examination is done with the aim to determine ‘whether [the accused] can meaningfully participate in the current proceedings against him’.¹⁵ In case the Defence meant to seek an adjournment in order to merely collect information regarding the state of health of the accused, the Chamber indicates that this would have been rejected on grounds that there is no justification for such adjournment.
9. The Chamber recalls that it has already informed the Defence that the accused may receive visitors, which includes the Defence Experts, subject to the

¹² Should the Defence have meant to request a stay of proceedings, the Chamber notes that nothing in the facts presented in the Request justifies the exceptional remedy of a temporary stay of proceedings.

¹³ Request, ICC-02/04-01/15-1405-Conf-Red, para. 44 a.

¹⁴ Request, ICC-02/04-01/15-1405-Conf-Red, para. 44 a.

¹⁵ Request, ICC-02/04-01/15-1405-Conf-Red, para. 2.

procedures set by the Chamber and the Detention Centre governing the accused's visits.¹⁶

10. However, the Chamber stresses that it will not appoint the Defence Experts in order to carry out a Rule 135 examination. The Chamber notes that the Defence Experts are nominated as witnesses by one of the parties and have already produced material, by order and on account of one of that party, which has been introduced into the proceedings. The requested examination pursuant to Rule 135 is not directly linked to their role as witnesses or the allegations against the accused, but is done exclusively to ensure and protect the accused's rights and health. It must therefore be executed in an impartial manner.
11. The Chamber further notes that the Defence already used the Defence Experts for a request, *inter alia*, arguing that the accused is not fit to stand trial and seeking an examination pursuant to Rule 135.¹⁷ This request was rejected at the commencement of the trial, and the Chamber finds it wholly inappropriate at this point to request that the same Defence Experts be mandated with an examination of the accused pursuant to Rule 135 of the Rules. To the extent that the adjournment is requested in order to enable the Defence experts to examine the accused for Rule 135 purposes, the Chamber is not persuaded.
12. Nevertheless, the Chamber has granted a two week adjournment, [REDACTED].¹⁸ This is done solely in order for the accused to receive any necessary medical treatment [REDACTED]. To this end – and also to ensure the fair and expeditious conduct of the proceedings – the Chamber further directs that the medical officer of the detention centre provides a report on whether the

¹⁶ E-mail communication between the Chamber and the Defence; e-mail from Trial Chamber IX Communications, 8 January 2019, at 11:41.

¹⁷ Public Redacted Version of "Defence Request for a Stay of the Proceedings and Examinations Pursuant to Rule 135 of the Rules of Procedure and Evidence", filed on 5 December 2016, 5 December 2016, ICC-02/04-01/15-620-Red.

¹⁸ E-mail from Trial Chamber IX Communications to the parties and participants and the Registry, 11 January 2019, at 16:41.

accused is able attend the hearing on 28 January 2019, by 23 January 2019 latest. This report is not supposed to be an additional examination of the accused or share parts of the medical record of the accused but rather the medical officer's assessment of whether the accused is able to attend the next hearing, based on the knowledge acquired in course of his or her normal routine activities. This report is to be provided on an *inter parte* basis, with redactions if necessary. Further, the Chamber hereby orders the Detention Centre to also file a report, as soon as possible, on the measures taken [REDACTED]. This report is to be provided to the Chamber only.

(ii) *Request to adjourn the proceedings for the purpose of a medical examination pursuant to Rule 135 of the Rules*

13. The Chamber recalls its prior decision on a request to order a medical examination pursuant to Rule 135 of the Rules ('Rule 135 Decision').¹⁹ It rejected a Defence request to order an examination to assess Mr Ongwen's fitness to stand trial but ordered an examination to diagnose Mr Ongwen's medical conditions and make recommendations to any necessary measure or treatment.²⁰
14. As previously stated,²¹ the Chamber underlines that the accused's general state of health or specific aspects of his well-being which might impact him negatively and the fact that he is fit to stand trial are not synonymous. The Chamber repeats²² that an accused is fit to stand trial when he is able to effectively exercise his fair trial rights and can meaningfully participate in the proceedings before the Court.

¹⁹ Decision on the Defence Request to Order a Medical Examination of Dominic Ongwen, 16 December 2016, ICC-02/04-01/15-637-Red.

²⁰ Rule 135 Decision, ICC-02/04-01/15-637-Red, paras 6, 28, 31, p. 18.

²¹ Rule 135 Decision, ICC-02/04-01/15-637-Red, paras 13 and 18.

²² See Rule 135 Decision, ICC-02/04-01/15-637-Red, paras 7-13.

15. The Chamber will only assess whether, with the information provided to it at this point in time, there are sufficient indicia to warrant a medical examination under Rule 135 of the Rules.
16. At the beginning of the trial, the Chamber satisfied itself that the accused understood the nature of the charges and stated that he was fit to stand trial.²³ The Chamber considers that no facts mentioned in the Request indicate that the accused is unable to participate effectively in the proceedings. Nothing indicates that the accused does not understand the testimonies of the witnesses, the overall meaning and importance of the proceedings or that he cannot communicate with his counsel. During the proceedings, the Chamber has repeatedly observed that the accused called his counsel during the testimony of witnesses in order to instruct them, frequently in reaction to answers provided by the testifying witness. The Chamber was able to see that the accused reacted to the testimony of witnesses, giving all indications that he followed its content and could process what was being said in court.
17. The Defence's submission that it is impossible for the accused to present a defence because he cannot participate is not based on any new fact. The medical situation of the accused has not changed. This holds especially true considering the report submitted by the Chamber appointed expert as a result of the Rule 135 Decision.²⁴ No new facts have been presented in order to justify the necessity of an examination under Rule 135.
18. Accordingly, the Chamber does not find sufficient reason to seek a Rule 135 examination in order to determine the accused's fitness to stand trial. Again, the Chamber wishes to underline that it is aware of the medical condition of the accused and a finding that there is no need to appoint an expert under rule 135

²³ Transcript of hearing, 6 December 2016, ICC-02/04-01/15-T-26-ENG, p.17, line 11 to p. 19, line 15.

²⁴ See Dr de Jong Report, UGA-D26-0015-0046-R01, 0068-0069.

of the Rules must not be construed as a finding that the accused does not need medical attention.

19. The Chamber does also not consider necessary to repeat an order for an examination as provided for in the Rule 135 Decision. The Chamber notes that the accused received and continues to receive ongoing medical treatment. It further notes Rule 103 of the Regulations of the Court mandates the Registrar with taking the appropriate arrangements to protect the accused's safety and health. In the absence of any compelling facts, the Chamber does not consider necessary to order a renewed examination under Rule 135 of the Rules in order to ensure that he receives the adequate medical treatment.
20. Accordingly, the Chamber rejects the part of the Request to order an examination pursuant to Rule 135 of the Rules.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

ADJOURNS the hearings scheduled from 14 to 24 January 2019;

ORDERS the medical officer of the Detention Centre to provide a report as specified above in paragraph 12;

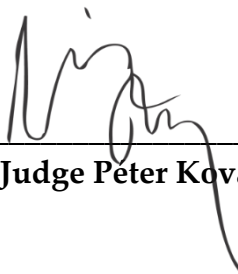
ORDERS the Detention Centre to provide a report as specified above in paragraph 12; and

REJECTS the remainder of the Request.

Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt
Presiding Judge



Judge Péter Kovács



Judge Raul C. Pangalangan

Dated 16 January 2019

At The Hague, The Netherlands