

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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No.: **ICC-02/04-01/15**

Date: **1 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

Decision on Further Defence Request for a Medical Examination

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

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

I. Procedural history and submissions

1. On 6 December 2016, the Chamber rejected, *inter alia*, a request by the Defence to order an examination of the accused in order to determine whether he is able to understand the nature of the charges levied against him, announcing that it ‘will determine for itself whether Mr Ongwen understands the nature of the charges’.¹ After having listened to the accused on the matter and questioned him, the Chamber found that the Mr Ongwen understood the nature of the charges.²
2. On 16 December 2016, the Chamber issued a decision on a Defence request to order a medical examination pursuant to Rule 135 of the Rules in order to assess whether the accused is fit to stand trial (the ‘First Medical Examination Decision’).³ Therein, the Chamber found that no information existed indicating that the accused was not fit to stand trial and rejected a request to order a medical examination in this regard.⁴ However, the Chamber ordered that a ‘targeted psychiatric examination of Mr Ongwen be conducted’ to diagnose Mr Ongwen’s medical conditions and make recommendations on any necessary measure or treatment.⁵
3. On 16 January 2019, the Chamber issued a decision regarding a request for an adjournment of the proceedings and an order for a medical examination of the accused (the ‘Second Medical Examination Decision’).⁶ Therein, it found no sufficient reason ‘to seek a Rule 135 examination in order to determine the accused’s fitness to stand trial.’⁷

¹ Transcript of hearing, 6 December 2016, ICC-02/04-01/15-T-26-Eng, p. 3, line 3 – p. 7, line 12.

² Transcript of hearing, 6 December 2016, ICC-02/04-01/15-T-26-Eng, p. 17, line 11 – p. 19, line 15.

³ Decision on the Defence Request to Order a Medical Examination of Dominic Ongwen, ICC-02/04-01/15-637-Conf. A public-redacted version was filed on the same day, ICC-02/04-01/15-637-Red.

⁴ First Medical Examination Decision, ICC-02/04-01/15-637-Red, para. 28.

⁵ First Medical Examination Decision, ICC-02/04-01/15-637-Red, para. 31.

⁶ Decision on Defence Request to Order an Adjournment and a Medical Examination, ICC-02/04-01/15-1412-Conf. A public-redacted version was filed on the same day, ICC-02/04-01/15-1412-Red.

⁷ Second Medical Examination Decision, ICC-02/04-01/15-1412-Red, para. 18.

4. On 16 September 2019, the Defence filed a request for a medical examination of Mr Ongwen ('Request').⁸ The Defence requests that a medical examination of Mr Ongwen be conducted in order to make 'a 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'.⁹ The Defence submits that there are sufficient indicia justifying such medical examination.¹⁰ Additionally it requests that an expert be appointed to conduct a psychiatric examination for that purpose.¹¹
5. On 23 September 2019, the Common Legal for Victims (the 'CLRv') provided its response (the 'CLRv Response').¹² The CLRv submits that the Request is 'legally flawed', since the issue is intrinsically linked with the accused's overall capacity to stand trial.¹³ Further, the CLRv asserts that no new information has been presented in order to justify a medical examination.¹⁴
6. On the same day, the Office of the Prosecutor (the 'Prosecution') filed its response (the 'Prosecution Response').¹⁵ It requests that the Request be dismissed *in limine* since the deadline to add witnesses to the Defence's list of witnesses has expired in June 2018.¹⁶ Should the Chamber consider the Request on the merits, the Prosecution submits that no changes to the health of the accused have been shown which necessitate a medical examination under Rule 135 of the Rules¹⁷ and argues that the Request should be rejected under this consideration.¹⁸
7. Also on the same day, the Legal Representatives for Victims (the 'LRV') submitted its response, equally requesting that the Request be dismissed (the 'LRV Response').¹⁹ The LRV submit that the Request is an attempt to re-litigate Mr Ongwen's fitness to stand

⁸ Defence Urgent Request to Order a Medical Examination of Mr. Ongwen, ICC-02/04-01/15-1595-Conf, with two confidential annexes A and B.

⁹ Request, ICC-02/04-01/15-1595-Conf, paras 3 and 27.

¹⁰ Request, ICC-02/04-01/15-1595-Conf, paras 25-26.

¹¹ Request, ICC-02/04-01/15-1595-Conf, paras 3 and 27.

¹² CLRv Response to "Defence Urgent Request to Order a Medical Examination of Mr. Ongwen", ICC-02/04-01/15-1604-Conf.

¹³ CLRv Response, ICC-02/04-01/15-1604-Conf, paras 9-13.

¹⁴ CLRv Response, ICC-02/04-01/15-1604-Conf, paras 15-16.

¹⁵ Prosecution's Response to the "Defence Urgent Request to Order a Medical Examination of Mr. Ongwen", ICC-02/04-01/15-1606-Conf.

¹⁶ Prosecution Response, ICC-02/04-01/15-1606-Conf, paras 9-11 and 27 a).

¹⁷ Prosecution Response, ICC-02/04-01/15-1606-Conf, paras 16-25.

¹⁸ Prosecution Response, ICC-02/04-01/15-1606-Conf, para. 27 b).

¹⁹ Victims' response to the "Defence Urgent Request to Order a Medical Examination of Mr. Ongwen", ICC-02/04-01/15-1607-Conf.

trial and should be rejected on the grounds that no new facts merit a medical examination in this regard.²⁰

8. On 26 September 2019, the Defence filed a request for leave to reply (the 'Request for Leave to Reply').²¹
9. On 27 September 2019, the CLRV filed a response to the Request for Leave to Reply.²²

II. Analysis

10. First, the Chamber notes that to date no public-redacted versions of the submissions have been filed. The fact that the subject matter of the Request relates to the accused's health is no reason for not providing a public redacted version of the motion.²³ Accordingly, the Chamber instructs the parties and participants to file public-redacted versions of their respective filings within five days of notification of this decision. In respect of the CLRV Response to Leave to Reply Request the Chamber notes the submission by the CLRV²⁴ and orders the Registry to reclassify the filing as 'public'.
11. Second, regarding the Request for Leave to Reply, the Chamber finds that further submissions are not necessary for the Chamber in order to adjudicate the matter.
12. As a preliminary matter, the Chamber notes that the Prosecution seeks the Request to be rejected *in limine*, since the deadline for adding witnesses for the Defence has already passed.²⁵ While this is correct, the Chamber does not consider that this automatically precludes the Defence from raising the matter. It is indeed still possible for the Defence to file a request that the accused be, exceptionally, allowed to testify in his defence. Accordingly, the Chamber will address the substance of the Request.
13. As a starting point, the Chamber needs to identify the exact content of the Request. The Defence submits that the purpose of the requested medical examination is to decide

²⁰ LRV Response, ICC-02/04-01/15-1607-Conf, paras 15-19 and 22.

²¹ Defence Request for Leave to Reply to CLRV, Prosecution and LRV Responses to 'Defence Urgent Request to Order a Medical Examination of Mr. Ongwen', ICC-02/04-01/15-1612-Conf.

²² CLRV's Response to "Defence Request for Leave to Reply to CLRV, Prosecution and LRV Responses to 'Defence Urgent Request to Order a Medical Examination of Mr. Ongwen'", ICC-02/04-01/15-1614-Conf (the 'CLRV Response to Leave to Reply Request').

²³ See, Request, ICC-02/04-01/15-1595-Conf, footnote 1.

²⁴ CLRV Response to Leave to Reply Request, ICC-02/04-01/15-1614-Conf, para. 7.

²⁵ Prosecution Response, ICC-02/04-01/15-1606-Conf, paras 9-11.

whether Mr Ongwen can decide whether to testify in his defence.²⁶ It seems to argue that such a medical examination would be different from the ones previously requested by the Defence, claiming that the possibility of Mr Ongwen's testimony is a 'new circumstance'.²⁷

14. It is the jurisprudence of this and other chambers of this Court that the notion of 'fitness to stand trial' is an aspect of the fairness of trial, focussing on the ability of the accused to meaningfully exercise his or her procedural rights. In case such exercise is not possible, a fair trial is impossible and the proceedings must be paused until such exercise is guaranteed.²⁸ The right of the defendant to testify is part of these procedural rights.²⁹ This does not only include the ability of the accused to make such a statement but also the ability to make an informed decision whether he wishes to do so or not.
15. It has been previously held that a chamber must take into account 'all the relevant circumstances of each individual case'³⁰ when deciding if an accused is fit to stand trial. This means that the meaningful exercise of one's procedural rights cannot be split up separately in individual, compartmentalised rights, which form subject of completely separated orders of a medical examination. This becomes also apparent from the Request which relies on jurisprudence on the fitness to stand trial in general and not an distinct jurisprudence examining whether the accused can make a decision to testify or not. The purpose of the Request is to order an examination for the purpose to determine whether Mr Ongwen has any conditions which would ultimately preclude him from exercising his procedural rights, focusing on one such right in particular.
16. Accordingly, the Chamber will assess whether there are indications which suggest the existence of medical conditions which might impact the accused's ability to

²⁶ Request, ICC-02/04-01/15-1595-Conf, paras 3 and 27.

²⁷ Request, ICC-02/04-01/15-1595-Conf, para. 20.

²⁸ First Medical Examination Decision, ICC-02/04-01/15-637-Red, para. 7. *Citing also to* Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court, 2 November 2012, ICC-02/11-01/11-286-Red, para. 43 and Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the fitness of Laurent Gbagbo to stand trial, 27 November 2015, ICC-02/11-01/15-349, para. 33.

²⁹ Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the fitness of Laurent Gbagbo to stand trial, ICC-02/11-01/15-349, para. 35.

³⁰ Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court, ICC-02/11-01/11-286-Red, para. 51.

meaningfully exercise his fair trial rights.³¹ In light of the Request, the Chamber will take into account the particular issue of the accused's ability to decide whether to testify on his behalf.

17. The Chamber reiterates that in order to have the ability to take a procedural decision it is not necessary that the accused has the same capacity as if he was a trained lawyer.³² Accordingly, it is necessary that the accused understands the implications of his actions, but is assisted by counsel in the explanations as to what legal consequences might arise from certain choices.
18. With regard to the choice whether to testify in his defence, the accused does not need to understand the reach and implication of every potential question or how each of the answers provided could be legally interpreted. He needs to understand, with the assistance of his lawyers, that the answers he provides can also be used against him, that the other party and participants are also allowed to pose him questions and that he must answer them.³³ And he needs to take an informed decision, with the help and advice of his lawyers, whether under these conditions he would like to exercise his right to testify in his defence.
19. The Chamber has previously held that for the purpose of deciding whether to order a medical examination it will look at whether the submissions made by the requesting party are based on information containing sufficient indicia to warrant such examination.³⁴
20. The Defence invokes three points in arguing that there are sufficient indicia to order a medical examination: a psychiatric examination from December 2016 ('December 2016 Report');³⁵ a report sent by the Court's detention centre's medical officer in February

³¹ See, First Medical Examination Decision, ICC-02/15-01/15-637-Red, para. 12; Second Medical Examination Decision, ICC-02/04-01/15-1412-Red, para. 15.

³² First Medical Examination Decision, ICC-02/04-01/15-637-Red, para. 10. *See also the further decisions contained in footnote 25.*

³³ See, for example, Decision on further matters related to the testimony of Mr Ntaganda, 8 June 2017, ICC-01/04-02/06-1945.

³⁴ Second Medical Examination Decision, ICC-02/04-01/15-1412-Red, paras 15-18.

³⁵ Request, ICC-02/04-01/15-1595-Conf, paras 18-21.

2019 ('February 2019 Report')³⁶ and the medication that the accused is currently taking.³⁷

21. In respect of the December 2016 Report, the Chamber notes that it has already considered the report in its Second Medical Examination Decision.³⁸ The Chamber found that the medical situation of the accused did not change from the time of the issuance of the December 2016 Report to the time of the issuance of the Second Medical Examination Decision.³⁹ The assertion however by the Defence that the Chamber did not consider this report 'in respect of the new circumstance(s), for example, the possibility of Mr. Ongwen's testimony'⁴⁰ is misleading. As explained above, the fact that the accused has to decide whether he wishes to testify is not a new circumstance.
22. The jurisprudence relied upon by the Defence in this regard⁴¹ is also not convincing. The case of *T. vs. the United Kingdom* and the current case are simply not comparable. First, the former concerned a case of a 10-year old perpetrator who was tried at the age of 11. Second, the Grand Chamber of the European Court of Human Rights pointed out that the accused did not receive any treatment, which is also different in the current proceedings.
23. Consequently, the Chamber finds that the December 2016 Report does not contain any new indicia to warrant a medical examination.
24. The second point relied upon by the Defence, the February 2019 Report, does also not contain any indicia indicating that a Rule 135 examination is warranted. To the contrary, the report concluded that the accused is 'medically fit to resume the trial process' while remaining cautious about his individual circumstances.⁴² While the medical officer of the detention centre continues to point out the implications of the accused's state he explains that the health of the accused will be continuously monitored and the Registry will be informed of any changes during the Court proceedings.⁴³ Consequently, the Chamber

³⁶ Request, ICC-02/04-01/15-1595-Conf, paras 22-23.

³⁷ Request, ICC-02/04-01/15-1595-Conf, paras 24-25.

³⁸ See also, Request, ICC-02/04-01/15-1595-Conf, para. 19.

³⁹ Second Medical Examination Decision, ICC-02/04-01/15-1412-Red, para. 17.

⁴⁰ Request, ICC-02/04-01/15-1595-Conf, para. 20.

⁴¹ *T. v. the United Kingdom* (application no. 24724/94), Decision by the Grand Chamber, 16 December 1999.

⁴² Annex A to the Request, ICC-02/04-01/15-1595-Conf-AnxA, para. 6.

⁴³ Annex A to the Request, ICC-02/04-01/15-1595-Conf-AnxA, para. 8.

does not consider that any information contained in the February 2019 Report raises the necessity for a medical examination pursuant to Rule 135.

25. Lastly, the Defence invokes that due to the medication taken by the accused and their potential side effects the accused ‘may lack the basic capability to make an informed decision whether to testify or not’.⁴⁴ The Chamber notes that the Defence does not claim that there are actually any side effects which impair the accused. It merely points out their possible existence.
26. As noted above, the accused’s health is continuously monitored at the Detention Centre and any changes in his health condition will be transmitted accordingly. The allegations of the Defence as to potential side effects and their effects on the accused’s capacity are hypothetical and amount to speculation. Accordingly, the Chamber finds that the third point presented by the Defence also does not give rise to a need to order a medical examination pursuant to Rule 135 of the Rules.
27. The Chamber further notes that the Defence expert witnesses (hereinafter: ‘Defence Experts’) made a recommendation with regard to a potential testimony by the accused. In their second report (the ‘Report’⁴⁵) they state that ‘caution should be exercised in granting him this right’ and cite to their medical findings.⁴⁶ The Chamber notes that the Defence does not mention this Report in its Request. However, in order to fully discharge its obligation and in order assess whether a medical examination is warranted, the Chamber will still consider the Report.
28. The Chamber observes that while the terms of reference provided by the Defence did not direct them to determine whether the accused is able to exercise all its procedural rights,⁴⁷ the Defence Experts still provided a recommendation in this regard. They advise that ‘caution’ should be exercised in case Mr Ongwen testifies. They do not give any indication that the accused would not be able to testify (or take a decision whether to do so) but seem to be motivated by a concern for his state of health in the framework of his rehabilitation. The Report was also available to the Chamber at the time of the Second

⁴⁴ Request, ICC-02/04-01/15-1595-Conf, para. 25.

⁴⁵ UGA-D26-0015-0948.

⁴⁶ UGA-D26-0015-0948, at 0980.

⁴⁷ *See*, UGA-D26-0015-0948, at 0950.

Medical Examination Decision⁴⁸ – meaning that it does not constitute any new information since the last occasion the Chamber decided not to order a further medical examination. Accordingly, the Chamber does not find that the Report contains any information warranting a medical examination under Rule 135. Should the accused decide to request leave to testify and should this leave be granted the Chamber will, of course, follow the advice provided by the Expert Witnesses and exercise all necessary caution during the accused's testimony.

29. In summary, the Chamber finds that there are no indications which give rise to an order for a medical examination pursuant to Rule 135 of the Rules. Accordingly, the Chamber rejects the Request.

⁴⁸ Annex A to the Defence Notification of Disclosure of Rule 78 Material on 29 June 2018, 29 June 2018, ICC-02/04-01/15-1293-Conf-AnxA (showing the Report was disclosed about a half year prior to the Second Medical Examination Decision).

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY


ORDERS the Registry to reclassify the CLRV Response to the Request for Leave to Reply (ICC-02/04-01/15-1614-Conf) as ‘public’;

ORDERS the parties and participants to file public-redacted versions of the other filings or request their reclassification as ‘public’ within five days of the reception of this decision;

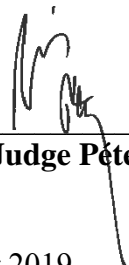
REJECTS the Request for Leave to Reply; and

REJECTS 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 1 October 2019

At The Hague, The Netherlands