

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 22 January 2019

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Presiding Judge
Judge Peter Kovacs
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 Appeal “Decision on the Defence Request for a stay of Proceedings and for an Order of Medical Examination of Dominic Ongwen pursuant to Rule 135 of the Rules of Procedure and Evidence” (ICC-02/04-01/15-1412)’, filed on 22 January 2019

Source: Defence for Dominic Ongwen

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

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**Unrepresented Applicants
(Participation/Reparation)**

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I. INTRODUCTION

1. Pursuant to Article 82(1)(d) of the Rome Statute and Rule 155 of the Rules of Procedure and Evidence, the Defence for Dominic Ongwen ('Defence') requests leave to appeal the "Decision on the Defence Request for stay of Proceedings and for an Order of Medical Examination of Dominic Ongwen pursuant to Rule 135 of the Rules of Procedure and Evidence" ('Impugned Decision').¹
2. The Defence seeks leave to appeal on the issue of the appropriate standard and evaluation of proof applicable in determining an accused's current fitness to stand trial.

II. CONFIDENTIALITY

3. Pursuant to Regulation 23 *bis*(2) of the Regulations of the Court, the Defence files this request as confidential *ex parte* because of the nature of some of the issues discussed related to Mr Ongwen's mental and physical health and that it requests leave to appeal a confidential decision. The Defence files a confidential redacted and public redacted version of this request contemporaneously with the confidential *ex parte* version.

III. PROCEDURAL BACKGROUND

4. On 10 January 2019, the Defence filed a Request for Stay of Proceedings and for an Order of medical Examination Pursuant to Rule 135 of the Rules of Procedure and Evidence ("Request").² In the Request, the Defence, basing itself on Mr Ongwen's [REDACTED], sought a temporary two-week adjournment of the proceedings so its Experts could examine Mr Ongwen as soon as possible and an adjournment for purposes of an additional examination to be ordered by Trial Chamber IX ("Trial Chamber") pursuant to Rule 135 to determine if Mr Ongwen is fit to stand trial.
5. On 16 January 2019, the Trial Chamber delivered the Impugned Decision. It rejected the Defence Request for an order of examination pursuant to Rule 135 of the Rules, reasoning that no new facts had been presented in order to justify the necessity of an examination. The Defence respectfully disagrees.

¹ ICC-02/04-01/15-1412-Conf ('Impugned Decision').

² ICC-02/04-01/15-1405-Conf-Exp ('Request').

6. The Trial Chamber noted that it granted the two-week adjournment solely in order to enable the accused to receive the necessary medical treatment.³
7. The Trial Chamber directed the medical officer of the detention centre to provide a report on whether the accused is able to attend hearing on 28 January 2019 based on the knowledge acquired in the course of his normal activities.⁴

IV. APPLICABLE LAW

8. Pursuant to Article 82(1)(d) of Statute, either party may appeal a decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings. The purpose of such procedure is to “pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial”.⁵ The Pre-Trial Chamber is vested with the power to certify the existence of an appealable issue.⁶ However, when determining whether leave to appeal should be granted, the Pre-Trial Chamber must not justify or defend the correctness of its decision, but instead determine whether the issues presented significantly affect the fairness of the proceedings.⁷
9. According to Rule 155(1) of the Rules of Procedure and Evidence (‘RPE’), a party shall make a written application for leave to appeal to the Chamber that gave the decision, setting out the reasons for the request for leave to appeal. The application for leave to appeal shall state the name and number of the case or situation and shall specify the legal and/or factual reasons in support thereof, in accordance with Regulation 65(1) of the Regulations of the Court (‘RoC’). It shall also specify the reasons warranting immediate resolution by the Appeals Chamber of the matter at issue.⁸
10. The Appeals Chamber has ruled that only an “issue” may form the subject-matter of an appealable decision, which it defined as “an identifiable subject or topic requiring a

³ *Impugned Decision*, para. 12.

⁴ *Ibid.*

⁵ ICC-01/04-168, para. 19.

⁶ *Ibid.*, para. 20.

⁷ See e.g. ICC-01/09-02/11-253, para. 28.

⁸ Regulation 155(2) of the RoC.

decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”.⁹ Further, an issue is “a subject the resolution of which is essential for the determination of the matters arising in the judicial cause under examination” and may be “legal or factual or a mixed one”.¹⁰ The issue must be one apt to “significantly affect”, that is, in a material way, either the fair and expeditious conduct of the proceedings, or the outcome of the trial.¹¹ In other words, the issue “must be one likely to have repercussions on either of these two elements of justice”.¹²

11. The Appeals Chamber has defined the term “fair” as being associated with the norms of a fair trial and corresponding human rights, as per Article 64(2) and 67(1) of the Statute.¹³ In particular, it noted that the “expeditious conduct of the proceedings in one form or another constitutes an attribute to a fair trial”.¹⁴ The term “proceedings” extends to proceedings prior and subsequent to the current proceedings.¹⁵
12. The Appeals Chamber also held that an issue will be appealable “where the possibility of error in an interlocutory or intermediate decision may have a bearing” on the outcome of the trial.¹⁶ The Pre-Trial Chamber, when deciding on a request for leave to appeal, “must ponder the possible implications of a given issue being wrongly decided on the outcome of the case”, thereby forecasting the consequences of such an occurrence.¹⁷
13. Regarding the second aspect of a request for leave to appeal (the immediate resolution by the Appeals Chamber), the Appeals Chamber has held that this criterion will be satisfied if the relevant Chamber rules that an authoritative determination on the appeal would “move forward” the proceedings and “remove doubts about the correctness of the decision or map a course of action along the right lines”.¹⁸ The issue at stake must also be “such that its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of

⁹ ICC-01/04-168, para. 9.

¹⁰ *Ibid.*

¹¹ *Ibid.*, para. 10.

¹² *Ibid.*

¹³ *Ibid.*, para. 11.

¹⁴ *Ibid.*

¹⁵ *Ibid.*, para. 12.

¹⁶ *Ibid.*, para. 13.

¹⁷ *Ibid.*, para. 13.

¹⁸ *Ibid.*, paras 14-15.

the proceedings or mar the outcome of the trial”.¹⁹ The resolution of the issue by the Appeals Chamber is aimed to “ensure that the proceedings follow the right course”.²⁰

V. SUBMISSIONS

A. The applicable standard and evaluation of proof required to determine fitness to stand trial arises from the Impugned Decision and must reflect the current mental health status of Mr Ongwen.

14. In its evaluation of the issue of Mr Ongwen’s fitness, the Trial Chamber reasoned that before the start of the trial, the Trial Chamber satisfied itself that the Accused understood the nature of charges and concluded that no new facts were presented in order to justify the necessity of an examination pursuant to Rule 135. Furthermore, during 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.²¹ The Defence considers that apart from the Experts, who are medical professionals, neither the Defence nor the Trial Chamber have the necessary knowledge or skills to make a medical assessment of Mr Ongwen’s present status based on observations in court. In addition, the Trial Chamber’s finding of the mental health status of Mr Ongwen over two years ago at the commencement of trial cannot be representative of his current mental state.

15. The rationale of the doctrine of fitness to stand trial, which is based in part upon “inextricable link between a defendant's right to a fair trial and the requirement that he be competent to understand and exercise his rights at that stage of the proceedings against him”,²² places an emphasis on the *contemporaneity of fitness*. A contemporaneous assessment is clearly articulated in the Experts’ reports, which detail present concerns with his *present* well-being,²³ while making reference to persisting factors identified by the Experts in relation to examining his historic presence of mind. For this reason, the Defence submits that the Trial Chamber applied inappropriate

¹⁹ *Ibid.*, para. 14.

²⁰ *Ibid.*, para. 15.

²¹ *Impugned Decision*, paras 16 and 17.

²² Findings and Order on Defendant Nahak’s Competence to Stand Trial, Deputy General Prosecutor for Serious Crimes v. Josep Nahak (01A/2004), Democratic Republic of East Timor Dili District Court Special Panels for Serious Crimes, 1 March 2005, para. 32, available at: http://www.worldcourts.com/un_etta/eng/decisions/2005.03.01_Prosecutor_v_Nahak.pdf.

²³ For example see UGA-D26-0015-0004, pp. 0014-15.

facts to the standard, or alternatively, due to the unarticulated standard, did not apply the correct standard.

16. Further related to the contemporaneousness of the assessment, there has been an increasing trend of incidents from the commencement of trial to present, some of which were noted in the Defence motion.²⁴ For example, [REDACTED]. In addition, the frequency and intensity of [REDACTED] have increased,²⁵ which must be viewed as a significant indicators of Mr Ongwen's **current** ill mental health that impact on his meaningful participation in the proceedings. These new facts demonstrate a serious negative escalation of his mental health.
17. As the European Court of Human Rights has held, age, one's level of maturity and intellectual and emotional capacities should be taken into account when assessing one's ability to meaningfully participate in the proceedings.²⁶ It is not disputed by the Parties and the Participants that Mr Ongwen was abducted as a child and is himself a victim of the same type of crimes he is now alleged to have committed. The Impugned Decision also tentatively accepts that Mr Ongwen is experiencing various mental health issues.²⁷ This cannot be ignored by the Trial Chamber in its assessment of Mr Ongwen's present fitness to stand trial, especially with the increasing frequency of [REDACTED]. The Defence is concerned that as the case continues, Mr Ongwen's [REDACTED].
18. With the above considerations in mind, the Defence submits that the Trial Chamber applied an erroneous standard or miss-applied the facts to the standard. The indicators available should lead to an order directing the appointment of a medical professional by the Trial Chamber to examine Mr Ongwen to determine his fitness to stand trial. This does not mean automatically that he will be found unfit. As the ICTY jurisprudence indicates, the fact that an accused is found with a certain health condition will not automatically render him unfit to stand trial. The question should be whether he is able to exercise effectively his rights in the proceedings against him.²⁸ A

²⁴ *Request*, paras 3, 8-20 and 40-43 (specifically noting paras 3, 17-20 and 40-43).

²⁵ *Request*, paras 3 and 40.

²⁶ ECtHR, T v. The United Kingdom, Application No. 24724/94, Judgment, 16 December 1999, paras 86-88, available at: [http://hudoc.echr.coe.int/eng#{"appno":\["24724/94"\],"itemid":\["001-58593"\]}](http://hudoc.echr.coe.int/eng#{).

²⁷ Impugned Decision, para. 12.

²⁸ ICTY, *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Trial Chamber Consolidated decision on the continuation of proceedings, 26 October 2015, para. 41, available at:

mere review of Mr Ongwen's [REDACTED], but failing to address whether these will impact upon his fitness, is an error that runs the risk of seriously impacting upon Mr Ongwen's fundamental fair trial rights, including the integrity of the proceedings.

19. The Defence has demonstrated and so proven that the issue arises from the Impugned Decision and not a mere disagreement in opinion.

B. The issue significantly affects the fair and expeditious conduct of the proceedings or the outcome of trial as the issue impacts on the fundamental rights of Mr Ongwen.

20. The Appeals Chamber at the ICTY on the *Strugar* appeal ruled that:

[T]he issue of an accused's fitness to stand trial is of such importance that it may generally be regarded as "an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial" under Rule 73(B) of the Rules.²⁹

It is clear from *Strugar* that fitness to stand trial directly and significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial.

21. The Prosecution closed its case and Mr Ongwen is presenting his defence. The question of Mr Ongwen's fitness to stand trial is of paramount importance, for to proceed with the trial when he is potentially so disabled to meaningfully participate in the proceedings would be unlawful. It will violate Mr Ongwen's fundamental right of fairness to continue with the trial and then later, after the violation has occurred, deal with the possible unfitness to stand trial.³⁰

http://www.icty.org/x/cases/hadzic/tdec/en/151026_1.pdf, (citing ICTY, *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision Re the Defence Motion to Terminate Proceedings, 26 May 2004, para. 35, available at: <http://www.icty.org/x/cases/strugar/tdec/en/040526.pdf>).

²⁹ ICTY, *Prosecutor v Strugar*, Appeals Judgement, IT-01-42-A, 17 July 2008, para. 34, available at: http://www.legal-tools.org/uploads/tx_ltpdb/080717_03.pdf.

³⁰ For example see *Prosecutor v Popovic et al*, No. IT-05-88-A, Decision on Motion by Counsel Assigned to Milan Gvero Relating to his Present Health Condition (16 May 2011) (noting that a defendant's fitness to stand trial is ongoing and worried with the current state of the appellant Gvero in *Prosecutor v Popovic et al*, the Appeals Chamber "consider[ed] it appropriate to suspend the appeal proceedings against Gvero, including the requirement to file notice of appeal, pending the independent verification of Gvero's medical condition.") available at: <http://www.icty.org/x/cases/popovic/acdec/en/110516.pdf> and *Prosecutor v Popovic et al*, No. IT-05-88-A, Public Redacted Version of 30 November 2012 Decision on Request to Terminate Appellate Proceedings in Relation to Milan Gvero (16 January 2013) at para. 29 (only once Gvero was considered fit to stand trial did the Appeals Chamber continue appeal proceedings.) available at: <http://www.icty.org/x/cases/popovic/acdec/en/130116.pdf>.

22. In addition, the delicate nature of the case as well as its complexity requires that Mr Ongwen meaningfully participates and is fully aware of all the stages regarding his trial as well the implications of his trial.
23. The issue directly touches upon the fundamental rights of Mr Ongwen and would affect the outcome of the trial.

C. An immediate resolution of the issue from the Appeals Chamber may materially advance the proceedings.

24. Once again, in this regard, the ICTY Appeals Chamber in *Strugar* has stated that:

Absent certain exceptions, such as when an accused's submissions in support of his inability to stand trial are frivolous or manifestly without merit, the immediate resolution by the Appeals Chamber of any question of fitness would appear to be essential in that any decision that an accused is not fit to stand trial would necessarily materially advance the proceedings.³¹

25. Interlocutory appeals are meant to pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial. In this case, an immediate resolution from the Appeals Chamber is necessary to determine the appropriate standard of proof required in determining Mr Ongwen's fitness to stand trial under the prevailing circumstances. Should the Defence Experts interview, which is being conducted simultaneous with this pleading, state that Mr Ongwen is not fit to stand trial, the remainder of the proceedings will be irreparably tainted.

VI. RELIEF

26. The Defence respectfully requests the Trial Chamber to grant leave to appeal the issue of whether the Trial Chamber applied the appropriate standard for ordering a mental health examination of an accused's current fitness to stand trial.

³¹ *Ibid.*

Respectfully submitted,

A handwritten signature in black ink, featuring a large, stylized 'K' and 'O' with a horizontal line extending to the right.

.....

Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 22nd day of January, 2019

At London, England