

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **24 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

Public Redacted Version of Prosecution Response to the “Defence Request for Leave to Appeal ‘Decision on the Defence Request for a Stay of the 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)’”, ICC-02/04-01/15-1420-Conf, filed on 23 January 2019

Source: The Office of the Prosecutor

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

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Introduction

1. The Defence request for leave to appeal decision 1412 (“Defence Request”)¹ should be denied. The Defence Request does not identify an appealable issue because it misreads the decision (“Impugned Decision”)² and constitutes a mere disagreement with the Trial Chamber’s assessment. Moreover, under the circumstances, there is no issue significantly affecting the fair and expeditious conduct of the proceedings or the outcome of the trial, nor would an immediate resolution from the Appeals Chamber materially advance the proceedings.

2. The Prosecution submits that further litigation of the proposed issue would be particularly inefficient in light of the recently filed Registry Report³ and the [REDACTED]. Appellate intervention now would delay, rather than expedite, the proceedings in this case.

Confidentiality

3. The Prosecution files this response confidentially pursuant to regulation 23*bis* of the Regulations of the Court, because it responds to a confidential filing and makes references to confidential information. A public redacted version will be filed in due course.

¹ ICC-02/04-01/15-1415-ConfRed (“Defence Request”).

² ICC-02/04-01/1512-1412-Conf (“Impugned Decision”).

³ ICC-02/04-01/15-1416-Conf-Exp (“Registry Report”).

Submissions

The Defence Request identifies no appealable issue

4. The Defence seeks “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.”⁴ It criticises the Trial Chamber for considering the Accused’s past conduct and not taking, according to the Defence, account of the current circumstances of the Accused.

5. By doing so, the Defence misread the Impugned Decision. The Trial Chamber based its decision largely on the Defence’s failure to identify any new facts justifying a new examination of the Accused under rule 135. The Chamber took account not only of the recent conduct of the Accused, but also other factors, including the fact that the Accused has previously been examined and his fitness previously assessed by the Chamber. In any event, the Chamber made clear that it was aware of the Accused’s medical condition.⁵ Ultimately, the Defence Request misreads the Impugned Decision and amounts to a mere disagreement with the Trial Chamber’s assessment of the circumstances known to it at the time.

6. Furthermore, and in any event, the Trial Chamber effectively granted the core relief sought in the Defence’s original request, and did so taking into account the “current” circumstances now relied upon by the Defence to show error. For instance, the Trial Chamber granted the two-week adjournment sought by the Defence⁶, and it

⁴ Defence Request, para. 26.

⁵ Impugned Decision, para. 18.

⁶ Impugned Decision, para. 4. *Cf.* ICC-02/04-01/15-1405-Conf-Red, para. 2 (requesting “a stay of proceedings to enable its Experts ... to examine [the Accused] in person and make a determination of his current mental state and whether he meaningfully participate in the current proceedings against him.”); *id.* para. 44.a.

is clear from the Defence Request⁷ that the Defence Experts are in the process of conducting an examination of the Accused. To that extent, the core relief sought by the Defence – a postponement to permit an examination of the Accused – was effectively allowed by the Chamber.

7. Although the Trial Chamber declined to appoint the Defence Experts to conduct an examination of the Accused on the Chamber's behalf pursuant to rule 135 of the Rules of Procedure and Evidence, its reasons for doing so do not support an interlocutory appeal of the issue proposed by the Defence. The Trial Chamber declined to appoint the Defence Experts under rule 135 because they are already witnesses in this case, associated with one of the Parties, and therefore inappropriate candidates for designation as court-appointed experts.⁸ This rationale has nothing to do with "the appropriate standard for ordering a mental health examination of an accused's current fitness to stand trial."

8. Moreover, to the extent the Defence Request complains that some other expert was not appointed under rule 135, this too leaves out critical information. The Trial Chamber ordered a report from the medical officer of the detention centre on the question of "whether the accused is able to attend the hearing on 28 January 2019."⁹ This is in essence what the Defence requested. The Defence may have preferred a different variation, such as a new examination by someone external to the detention centre, but the Chamber's determination by no means amounts to the application of an erroneous standard or the misapplication of the correct standard. It simply came to a conclusion different from that favoured by the Defence. Moreover, yesterday's

⁷ Defence Request, para. 25.

⁸ Impugned Decision, para. 10-11.

⁹ Impugned Decision, para. 12.

Registry Report has now made plain that [REDACTED],¹⁰ yet another indication that the relief sought by the Defence has effectively been provided.

9. Finally, the key allegation underlying the Defence Request is that the Chamber failed to make a proper assessment of the Accused's "current" fitness to stand trial, assessed on the basis of contemporary information.¹¹ In fact, the Trial Chamber's analysis was very clearly addressed to the Accused's current mental state. The Chamber made specific reference to [REDACTED].¹² The Chamber also made reference to the Accused's comportment in court, including "repeated" instances of the Accused actively providing instructions to counsel, which suggests an ongoing, rather than a purely past, circumstance. Perhaps most significantly, the Trial Chamber emphasised its awareness of the medical condition of the Accused and the ongoing treatment which he receives at the detention centre.¹³ The Chamber did make note of past incidents and past rulings, but it did so primarily in response to the Defence's own submissions, which highlighted those same past circumstances.¹⁴ The Defence cannot reasonably criticise the Chamber for addressing facts which the Defence itself placed at issue. Once again, the recent Registry Report, as well as this morning's email decision¹⁵ cancelling the hearings scheduled for 28 and 29 January 2019, further indicate that the Chamber is properly operating on the basis of the most current information available.

10. When seen in this light, the issue proposed for interlocutory appeal in the Defence Request cannot be said to genuinely arise from the Impugned Decision. The Trial Chamber granted, in significant part, the relief sought by the Defence. In doing

¹⁰ ICC-02/04-01/15-1416-Conf-Exp-AnxI.

¹¹ Defence Request, para. 2, 14-17, 26.

¹² Impugned Decision, para. 12.

¹³ Impugned Decision, para. 18-19.

¹⁴ See ICC-02/04-01/15-1405-Conf-Red, para. 8-21 (setting out past incidents going all the way back before the start of the trial).

¹⁵ Email from the Trial Chamber to Counsel and Registry, dated 23 January 2019, at 10:03h.

so, it took into consideration precisely the kind of contemporary or current information emphasised by the Defence. The Defence Request is merely a disagreement with the Chamber's ultimate conclusion.

Under the circumstances, the issue does not affect the fair and expeditious conduct of the proceedings or the outcome of trial, nor would an immediate resolution by the Appeals Chamber materially advance the proceedings

11. The Prosecution accepts that issues relating to an accused person's fitness to stand trial may in many instances significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial for purposes of article 82(1)(d). However, that is not the case for most decisions on requests for reconsideration of decisions relating to fitness, which is in effect what the Defence requested in this case. As set out in the original Defence request¹⁶ and referred to in the Impugned Decision¹⁷, this very same issue of fitness was raised on the eve of trial. The Trial Chamber addressed the issue squarely at that time, ordering an independent examination of the Accused's mental health and making a legal determination regarding Mr Ongwen's fitness to continue with the trial. The most recent Defence request is, in effect, a request for reconsideration of that prior decision. However, as the Trial Chamber pointed out, the Defence offered no new facts to justify reconsideration.¹⁸ In these circumstances, the fair and expeditious conduct of the trial is not significantly affected, nor is the outcome.

12. Similarly, although fitness issues may often satisfy the final article 82(1)(d) requirement, the Defence has not shown that an immediate resolution by the Appeals Chamber of the proposed issue would advance these proceedings. To the contrary, the Trial Chamber has already ordered (and yesterday received) a report

¹⁶ ICC-02/04-01/15-1405-Conf-Red, para. 14-15.

¹⁷ *E.g.*, Impugned Decision, para. 16.

¹⁸ Impugned Decision, para. 17.

by the medical officer regarding the Accused's ability to attend proceedings, at least on 28 January 2019, and the Chamber has also ordered as a separate report from the Registry regarding [REDACTED]. If either of those reports yields significant new information regarding the Accused's fitness to stand trial, the Trial Chamber will take appropriate action then. By the time the Appeals Chamber could reasonably address the issue proposed by the Defence, its pronouncement will have been overtaken by events on the ground.

13. This latter contention is underscored by the filing yesterday afternoon of the Registry Report and its Annex I notifying the Parties of [REDACTED]. Already it is apparent that events are overtaking the Defence Request. For that reason, intervention by the Appeals Chamber will not materially advance these proceedings, but would instead be a waste of time and court resources.

Conclusion

14. For the reasons set forth above, the Defence Request should be denied.



Fatou Bensouda, Prosecutor

Dated this 24th day of January 2019
At The Hague, The Netherlands