

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/04-01/15
Date: 31 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

**Decision on Request for Leave to Appeal the ‘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:

The Office of the Prosecutor

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Legal Representatives of Victims

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Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber IX ('Chamber') of the International Criminal Court, in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Article 82(1)(d) of the Rome Statute ('Statute'), issues the following 'Decision on Request for Leave to Appeal the "Decision on Defence Request to Order an Adjournment and a Medical Examination"'.¹

I. Procedural history and submissions

1. On 16 January 2019, the Chamber delivered the 'Decision on Defence Request to Order an Adjournment and a Medical Examination' ('Impugned Decision').¹ The Chamber, granting in part the request by the Defence for Dominic Ongwen ('Defence'), adjourned the hearings scheduled from 14 to 24 January 2019 and ordered the medical officer of the Detention Centre to provide a report on whether the accused is able to attend the hearing on 28 January 2019.² The Chamber rejected the Defence's request for a medical examination of Mr Ongwen pursuant to Rule 135 of the Rules of Procedure and Evidence ('Rules').³
2. On 22 January 2019, the Defence sought leave to appeal the Impugned Decision ('Request').⁴ The Defence submits that the Chamber did not apply the correct standard to determine Mr Ongwen's fitness to stand trial as it did not take into account the current state of Mr Ongwen's mental health.⁵ Accordingly, the Defence seeks leave to appeal on the single issue of 'the appropriate standard

¹ ICC-02/04-01/15-1412-Conf. A public redacted version was notified same day, ICC-02/04-01/15-1412-Red.

² ICC-02/04-01/15-1412-Conf, para. 12.

³ ICC-02/04-01/15-1412-Conf, paras 18-20.

⁴ '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)', ICC-02/04-01/15-1415-Conf-Exp. A confidential redacted version and a public redacted version were notified same day, ICC-02/04-01/15-1415-Conf-Red and ICC-02/04-01/15-1415-Red2, respectively.

⁵ Request, ICC-02/04-01/15-1415-Red2, paras 14-19.

and evaluation of proof applicable in determining an accused's current fitness to stand trial'.⁶

3. On 24 January 2019, the Office of the Prosecutor ('Prosecution') responded ('Response'),⁷ opposing the Request. In particular, the Prosecution submits that the Request 'does not identify an appealable issue because it misreads' the Impugned Decision.⁸

II. Applicable law and analysis

4. The Chamber is required under Article 82(1)(d) of the Statute to assess: (i) whether the matter is an appealable issue;⁹ (ii) whether the issue would significantly affect either the fair and expeditious conduct of the proceedings or the outcome of the trial; and (iii) whether, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings. The Chamber recalls the interpretation of Article 82(1)(d) of the Statute as set out in detail in previous decisions.¹⁰ It is important to highlight that the issue in question must arise from the Impugned Decision.¹¹
5. The Chamber will first determine the exact content of the relief sought, as the Defence has framed its issue in slightly different ways. The introduction refers to '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'.¹²

⁶ Request, ICC-02/04-01/15-1415-Red2, para. 2.

⁷ 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. A public redacted version was notified same day, ICC-02/04-01/15-1420-Red.

⁸ Response, ICC-02/04-01/15-1420-Red, para. 1.

⁹ Appeals Chamber, *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 9.

¹⁰ Decision on Defence Request for Leave to Appeal Decision ICC-02/04-01/15-521, 2 September 2016, ICC-02/04-01/15-529, paras 4-8; *see also* Decision on the Defence Request for Leave to Appeal the Decision on the Confirmation of Charges, 29 April 2016, ICC-02/04-01/15-428, paras 5-9.

¹¹ ICC-01/04-168, para. 9.

¹² Request, ICC-02/04-01/15-1415-Red2, para. 2.

Equally, in its submissions the Defence refers to the ‘applicable standard and evaluation of proof required to determine fitness to stand trial’¹³ and makes detailed arguments on how fitness at trial should be assessed.¹⁴ However, in the relief sought the Defence requests leave to appeal on the alleged issue of whether the Chamber ‘applied the appropriate standard for ordering a mental health examination of an accused’s current fitness to stand trial’.¹⁵ The Chamber understands the Request to allege that in the Impugned Decision the Chamber assessed Mr Ongwen’s current fitness to stand trial and did not apply the correct standard in so doing.

6. The Chamber is of the view that this issue, as presented, does not constitute an appealable issue arising from the Impugned Decision.
7. The Defence’s issue does not arise from the Impugned Decision because it is premised on the erroneous assertion that the Chamber assessed Mr Ongwen’s current fitness to stand trial. The Chamber emphasises that it did not conduct a fitness assessment as such. It only assessed whether all information available at the time of the Impugned Decision warranted a medical examination under Rule 135 of the Rules.¹⁶ As noted by the Defence itself, ordering a medical examination is not the same as determining fitness.¹⁷
8. In discussing the Defence’s failure to provide any new facts justifying another examination of the accused under Rule 135 of the Rules, the Chamber did not apply any new standard arising from the Impugned Decision. Rather, the Chamber recalled a standard derived from its decision of 16 December 2016 rejecting a Defence request to order an examination of Mr Ongwen’s fitness to

¹³ Request, ICC-02/04-01/15-1415-Red2, para. 14.

¹⁴ Request, ICC-02/04-01/15-1415-Red2, paras 15-18.

¹⁵ Request, ICC-02/04-01/15-1415-Red2, para. 26.

¹⁶ Impugned Decision, ICC-02/04-01/15-1412-Red, para. 15.

¹⁷ Request, ICC-02/04-01/15-1415-Red2, para. 18 (noting that ordering a medical examination does not mean that the accused will automatically be found unfit).

stand trial.¹⁸ Considerations from past decisions do not arise anew simply because they are repeated – leave to appeal must be sought and resolved at the original pronouncement. As the Defence well knows, it did seek leave to appeal this earlier decision – raising a very similar issue as the one in the Request – and the Chamber rejected it in January 2017.¹⁹

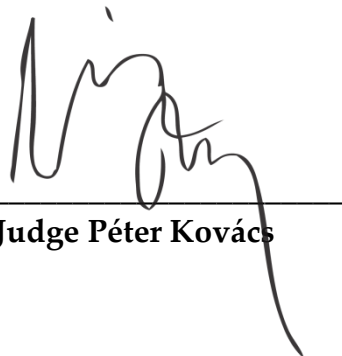
9. As the leave to appeal criteria are cumulative, the conclusion that the Defence fails to raise an appealable issue means that the relief sought must be rejected.

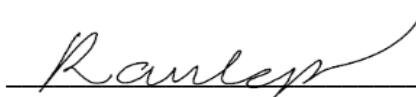
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

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 31 January 2019

At The Hague, The Netherlands

¹⁸ Impugned Decision, ICC-02/04-01/15-1412-Red, para. 14 *referring to* Decision on the Defence Request to order a Medical Examination of Dominic Ongwen, 16 December 2016, ICC-02/04-01/15-637-Conf. A public redacted version was notified same day, ICC-02/04-01/15-637-Red.

¹⁹ Decision on Defence Request for Leave to Appeal the Decision Ordering a Medical Examination of the Accused, 12 January 2017, ICC-02/04-01/15-650.