

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: **20 May 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 “Defence Request for Leave to Appeal
‘Decision on Defence Request for Amendment of the Seating Schedule’”**

Source: Defence for Dominic Ongwen

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

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I. INTRODUCTION

1. Pursuant to Article 82(1)(d) of the Rome Statute ('Statute'), the Defence for Dominic Ongwen ('Defence') seeks leave to appeal Judge Bertram Schmitt's, acting as Single Judge on behalf of Trial Chamber IX ('Single Judge' and 'TC IX', respectively), 'Decision on Defence Request for Amendment of the Seating Schedule' ('Decision').¹
2. As a preliminary matter, the Defence must address the Single Judge's claim that "the Chamber ensured, in scheduling the additional hearing days in June, that no hearings would be scheduled on Wednesdays, **as it has been done in the past**".² The claim appears to present the Single Judge as taking full consideration of Mr Ongwen's mental condition and disability by virtue of cancelling all hearings scheduled for Wednesdays. In particular, it is important to note that the Medical Officer's recommendations from **28 February 2018, 21 March 2018** and **25 July 2018** advised that Mr Ongwen's mental health would significantly benefit from a day off on Wednesdays.³ These medical reports and the Defence's requests concerning Wednesdays off⁴ were disregarded by the Single Judge until after **29 October 2018** (for eight months).⁵ In other words, in managing the *Ongwen* trial proceedings, the Single Judge acted in conflict with multiple medical recommendations and failed to take into consideration Mr Ongwen's mental condition and disability. This deprived Mr Ongwen of his right to a fair trial under Articles 21(3), 64(2) and 67(1) of the Statute.

¹ ICC-02/04-01/15-1512.

² Decision, para. 7. (Bold added).

³ ICC-02/04-01/15-1200-Conf-Exp-Anx: [REDACTED]. Another Medical Officer's recommendation from 27 July 2018 advised that [REDACTED] see ICC-02/04-01/15-1315-Conf-Exp-Anx, para. 2; see also ICC-02/04-01/15-1334-Conf, paras 30-31. ICC-02/04-01/15-1326; ICC-02/04-01/15-1334; see also Email from the Defence to TC IX Communications, [REDACTED], 24 October 2018, at 9:05.

E-mail from TC IX Communications, [REDACTED], 29 October 2018, at 12:10; see also E-mail from TC IX Communications, [REDACTED], 31 October 2018, at 11:26; E-mail from TC IX Communications, [REDACTED], 19 February 2019, at 14:07: TC IX cancelled all hearings scheduled for Wednesdays without providing any reasoned statement for its decision.

II. CONFIDENTIALITY

3. Pursuant to Regulation 23*bis* (2) of the Regulations of the Court ('RoC'), the Defence files this request as confidential because it refers to private medical matters. A public redacted version of this request will be filed in due course.

III. APPELATE ISSUE

4. The appellate issue arising out of the Decision is:

Whether the Decision, based on the necessity to compensate for six hearing days and expeditious advancement of the trial proceedings, implements the Single Judge's obligations under Article 64(2) to "ensure that a trial is fair [...] and is conducted with full respect for the right of the accused" consistent with Articles 21(3) and 67(1)(e) ('Issue').

IV. SUBMISSIONS

5. The Defence notes Articles 21(3), 64(2), 67(1)(e) of the Rome Statute ('Statute'), Regulations 103(1) and (2) of the RoC, and Article 9(2) of the Code of Professional Conduct for counsel. Furthermore, according to Article 21(3) of the Statute the "application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights [...]".⁶ In this respect, the Defence notes relevant international human rights instruments concerning the treatment of detained persons with disabilities subject to proceedings before criminal court.⁷
6. The Defence also incorporates by reference the jurisprudence of the Appeals Chamber with respect to seeking leave to appeal as set out in prior requests.⁸

⁶ *Palestine Situation*, Decision on Information and Outreach for the Victims of the Situation, ICC-01/18-2, 13 July 2018, para. 9; in this context, the Appeals Chamber held: "[a]rticle 21 (3) of the Statute stipulates that the law applicable under the Statute must be interpreted as well as applied in accordance with internationally recognized human rights. Human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provision must be interpreted and more importantly applied in accordance with internationally recognized human rights [...]", see *Lubanga*, 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, ICC-01/04-01/06-772, 14 December 2006, para. 37.

⁷ Articles 2, 4(2), 5(3) and 13(1) of the Covenant on the Rights of Persons with Disabilities, UNGA/RES/61/106 (adopted on 13 December 2006, entered into force on 3 May 2008); Articles 12(1) and 12(2)(d) of the International Covenant on Economic, Social and Cultural Rights (adopted on 16 December 1966, entered into force on 3 January 1976); Rules 27(2) and 30(e) of the Nelson Mandela Rules.

⁸ ICC-02/04-01/15-1334-Red, paras 4 to 10.

A. Issue

7. The Issue arises from the Single Judge's Decision, which rejected the Defence request to amend the seating schedule (hearings scheduled for every week in June), failing to take into consideration both Mr Ongwen's mental condition and disability and **the risk** of Mr Ongwen suffering adverse mental effects. In particular, the Decision holds:

The decision of the Chamber to schedule five additional hearing days in June was based on the necessity to compensate for six hearing days which had to be cancelled in May due to unforeseen and urgent personal circumstances within the Chamber, this also with a view to ensuring that the trial proceedings advance expeditiously.⁹

8. Put differently, the Single Judge's addition of hearing dates in June and rejection of the Defence request for amendment stands on the basis of "necessity to compensate for six hearing days" and expeditious advancement of the trial proceedings. Moreover, having regard to Articles 64(2) and 67 of the Statute, and Regulation 103 of the RoC, the Single Judge found that the Defence request does not provide any concrete information and speculates as to how the changes in seating schedule for June concretely impact on Mr Ongwen's mental health and his ability "to instruct his counsel and thereby the planning and preparation of his defence".¹⁰

Single Judge's Decision amounts to an abuse of Article 64(2) discretion

9. The Single Judge is bound under Articles 21(3), 64(2) and 67(1), and Regulations 103(1) and (2) of the RoC to take all appropriate measures (as concerns the seating schedule) to ensure that Mr Ongwen's mental condition and disability does not interfere with his enjoyment of human rights, specifically his right to a fair trial.
10. The Defence submits that the Decision was based on considerations of trial expediency, which however pose the risk of Mr Ongwen suffering adverse mental health effects, thereby limiting his right to follow the proceedings, instruct and consult his counsel and prepare his defence under

⁹ Decision, para. 7.

¹⁰ Decision, paras 5-8.

Article 67(1)(e) of the Statute.¹¹ The Single Judge's abuse of Article 64(2) discretion – by giving central importance to trial expediency – amounted to an error materially affecting the Decision.

11. Moreover, the Single Judge failed to act within his Article 64(2) obligations by relying on his own medical opinion. In particular, the Decision incorrectly prioritised considerations of trial expediency over medical reports that are clear about Mr Ongwen's mental vulnerability and caution TC IX that [REDACTED]. In other words, the Single Judge's Decision has had the effect of overruling recommendations of mental health specialists.
12. In a similar scenario in the *Mladić* case, the Appeals Chamber held the following:

In light of the foregoing, the Appeals Chamber considers that the Trial Chamber erred by failing to attribute sufficient weight to the information contained in the Report and the advice provided by the UNDU medical staff as well as submissions in support of the reduced sitting schedule of the Registrar and the Prosecution. Accordingly, the Appeals Chamber finds that the Trial Chamber abused its discretion in rejecting Mladić's request for a modified sitting schedule and therefore committed a discernible error.¹²

13. Accordingly, the Defence submits that the Single Judge abused his discretion under Article 64(2) of the Statute in rejecting the Defence request for amendment and therefore committed an error that materially affects the Decision. It materially affects the Decision because Mr Ongwen will have to attend hearings through every week in June, therefore posing a risk of adverse effects to his mental condition and disability and limiting his right prepare a defence.

Single Judge's Decision that there is no concrete information that the changes in seating schedule would affect Mr Ongwen's mental health and his right to defend himself is unreasonable

14. The Single Judge's Decision that there is no concrete information or indication that the changes in seating schedule would affect Mr Ongwen's mental health and thereby his fair trial right to prepare a defence is unreasonable. In the same vein, the Defence could equally allege that the

¹¹ See, for example, *Mladić*, Decision on Mladić's Interlocutory Appeal Regarding Modification of Trial Sitting Schedule Due To Health Concerns, Appeals Chamber, IT-09-92-AR73.3, 22 October 2013, para. 10: where the Appeals Chamber noted the Prosecution's acknowledgement that "the reduced trial schedule would likely reduce Mladić's fatigue and ensure his full participation in the trial".

¹² *Mladić*, Decision on Mladić's Interlocutory Appeal Regarding Modification of Trial Sitting Schedule Due To Health Concerns, Appeals Chamber, IT-09-92-AR73.3, 22 October 2013, para. 16.

Single Judge’s finding that “the distribution of hearing days as currently scheduled in May and June will allow the accused sufficient time in between hearing days to consult with and instruct counsel”¹³ is speculative.

15. Obviously, the Defence’s amendment request addresses a matter that is set *in the future*. Therefore, any discussion concerning future matters must bear certain indicia of assumption based on previous experience or history. The Defence request was based on its direct and daily interaction with Mr Ongwen, medical recommendations concerning his mental vulnerability, and [REDACTED].¹⁴
16. Accordingly, to the extent that both Mr Ongwen’s mental condition and disability and the risk of Mr Ongwen suffering adverse mental effects because of hearings scheduled for every week in June was an important factor when considering the Defence request, Single Judge’s dismissal thereof on the grounds of “speculation” and lack of “concrete indication” was unreasonable.
17. In light of the above, the Defence avers that in exercising his discretion under Article 64(2) of the Statute, the Single Judge issued the Decision that is in contravention with Mr Ongwen’s human rights concerning his treatment as a detained person with disabilities, and his fair trial rights.

B. Issue satisfies the legal criteria under Article 82(1)(d)

18. As outlined above, the essence of the appealable Issue is whether the Decision takes full consideration of Mr Ongwen’s mental condition and disability and the risk of Mr Ongwen suffering adverse mental effects, thereby ensuring his human rights as a detained person and his right to a fair trial. The Defence submits that the Issue satisfies the legal criteria under Article 82(1)(d) of the Statute for the following reasons:
19. *First*, the resolution of the Issue is essential for the determination of the matters raised in the Defence’s requests – the Single Judge’s abuse of Article 64(2) discretion and failure to respect

¹³ Decision, para. 8.

¹⁴ See, for example, E-mail from TC IX Communications, [REDACTED], sent on 30 January 2019, at 17:23, see point 2 of the email titled [REDACTED] attached to the TC IX’s email; E-mail from the Defence to TC IX Communications, [REDACTED], sent on 19 February 2019, at 12:25; ICC-02/04-01/15-1200-Conf-Exp-Anx; ICC-02/04-01/15-1315-Conf-Exp-Anx; and ICC-02/04-01/15-T-198-CONF-ENG, p. 20 lines 4 to 14; ICC-02/04-01/15-T-199-CONF-ENG, p. 5 lines 1 to 17; ICC-02/04-01/15-T-201-T-CONF-ENG, p. 47, lines 16-24.

Mr Ongwen's mental condition and disability, violating his human rights as a detained person with disabilities and his right to a fair trial.¹⁵

20. *Second*, having outlined the Issue above, the Defence submits that it significantly affects the fair and expeditious conduct of the proceedings, and the outcome of the trial. Ultimately, the essence of the Issue is fair trial, *i.e.* Mr Ongwen's disability to follow the proceedings, consult with his counsel and exercise his right to defend himself under Article 67(1)(e) of the Statute. The Decision's disregard for Mr Ongwen's vulnerable mental condition and disability and the risk of adverse mental effects, Medical Officer's reports and the Defence's submissions on this critical matter have the potential to amount to a mistrial.
21. *Third*, the Defence is of the view that an immediate resolution by the Appeals Chamber may materially advance the proceedings. As discussed above, failure to resolve this fair trial matter outlined in the Issue can potentially have a substantial impact on the trial. A decision by the Appeals Chamber on the Issue before the trial judgment is therefore warranted in this instance.
22. To conclude, the Defence takes note of the Single Judge's declaration that he "sees no need to *further* consult the Defence in order for it to pick hearing dates which might be convenient".¹⁶ First, the Single Judge *never* consulted the Defence on this matter. Second, the Defence raised this matter and will continue to do so not because of 'convenience', but because of Mr Ongwen's serious mental health condition and disability, and our obligation to represent and protect the interests and rights of our client.

V. RELIEF SOUGHT

23. For the reasons stated above, the Defence respectfully requests that leave is granted by TC IX to appeal the **Issue** cited above.

Respectfully submitted,

¹⁵ ICC-02/04-01/15-1512; ICC-02/04-01/15-1334; and ICC-02/04-01/15-1326.

¹⁶ Decision, para. 9. (*Italics added*).



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 20th day of May, 2019
At The Hague, The Netherlands