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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

**Prosecution's Response to the "Defence Request for Leave to Appeal the Decision
on Defence Request for Medical Examination of Mr. Ongwen"**

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 request¹ for leave to appeal the “Decision on Further Defence Request for a Medical Examination”² should be rejected. The three issues identified in the Defence Request for Leave do not arise from the Impugned Decision. Even if they did, they do not satisfy the other cumulative requirements of article 82(1) (d) of the Rome Statute (“Statute”). None of them would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Their immediate resolution by the Appeals Chamber would not materially advance the proceedings.

Procedural Background

2. On 5 December 2016 the Defence requested an adjournment and an assessment of Mr Ongwen’s fitness to stand trial.³ On 6 December 2016, the Chamber issued an oral decision, finding that it has been “presented with insufficient evidence at this time to conclude that Mr Ongwen is unfit; and [...] no adjournment of the trial is therefore justified.”⁴

3. On 16 December 2016, the Chamber issued its Decision on the Defence Request to Order a Medical Examination of Dominic Ongwen⁵ (“16 December 2016 Decision”). The Chamber decided that “the available information demonstrates Mr Ongwen’s fitness to stand trial”⁶ and concluded that “a medical examination of Mr Ongwen under Rule 135 [...] to assess his fitness to stand trial is unwarranted.”⁷

4. On 9 January 2019 the Defence made an urgent *ex parte* email request to the Chamber for adjournment of the trial for reasons related to the health and safety of

¹ ICC-02/04-01/15-1626 (“Defence Request for Leave”).

² ICC-02/04-01/15-1622 (“Impugned Decision”).

³ ICC-02/04-01/15-620-Conf.

⁴ ICC-02/04-01/15-T-26-ENG CT, page 6, line 25 to page 7, lines 1-3.

⁵ ICC-02/04-01/15-637-Red.

⁶ 16 December 2016 Decision, para.28.

⁷ *Ibid.*

the Accused.⁸ On 16 January 2019, the Chamber issued its Decision on Defence Request to Order an Adjournment and a Medical Examination (“16 January 2019 Decision”).⁹ The Chamber found that “[t]he medical situation of the accused has not changed”¹⁰ and did not “find sufficient reason to seek a Rule 135 examination in order to determine the accused’s fitness to stand trial.”¹¹

5. On 16 September 2019, the Defence requested that a psychiatric examination of Mr Ongwen be conducted by an expert appointed by the Chamber under article 64(2) of the Statute and rule 135 of the Rules of Procedure and Evidence (“Rules”).¹² On 1 October 2019 the Chamber issued the Impugned Decision, rejecting the Defence Request. On 7 October 2019 the Defence sought leave to appeal the Impugned Decision.

The issues raised in the Defence Request for Leave do not arise from the Impugned Decision

The first issue

6. The first issue raised by the Defence is “[w]hether the Chamber’s consideration of lateness with respect to the accused’s testimony is consistent with its obligations under articles 21(3) and 64(2) of the Statute and with the accused’s fundamental fair trial right to testify”.¹³

7. This issue does not arise from the Impugned Decision. While the Prosecution requested dismissal of the Defence Request *in limine* since the Defence was out of time, the Chamber explicitly rejected the Prosecution’s proposal. It found that “[i]t is indeed still possible for the Defence to file a request that the accused [...] testify in

⁸ ICC-02/04-01/15-1405-Conf-AnxA-Red.

⁹ ICC-02/04-01/15-1412.

¹⁰ 16 January 2019 Decision, para.17.

¹¹ *Id.*, para.18.

¹² ICC-02/04-01/15-1595-Conf (“Defence Request”), para.2.

¹³ Defence Request for Leave, page 3.

his defence. Accordingly, the Chamber will address the substance of the Request.”¹⁴ It then went on to consider the Defence’s substantive submissions, and the tardiness of the Defence played no role in the Chamber’s substantive analysis.

The second issue

8. The second issue raised by the Defence is “[w]hether the Chamber is required, when determining if an accused is fit to stand trial under its article 64(2) obligations, to assess the meaningful exercise of all fair trial rights in a holistic manner, or the assessment can be based on an individual fair trial right, which forms the subject of separate orders of a medical examination.”¹⁵

9. This issue is not appealable now, since it is a matter that arose from a number of earlier decisions. Throughout these proceedings the Chamber and the Parties have consistently assessed Mr Ongwen’s fitness to stand trial in a holistic manner, without seeking to artificially disaggregate it into separate “compartments”. In the motion that triggered the 16 December 2016 Decision, the Defence referred concurrently, and as a whole, to Mr Ongwen’s ability to exercise his various different fair trial rights.¹⁶ The Chamber took the same approach in the 16 December 2016 Decision.¹⁷ When seeking leave to appeal that decision, the Defence again addressed the issue of fitness in a holistic manner.¹⁸ The motion that prompted the

¹⁴ Impugned Decision, para.12.

¹⁵ Defence Request for Leave, page 4.

¹⁶ ICC-02/04-01/15-620-Red, para.1 (“[...] the Defence [...] requests Trial Chamber IX (‘Chamber’) to: [...] Order a psychiatric and/or psychological examination to ensure that Mr Ongwen is fit to stand trial, to wit, he has the ability to participate meaningfully and *exercise his fair trial rights* in a manner which allows him to *participate effectively in the trial*, and has the ability to understand the proceedings”). Emphasis added.

¹⁷ For example, the Chamber stated, in the context of appointing a medical expert that “[...] for the Chamber to resort to this measure there must be indications suggesting the existence of medical conditions which may impact on the accused’s *ability to meaningfully exercise his fair trial rights*” (ICC-02/04-01/15-637-Red , para.12). Similarly the Chamber added in the same decision that “the question of whether an accused is unfit to stand trial does not concern, in and of itself, whether he or she has particular medical conditions, but whether the accused is *able to exercise effectively his fair trial rights in the proceedings against him* irrespective of the existence of any such medical condition. In this sense, when the Chamber is satisfied, in light of the available information and consideration of all relevant circumstances, that the *accused is able to meaningfully exercise his or her fair trial rights*, an inquiry on whether the person suffers from any particular medical condition is unnecessary for the Chamber to discharge its obligations to ensure that the accused is fit to stand trial.” (ICC-02/04-01/15-637-Red, para.13). Emphasis added.

¹⁸ The Defence stated, for example that “[t]he question should be whether he is able to exercise effectively *his rights* in the proceedings against him” (ICC-02/04-01/15-644-Red, para 26).

16 January 2019 Decision argued the same¹⁹, as did the decision.²⁰ This was once more echoed by the Defence when seeking leave to appeal the decision.²¹

10. Hence the “holistic” approach is not an innovation that first saw the light of day in the Impugned Decision. It has been a consistent feature of how the Chamber and, notably, the Defence have approached the question of fitness throughout the trial. If the Defence disagreed with this interpretation of the law, it should have raised it when the issue first arose. As the Chamber has emphasized previously: “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.”²²

The third issue

11. The third issue raised by the Defence is “[w]hether the Decision discriminates against Mr. Ongwen, based on his documented mental health conditions and disabilities, by rejecting the appointment of an impartial mental health expert to assess his ability to make an informed decision whether or not to testify on his own behalf.”²³ The Defence argues that “[t]he central appellate issue [...] is whether the Chamber’s analysis and conclusions, which are *based on the premise* that Mr. Ongwen [...] *does not suffer from any mental health condition* and disability, are discriminatory.”²⁴

12. This issue is based on a mischaracterization of the Impugned Decision. The Chamber has consistently acknowledged Mr Ongwen’s medical issues, recalling

¹⁹ ICC-02/04-01/15-1405-Red2, para.30, 34.

²⁰ ICC-02/04-01/15-1412-Red, para 14. (“The Chamber repeats that an accused is fit to stand trial when he is able to *effectively exercise his fair trial rights* and can meaningfully participate in the proceedings before the Court.”) Emphasis added.

²¹ ICC-02/04-01/15-1415- Red2, para.18 (“The question should be whether he is able to *exercise effectively his rights* in the proceedings against him”). Emphasis added.

²² Defence ICC-02/04-01/15-1426, para 8.

²³ Defence Request for Leave, page 7.

²⁴ Defence Request for Leave, para.19. Emphasis added.

firstly that it had ordered that a “psychiatric examination of Mr Ongwen be conducted”²⁵ to “diagnose Mr Ongwen’s medical conditions and make recommendations”²⁶ and secondly, adding that the Accused’s health “is continuously monitored at the Detention Centre and any changes in his health condition will be transmitted accordingly.”²⁷

13. Moreover, the above must be viewed in the context of prior findings that directly informed the Impugned Decision. In the 16 January 2019 Decision, the Chamber noted that it “wishes to underline that it is aware of the medical condition of the accused and a finding that there is no need to appoint an expert under rule 135 of the Rules must not be construed as a finding that the accused does not need medical attention.”²⁸ The Chamber emphasized that the accused received and continues to receive ongoing medical treatment.²⁹

14. In light of the above, the Defence’s claim that the Chamber’s analysis and conclusions ignored his mental health conditions is false. The reality is that the Defence merely disagrees with the Impugned Decision, and has failed to identify any particular error committed by the Chamber.

The issues raised in the Request for Leave do not meet the other requirements of article 82(1)(d) of the Statute

The first issue

15. The first issue, which relates to the Chamber’s “consideration of lateness with respect to the accused’s testimony”,³⁰ does not significantly affect the fair and expeditious conduct of the proceedings. This is because the Chamber did consider the Defence’s substantive submissions, and did not base its decision upon the timing

²⁵ Impugned Decision, para.2.

²⁶ Impugned Decision, para.2.

²⁷ Impugned Decision, para.26.

²⁸ ICC-02/04-01/15-1412, para.18.

²⁹ ICC-02/04-01/15-1412, para.19.

³⁰ Defence Request for Leave, page 3.

of the Defence Request. By the same logic, the issue would not significantly affect the outcome of the trial, and an immediate resolution by the Appeals Chamber would not advance the proceedings in any way.

The second issue

16. The second issue, which relates to the assessment of fitness in a holistic manner, does not significantly, affect the fair and expeditious conduct of the proceedings. This is the case, *regardless* of the Chamber's findings about whether fitness assessments can be disaggregated, since the Chamber decided:

-) Firstly, that the purpose of the Defence Request is to “order an examination [...] 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*”³¹ and
-) Secondly that in light of the Defence Request, the Chamber “will *take into account the particular issue* of the accused's ability to decide whether to testify on his behalf.”³²

17. In other words, the Chamber paid particular attention to Mr Ongwen's ability to decide whether or not to testify, which is precisely the focus and assessment requested by the Defence. The mere fact that, having carried out the analysis requested by the Defence, the Chamber came to a conclusion that the Defence finds displeasing, does not amount to unfairness. For the same reasons, the second issue would not significantly affect the outcome of the trial, and an immediate resolution by the Appeals Chamber would not advance the proceedings in any way.

³¹ Impugned Decision, para.15.

³² Impugned Decision, para.16.

The third issue

18. The third issue, which relates to whether the Chamber's reasoning is discriminatory and ignores Mr Ongwen's health condition, does not significantly affect the fair and expeditious conduct of the proceedings.

19. The Defence argues that it is "essential that the accused [...] is dealt with in a manner which takes full account of his several symptoms [...] as well as daily medicine regimen"³³ This is precisely what the Chamber has always done: It has consistently acknowledged and addressed Mr Ongwen's medical problems,³⁴ ordered, where necessary, that a psychiatric examination of Mr Ongwen be conducted to diagnose his medical conditions and make recommendations³⁵ and ensured that he is continuously monitored at the Detention Centre and that any changes in his health condition be transmitted to the Chamber immediately.³⁶ The Chamber also adopted a four-day weekly sitting schedule to ensure Mr Ongwen has sufficient time for rest.

20. Finally, it has regularly taken note of information provided by the medical (including mental health) professionals who monitor Mr Ongwen, and postponed or adjusted hearings accordingly. Consequently, if Mr Ongwen's health deteriorates, the Chamber and the Parties will be notified. If such deterioration endangers the exercise of any fair trial right by Mr Ongwen, the Chamber can and will immediately take steps in response.

21. The third issue could only be considered to affect the fair and expeditious conduct of the proceedings if one ignored, wholesale, (as the Defence Request for Leave does) the comprehensive framework of safeguards set out above. This is a

³³ Defence Request for Leave, para.41.

³⁴ ICC-02/04-01/15-1412, para 18, para.19.

³⁵ Impugned Decision, para.2.

³⁶ Impugned Decision, para.26.

flawed approach and should be rejected. By the same token, the third issue would not significantly affect the outcome of the trial, and an immediate resolution by the Appeals Chamber would not advance the proceedings in any way.

Conclusion

22. In light of the above, the Prosecution requests that the Defence Request for Leave be rejected.



Fatou Bensouda, Prosecutor

Dated this 11th day of October 2019

At The Hague, the Netherlands