

**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**



Original: **English**

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

Date: **16 October 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 Defence Request for Leave to Appeal the Decision on Defence Request  
for Medical Examination of Mr Ongwen**

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

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Participation/Reparation**

**The Office of Public Counsel for  
Victims**

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

**States Representatives**

*Amicus Curiae*

**REGISTRY**

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**Detention Section**

**Victims Participation and Reparations  
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**Others**

**Trial Chamber IX** 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 (the ‘Statute’) issues the following ‘Decision on Defence Request for Leave to Appeal the Decision on Defence Request for Medical Examination of Mr Ongwen’.

## **I. Procedural history and submissions**

1. On 16 September 2019, the Defence filed an urgent request for a medical examination of Mr Ongwen.<sup>1</sup> The Defence requested a psychiatric examination of Mr Ongwen by an expert to be appointed by the Chamber ‘[t]o make a diagnosis as to any medical condition or disorder that Mr. Ongwen may suffer at the present time that makes him unable to make an informed decision whether or not to testify in his defence’.<sup>2</sup>
2. On 1 October 2019, the Chamber rejected the Request for Medical Examination (the ‘Impugned Decision’).<sup>3</sup> The Chamber reasoned that the matter of taking a decision whether to testify in one’s own defence forms part of an accused’s overall fitness to stand trial and, as such, the request concerned an examination to determine whether the accused has any conditions which would preclude him from exercising his procedural rights.<sup>4</sup> The Chamber found that based on the information available and presented by the Defence, including two reports and the medication taken by the accused, there were no indications giving rise to an order for a medical examination pursuant to Rule 135 of the Rules of Procedure and Evidence.<sup>5</sup>
3. On 7 October 2019, the Defence filed a request for leave to appeal the Impugned Decision (the ‘Request’).<sup>6</sup> In the Request, the Defence asks for leave to appeal the following three issues:
  - i. ‘Whether 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

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<sup>1</sup> Defence Urgent Request to Order a Medical Examination of Mr Ongwen, ICC-02/04-01/15-1595-Conf with two confidential annexes (the ‘Request for Medical Examination’). A public redacted version was filed on 3 October 2019.

<sup>2</sup> Request for Medical Examination, ICC-02/04-01/15-1595-Red, para. 3.

<sup>3</sup> Decision on Further Defence Request for a Medical Examination, ICC-02/04-01/15-1622.

<sup>4</sup> Impugned Decision, ICC-02/04-01/15-1622, para. 15.

<sup>5</sup> Impugned Decision, ICC-02/04-01/15-1622, para. 29.

<sup>6</sup> Defence Request for Leave to Appeal the Decision on Defence Request for Medical Examination of Mr. Ongwen, ICC-02/04-01/15-1626.

Statute and with the accused's fundamental fair trial right to testify' (the 'First Issue');<sup>7</sup>

- ii. 'Whether 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' (the 'Second Issue');<sup>8</sup> and
  - iii. 'Whether 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' (the 'Third Issue').<sup>9</sup>
4. Specifically, the Defence argues with regard to the First Issue that the Chamber should not have considered the lateness of the request, this being inconsistent with the Chamber's obligations under Articles 21(3) and 64(2) of the Statute.<sup>10</sup> It further submits in respect of the Second Issue that the Chamber committed an error of law by not assessing the 'fair trial right of an accused person to make an informed decision as to whether or not to testify on his/her behalf' as a stand-alone right, but rather as part of an assessment of an accused's fitness to stand trial and to exercise his or her procedural rights.<sup>11</sup> Finally, regarding the Third Issue, the Defence submits that the Chamber in its decision discriminates against the accused 'as a mentally disabled defendant', arguing that the Chamber should have applied 'the available standards on equal and meaningful participation by defendants with mental disabilities'.<sup>12</sup> Overall, the Defence argues that all three issues fulfil the further criteria under Article 82(1)(d) of the Statute.<sup>13</sup>
5. On 11 October 2019, the Office of the Prosecutor (the 'Prosecution') filed its response, opposing the Request (the 'Prosecution Response').<sup>14</sup> The Prosecution submits that the three issues do not arise from the Impugned Decision, and in any event do not satisfy the requirements of Article 82(1)(d) of the Statute.<sup>15</sup> It argues that the lateness of the Request

<sup>7</sup> Request, ICC-02/04-01/15-1626, p. 3.

<sup>8</sup> Request, ICC-02/04-01/15-1626, p. 4.

<sup>9</sup> Request, ICC-02/04-01/15-1626, p. 7.

<sup>10</sup> Request, ICC-02/04-01/15-1626, paras 5-8.

<sup>11</sup> Request, ICC-02/04-01/15-1626, paras 9-18.

<sup>12</sup> Request, ICC-02/04-01/15-1626, paras 19-39.

<sup>13</sup> Request, ICC-02/04-01/15-1626, paras 40-47.

<sup>14</sup> Prosecution's Response to the "Defence Request for Leave to Appeal the Decision on Defence Request for Medical Examination of Mr. Ongwen", ICC-02/04-01/15-1634.

<sup>15</sup> Prosecution Response, ICC-02/04-01/15-1634, para. 1.

played no role in the Chamber's determination of the Request,<sup>16</sup> that the Second Issue arose from earlier decisions and can not now be subject of a request for leave to appeal,<sup>17</sup> and that the Third Issue is based on a mischaracterisation of the Impugned Decision.<sup>18</sup>

6. On the same day, the Common Legal Representative of Victims (the 'CLRv') equally opposed the Request (the 'CLRv Response').<sup>19</sup> The CLRv argues that the three issues do not arise from the Impugned Decision and fail to meet the requirements of Article 82(1)(d) of the Statute.<sup>20</sup> In particular, the CLRv submits that the First Issue concerns an *obiter dictum*.<sup>21</sup> It argues with regard to the Second Issue that the Chamber did assess the accused's ability to decide whether to testify and that nothing shows the Chamber would have reached a substantially different conclusion had it assessed this ability separately.<sup>22</sup> Finally, the CLRv argues the Third Issue does not arise since the allegation that the accused is mentally disabled was never litigated in the initial request.<sup>23</sup>

## II. Analysis

7. At the outset, the Chamber recalls the interpretation of Article 82(1)(d) of the Statute as set out in detail previously.<sup>24</sup>
8. Turning to the First Issue, the Chamber considers that it specifically did not consider the Prosecution's submission as to the lateness of the Request for Medical Examination, but rather noted it '[a]s a preliminary matter' and then proceeded to address the substance of the request.<sup>25</sup> Hence, the Chamber did not take the argument as to the tardy submission of the Request for Medical Examination into account in its assessment. As such, the First Issue does not arise from the Impugned Decision.

<sup>16</sup> Prosecution Response, ICC-02/04-01/15-1634, para. 7.

<sup>17</sup> Prosecution Response, ICC-02/04-01/15-1634, para. 9.

<sup>18</sup> Prosecution Response, ICC-02/04-01/15-1634, para. 12.

<sup>19</sup> CLRv Response to "Defence Request for Leave to Appeal the Decision on Defence Request for Medical Examination of Mr. Ongwen", ICC-02/04-01/15-1635. The Chamber notes that the Legal Representatives of Victims indicated via email that they would not file a response to the Request, but 'fully endorse' the position of the Prosecution. See email to Trial Chamber IX, 11 October 2019, at 16:50.

<sup>20</sup> CLRv Response, ICC-02/04-01/15-1635, paras 1-2.

<sup>21</sup> CLRv Response, ICC-02/04-01/15-1635, para. 11.

<sup>22</sup> CLRv Response, ICC-02/04-01/15-1635, para. 16.

<sup>23</sup> CLRv Response, ICC-02/04-01/15-1635, para. 20.

<sup>24</sup> 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; Decision on Defence Request for Leave to Appeal the Decision on Prosecution Request to Introduce Evidence of Defence Witnesses via Rule 68(2)(b), 5 September 2018, ICC-02/04-01/15-1331, para. 8.

<sup>25</sup> See Impugned Decision, ICC-02/04-01/15-1622, para. 12.

9. With regard to the Second Issue, the Chamber notes that the Impugned Decision identified the Request for Medical Examination as focusing on one particular aspect of the accused's fitness to stand trial and ability to exercise his procedural rights.<sup>26</sup> The Impugned Decision further clarified that the assessment of the request would 'take into account the particular issue of the accused's ability to decide whether to testify on his behalf'.<sup>27</sup>
10. While the Defence argues that the Chamber should have assessed the accused's capacity to make an informed decision whether to testify on its own,<sup>28</sup> it fails to outline in which way the Chamber's conclusion would have been 'materially affected'<sup>29</sup> had it attempted to separate this matter from the more general question of an accused's capacity to exercise his or her procedural rights. In any event, as indicated above, the Chamber did take into account in its determination that the Defence focused its arguments in favour of a medical examination of the accused on one specific procedural right. Therefore, the Second Issue does not qualify as appealable issue within the meaning of Article 82(1)(d) of the Statute.
11. In relation to the Third Issue, the Chamber notes that the Impugned Decision assessed whether any of the information presented in the Request for Medical Examination – which did not argue that the accused is 'mentally disabled' – would warrant a medical examination. Accordingly, the question of whether the accused may be mentally disabled was never considered in the Impugned Decision. Bearing this in mind, the question of whether the Chamber discriminated against the accused 'as a mentally disabled defendant' also does not arise from the Impugned Decision.
12. Accordingly, the Request is rejected.

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<sup>26</sup> Impugned Decision, ICC-02/04-01/15-1622, para. 15.

<sup>27</sup> Impugned Decision, ICC-02/04-01/15-1622, para. 16.

<sup>28</sup> See Request, ICC-02/04-01/15-1626, paras 9-10.

<sup>29</sup> See Request, ICC-02/04-01/15-1626, para. 10.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

**REJECTS** the Request.

Done in both English and French, the English version being authoritative.

  
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**Judge Bertram Schmitt, Presiding Judge**  
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**Judge Péter Kovács**  
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**Judge Raul C. Pangalangan**

Dated 16 October 2019

At The Hague, The Netherlands