

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 5 December 2016

**TRIAL CHAMBER IX**

**Before:** Judge Bertram Schmitt, Single Judge  
Judge Péter Kovács  
Judge Raul C. Pangalangan

**SITUATION IN UGANDA**

**IN THE CASE OF  
*THE PROSECUTOR v. DOMINIC ONGWEN***

**Public with Public Annexes A and B**

**Public Redacted Version of “Defence Request for a Stay of the Proceedings and Examinations Pursuant to Rule 135 of the Rules of Procedure and Evidence”, filed on 5 December 2016**

**Source:** Defence for Dominic Ongwen

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

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## I. INTRODUCTION

1. Pursuant to Rule 135 of the Rules of Procedure and Evidence, the Defence for Dominic Ongwen ('Defence') requests Trial Chamber IX ('Chamber') to:
  - (1) Issue an order halting the opening statements of the trial, which is set to commence on 6 December 2016, and schedule a status conference on this date pursuant to Rule 132(2) of the Rule of Procedure and Evidence;
  - (2) Order a psychiatric and/or psychological examination to ensure that the Chamber can discharge its duty pursuant to Article 64(8)(a), *to wit*, Mr Ongwen understands the nature of the charges levied against him;
  - (3) 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; and
  - (4) Order a psychiatric and/or psychological examination of Mr Ongwen to confirm or reject findings by ██████████ (D26-0042) and ██████████ (D26-0041) (collectively 'Experts') that pursuant to Article 31(1)(a), Mr Ongwen suffered, and still suffers, from a mental disease or defect that destroyed Mr Ongwen's capacity to appreciate the unlawfulness or nature of his conduct.
2. The final request, paragraph 1(4), shall be the topic of a subsequent motion owing to the urgency of paragraphs 1(1)-(3). The Defence notifies the Chamber, Prosecution and Participants of its intentions at this time for the purpose of the Chamber to conduct a more expeditious proceeding.

## II. CONFIDENTIALITY

3. Pursuant to Regulation 23 *bis*(1) of the Regulations of the Court, the Defence files this request as confidential as the names of the Experts are not currently known to the public, and the knowledge of their involvement at this stage might pose problems with their current work. The Defence understands that as expert witnesses, their confidential status will need to be explained in more detail when they are called upon by the Chamber, Defence and Prosecution to testify, but it is the request of the Experts and Defence to keep their involvement

confidential until such time. The Defence also files this confidential because of the nature of some of the issues discussed related to Mr Ongwen's mental and physical health.

4. The Defence files a public redacted version of this request contemporaneously with the confidential version.

### III. BACKGROUND

5. On 28 June 2015, the Defence began its search for experts in the fields of psychiatry and psychology.

6. On 19 September 2015, Mr Ongwen suffered [REDACTED] [REDACTED] during the last day of the first Article 56 proceeding.

7. On 24 September 2015, during what should have been a routine DNA mouth-swap, Mr Ongwen initially refused to comply with Pre-Trial Chamber II's order for DNA extraction because, in part, [REDACTED] [REDACTED].

8. On 17 October 2015, the Defence Investigator talked to D26-0041.

9. On 21 October 2015, the Defence Investigator and Resource Person conducted an initial interview with D26-0042.

10. On 2 November 2015, the Defence Investigator, Assistant to Counsel and Resource Person conducted a second interview of D26-0042.

11. On 16 December 2015, D26-0041 was admitted to the List of Experts maintained by the Registrar at the International Criminal Court.

12. On or about the night of 31 December 2015, Mr Ongwen [REDACTED] [REDACTED] [REDACTED].

13. On or about 27 January 2016, D26-0042 was admitted to the List of Experts maintained by the Registrar at the International Criminal Court.
14. On 29 January 2016, Judge Cuno Tarfusser granted the Defence's request for visitations to Mr Ongwen by D26-0041.<sup>1</sup>
15. On 1 February 2016, after a request from the Defence,<sup>2</sup> Judge Tarfusser allowed the use of a recording device by D26-0041 during his visits with Mr Ongwen.<sup>3</sup> Furthermore, Judge Tarfusser decided that the visits between Mr Ongwen and D26-0041 were not covered by doctor-patient privilege, but were still confidential.<sup>4</sup> Judge Tarfusser stressed that "the purpose of these visits is...to generate evidence that could eventually be disclosed to the parties and the Court and used in the proceedings."<sup>5</sup>
16. From [REDACTED] 2016, D26-0041 met with Mr Ongwen at the International Criminal Court Detention Centre ('ICC-DC') every other working day.
17. On or about 30 March 2016, Mr Ongwen threatened to commit suicide because a phone call to his family in Coorom was disconnected by the ICC-DC for an alleged infraction of Judge Tarfusser's order of 3 August 2015.<sup>6</sup>
18. On 30 May 2016, the Chamber concurred with Judge Tarfusser's decision on confidential visits and decided not to grant privileged telephone conversations with Mr Ongwen and D26-0041 for the purpose seeking medical advice for his mental conditions.<sup>7</sup>
19. From [REDACTED] 2016, D26-0041 met with Mr Ongwen at the ICC-DC several times.

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<sup>1</sup> Email from Pre-Trial Chamber II to Defence, 29 January 2016 at 14h38 CET.

<sup>2</sup> Email from Defence to Pre-Trial Chamber II, 1 February 2016 at 10h59 CET.

<sup>3</sup> The Defence notes that neither D26-0041 nor D26-0042 recorded their conversations with Mr Ongwen.

<sup>4</sup> Email from Pre-Trial Chamber II to Defence, 1 February 2016 at 16h24 CET.

<sup>5</sup> *Ibid.*

<sup>6</sup> For the restrictions, *see* ICC-02/04-01/15-283, pg. 8.

<sup>7</sup> ICC-02/04-01/15-450-Conf, para. 8.

20. On [REDACTED] 2016, Mr Ongwen signed a waiver releasing his medical files to the Defence.
21. On [REDACTED] 2016, the Defence emailed the Chamber notifying it that the ICC-DC was hindering the Defence's efforts to review Mr Ongwen's medical files.<sup>8</sup> The next day, the Chamber notified the "Defence that it has forward [sic] this email to the Registry in order to enable them to fully resolve the matter."<sup>9</sup>
22. On [REDACTED] 2016, the Defence received an email from the CCO of the ICC-DC stating that the medical officer and clinical psychologist refused the Defence's request for a meeting between them and D26-0041.<sup>10</sup>
23. On [REDACTED] 2016, the Defence received an email from the CCO of the ICC-DC stating that he had received an answer from Mr Ongwen's priest about meeting D26-0041.<sup>11</sup> The CCO explained that the priest was bound by the Secret of Confession and Professional Secret of the Roman Catholic Church, and thus could not have a meeting with D26-0041, even with a signed waiver.<sup>12</sup> The Defence decided not to take any further action on this issue.
24. On 9 August 2016, the Defence filed a notification pursuant to Rule 79(1)(b) alerting the Chamber, Prosecution and the Participants that the Defence was considering an affirmative defence pursuant to Article 31(1)(a) of the Rome Statute.<sup>13</sup>
25. On 19 August 2016, the Parties and Participants held an *inter partes* meeting where the Defence disclosed the identities of D26-0041 and D26-0042. The Defence notified the Chamber of this meeting on 28 August 2016.<sup>14</sup>

<sup>8</sup> Email from Defence to Trial Chamber IX, [REDACTED] 2016 at 13h45 CET.

<sup>9</sup> Email from Trial Chamber IX to Defence, [REDACTED] 2016 at 16h03 CET.

<sup>10</sup> Email from ICC-DC CCO to the Defence, [REDACTED] 2016 at 12h18 CET.

<sup>11</sup> Email from ICC-DC CCO to the Defence, [REDACTED] 2016 at 11h19 CET.

<sup>12</sup> *Ibid.*

<sup>13</sup> ICC-02/04-01/15-518.

<sup>14</sup> ICC-02/04-01/15-528 with Confidential Annex A.

26. On 8 September 2016, the Defence emailed the ICC-DC's CCO, Deputy CCO, Detention Visits and Director of DJS requesting to know the status of an application to add Mr Ongwen's children on his non-privileged phone list.<sup>15</sup> The Defence emailed the same emails addresses on 14 September 2016, requesting again to know the status of the request.<sup>16</sup>
27. On 14 September 2016 in the afternoon, [REDACTED]  
[REDACTED]  
[REDACTED]
28. From [REDACTED]  
[REDACTED]  
[REDACTED]
29. On 22 September 2016, after being forcibly removed from his cell, [REDACTED]  
[REDACTED]  
[REDACTED]
30. On or about 22-27 September 2016, Mr Ongwen engaged in a hunger strike<sup>18</sup> because of the ICC-DC's initial refusal to let him talk to his children and his forcible extraction from his cell.
31. On 23 September 2016, the Defence requested the Chamber to order the release of Mr Ongwen's medical records for the purpose of the Defence to continue its work on Mr Ongwen's Article 31(1)(a) defence.<sup>19</sup>

<sup>15</sup> Email from Defence to DJS, CCO and Deputy CCO, 8 September 2016 at 16h59 CET.

<sup>16</sup> Email from Defence to DJS, CCO and Deputy CCO, 14 September 2016 at 10h03 CET. The Defence threatened filing a request to the Chamber to order the ICC-DC to file the request to add non-privileged phone numbers if it was not notified of the submission that day.

<sup>17</sup> Because of the nature of the video recording from the ICC-DC, the Defence is requesting the ICC-DC to make copies of the relevant times of the video for the Chamber and Prosecution, but the Defence offers to show the Chamber and Prosecution the video for the purpose of expeditiousness. Once copies are produced, it shall be distributed to the Chamber and Prosecution *ex parte*.

<sup>18</sup> ICC-02/04-01/15-549-Conf-Exp, paras 9 and 12.

<sup>19</sup> ICC-02/04-01/15-Conf-Exp, paras 1 and 49(b).

32. On 3 October 2016, the Registry replied to the Defence's 23 September 2016 request, informing the Defence for the first time of the alleged defects in Mr Ongwen's 20 June 2016 waiver in respect to the release of his medical records.<sup>20</sup>
33. On 11 October 2016, Mr Ongwen signed a new waiver to release his medical files to the Defence.
34. On 13 October 2016, the Chamber rejected the Defence's request for an order to the ICC-DC to disclose Mr Ongwen's medical records, but noted the content of the Registry's 3 October 2016 response and requested the Defence and Registry to liaise with each other "to ensure disclosure of relevant documents."<sup>21</sup>
35. On 13 October 2016, the Defence emailed the new waiver to the ICC-DC.<sup>22</sup>
36. On 14 October 2016, the Defence requested the Presidency to order the ICC-DC to disclose the video footage of the forcible extraction of Mr Ongwen.<sup>23</sup> The Defence received a copy of the video footage on 24 October 2016. The Defence withdrew its request on 28 October 2016 because it received the video footage.<sup>24</sup>
37. From [REDACTED] 2016, the Experts met with Mr Ongwen five (5) times at the ICC-DC. During this time, the Experts met [REDACTED]  
[REDACTED]
38. On [REDACTED] the Experts received selected medical files of Mr Ongwen from the ICC-DC.
39. On [REDACTED] 2016, the Defence requested the medical files related to the 19 September 2015 incident described in paragraph 6 above.<sup>25</sup> The Defence re-

<sup>20</sup> ICC-02/04-01/15-Conf-Exp, para. 12. The Defence also notes that it had a meeting with the Director of DJS on 20 September 2016 to discuss this, and other, issues. During the meeting, the Director of DJS did not understand why the medical records had not been disclosed to the Defence yet.

<sup>21</sup> ICC-02/04-01/15-566-Conf, para. 12.

<sup>22</sup> Email from Defence to ICC-DC, 13 October 2016 at 11h09 CET.

<sup>23</sup> ICC-RoR220-01/16-1-Conf-Exp.

<sup>24</sup> ICC-RoR220-01/16-2-Conf-Exp.

<sup>25</sup> Email from Defence to ICC-DC, [REDACTED] 2016 at 15h09 CET.

emailed the ICC-DC on 30 November 2016 of this request, demanding immediate disclosure.<sup>26</sup> The Defence received the requested files that afternoon.

40. On 15 November 2016, after learning that his children whose mothers are Prosecution witnesses were not attending school and sometimes going to bed hungry, Mr Ongwen [REDACTED]

41. On 15 November 2016, the Defence received a preliminary report from the Experts stating that Mr Ongwen does not understand the charges brought against him at the International Criminal Court. Furthermore, the Experts stated that Mr Ongwen was not aware of the wrongfulness of any actions during his time in the bush.

42. The Defence is currently awaiting the final report from the Experts, which should be in the Defence's possession any day. The Defence shall disclose the report within 24 hours after receiving it.

43. Finally, the Defence notes that Mr Ongwen has been dealing with [REDACTED]

#### IV. SUBMISSIONS

a) *The Law*

44. Rule 135 of the Rules of Procedure and Evidence, entitled "Medical examination of the accused", states:

(1) The Trial Chamber may, *for the purpose of discharging its obligations under article 64, paragraph 8 (a), or for any other reasons*, or at the request of a party, order a medical, psychiatric or psychological examination of the accused, under the conditions set forth in rule 113. (emphasis added)

<sup>26</sup> Email from Defence to ICC-DC, 30 November 2016 at 08h55 CET.

- (2) The Trial Chamber shall place its reasons for any such order on the record.
- (3) *The Trial Chamber shall appoint* one or more experts from the list of experts approved by the Registrar, or an expert approved by the Trial Chamber at the request of a party. (emphasis added)
- (4) Where the Trial Chamber is satisfied that the accused is unfit to stand trial, it shall order that the trial be adjourned. The Trial Chamber may, on its own motion or at the request of the prosecution or the defence, review the case of the accused. In any event, the case shall be reviewed every 120 days unless there are reasons to do otherwise. When the Trial Chamber is satisfied that the accused has become fit to stand trial, it shall proceed in accordance with rule 132.

45. Rule 113 of the Rules of Procedure and Evidence states:

- (1) The Pre-Trial Chamber may, on its own initiative or at the request of the Prosecutor, the person concerned or his or her counsel, order that a person having the rights in article 55, paragraph 2, be given a medical, psychological or psychiatric examination. In making its determination, the Pre-Trial Chamber shall consider the nature and purpose of the examination and *whether the person consents to the examination*. (emphasis added)
- (2) *The Pre-Trial Chamber shall appoint* one or more experts from the list of experts approved by the Registrar, or an expert approved by the Pre-Trial Chamber at the request of a party. (emphasis added)

46. Article 64(8)(a) of the Rome Statute states:

At the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber. *The Trial Chamber shall satisfy itself that the accused understands the nature of the charges*. It shall afford him or her the opportunity to make an admission of guilt in accordance with article 65 or to plead not guilty. (emphasis added)

47. Article 31(1)(a) of the Rome Statute states:

In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct: The Person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of the law.

48. Article 30 of the Rome Statute states:

- (1) Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime with the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
- (2) For the purpose of this article, a person has intent where:
  - (a) In relation to conduct, that person means to engage in the conduct;
  - (b) In relation to consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
- (3) For the purpose of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. “Know” and “knowingly” shall be construed accordingly.

*b) Case Law on Fitness to Stand Trial – ICC*

49. As noted by Pre-Trial Chamber I in *The Prosecutor vs Laurent Gbagbo*, “[n]either the Rome Statute nor the Rule of Procedure and Evidence contain any provision specifically addressing fitness to stand trial.”<sup>27</sup> In its interpretation of the Statute and Rules of Procedure and Evidence, and considering internationally recognised human rights law, Pre-Trial Chamber I decided that fitness to stand trial is inherent in any trial and a fundamental human right.<sup>28</sup>
50. Pre-Trial Chamber I decided that Article 67(1) of the Rome Statute contained “a number of relevant capacities [that] can be discerned which are necessary for the meaningful exercise of these rights.”<sup>29</sup> These capacities include the ability:
  - (1) To understand in detail the nature, cause and content of the charges;
  - (2) To understand the conduct of the proceedings;
  - (3) To instruct counsel;
  - (4) To understand the consequences of the proceedings; and
  - (5) To make a statement.<sup>30</sup>
51. Pre-Trial Chamber I stated that “the focus on article 67(1) of the Statute makes it clear that the question before the Chamber is not merely the existence of

<sup>27</sup> ICC-02/11-01/11-286-Red, para. 43.

<sup>28</sup> See ICC-02/11-01/11-286-Red, paras 44-50.

<sup>29</sup> ICC-02/11-01/11-286-Red, para. 50.

<sup>30</sup> ICC-02/11-01/11-286-Red, para. 50 (*citing* ICC-02/11-01/11-164-Conf-tENG, para. 39).

particular medical conditions, or what their [sic] sources are, but primarily whether these medical conditions affect the capacities of the person concerned to meaningfully exercise his or her fair trial rights.”<sup>31</sup> Pre-Trial Chamber I also noted that it needed to “take into account all the relevant circumstances of each individual case... [and] examine whether the negative impact of particular medical conditions can be mitigated by putting in place certain practical arrangements.”<sup>32</sup>

52. Pre-Trial Chamber I adopted the policy “that the meaningful exercise of one’s fair trial rights does not require that the person be able to exercise them as ‘if he or she were trained as a lawyer or judicial officer.’”<sup>33</sup> Access to a competent attorney during the proceedings lessens this issue, and has been adopted by other tribunals and courts.<sup>34</sup>
53. Pre-Trial Chamber I decided that the Prosecution’s proposal for the standard and burden of proof, namely that the moving party bears the burden of proof to demonstrate that the accused is unfit to stand trial and that the burden of proof is on the “balance of probabilities, were incorrect.”<sup>35</sup> Pre-Trial Chamber I declared that “the role of the parties is better seen as assisting the Chamber in the exercise of its obligations.”<sup>36</sup> That chamber ruled that the standard of proof,

<sup>31</sup> ICC-02/11-01/11-286-Red, para. 51 (citing ICC-02/11-01/11-164-Conf-tENG, para. 39; ICTY, Trial Chamber II, *Prosecutor v. Strugar*, IT-01-42-A, “Decision re the Defence Motion to Terminate Proceedings”, 26 May 2004, para. 35; ICTY, Appeals Chamber, *Prosecutor vs Strugar*, IT-01-42-A, “Judgement”, 17 July 2008, para. 61 (‘Strugar AC Judgement’); ECtHR, *S.C. vs The United Kingdom*, Appl. no. 60958/00, “Judgment”, 15 June 2004; *Liebreich vs Germany*, Appl. no. 30443/03, “Decision as to Admissibility”, 8 January 2008; *Timergaliyev vs Russia*, Appl. no. 40631/02, “Judgment”, 14 January 2009; *G. vs France*, Appl. no. 27244/09, 23 May 2012).

<sup>32</sup> ICC-02/11-01/11-286-Red, para. 51 (citing ECtHR, *T. vs The United Kingdom*, Appl. no. 24724/94, “Judgment”, 16 December 1999, paras 84-88; *S.C. vs The United Kingdom*, Appl. no. 60958/00, “Judgment”, 15 June 2004, paras 28-30; *Liebreich vs Germany*, Appl. no. 30443/03, “Decision as to Admissibility”, 8 January 2008; *Timergaliyev vs Russia*, Appl. no. 40631/02, “Judgment”, 14 January 2009, para. 58).

<sup>33</sup> ICC-02/11-01/11—286-Red, para. 52 (citing ICC-02/11-01/11-164-Conf-tENG, para. 40 and Appeals Chamber, “Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled ‘Decision on Defence Request Concerning Languages’”, 27 May 2008, ICC-01/04-01/07-522, para. 61).

<sup>34</sup> ICC-02/11-01/11-286-Red, paras 52-53 (citing ECtHR, *Liebreich vs Germany*, Appl. no. 30443/03, “Decision as to Admissibility”, 8 January 2008; *Stanford vs The United Kingdom*, Appl. no. 16757/90, “Judgment”, 23 February 1994, para. 30; *Timergaliyev vs Russia*, Appl. no. 40631/02, “Judgment”, 14 January 2009, para. 59; ICTY, Appeals Chamber, *Prosecutor vs Strugar*, IT-01-42-A, “Judgement”, 17 July 2008, para. 60; *S.C. vs The United Kingdom*, Appl. no. 60958/00, “Judgment”, 15 June 2004, para. 29).

<sup>35</sup> ICC-02/11-01/11-286-Red, para. 56.

<sup>36</sup> *Ibid.*

*i.e.* the evidentiary standard, was that “the Chamber is ‘satisfied that the accused is unfit to stand trial.’”<sup>37</sup> Whilst the Defence agrees with the Chamber’s findings on the burden of proof, the Defence asserts the standard defined by the ICTY Appeals Chamber in *Strugar* is better defined and should be adopted by the Chamber.

54. Finally, Pre-Trial Chamber I noted several other issues the Prosecution desired to be factored into the chamber’s decision. That chamber did not rely on statements by counsel and persons visiting Mr Gbagbo averring Mr Gbagbo was in good health because “they may have been made in the absence of specific information on the medical condition of Mr Gbagbo or for other purposes, such as reassuring his supporters.”<sup>38</sup> Additionally, the Chamber did not rely on Mr Gbagbo’s demeanour and statement during his initial appearance as it took place almost a year prior and not representative of his state at the time of the application.<sup>39</sup> The Defence argues that the Chamber should follow this same logic.

*c) Prevailing Case Law on Fitness to Stand Trial - ICTY*

55. To determine whether a person is fit to stand trial, a court must identify a list of capacities a defendant ought to be able to exercise, and then identify the standard to which those capacities need to be present.
56. The Appeals Chamber at the ICTY endorsed the non-exhaustive list of capacities that a defendant ought to be able to exercise, that is:
- (1) to plead;
  - (2) to understand the nature of the charges;
  - (3) to understand the course of the proceedings;
  - (4) to understand the details of the evidence;
  - (5) to instruct counsel;
  - (6) to understand the consequences of the proceedings; and

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<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*, para. 58.

<sup>39</sup> *Ibid.*, para. 61.

(7) to testify.<sup>40</sup>

57. The Appeals Chamber at the ICTY was satisfied the Trial Chamber had also applied the correct standard, but had expressed it poorly. It rephrased it as:

[T]he applicable legal standard is that of *meaningful participation* which allows the accused to exercise his fair trial rights to such a degree that he is able to participate effectively in his trial, and has an understanding of the proceedings.<sup>41</sup>

58. It was noted that “meaningful participation” does not mean a defendant needs to possess the same understanding as an experienced lawyer, because “[e]ven persons in good physical and mental health...require considerable legal assistance, especially in cases of such complex legal and factual nature as those brought before the Tribunal”.<sup>42</sup>

*d) Collateral Material used by the Experts*

59. The Experts did not rely solely on their interviews with Mr Ongwen. In pursuit of a proper medical diagnosis, the Experts interviewed four (4) persons known to Mr Ongwen in and around the relevant periods of his life. The Experts also relied upon reports from the Defence about Mr Ongwen’s actions whilst at the ICC-DC. Finally, the Experts reviewed psychiatric and psychological reports generated by the ICC-DC medical officers, but they do not rely upon those reports because the reports do not contain anything new or unknown to the Experts, even though the reports did confirm the Experts’ findings.

*e) Defence’s Interpretation as to the Capacity, Standard and Burden for the Chamber to Employ*

60. The Defence sees no reason to depart from the standard employed the Pre-Trial Chamber in *Gbagbo*, except for criteria discussed below.

61. The Defence argues that the fourth capacity in *Strugar*, *to wit*, the capacity to understand the details of the evidence, should be included in the Chamber’s

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<sup>40</sup> Strugar AC Judgement, para. 55.

<sup>41</sup> *Ibid*, para. 55 (emphasis added).

<sup>42</sup> *Ibid*, para. 60.

determination. The Defence understands that one might argue that this capacity is inherent in the capacity to understand the conduct of proceedings or to instruct counsel, but the Defence maintains this is a separate category which must be given due consideration and weight.

62. Mr Ongwen has the right to have evidence in order to prepare for trial pursuant to Articles 61(3)(b),<sup>43</sup> 64(3)(c) and 67(2) of the Rome Statute and Rules 76(1), 76(3) and 77 of the Rules of Procedure and Evidence. In order for Mr Ongwen to exercise his fair trial right pursuant to Article 67(1)(b), Mr Ongwen must have the capacity to consult and understand the evidence so that he may meaningfully participate in trial through his counsel. The Defence asserts that this is one additional capacity which the Chamber must consider.
63. Furthermore, whilst one might also argue that there is no significant difference between the standard of proof in *Gbagbo* and *Strugar*, the Defence avers that the Chamber should employ the standard of proof from *Strugar*. This standard encapsulates and expresses the meaning the fair trial rights of the Rome Statute in a succinct manner.
64. As for which party bears the burden of proof, the Defence agrees with the *Gbagbo* decision that the Defence does not bear the burden of proof. Rules 113 and 135 of the Rules of Procedure and Evidence are clearly fashioned after the inquisitorial legal system where it is the duty of a chamber to decide, whilst it is the obligation of the parties to assist the trial chamber to make its determination.<sup>44</sup>

*f) The Chamber's Role in Rule 135 of the Rules of Procedure and Evidence*

65. Rule 135 of the Rules of Procedure clearly states that the Chamber's may appoint experts to aid in the determination of whether it can discharge its obligations pursuant to Article 64(8)(a) and for any other reason, *i.e.* fitness to

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<sup>43</sup> See Article 64(6)(a) and 61(11).

<sup>44</sup> ICC-02/11-01/11-286-Red, para. 56.

stand trial. If the Chamber decides the assistance of an expert is warranted, it is the Chamber's duty to select the expert(s) to examine Mr Ongwen. Even so, the Chamber is not restricted from receiving expert opinions from persons not selected by the Chamber to perform an examination.

66. Furthermore, Rule 113 of the Rules of Procedure and Evidence requires the Chamber to consider the wishes of Mr Ongwen. Following the advice of his Defence, Mr Ongwen has consented to be examined by experts approved, appointed, instructed and paid for by the Chamber.<sup>45</sup> Also, on advice from his Defence, Mr Ongwen refuses to be examined by any expert retained by the Prosecution or [REDACTED]<sup>46</sup>

g) *Defence Methodology for Choosing the Experts and Instructions*

67. The Defence methodology for choosing its experts are as follows.

List of Experts Maintained by the Registrar at the ICC

68. Starting on 28 June 2015, the Defence began its search for experts to aid the Defence in its case. The Defence began by researching every expert on the list of experts maintained by the Registrar at the ICC.
69. The Defence's main focal point were: 1) experience with child soldiers/former child soldiers, 2) language skills, 3) experience with PTSD and other mental diseases or defects associated with persons in conflict, 4) knowledge of the LRA, 5) international exposure if an expert was not from the EAC, and 6) years practiced. These were not the only factors, but major indicators for the Defence.
70. After a comprehensive review of public materials available to the Defence, it was determined that whilst there were qualified candidates on the list of experts, none met all criteria well enough.

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<sup>45</sup> The Defence understands that any expert retained by the Chamber would be paid for by the Registry. The Defence also understands that the Parties can recommend experts to the Chamber for the Chamber to appoint, including recommending instructions to the Chamber.

<sup>46</sup> This was notified to the Prosecution and Participants *via* email on 25 October 2016 at 17h26 CET.

### External Search for Experts

71. Contemporaneous with its review of the list of experts, the Defence sought out other potential experts. The Defence Investigator, with her knowledge and associations in the field of child soldiers, reviewed literature and discussed about potential experts with her colleagues.
72. From her inquiries, the Defence identified several persons. After initial contacts, several people were ruled out for various reasons. The Defence identified, interviewed and selected D26-0041 and D26-0042.

### Instructions to the Experts

73. The terms of reference given to the Experts is attached as Confidential Annex B. In addition to the terms of reference, the Experts were instructed to use Article 31 of the Rome Statute as their guide.
74. After meeting with Mr Ongwen during [REDACTED], D26-0041 recommended that Mr Ongwen also be tested to see if he was fit to stand trial. This concern developed further in [REDACTED] 2016 because of the incident of [REDACTED] described in paragraph 27 above and the incidents described in paragraphs 6, 29 and 30 above.
75. In drawing their conclusions as to whether Mr Ongwen was fit to stand trial, the Experts were asked to explain their expert opinions using the *Strugar* and *Gbagbo* standards.

#### *h) Findings of the Defence Experts - Article 64(8)(a) and Fitness to Stand Trial*

76. The Defence Experts, after many meetings with Mr Ongwen, have determined that Mr Ongwen does not understand the charges brought against him at the International Criminal Court and is not fit to stand trial.
77. The Defence apologises for this section not containing more detail. The Defence considers that it could be tantamount to malpractice if it explained in more detail this section without the final report of the Experts, even though the

Defence has consulted and confirmed with the Experts the accuracy of paragraph 76 above pursuant to the *Gbagbo* and *Strugar* standards.

*i) Request of the Defence*

78. The Experts, after meeting with Mr Ongwen on many occasions, have determined that Mr Ongwen does not understand the charges brought against him at the International Criminal Court, is not fit to stand trial and that Mr Ongwen was not aware of the wrongfulness of any actions during his time in the bush.
79. The Defence requests the Chamber to begin immediately the process of selecting one or more experts to determine whether: 1) the Chamber can discharge its duty pursuant to Article 64(8)(a), 2) Mr Ongwen is fit to stand trial and 3) Mr Ongwen suffered, and still suffers, from a mental disease or defect that destroyed Mr Ongwen's capacity to appreciate the unlawfulness or nature of his conduct.

**V. RELIEF**

80. The Defence respectfully requests the Chamber to:
- (1) Halt the opening of the trial and order a status conference to be held on 6 December 2016 pursuant to Rule 132(2) of the Rules of Procedure and Evidence;
  - (2) Order a psychiatric and/or psychological examination to ensure that the Chamber can discharge its duty pursuant to Article 64(8)(a);
  - (3) Order a psychiatric and/or psychological examination to ensure that Mr Ongwen is fit to stand trial; and
  - (4) As a pre-emptive measure to a forthcoming submission, order a psychiatric and/or psychological examination of Mr Ongwen to confirm or reject findings by the Experts that pursuant to Article 31(1)(a), Mr Ongwen suffered, and still suffers, from a mental disease or defect that destroyed Mr Ongwen's capacity to appreciate the unlawfulness or nature of his conduct.

Respectfully submitted,



.....  
Hon. Krispus Ayena Odongo  
On behalf of Dominic Ongwen

Dated this 5<sup>th</sup> day of December, 2016

At The Hague, Netherlands