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**International
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Date: 16 December 2016

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 "Defence Request for Leave to Appeal the Oral Decision of 6 December 2016 on Mr Ongwen's Understanding of the Nature of the Charges", ICC-02/04-01/15-632

Source: Office of the Prosecutor

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Introduction

1. The Trial Chamber should deny the Defence request¹ seeking leave to appeal the Chamber's oral decision that Mr Ongwen understands the nature of the charges.²
2. The issue proposed for certification – “whether the standard for Article 64(8)(a) allows for the Chamber to use historical statements of the Accused for the major basis of determining the Accused understanding of the charges”³ (“Issue”) – does not arise from the Decision, because it does not accurately reflect the Chamber's reasoning.
3. In addition, the Issue does not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and its immediate resolution by the Appeals Chamber would not materially advance the proceedings.

Background

4. On 5 December 2016, the day before the trial was due to commence, the Defence asked the Trial Chamber, *inter alia*, to postpone the start of trial because the Accused failed to understand the nature of the charges and was thus unfit to stand trial.⁴
5. On 6 December 2016, the Trial Chamber denied the Defence's application, finding that the Accused did understand the nature of the charges.⁵

¹ ICC-02/04-01/15-632 (“Request”).

² ICC-02/04-01/15-T-26-ENG ET, p. 17, ln. 23 to p. 20, ln. 4 (“Decision”).

³ Request, para. 8.

⁴ ICC-02/04-01/15-620, para. 78, 80.

⁵ Decision, p. 20, lns. 3-4.

6. Also on 6 December 2016, the Chamber ordered the Registry, in consultation with the Defence and the Prosecution, to recommend experts to perform a psychiatric or psychological examination of the Accused for the purpose of assessing his continued fitness to stand trial.⁶ On 13 December 2016, the Registry provided its recommendations.⁷ On 14 December 2016, the Prosecution and the Defence filed their respective submissions on the matter.⁸

Applicable law

7. Interlocutory appeals are “exceptional”⁹ and should not be a device “to express mere disagreement with any of the Chamber[’s] decisions.”¹⁰ An “issue” for the purpose of article 82(1)(d) of the Statute is “an identifiable and discrete subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion.”¹¹ Such subject or topic must be “essential for the determination of matters arising in the judicial cause under examination”¹² and must genuinely arise from the impugned decision.¹³

8. Article 82(1)(d) criteria are cumulative, and a failure to fulfill any one of the criteria is fatal to an application for leave to appeal.¹⁴

⁶ ICC-02/04-01/15-T-26-ENG ET, p. 7, lns. 3-18.

⁷ ICC-02/04-01/15-633.

⁸ ICC-02/04-01/15-634; ICC-02/04-01/15-635.

⁹ See e.g. ICC-02/05-03/09-109, para. 2; ICC-02/04-01/15-428, para. 4.

¹⁰ See e.g. ICC-01/05-01/13-T-10-Red-ENG, p. 11, lns. 4-8; ICC-01/12-01/15-T-1-ENG, p. 12, lns. 11-12.

¹¹ See e.g. ICC-01/04-168 OA3 (“DRC Appeal Decision”), para. 9.

¹² See e.g. DRC Appeal Decision, para. 9.

¹³ See e.g. ICC-01/05-01/13-1278, paras. 9-10.

¹⁴ ICC-01/05-01/08-3273, para. 8; ICC-02/11-01/15-117, para. 26; ICC-02/11-01/15-132, para. 5.

Submissions

I. The Issue does not arise from the Decision

9. The Issue raised in the Defence Request does not arise from the Trial Chamber's Decision, because it does not accurately reflect the Chamber's reasoning. In framing the Issue, the Defence has focused on just one part of the Decision, taking it out of context and over-emphasising its significance, while ignoring the rest of the Decision.

10. Contrary to the Defence's suggestion, the Chamber did not base its Decision merely, or even primarily, upon the Accused's 21 January 2016 statement that he understood the charges against him.¹⁵ It is hardly remarkable that the Chamber began its chronological review of the relevant information with the January 2016 statement, given that it was the earliest information considered by the Chamber. The only other references to the January statement were made while noting that the confirmed charges were essentially the same as those the Accused had apparently understood in January 2016.¹⁶

11. The entire remainder of the Chamber's analysis concerned other facts and information, all of which were more recent, up to and including statements made by the Accused just minutes before the Decision was rendered.¹⁷ The Chamber

¹⁵ Request, paras. 8, 10.

¹⁶ Decision, p. 18, l.17-18.

¹⁷ Decision, p. 17, lns. 2-14. Mr Ongwen made the following statement at the trial opening on : "I did understand the document containing the charges – I do understand – I did understand the document containing the charges but not the charges, because the charges – the charges I do understand as being brought against the LRA but not me, because I'm not the LRA. The LRA is Joseph Kony who is the leader of the LRA." See Decision, p. 18, lns, 1-11. Then, Mr Ongwen made a similar statement a few moments later: "Yes, I did receive the charges in Acholi, but I reiterate it is the LRA who abducted people in northern Uganda. The LRA killed people in northern Uganda. LRA committed atrocities in northern Uganda, and I'm one of the people." See Decision, p. 19, lns, 22-25.

emphasised that the Defence had given “no indication” during the course of the proceedings “that Mr Ongwen was having difficulty understanding the nature of the charges or the proceedings more generally”.¹⁸ On the contrary, the Chamber found, the Defence had “made several arguments, such as requests for Acholi translations, reinforcing that [the Accused] did understand”.¹⁹ Next, the Chamber noted that the Accused claimed not to understand the charges only after his Defence team had raised the issue of fitness to stand trial (on the previous day).²⁰ The Chamber next considered, and rejected, the unsubstantiated (and also new) claim that Defence experts had found the Accused unfit to stand trial.²¹ Finally, the Chamber considered Mr Ongwen’s own words uttered earlier that same day, which the Chamber concluded “demonstrate[d] an understanding of the confirmed charges.”²²

12. The Defence’s reliance on its expert report²³ to illustrate that the Chamber disregarded “contemporaneous” information does not undermine the Chamber’s determination.²⁴ As noted above, the Chamber did in fact consider the Defence’s assertions based on the report. The Chamber noted that the report itself had not been provided to the Chamber²⁵ (despite the Defence having had a preliminary version of the report since 15 November 2016²⁶). However, the Chamber nevertheless examined the Defence assertions arising from the report, finding that the conclusions

¹⁸ Decision, p. 19, lns. 2-4.

¹⁹ Decision, p. 19, lns. 4-6.

²⁰ Decision, p. 19, lns. 7-9.

²¹ Decision, p. 19, lns. 10-21.

²² Decision, p. 19, lns. 22-25.

²³ Request, paras. 10, 12.

²⁴ The Report, even if available to the Trial Chamber in good time, would have been unhelpful. Contrary to the Defence claim (Request for Stay of Proceedings, para. 41), nowhere in the Report did Defence experts D26-0042 and D26-0043 conclude that Mr Ongwen did not understand the nature of charges. *See* UGA-D26-0015-0004, pp. 11-12. On an unspecified date, Defence experts merely recorded Mr Ongwen’s own words, without reaching conclusions of their own: “Though Mr Dominic Ongwen says that he does not understand any of the charges brought against him at the International Criminal Court (ICC), he feels deeply remorseful and he regrets his participation in the activities of the LRA in the bush on orders from Joseph Kony and other LRA leaders (before he himself became one of the institution’s top leader).” Indeed, the experts’ terms of reference did not include a request to assess Mr Ongwen’s understanding of the nature of the charges or his fitness to stand trial. *See* ICC-02/04-01/15-620-Conf-AnxB; Report, pp. 1-2.

²⁵ Decision, p. 19, lns. 11-13. *See also*, ICC-02/04-01/15-T-26-ENG ET, p. 5, ln. 20 to p. 6, ln. 1.

²⁶ Request for Stay of Proceedings, para. 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.”).

purportedly contained in the report were in one instance a legal question for determination by the Chamber rather than by experts, and in the other instance actually of minimal relevance to the Accused's fitness to stand trial (as opposed to potential defences on the merits).²⁷

13. In summary, the Defence Request misconstrues the Chamber's Decision, which was based on due consideration of a number of facts and factors, including statements made by the Accused on the very day of the Decision. There is no indication that the Decision would have been different had the Chamber disregarded the Accused's January 2016 statements; indeed the Chamber's analysis makes plain that no other information in the record suggested that the Accused's did not understand the charges. While the Defence disagrees with the Decision, such disagreement alone does not render the Issue appealable.²⁸

II. The remaining article 82(1)(d) criteria are not met

14. In addition, the Request fails to meet the remaining article 82(1)(d) criteria, because the Issue will not affect the fairness or expeditiousness of the proceedings or the outcome of the trial.

15. First, the Issue will not affect the fairness of the trial, or its outcome, because the Chamber has already taken steps to ensure the Accused's continued fitness to stand trial. Pursuant to the Chamber's order of 6 December 2016, the Registry has already identified potential experts, and the Parties have already submitted their submissions regarding the same. This makes clear the Chamber's attention to this issue, and it will further ensure that the Chamber has all the information necessary to assist it in assessing the Accused's fitness to stand trial, which has now been put at

²⁷ Decision, p. 19, lns. 13-21.

²⁸ See e.g. DRC Appeal Decision, para. 9.

issue by the Defence. Any expert evidence based on an upcoming examination of the Accused will also clearly be “contemporaneous” and thus presumably satisfactory to the Defence.

16. For similar reasons, an immediate resolution of the Issue by the Appeals Chamber is unlikely to expedite the proceedings. In effect, the Chamber has already taken the steps which the Defence would ask it to take if the Request were granted and the envisioned appeal decided in the Accused’s favour. Litigating the appeal now will only divert attention and resources from the central matter, which is assessing the Accused’s fitness going forward.

Conclusion

17. For the reasons set out above, the Request should be denied.



Fatou Bensouda, Prosecutor

Dated 16th day of December 2016
At The Hague, The Netherlands