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**International  
Criminal  
Court**

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Date: **3 January 2017**

**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 'Decision on the Defence Request to Order a Medical Examination of Dominic Ongwen'", ICC-02/04-01/15-644-Conf, filed 3<sup>rd</sup> January 2017**

**Source:** Office of the Prosecutor

**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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## Introduction

1. The Defence's application<sup>1</sup> ("Application") for leave to appeal the Trial Chamber's decision<sup>2</sup> ("Impugned Decision") on the Defence request<sup>3</sup> to order a medical examination of the Accused ("Defence Request") should be rejected for three separate reasons.
2. First, the Impugned Decision does not involve an issue which would significantly affect the fair and expeditious conduct of the trial.
3. Second, the issue proposed for certification does not arise from the Impugned Decision.
4. Third, an appeal against the Impugned Decision would be premature.

## Confidentiality

5. Pursuant to Regulation 23 *bis* (1) and (2) of the Regulations of the Court, this document is filed confidentially because it responds to a filing similarly marked. The Prosecution will file a public redacted version of this document after the Defence files a public redacted version of the application.

## Submissions

*The Impugned Decision does not affect the fair and expeditious conduct of the trial*

6. Article 82(1)(d) entitles a party to appeal a decision only where it involves "an issue that would significantly affect the fair and expeditious conduct of the trial". The Impugned Decision does not do so. It refuses the Defence Request only in as much as the Defence requested that a psychiatric examination of the Accused should

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<sup>1</sup> ICC-02/04-01/15-644-Conf.

<sup>2</sup> ICC-02/04-01/15-637.

<sup>3</sup> ICC-02/04-01/15-620.

be carried out, limited in its purpose to assisting in the Chamber's determination of the Accused's fitness to stand trial.

7. Instead, the Impugned Decision orders that a psychiatric examination of the Accused be immediately conducted by an appropriate expert with a view, *inter alia*, to "making a diagnosis as to any mental condition or disorder that Dominic Ongwen may suffer at the present time".<sup>4</sup> It requires that the report resulting from this examination be made available to the Parties by being placed on the record of the case. And it specifically accepts that this report might have an impact on the Chamber's obligation under article 64(2) "to ensure that the proceedings before it are fair and expeditious".<sup>5</sup>

8. It is correct that the Trial Chamber does consider<sup>6</sup> the material available to it concerning the Accused's fitness to stand trial, and conclude that presently "there exists no available information" which suggests that the Accused is unfit to stand trial.

9. But the correctness or otherwise of this consideration is not an issue which is "essential for the determination of matters arising in the judicial cause under examination".<sup>7</sup> It is not dispositive of the Impugned Decision. Indeed, had the Trial Chamber's consideration come to a contrary conclusion (that there *was* some information available to suggest that the Accused was unfit) the Impugned Decision would have been effectively the same, namely that a proper expert report be immediately commissioned. The broad mandate given to the expert under the Impugned Decision will ensure that any mental condition from which the Accused may suffer which could affect his fitness to be tried will be made known to the

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<sup>4</sup> ICC-02/04-01/15-637, p. 18.

<sup>5</sup> ICC-02/04-01/15-637, para. 32.

<sup>6</sup> ICC-02/04-01/15-637, paras. 18-28.

<sup>7</sup> See e.g. ICC-01/04-168 ("DRC Appeal Decision"), para. 9.

Chamber and the Parties and Participants. At that time the Trial Chamber will be in a better position to make an informed decision on this issue.

*The proposed issue does not arise from the Impugned Decision*

10. The issue proposed for certification - “the appropriate standard and evaluation of proof applicable in determining an Accused’s fitness to stand trial”<sup>8</sup> (“Proposed Issue”) - does not arise from the Impugned Decision.

11. The Proposed Issue has two parts. The first concerns the appropriate standard of proof. The second concerns the “evaluation of proof”, by which the Prosecution understands the evaluation by the Trial Chamber of the available information concerning the Accused’s fitness to stand trial.

*Standard of Proof*

12. Paragraphs 7-13 of the Impugned Decision are cited in the Application as being the basis of a finding “by implication” that the Trial Chamber must decide whether or not an Accused is fit to stand trial on the balance of probabilities.<sup>9</sup> In fact, the question of the appropriate standard of proof is not one with which the Chamber deals at any stage in the Impugned Decision. Pre-Trial Chamber I, in the case of *The Prosecutor v Laurent Gbagbo*, declined to endorse the proposition that the evidentiary standard to be applied was the balance of probabilities, referring instead to the text of rule 135 , which requires the Chamber to be “satisfied that the accused is unfit to stand trial” to adjourn the proceedings on these grounds”.<sup>10</sup>

13. In accordance with the *Gbagbo* Pre-Trial Chamber, the Impugned Decision characterises the Trial Chamber’s task as being a “responsibility to ascertain that an

<sup>8</sup> ICC-02/04-01/15-620, para. 2.

<sup>9</sup> ICC-02/04-01/15-644-Conf, para. 13.

<sup>10</sup> See ICC-02/11-01/11-286-Red, para. 56.

Accused is not unfit to stand trial [...as] part of its obligations under Article 64(2) of the Statute to ensure that the trial is fair.”<sup>11</sup>

14. Even if the concept of the standard of proof were applicable to the Trial Chamber’s responsibility in this regard, the Application fails to articulate how it is alleged that this issue (the possible application of an incorrect standard)<sup>12</sup> arises from the Impugned Decision. The Application neither asserts that the balance of probabilities is the incorrect standard nor explains how the Trial Chamber applied this standard incorrectly. This lack of clarity is itself a reason for refusing leave to appeal.<sup>13</sup>

#### *Evaluation of Proof*

15. As noted above, the Trial Chamber conducted a detailed evaluation of the available information to establish whether it justified a psychological and/or psychiatric examination directed specifically at the Accused’s “continued fitness to stand trial.”

16. The Trial Chamber concluded that none of that information “indicates that Mr Ongwen may lack the basic capacities to meaningfully exercise his fair trial rights [...] and be therefore unfit to stand trial”. It was for this reason that the Trial Chamber declined to limit the examination to one which would assist in the Chamber’s determination of the Accused’s understanding of the charges under article 64(8)(a) and instead ordered a more general examination as summarised in paragraph 7 above.

17. The Application is effectively a challenge to the Impugned Decision as a whole. Rather than identifying particular appealable issues, the Defence seek to re-litigate

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<sup>11</sup> ICC-02/04-01/15-637, para. 11.

<sup>12</sup> ICC-02/04-01/15-644-Conf, para. 15.

<sup>13</sup> See e.g.: ICC-02/11-01/11-389, para.28; ICC-02/11-01/11-464, para.26.

the entire decision before the Appeals Chamber because they disagree with the result of the Trial Chamber's evaluation of the available material. Leave to appeal must be refused in such circumstances<sup>14</sup>

18. The Application fails to explain how this evaluation was wrongly conducted. It does not identify any discrete conclusions drawn from the material available which caused the Trial Chamber wrongly to refuse to order that the examination should be specifically directed at the issue of the Accused's understanding of the charges. Instead, the Defence resorts to assertions unsupported by any evidence.

19. The Defence asserts that:

- a) Statements made by the Accused 11 months ago "cannot be representative of his current state of mind";<sup>15</sup>
- b) [REDACTED] may make it virtually impossible to know – without more assessment – whether Mr Ongwen is understanding what is said in court [...] or at least retaining information upon which he can [...] instruct Counsel";<sup>16</sup>
- c) In evaluating the Accused's fitness to stand trial, the Trial Chamber relied on his account of events to the Defence experts without having the means to evaluate the coherence and consistency of those accounts;<sup>17</sup>
- d) The Accused's claim that [REDACTED] indicates that he cannot make a "realistic evaluation of consequences of given actions";<sup>18</sup>
- e) The Accused's statement to the Trial Chamber that it was not he, but the LRA, who was responsible for the crimes charged does not indicate that "he understands what he is alleged to have done". A denial of responsibility, the Defence assert, is not sufficient to cast doubt on whether

<sup>14</sup> ICC-02/11-01/11-307, paras. 70 and 71.

<sup>15</sup> ICC-02/04-01/15-644-Conf, para. 14.

<sup>16</sup> ICC-02/04-01/15-644-Conf, para. 18.

<sup>17</sup> ICC-02/04-01/15-644-Conf, paras. 21 and 22.

<sup>18</sup> ICC-02/04-01/15-644-Conf, para. 24.

he “understands the charges or can necessarily instruct counsel in a rational way”.<sup>19</sup>

20. None of these assertions are founded on expert opinion contained within the report prepared by the defence experts, or on any information available to the Chamber at all. They amount to nothing more than *ex post facto* arguments in support of the contention that Dominic Ongwen may be unfit to stand trial. They do not arise from the Impugned Decision, which was limited to a refusal to accept the terms proposed by the Defence for the forthcoming psychiatric examination.

*An appeal against the Impugned Decision would be premature*

21. In any event an appeal against the Impugned Decision, or indeed any further litigation concerning the issue of the Accused’s fitness to stand trial, would be premature until the examination ordered by the Trial Chamber has been conducted and the ensuing report prepared.

22. That report will, for the first time, enable the Chamber and the Parties to operate on the basis of properly founded expert evidence, rather than “the Defence’s own unsubstantiated last-minute claim”.<sup>20</sup>

23. As a result, the proposed issue fails to meet the additional requirements of article 82(1)(d) that its resolution may materially advance the proceedings.

24. The matter of Dominic Ongwen’s fitness to be tried is not foreclosed by the Impugned Decision. The Trial Chamber will retain the responsibility of which it speaks in paragraph 11 of that decision throughout the trial. If significant new

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<sup>19</sup> ICC-02/04-01/15-644-Conf, paras. 23 and 25.

<sup>20</sup> ICC-02/04-01/15-637, para. 28.



information emerges – as a result of the expert report which the Trial Chamber has ordered, or from any other source – the Trial Chamber may consider the matter again.

25. Even a successful appeal on the Proposed Issue would be likely simply to result in delay and the wasteful expenditure of litigation resources. The report is likely to be ready long before the appeal would be determined by the Appeals Chamber, but that Chamber would not be able to take its contents into account in its determination of the correctness of the Impugned Decision. An appellate decision in favour of the Defence would require the Trial Chamber to consider the matter again; a consideration which is likely to have been rendered moot, or subject to very different evidential consideration, by the arrival of the report.

### **Conclusion**

26. For all these reasons, the Application fails to meet the article 82(1)(d) criteria for leave to appeal. The Application should therefore be rejected.



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**Fatou Bensouda, Prosecutor**

Dated 3rd day of January 2017  
At The Hague, The Netherlands