

**Cour
Pénale
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**International
Criminal
Court**

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

Date: **3 January 2017**

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Presiding Judge
Judge Peter Kovacs
Judge Raul C. Pangalangan

SITUATION IN UGANDA

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

Public

**Public Redacted Version of
'Defence Request for Leave to Appeal
"Decision on the Defence Request to Order a Medical Examination of Dominic Ongwen"
(ICC-02/04-01/15-637)', filed 27 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 Article 82(1)(d) of the Rome Statute, the Defence for Dominic Ongwen ('Defence') respectfully requests leave to appeal the "Decision on the Defence Request to Order a Medical Examination of Dominic Ongwen" ('Impugned Decision').¹
2. The Defence seeks leave to appeal on the issue of the appropriate standard and evaluation of proof applicable in determining an accused's fitness to stand trial.

II. CONFIDENTIALITY

3. Pursuant to Regulation 23 *bis*(1) and (2) of the Regulations of the Court, the Defence files this request as confidential because of the nature of some of the issues discussed related to [REDACTED] and that it requests leave to appeal a confidential decision. The Defence files a public redacted version of this request contemporaneously with the confidential version.

III. PROCEDURAL BACKGROUND

4. On 5 December 2016, the Defence filed a Request for Stay of Proceedings and Examinations Pursuant to Rule 135 of the Rules of Procedure and Evidence ("The Request").² In the Request, the Defence, basing itself on a preliminary report from two expert psychiatrists on Article 31(1) defences, sought an examination to determine if Mr Ongwen understood the charges against him and if he is fit to stand trial.
5. On 6 December 2016, Trial Chamber IX ('Trial Chamber') delivered an oral decision holding that Mr Ongwen understood the charges against him.³ While rejecting the Defence Request, the Chamber refused to exclude conducting a later examination on its own motion.⁴

¹ ICC-02/04-01/15-637.

² ICC-02/04-01/15-620.

³ ICC-02/04-01/15-T-26-ENG, p. 3, line 5 to p. 7 line 18.

⁴ ICC-02/04-01/15-T-26-ENG, p. 7, lines 9-15.

6. On 6 December 2016, the Defence disclosed the experts' report to the Trial Chamber.⁵ The Defence disclosed the report to the Prosecution this next day.⁶
7. On 12 December 2016, the Defence applied for leave to appeal the oral decision.⁷ The Trial Chamber's decision on this application is still pending.
8. On 16 December 2016, the Trial Chamber, having read the experts' report, delivered a decision denying the Defence's application requesting for the examination of Mr Ongwen's fitness to stand trial. Instead, the Chamber ordered an examination of Mr Ongwen to diagnose any mental condition or disorder that Mr Ongwen may suffer for the purpose of providing recommendations to address or treat such condition. The Chamber specifically ordered that this examination was not for purposes of determining Mr Ongwen's fitness to stand trial.

IV. The Law

9. Article 82(1)(d) sets the standard for interlocutory appeals before any chamber of the court. The standard for an interlocutory appeal is that:

A decision that involves an issue⁸ that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

10. The purpose of such procedure is to “pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial”⁹ The Pre-Trial Chamber is vested with the power to certify the existence of an appealable issue,¹⁰ however when determining whether leave to appeal should be granted, the Pre-Trial Chamber must not justify or defend the correctness of its decision, but instead determine whether the issues presented significantly affect the fairness of the proceedings.¹¹

⁵ Email sent from Defence to Trial Chamber, 6 December 2016 at 17h27 CET.

⁶ ICC-02/04-01/15-628-Conf-AnxA and AnxB, disclosed as UGA-D26-0015-0004.

⁷ ICC-02/04-01/15-632

⁸ All issues arise from the Decision and are not mere disagreements between the Chamber and the Defence. *See* ICC-01/04-168 AO3, para. 9.

⁹ ICC-01/04-168, para. 19.

¹⁰ ICC-01/04-168, para. 20.

¹¹ ICC-01/09-02/11-253, para. 28.

11. The Appeals Chamber has ruled that only an “issue” may form the subject- matter of an appealable decision, which it defined as “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”.¹² Further, an issue is “a subject the resolution of which is essential for the determination of the matters arising in the judicial cause under examination” and may be “legal or factual or a mixed one”.¹³
12. The issue must be one apt to “significantly affect”, that is, in a material way, either the fair and expeditious conduct of the proceedings, or the outcome of the trial.¹⁴ In other words, the issue “must be one likely to have repercussions on either of these two elements of justice”.¹⁵

V. SUBMISSIONS

A. The applicable standard and evaluation of proof required to determine fitness to stand trial arises from the Impugned Decision.

13. The Trial Chamber in the Impugned Decision relied on jurisprudence from this Court, the ICTY, and the European Court of Human Rights. Though at no point articulating the standard, the Trial Chamber’s survey and approval of jurisprudence indicated that by implication the standard of proof is the balance of probabilities.¹⁶ The Trial Chamber concluded that “there exists no indication in the record of the case which justify the necessity of a medical examination of Mr Ongwen to assess his fitness to stand trial”.¹⁷
14. In its evaluation of the issue of Mr Ongwen’s fitness, the Trial Chamber relied on statements made by Mr Ongwen himself during the confirmation phase of this case, statements made by his lawyers, as well as the Defence experts who have talked to him.¹⁸ Apart from the experts who are medical professionals, neither Mr Ongwen, nor his lawyers have the necessary knowledge or skills to make a medical assessment of Mr Ongwen’s present status. The statements made by Mr Ongwen eleven (11) months

¹² ICC-01/04-168, para. 9.

¹³ ICC-01/04-168, para. 9.

¹⁴ ICC-01/04-168, para. 10.

¹⁵ ICC-01/04-168.

¹⁶ Impugned Decision, paras 7-13.

¹⁷ Impugned Decision, para. 25.

¹⁸ Impugned Decision, para. 15.

ago during the confirmation hearing, cannot be representative of his current state of mind.

15. The rationale of the doctrine of fitness to stand trial, which is based in part upon “inextricable link between a defendant's right to a fair trial and the requirement that he be competent to understand and exercise his rights at that stage of the proceedings against him”,¹⁹ places an emphasis on contemporaneousness of fitness. A contemporaneous assessment is clearly articulated in the experts’ report through the present concerns with his *present* well-being²⁰ which are made in reference to persisting factors identified by the experts in relation to examining his historic presence of mind. Because the report was not aimed at fitness, the implications of these conditions are not directed towards the ongoing trial process. For this reason, the Trial Chamber may not have applied the appropriate facts to the standard or alternatively, due to the unarticulated standard, not applied the correct standard.
16. Further related to the contemporaneousness of the assessment, there has been [REDACTED] which were noted in the report. As an example, it was not until September 2016 that [REDACTED]. In addition, [REDACTED].
17. The Trial Chamber may have inadvertently misconstrued the nature of the Defence expert report and request, which in turn may have impacted upon the way in which it evaluated the evidence before it or applied the evidential standard. Unlike as stated by the Trial Chamber,²¹ the Defence request did not claim that the report indicated Mr Ongwen was not fit to stand trial.²² Moreover, as indicated, at the time of filing the request, the Defence did not have the final report.
18. The Defence does take note of the Trial Chamber’s guidance as regards the appropriate conclusions to be drawn by its experts.²³ The final report was rushed to the Defence out of concerns related to the opening of trial, and had time made it possible, would have benefited from more tentatively stated conclusions. Although in this

¹⁹ Findings and Order on Defendant Nahak’s Competence to Stand Trial, Deputy General Prosecutor for Serious Crimes v. Josep Nahak (01A/2004), Democratic Republic of East Timor Dili District Court Special Panels for Serious Crimes, 1 March 2005, para. 32, available at: http://www.worldcourts.com/un_etta/eng/decisions/2005.03.01_Prosecutor_v_Nahak.pdf.

²⁰ UGA-D26-0015-0004, pp. 0014-15.

²¹ Impugned Decision, para. 17.

²² ICC-02/04-01/15-620, paras 76 and 78.

²³ Impugned Decision, para. 19.

regards, as indicated previously,²⁴ the report was aimed at the Article 31 defences, and thus the observations and conclusions indicated by the experts had to be interpreted by the Trial Chamber. For example, [REDACTED]²⁵ [REDACTED] may make it virtually impossible to know – without more assessment – whether Mr Ongwen is understanding what is said in court on a day to day basis, or at least retaining information upon which he can reflect and instruct Counsel.

19. As the European Court of Human Rights has held, age, one’s level of maturity and intellectual and emotional capacities should be taken into account when assessing one’s ability to meaningfully participate in the proceedings.²⁶ It is not disputed by the parties and the participants that Mr Ongwen was abducted as a child and is himself a victim of the same type of crimes he is now alleged to have committed. The Impugned Decision also tentatively accepts that Mr Ongwen is experiencing various mental health. This cannot be ignored by the Trial Chamber in its assessment of Mr Ongwen’s present fitness to stand trial, especially with [REDACTED]. As an example, during the Article 56 proceedings when Mr Ongwen suffered [REDACTED]. The Defence worries that as the case develops, Mr Ongwen’s participation could realistically diminish.
20. The parties and the Registry have already made substantial steps in agreeing on the terms of reference for such an expert. While the Defence welcomes the Trial Chamber’s order for Professor Joop T.V.M. de Jong to examine Mr Ongwen, there is concern because the order limits the examination to mere medical solutions aimed at redressing his health needs and not his fair trial needs. A mere examination as ordered by the Trial Chamber is not sufficient to determine the fundamental issue at stake, and a resolution from the Appeals Chamber would materially advance the proceedings. Mr Ongwen’s fair trial rights should not be sacrificed for expeditiousness alone.
21. In finding that Mr Ongwen is “able to identify aspects of relevance to the case against him before the Court and provide his version of the relevant events, including to his

²⁴ ICC-02/04-01/15-620, para. 73, and further clarified by the terms of reference indicated in ICC-02/04-01/15-620-Conf-AnxB.

²⁵ UGA-D26-0015-0004, p. 13 (e), which is indicated to be persisting at page 14.

²⁶ ECtHR, T v. The United Kingdom, Application No. 24724/94, Judgment, 16 December 1999, para. 88, available at: [http://hudoc.echr.coe.int/eng#{"appno":\["24724/94"\],"itemid":\["001-58593"\]}](http://hudoc.echr.coe.int/eng#{).

Defence”²⁷, the Trial Chamber noted that Mr Ongwen described to the Defence Experts:

[H]is ‘steady but rapid promotion’ within the LRA, the fact that ‘all activities carried out in the bush were on the express orders of Joseph Kony’, the modalities of transmission of Joseph Kony’s orders down the hierarchy, his relationship with junior soldiers, the training, ‘brainstorming propaganda’ and disciplinary system of child soldiers in the LRA, the reasons why he eventually left the LRA and his explanations of why he had not done it before.²⁸

The Trial Chamber also relied upon the existence of a book which the report indicates Mr Ongwen is writing about his life in the bush as proof that he has memory.²⁹

22. While details are provided in the report, from what is provided, the Trial Chamber would have been incapable of concluding the coherence of the accounts, whether the details as regards other charged events were similar or whether there are gaps in Mr Ongwen’s memory. Particularly as regards Mr Ongwen’s book, the mere act of writing a narrative says nothing as regards the coherence or even lucidity of such a narrative. Furthermore, as described in the report, [REDACTED].
23. Assuming *arguendo* that Mr Ongwen’s statements can be used in evaluating his fitness to stand trial, read together with the experts’ report, there is a strong indication that Mr Ongwen does not possess an understanding of the purpose of the proceedings, thus impacting his ability to meaningfully participate and instruct his lawyers accordingly. Though during the opening statements Mr Ongwen told the Trial Chamber that he was not the LRA which was responsible for the crimes charged, this gives no indication that he understands what he is alleged to have done – even if he would contest such a narrative.
24. It is also unclear that Mr Ongwen understands the consequences. The experts’ report documents [REDACTED].³⁰ He [REDACTED]. If one believes that [REDACTED], then a *realistic* evaluation of consequences of given actions or decisions is simply not possible.

²⁷ Impugned Decision, para. 24.

²⁸ Impugned Decision, para. 23.

²⁹ Impugned Decision, para. 23.

³⁰ UGA-D26-0015-0004, at 0007.

25. A denial of responsibility is certainly one aspect of a contested criminal trial; however, it is not a sufficient condition to conclude that an individual understands the charges or can necessarily instruct counsel in a rational way. The basis of the denial of responsibility is critical to understand whether the individual can effectively participate in his or her trial. If, as suggested in the report, Mr Ongwen believes that the trial against him is just the latest manifestation of some kind of [REDACTED] or theatre of cruelty where he is the protagonist, then his mind will not *necessarily* be focused upon identifying information that could be directed to disputing the charges connected to events in the real world based upon the alleged actions and choices of real people and organisations.
26. Considering that the standard of proof is *on the balance of probabilities*, with the above considerations in mind, the Defence submits that the Trial Chamber appears to have applied an erroneous standard or miss-applied the standard to the facts. The indicators available could lead to an order directing the appointment of a medical professional to examine Mr Ongwen to determine his fitness to stand trial – such an action is not to say he will be found unfit. As the ICTY jurisprudence indicates, the fact that an accused is found with a certain health condition will not automatically render him unfit to stand trial. The question should be whether he is able to exercise effectively his rights in the proceedings against him.³¹ A mere examination to record all of Mr. Ongwen’s pathologies, disorders or syndromes, but failing to address whether these will impact upon his fitness is an error that runs the risk of fundamentally impacting upon Mr Ongwen’s his fair trial rights, as well as the integrity of the proceedings.

B. The issue significantly affects the fair and expeditious conduct of the proceedings or the outcome of trial.

27. In the most extensively reasoned decision on fitness in international criminal law, the Appeals Chamber at the ICTY on the *Strugar* appeal commented that:

³¹ ICTY, *Prosecutor v. Goran Hadži*, Case No. IT-04-75-T, Trial Chamber Consolidated decision on the continuation of proceedings, 26 October 2015, para. 41, available at: http://www.icty.org/x/cases/hadzic/tdec/en/151026_1.pdf, (citing ICTY, *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision Re the Defence Motion to Terminate Proceedings, 26 May 2004, para. 35, available at: <http://www.icty.org/x/cases/strugar/tdec/en/040526.pdf>).

[T]he issue of an accused's fitness to stand trial is of such importance that it may generally be regarded as "an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial" under Rule 73(B) of the Rules.³²

A clearer statement as regards the suitability of an issue for appeal cannot be found.

28. The opening statements have already been given and evidence in the case against Mr Ongwen is scheduled to begin on 16 January 2016. The question of Mr Ongwen's fitness to stand trial is of paramount importance, for to proceed with the trial when he is potentially so disabled to meaningfully participate in the proceedings would be futile. It would be against the spirit of expediency and resource management to begin the trial and then later deal with the possible unfitness to stand trial.
29. In addition, the delicate nature of the case as well as its complexity requires that Mr Ongwen meaningfully participates and is fully aware of the nature, purpose, and what is at stake for him, including the significance of the charges and their accompanying possible penalties.
30. The issue touches on fundamental rights of Mr Ongwen and would affect the outcome of the trial. An immediate resolution from the Appeals Chamber would materially advance the proceedings.

C. An immediate resolution of the issue from the Appeals Chamber may materially advance the proceedings.

31. Once again, in this regard, the Appeals Chamber in *Strugar* has stated that:

Absent certain exceptions, such as when an accused's submissions in support of his inability to stand trial are frivolous or manifestly without merit, the immediate resolution by the Appeals Chamber of any question of fitness would appear to be essential in that any decision that an accused is not fit to stand trial would necessarily materially advance the proceedings.³³

32. Interlocutory appeals are meant to pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial. In this case, an immediate resolution from the Appeals Chamber is ideal to determine the appropriate

³² ICTY, Prosecutor v Strugar, Appeals Judgement, IT-01-42-A, 17 July 2008, para. 30, available at: http://www.legal-tools.org/uploads/tx_ltpdb/080717_03.pdf.

³³ *Ibid.*

standard of proof required in determining Mr Ongwen's fitness to stand trial under the prevailing circumstances.

VI. RELIEF

33. The Defence respectfully request the Chamber to grant leave to appeal the single issue discussed above.

Respectfully submitted,



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

Dated this 3rd day of January, 2017

At Kampala, Uganda