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**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 redacted version of**

**Decision on the Defence Request to Order a Medical Examination of Dominic  
Ongwen**

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

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**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

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**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

**Trial Chamber IX** ('Chamber') of the International Criminal Court ('Court') in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Articles 64(2), 64(8)(a) and 67(1) of the Rome Statute ('Statute'), Rules 113 and 135 of the Rules of Procedure and Evidence ('Rules') and Regulation 103 of the Regulations of the Court ('Regulations') issues the following 'Decision on the Defence Request to Order a Medical Examination of Dominic Ongwen'.

### **I. Background and submissions**

1. On 5 December 2016, the day before the commencement of the trial, the Chamber received the 'Defence Request for a Stay of Proceedings and Examinations Pursuant to Rule 135 of the Rules of Procedure and Evidence' ('Request').<sup>1</sup> In the Request, the Defence, *inter alia*, requested the Chamber to 'halt the opening of the trial' and order a psychiatric and/or psychological examination of Dominic Ongwen to ensure that he understands the nature of the charges brought against him and, more broadly, that he is fit to stand trial.<sup>2</sup> According to the Defence, these measures were warranted as two experts in the fields of psychiatry and psychology retained by the Defence (collectively, 'Defence Experts'),<sup>3</sup> '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'.<sup>4</sup> The report of the Defence Experts was not provided to the Chamber and the participants, but the Defence anticipated that it would be in its possession 'any day' and endeavoured to disclose it 'within 24 hours after receiving it'.<sup>5</sup>

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<sup>1</sup> ICC-02/04-01/15-620-Conf, also publicly available in redacted form (ICC-02/04-01/15-620-Red).

<sup>2</sup> Request, ICC-02/04-01/15-620-Red, para. 80.

<sup>3</sup> In these proceedings, upon request of the Defence, the names of these two experts have not been made public to date. They are designated as D26-41 and D26-42.

<sup>4</sup> Request, ICC-02/04-01/15-620-Red, para. 76.

<sup>5</sup> Request, ICC-02/04-01/15-620-Red, para. 42.

2. The Office of the Prosecutor ('Prosecution') filed its response to the Request on 6 December 2016,<sup>6</sup> arguing that the Request shall be denied on account, *inter alia*, that it is unsubstantiated<sup>7</sup> and that even a cursory review of the record of the case shows that Mr Ongwen has repeatedly demonstrated his ability to understand the nature of the charges against him, participate in the proceedings before the Court and instruct his defence team on a number of strategic and procedural matters.<sup>8</sup> The legal representatives of the participating victims supported the Prosecution's arguments in the Response.<sup>9</sup>
  
3. On 6 December 2016, at the opening of the trial, the Chamber rendered an oral decision on the Request, in which it, *inter alia*, rejected the request to halt the opening of the trial pending a psychiatric and/or psychological examination of Mr Ongwen aimed at determining whether he understands the nature of the charges against him and is fit to stand trial.<sup>10</sup> In particular, the Chamber, taking into account, *inter alia*, Mr Ongwen's answers to the questions posed to him by the Presiding Judge in the course of the hearing, satisfied itself that Mr Ongwen understands the nature of the charges brought against him in the proceedings before the Court.<sup>11</sup> The Chamber also noted that the report by the Defence Experts – which constituted the basis of the Request – had not been provided and that, at that moment, the information was insufficient to conclude that Mr Ongwen might be unfit to stand trial.<sup>12</sup> Nonetheless, the Chamber stated that it 'may order a psychological and psychiatric examination with a view to

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<sup>6</sup> Prosecution's Response to the Defence Request for a Stay of Proceedings, ICC-02/04-01/15-620-Conf, ICC-02/04-01/15-624-Conf ('Response'). An advance courtesy copy of the Response was provided by the Prosecution to the Chamber and the participants by email on 5 December 2016 at 18:03.

<sup>7</sup> Response, ICC-02/04-01/15-624-Conf, paras 11-13.

<sup>8</sup> Response, ICC-02/04-01/15-624-Conf, paras 14-24

<sup>9</sup> Email from the common legal representative of victims to the Chamber and the other participants, 6 December 2016 at 09:00.

<sup>10</sup> Transcripts of the hearing of 6 December 2016, ICC-02/04-01/15-T-26-ENG ET, page 3, line 5, to page 7, line 18.

<sup>11</sup> Transcripts of the hearing of 6 December 2016, ICC-02/04-01/15-T-26-ENG ET, page 17, line 25, to page 20, line 4, to page 7, line 18.

<sup>12</sup> Transcripts of the hearing of 6 December 2016, ICC-02/04-01/15-T-26-ENG ET, page 5, line 24, to page 6, line 1, and page 7, lines 5 to 7.

assessing Mr Ongwen's continued fitness to stand trial'.<sup>13</sup> For this purpose, the Chamber ordered the Registry to provide, by 13 December 2016, recommendations on experts that the Chamber could appoint to examine Mr Ongwen, and allowed the Prosecution and the Defence to make submissions on these recommendations.<sup>14</sup>

4. In the afternoon of the same day, the Defence provided to the Chamber the 'Psychiatric report' by the Defence Experts ('Report'),<sup>15</sup> which was later registered in Ringtail and disclosed as document UGA-D26-0015-0004.
5. On 13 December 2016, the Registry provided its recommendations on the experts that the Chamber could appoint to conduct a psychological or psychiatric examination of Mr Ongwen.<sup>16</sup> On 14 December 2016,<sup>17</sup> the Prosecution and the Defence made their submissions on the Registry's recommendations.<sup>18</sup>
6. Following the Chamber's oral decisions at the commencement of the trial and having now received the Report by the Defence Experts, the only part of the Request which remains to be addressed by the Chamber is the Defence request to order a psychological and/or psychiatric examination of Mr Ongwen under Rule 135 of the Rules with a view to ascertaining his continued fitness to stand trial. In the present decision, the Chamber disposes of this outstanding request.

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<sup>13</sup> Transcripts of the hearing of 6 December 2016, ICC-02/04-01/15-T-26-ENG ET, page 7, lines 9-11.

<sup>14</sup> Transcripts of the hearing of 6 December 2016, ICC-02/04-01/15-T-26-ENG ET, page 7, lines 14-15.

<sup>15</sup> Email from the Defence to the Chamber, 6 December 2016 at 17:27.

<sup>16</sup> Registry recommendations on psychological and psychiatric experts Pursuant to the Trial Chamber's Oral Order of 6 December 2016, ICC-02/04-01/15-633 ('Registry's Recommendations'), with one public annex.

<sup>17</sup> The time limit for the parties' submissions on the Registry's recommendations originally set at 13 December 2016 was subsequently extended to 14 December 2016 by the Chamber (email on 13 December 2016 at 10:11).

<sup>18</sup> Prosecution submissions on Registry's recommendations on psychological and psychiatric experts, ICC-02/04-01/15-633, ICC-02/04-01/15-634; Defence Response to ICC-02/04-01/15-633, ICC-02/04-01/15-635.

## II. Applicable law

7. As observed in the relevant jurisprudence of the Court, the concept of ‘fitness to stand trial’, while not specifically defined as such by the legal instruments of the Court, ‘must be viewed as an aspect of the broader notion of fair trial’, which ‘is rooted in the idea that whenever the accused is, for reasons of ill health, unable to meaningfully exercise his or her procedural rights, the trial cannot be fair and criminal proceedings must be adjourned until the obstacle ceases to exist’.<sup>19</sup> Correspondingly, a person is to be considered ‘fit to stand trial’ when he or she possesses the necessary capacities – to such a degree that he or she has an understanding of the essentials of the proceedings – to effectively exercise his or her fair trial rights and, as such, meaningfully participate in the proceedings before the Court against him or her.<sup>20</sup>
8. From the catalogue of fair trial rights contained in Article 67(1) of the Statute the relevant capacities which can be discerned as necessary for the meaningful exercise of these rights include the capacities to understand the charges<sup>21</sup> and the conduct, purpose and possible consequences of the proceedings, instruct counsel in the preparation and conduct of his or her defence, and make a statement.<sup>22</sup>
9. The Chamber notes that the European Court of Human Rights held that the fair trial rights, as contained in article 6 of the European Convention on Human

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<sup>19</sup> Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court, ICC-02/11-01/11-286-Red , 2 November 2012 (‘*Gbagbo* First Decision on Fitness’), para. 43. See also Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the fitness of Laurent Gbagbo to stand trial, ICC-02/11-01/15-349, 27 November 2015 (‘*Gbagbo* Second Decision on Fitness’), para. 33.

<sup>20</sup> *Gbagbo* Second Decision on Fitness, ICC-02/11-01/15-349, para. 36.

<sup>21</sup> In this regard, the Chamber notes that Article 64(8)(a) of the Statute specifically mandates that ‘[t]he Trial Chamber shall satisfy itself that the accused understands the nature of the charges’.

<sup>22</sup> See *Gbagbo* First Decision on Fitness, ICC-02/11-01/11-286-Red, para. 50; *Gbagbo* Second Decision on Fitness, ICC-02/11-01/15-349, para. 35.

Rights, guarantee ‘the right of an accused to participate effectively in a criminal trial’,<sup>23</sup> and stated in this regard:

‘[E]ffective participation’ in this context presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence.<sup>24</sup>

10. As observed by Pre-Trial Chamber I, ‘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>25</sup> The Chamber also endorses the position expressed by the Trial Chamber of the ICTY:

An accused's ability to participate in his trial should be assessed by looking at whether his capacities are, ‘viewed overall and in a reasonable and [common sense] manner, at such a level that it is possible for [him or her] to participate in the proceedings (in some cases with assistance) and sufficiently exercise the identified rights’. [...] [T]he Accused must have an understanding of the ‘essentials’ of the proceedings, with the processing of the wealth of complex information inherent in international criminal proceedings remaining the role of defence counsel. Consequently, there is no need for an accused to *fully* comprehend the course of proceedings. [...]

<sup>23</sup> European Court of Human Rights, *Stanford v. The United Kingdom*, Appl. no. 16757/90, Judgment, 23 February 1994, para. 26.

<sup>24</sup> European Court of Human Rights, *S.C. V. The United Kingdom*, Appl. no. 60958/00, Judgment, 15 June 2004, para. 29. See also *Liebreich v. Germany*, Appl. no. 30443/03, Decision as to Admissibility, 8 January 2008; *Timergaliyev v. Russia*, Appl. no. 40631/02, Judgment, 14 January 2009, para. 51; *G. v. France*, Appl. no. 27244/09, Judgment, 23 May 2012, para. 52.

<sup>25</sup> *Gbagbo* First Decision on Fitness, ICC-02/11-01/11-286-Red, para. 52. See also *Gbagbo* Second Decision on Fitness, ICC-02/11-01/15-349, para. 34. Similarly, the Appeals Chamber of the ICTY stated: ‘An accused represented by counsel cannot be expected to have the same understanding of the material related to his case as a qualified and experienced lawyer. Even persons in good physical and mental health, but without advanced legal education and relevant skills, require considerable legal assistance, especially in cases of such complex legal and factual nature as those brought before the Tribunal’ (ICTY, *Prosecutor v. Pavle Strugar, Case No. IT-01-42-A*, Appeals Chamber, Judgment, 17 July 2008, para. 60).

Effective participation requires a 'broad understanding' of the trial process with a comprehension of the 'general thrust' of what is said in court.<sup>26</sup>

11. The Chamber observes that the responsibility to ascertain that an accused is not unfit to stand trial lies with the Chamber itself as it is part of its obligations under Article 64(2) of the Statute to ensure that the trial is fair. In addition, Article 64(8)(a) of the Statute specifically provides that '[t]he Trial Chamber shall satisfy itself that the accused understands the nature of the charges'. The Chamber therefore endorses the observation by Pre-Trial Chamber I that the role of the parties in connection to the determination of whether an accused is not unfit to stand trial is 'better seen as assisting the Chamber in the exercise of its obligation'.<sup>27</sup>
  
12. At the same time, the fact that the Defence requests a medical examination of the accused to determine his fitness to stand trial does not entail, in and of itself, that the Chamber must inevitably accede to such request. Rather, for the Chamber to resort to this measure there must be indications suggesting the existence of medical conditions which may impact on the accused's ability to meaningfully exercise his fair trial rights which the Chamber is unable to resolve without the assistance of one or more medical experts. In the absence of any such indication, it must be concluded that that the accused is fit to stand trial.
  
13. As already clarified in the jurisprudence of the Court<sup>28</sup> and equally observed in the jurisprudence of the ICTY,<sup>29</sup> the question of whether an accused is unfit to stand trial does not concern, in and of itself, whether he or she has particular medical conditions, but whether the accused is able to exercise effectively his fair

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<sup>26</sup> ICTY, *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Trial Chamber, Consolidated decision on the continuation of the proceedings, 26 October 2015, paras 39-40 (emphasis in original), citing ICTY, *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Appeals Chamber, Judgment, 17 July 2008, paras 47, 55 and 60.

<sup>27</sup> *Gbagbo* First Decision on Fitness, ICC-02/11-01/11-286-Red, para. 56.

<sup>28</sup> *Gbagbo* First Decision on Fitness, ICC-02/11-01/11-286-Red, para. 51.

<sup>29</sup> See e.g. ICTY, *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Appeals Chamber, Judgment, 17 July 2008, para. 61; ICTY, *Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Trial Chamber, Consolidated decision on the continuation of the proceedings, 26 October 2015, para. 41.



trial rights in the proceedings against him irrespective of the existence of any such medical condition. In this sense, when the Chamber is satisfied, in light of the available information and consideration of all relevant circumstances, that the accused is able to meaningfully exercise his or her fair trial rights, an inquiry on whether the person suffers from any particular medical condition is unnecessary for the Chamber to discharge its obligations to ensure that the accused is fit to stand trial.

### III. Analysis

14. The issue under consideration in the present decision is whether the information available to the Chamber, and in particular the Report by the Defence Experts which was made available to it in the afternoon of 6 December 2016, justifies that a psychiatric and/or psychological examination of Mr Ongwen be ordered under Rule 135 of the Rules.
15. At the outset, the Chamber recalls that at the opening of the trial the Chamber found that Mr Ongwen understands the nature of the charges brought against him. The Chamber's oral decision – which is worth quoting in full – reads as follows:

The Chamber is satisfied that Mr Ongwen understands the nature of the charges. Mr Ongwen confirmed to Pre-Trial Chamber II that he had read and understood the charges as set out in the document containing the charges at the confirmation hearing.

As Mr Ongwen said back in January of this year:

Thank you, your Honour. Well, from my point of view, whether the charges are read or not read is all going to be a waste of time. You may speak five words and only two issues are correct. You may speak ten words and only two things are correct. The reading out these charges, whether they are true or not, is all going to be a waste of time. I've been handed out the document translated in Acholi, so I've read and understood it. Thank you.

Other information before the Chamber also confirms that Mr Ongwen understands the charges. First, the charges that Mr Ongwen said he understood in January are not materially different now. All 70 charges

alleged by the Prosecution were essentially confirmed. The confirmation decision has been fully translated into Acholi specifically for Mr Ongwen's benefit. The Chamber is not persuaded that Mr Ongwen cannot understand something now he so clearly understood back in January. In this context, the Chamber is also satisfied that Mr Ongwen has been fully informed of the incriminating conduct since the confirmation of charges decision set out the facts of the case with precision, together with their legal characterisation.

Lacking further substantiation and in light of Mr Ongwen's own admission at the confirmation stage, the Chamber is unpersuaded that Mr Ongwen at this stage does not understand the nature of the charges as foreseen in Article 64(8)(a) of the Statute.

Second, and as mentioned earlier today, the Defence gave no indication that Mr Ongwen was having difficulty understanding the nature of the charges or the proceedings more generally. Quite the contrary, the Defence has made several arguments, such as requests for Acholi translations, reinforcing that their client did understand.

Third, the Chamber cannot help but note that Mr Ongwen's alleged lack of understanding comes just after his Defence team alleged it has evidence supporting the notion that he is not fit to stand trial.

As stated previously, the Chamber has not received sufficient substantiation to conclude that Mr Ongwen is unfit. In particular, the expert reports which purport to prove the Defence's position have not been provided to the Chamber. The Chamber nevertheless notes that in describing the expert reports, the Defence says the experts conclude that Mr Ongwen, A, does not "understand the charges", and B, was not aware of the "wrongfulness of his actions during his time in the bush". The former statement is a legal question experts cannot determine at the expense of the Chamber, for it is the Chamber who has the final decision on whether Mr Ongwen understands the charges. The latter statement on its face is less about unfitness and more about Mr Ongwen disputing the legal characterisation of his alleged prior conduct.

Mr Ongwen's remarks today are no different. Mr Ongwen's remark that the LRA is not him and that the LRA committed these acts demonstrate an understanding of the confirmed charges. Mr Ongwen's remarks are rather a dispute as to Mr Ongwen's responsibility for these alleged acts. And this is precisely a matter to be discussed during trial and is not properly part of an Article 64(8)(a) determination.

For these reasons, the Chamber is satisfied that Mr Ongwen understands the nature of the charges.<sup>30</sup>

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<sup>30</sup> Transcripts of the hearing of 6 December 2016, ICC-02/04-01/15-T-26-ENG ET, page 17, line 25, to page 20, line 4, to page 7, line 18.

16. The information provided by the Defence Experts in the Report does not put the Chamber's conclusion into question, but rather, as explained below, confirms it.
17. Significantly, contrary to the Defence submission, at no point do the Defence Experts in their Report state, or even allude to the possibility, that Mr Ongwen is unfit to stand trial.
18. In the Report, the Defence Experts, in light of their examination of Mr Ongwen's mental health, address different aspects and make the following findings: (i) that '[i]n [their] considered opinion, Mr Dominic Ongwen is not criminally liable for his actions while he was in the bush';<sup>31</sup> and (ii) that certain measures could/should be taken at the detention centre to safeguard Mr Ongwen's health and safety.<sup>32</sup> Both these matters are unrelated to the issue of whether Mr Ongwen possesses the necessary capacities to meaningfully exercise his fair trial rights in the proceedings before the Court.
19. The Chamber observes in this regard that the determination of whether Mr Ongwen is criminally responsible for the crimes with which he is charged falls exclusively within the competence of the Chamber's itself. It is therefore inappropriate that the Defence Experts, who are professionals in the field of psychology and psychiatry, make (and have been requested to make<sup>33</sup>) findings on the ultimate issue of Mr Ongwen's criminal responsibility. That said, this determination provided by the Defence Experts is in any case ostensibly extraneous to the consideration of Mr Ongwen's fitness to stand trial.
20. The Defence Experts also recommend that certain measures be taken in order to ensure Mr Ongwen's well-being at the detention centre that are considered

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<sup>31</sup> Report, UGA-D26-0015-0004, page 12.

<sup>32</sup> Report, UGA-D26-0015-0004, pages 14-15.

<sup>33</sup> See the 'Terms of Reference' for D26-41 at ICC-02/04-01/15-620-Conf-AnxB.

warranted due to Mr Ongwen's current mental state.<sup>34</sup> Nonetheless, the expressed need for these measures does not lead the Defence Experts to conclude or even suggest that Mr Ongwen may be unfit to stand trial. The Defence Experts rather stress that the need for support of Mr Ongwen from individuals who are in regular contact with him 'will be more urgent during the entire trial and immediate post-trial period'.<sup>35</sup>

21. Not only does the Report not conclude that Mr Ongwen may lack the necessary capacities to meaningfully exercise his fair trial rights in the proceedings against him, but, on the contrary, it plainly reveals that Mr Ongwen is able to articulate and communicate well-structured thoughts with respect to his time with the Lord's Resistance Army ('LRA') and to provide his own account of his life in the bush, including in relation to the acts with which he is charged in the proceedings before the Court.
22. For example, the sections of the Report entitled 'Social history',<sup>36</sup> 'Mr Ongwen's life and roles within the LRA',<sup>37</sup> 'Personality',<sup>38</sup> 'Circumstances of arrest and escape',<sup>39</sup> 'Why it took long for Dominic Ongwen to leave the LRA',<sup>40</sup> 'Inside the Lord's Resistance Army',<sup>41</sup> 'The situation of Child soldiers in the LRA'<sup>42</sup> and 'Wrongfulness and Remorse'<sup>43</sup> are replete with information about broad-spectrum facts and specific episodes that Mr Ongwen himself reported to the Defence Experts that are of relevance to his time in the bush.

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<sup>34</sup> Report, UGA-D26-0015-0004, pages 14-15.

<sup>35</sup> Report, UGA-D26-0015-0004, page 15.

<sup>36</sup> Report, UGA-D26-0015-0004, pages 6-7.

<sup>37</sup> Report, UGA-D26-0015-0004, page 7.

<sup>38</sup> Report, UGA-D26-0015-0004, page 7.

<sup>39</sup> Report, UGA-D26-0015-0004, page 8.

<sup>40</sup> Report, UGA-D26-0015-0004, pages 8-9.

<sup>41</sup> Report, UGA-D26-0015-0004, page 9.

<sup>42</sup> Report, UGA-D26-0015-0004, page 9.

<sup>43</sup> Report, UGA-D26-0015-0004, pages 11-12.

23. Mr Ongwen is quoted in the Report as describing to the Defence Experts, for example, his ‘steady but rapid promotion’ within the LRA,<sup>44</sup> the fact that ‘all activities carried out in the bush were on the express orders of Joseph Kony’,<sup>45</sup> the modalities of transmission of Joseph Kony’s orders down the hierarchy,<sup>46</sup> his relationship with junior soldiers,<sup>47</sup> the training, ‘brainstorming propaganda’ and disciplinary system of child soldiers in the LRA,<sup>48</sup> the reasons why he eventually left the LRA<sup>49</sup> and his explanations of why he had not done it before.<sup>50</sup> In addition, the Report also states that, during meetings with the Experts, ‘Mr Ongwen proudly displayed a note book in which he is writing short accounts of his bush life, which he wants to publish for people to read’<sup>51</sup> and to ‘tell the world the truth about what happened’.<sup>52</sup>
24. These indications all confirm 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 Defence. In this sense, the Report, rather than suggesting that Mr Ongwen may be unfit to stand trial, all but explicitly confirms the opposite.
25. Other than the Defence and accused’s own assertions that Mr Ongwen does not understand the charges or is (or may be) unfit to stand trial – submissions not even supported by the Experts engaged by the Defence itself – 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.

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<sup>44</sup> Report, UGA-D26-0015-0004, page 7.

<sup>45</sup> Report, UGA-D26-0015-0004, page 7.

<sup>46</sup> Report, UGA-D26-0015-0004, page 9.

<sup>47</sup> Report, UGA-D26-0015-0004, pages 7-8.

<sup>48</sup> Report, UGA-D26-0015-0004, page 9.

<sup>49</sup> Report, UGA-D26-0015-0004, page 8.

<sup>50</sup> Report, UGA-D26-0015-0004, page 8.

<sup>51</sup> Report, UGA-D26-0015-0004, pages 4-5.

<sup>52</sup> Report, UGA-D26-0015-0004, page 15.

26. On the contrary, the record indicates – without the need for the Chamber to engage an expert under Rule 135 of the Rules – that Mr Ongwen has already demonstrated his capacity to understand the proceedings before the Court and meaningfully exercise his fair trial rights.<sup>53</sup> In addition to the arguments already made in this respect in the Chamber’s decision at the opening of the trial, the Chamber also notes, for instance, that certain submissions made by the Defence for the purposes of the hearing on the confirmation of charges explicitly acknowledge the input that Mr Ongwen himself has given to the preparation and conduct of his defence.<sup>54</sup> Similarly, the Chamber notes that the Defence has announced its intention to raise an alibi with respect to the charges in connection to the attack on Pajule IDP camp claiming that, at the time of the attack, Mr Ongwen was held in detention by the LRA, and more specifically by Vincent Otti.<sup>55</sup> As stated by the Prosecution in this regard, ‘more specific instructions to counsel are difficult to imagine’.<sup>56</sup> The Chamber also observes that, as conveyed by the Defence in the Request, ‘Mr Ongwen refuses to be examined by an expert retained by the Prosecution’, but ‘has consented to be examined by experts approved, appointed, instructed and paid for the Chamber’.<sup>57</sup> The Chamber agrees with the Prosecution that ‘this demonstrates [Mr Ongwen’s] ability to distinguish between the Court and the Prosecution and how his various interests and rights may be affected’.<sup>58</sup>

27. Finally, the Chamber recalls that at no point in the course of the proceedings before the Court since Mr Ongwen’s surrender in January 2015, did the Defence

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<sup>53</sup> The Chamber considers these indicators to be of relevance for the purpose of the present decision. It is noted in this regard that the Defence Experts explicitly state that Mr Ongwen ‘mental state [...] dated back from the time when he was abducted’ (Report, UGA-D26-0015-0004, page 10) and do not mention any worsening or deterioration of any such disorder which may have occurred only recently. Likewise the Defence does not argue that Mr Ongwen has only recently become unfit to stand trial.

<sup>54</sup> See e.g. Defence Brief for the Confirmation of Charges Hearing, ICC-02/04-01/15-404-Conf, para. 98.

<sup>55</sup> Defence Notification Pursuant to Rule 79(2) of the Rules of Procedure and Evidence, 9 August 2016, ICC-02/04-01/15-519-Red.

<sup>56</sup> Response, ICC-02/04-01/15-624-Conf, para. 23.

<sup>57</sup> Request, ICC-02/04-01/15-620-Red, para. 66.

<sup>58</sup> Response, ICC-02/04-01/15-624-Conf, para 20.

raise any argument to the effect that Mr Ongwen was having difficulties in understanding the proceedings against him or lacking the mental capacities to participate in the preparation of his defence. On the contrary, the Defence itself has frequently made arguments concerning the importance of (and presupposing) Mr Ongwen's own contribution to the preparation of his defence.<sup>59</sup> The Chamber notes in this regard that the Defence does not claim that Mr Ongwen, while initially fit to stand trial, has in the meantime become unfit at a certain point in time in the course of the present proceedings. In the Chamber's view, the fact that the Defence would not have realised at any time before the eve of the trial that Mr Ongwen lacks the mental capacities to understand the charges and the course, conduct and purpose of the proceedings before the Court and instruct counsel in the preparation of his defence, further militates against the conclusion that Mr Ongwen may be unfit to stand trial as now claimed by the Defence.

28. In light of the above considerations, the Chamber concludes that there exists no available information, other than the Defence's own unsubstantiated last-minute claim, which indicates that Mr Ongwen may lack the basic capacities to meaningfully exercise his fair trial rights in the proceedings before the Court and

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<sup>59</sup> For example, on 28 November 2016 (*i.e.* eight days before the commencement of the trial), the Defence requested leave to appeal two Chamber's decisions allowing the introduction of a number of prior recorded testimonies under Rule 68(2)(b) of the Rules which had not yet been translated in the language that Mr Ongwen fully understands and speaks, on the ground that 'not having these documents translated detracts from Mr Ongwen's ability to review documents during non-business hours, and severely restricts his ability to help prepare his defence with those charged with advising him' (Defence Request for Leave to Appeal Decisions ICC-02/04-01/15-596-Conf and ICC-02/04-01/15-600, ICC-02/04-01/15-609). On the same day, the Defence also requested that the oral testimony of Witness P-142 be postponed because Mr Ongwen could not read the transcripts of one the witness' interviews with the Prosecution due to a malfunctioning of his computer at the detention centre (Defence Response to "Prosecution's Request to Add Witness Transcripts and Seven Additional Documents to its List of Evidence", ICC-02/04-01/15-608, paras 5 and 16). Analogous arguments to the effect of Mr Ongwen's participation in the preparation of the Defence were made by the Defence on several occasions throughout the proceedings. As a further example, the Chamber notes that, in June 2016, the Defence argued that, because of the necessity of 'his personal and on-site involvement', Mr Ongwen should be granted interim release pending trial in order to enable him to 'participate actively in his defence', 'aid Defence investigators on the field' and be able 'to talk and visit with his attorneys and any day and at any time he is needed' and 'travel occasionally with his investigators on missions so his attorneys can better prepare his case' (Defence Request for Conditional Release, or in the Alternative, the Restoration of Mr Ongwen's Communication Privileges, 13 June 2016, ICC-02/04-01/15-461, paras 38-39).

be therefore unfit to stand trial. Rather, the available information demonstrates Mr Ongwen's fitness to stand trial. In these circumstances, a medical examination of Mr Ongwen under Rule 135 of the Rules to assess his fitness to stand trial is unwarranted.

#### IV. Related issues

29. That said, the Chamber observes that within the terms of Rule 135 of the Rules, the Chamber may order a medical examination of the accused not only for the purposes of its determination under Article 64(8)(a) of the Statute, but also for 'any other reason'.<sup>60</sup>
30. The Chamber notes that the Defence Experts conclude that Mr Ongwen's predominant present mental state 'is characterized by [REDACTED]'.<sup>61</sup> Irrespective of the issue of Mr Ongwen's fitness to stand trial, these findings are concerning. More detailed information in this respect is therefore required in order to properly manage Mr Ongwen's mental health and safety at the detention centre.
31. To this purpose, the Chamber considers it appropriate that a targeted psychiatric examination of Mr Ongwen be conducted by an expert appointed by the Chamber under Rule 135 of the Rules. The purpose of this examination is twofold: (i) to make a diagnosis as to any mental condition or disorder that Mr Ongwen may suffer at the present time; and (ii) to provide specific recommendations on any necessary measure/treatment that may be required to address any such condition or disorder at the detention centre.
32. The Chamber is aware that, in accordance with Regulation 103 of the Regulations, the responsibility to make all necessary arrangements to protect the

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<sup>60</sup> Rule 135(2) mandates that the Chamber 'shall place its reasons for any such order on the record'.

<sup>61</sup> Report, UGA-D26-0015-0004, page 10.



health and safety of detained persons lies with the Registrar,<sup>62</sup> including in case of ‘mentally ill persons and those who suffer from serious psychiatric conditions’.<sup>63</sup> In this sense, any expert recommendations following the psychiatric examination of Mr Ongwen will be addressed primarily to the Registrar. Nonetheless, considering that the report of the appointed expert might have an impact on the proceedings and that the Chamber bears the ultimate responsibility to ensure that the proceedings before it are fair and expeditious, the expert’s report shall be placed on the record of the case. This is for the Chamber to consider whether any follow-up measure within its competence may be warranted.<sup>64</sup>

33. The Chamber notes the Registry’s recommendation that, should the Chamber intend to order an examination of Mr Ongwen, Mr Joop T.V.M. de Jong be appointed to this purpose.<sup>65</sup> Mr de Jong is an expert in the field of psychiatry, psychotherapy and epidemiology.<sup>66</sup> The Registry makes this recommendation on the grounds of: (i) the positions expressed by the parties during the consultative process;<sup>67</sup> (ii) the fact that the appointment of Mr de Jong ‘makes practical and logistical sense’ due to his status as Dutch medical professional and geographic proximity to the Court;<sup>68</sup> and (iii) the fact that Mr de Jong’s working language is English (rather than French) which would allow for direct interpretation from Acholi (*i.e.* Mr Ongwen’s mother language) of Mr Ongwen’s statements, without

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<sup>62</sup> Regulation 103(1) of the Regulations.

<sup>63</sup> Regulation 103(6) of the Regulations.

<sup>64</sup> For example, under Regulation 103(6) of the Regulations.

<sup>65</sup> Registry’s Recommendations, ICC-02/04-01/15-633, paras 17 and 20.

<sup>66</sup> Annex A to the Registry’s Recommendations, ICC-02/04-01/15-633-AnxA.

<sup>67</sup> Registry’s Recommendations, ICC-02/04-01/15-633, para. 17. More specifically, the Registry submits in this regard that the ‘the Prosecution has suggested Mr Koop T.V.M. de Jong as an ideal candidate for appointment’ and that ‘[t]he Defence does not oppose this suggestion’ (Registry’s Recommendations, ICC-02/04-01/15-633, para. 11).

<sup>68</sup> Registry’s Recommendations, ICC-02/04-01/15-633, para. 17.

the risk of the essence of such statements being diluted in the interpretation from Acholi to English and then from English to French.<sup>69</sup>

34. In light of the Registry's submission, the Chamber accepts the recommendation to appoint Mr de Jong as the expert to conduct the ordered examination of Mr Ongwen, also taking into account that neither the Prosecution nor the Defence opposes to his appointment.<sup>70</sup>

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

**REJECTS** the Defence request to order a psychiatric and/or psychological examination of Dominic Ongwen with a view to assessing his fitness to stand trial;

**ORDERS** that a psychiatric examination of Dominic Ongwen be conducted with a view to: (i) making a diagnosis as to any mental condition or disorder that Dominic Ongwen may suffer at the present time; and (ii) providing specific recommendations on any necessary measure/treatment that may be required to address any such condition or disorder at the detention centre;

**APPOINTS** Mr Joop T.V.M. de Jong to conduct the psychiatric examination of Dominic Ongwen ordered in the present decision; and


**ORDERS** the Registrar to make the necessary arrangements to facilitate the conduct of such examination.

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<sup>69</sup> Registry's Recommendations, ICC-02/04-01/15-633, para. 19.


<sup>70</sup> Prosecution submissions on Registry's recommendations on psychological and psychiatric experts, ICC-02/04-01/15-633, ICC-02/04-01/15-634, para. 14; Defence Response to ICC-02/04-01/15-633, ICC-02/04-01/15-635, para. 16.

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



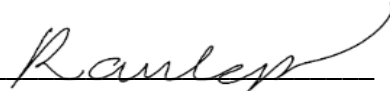
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**Judge Bertram Schmitt**  
**Presiding Judge**



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**Judge Péter Kovács**



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**Judge Raul C. Pangalangan**

Dated 16 December 2016

At The Hague, The Netherlands