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No.: ICC-02/04-01/15
Date: 12 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

**Decision on Defence Request for Leave to Appeal the Decision Ordering a
Medical Examination of the Accused**

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

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Other

Trial Chamber IX ('Chamber') of the International Criminal Court ('Court') in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Article 82(1)(d) of the Rome Statute ('Statute'), issues the following 'Decision on Defence Request for Leave to Appeal the Decision Ordering a Medical Examination of the Accused'.

I. Background and Submissions

1. On 5 December 2016, the defence for Mr Ongwen ('Defence') requested, *inter alia*, that the Chamber order a psychological and/or psychiatric examination of Mr Ongwen in order to determine his fitness to stand trial ('Original Request').¹ In support, it relied on a preliminary report of two experts instructed by the Defence.² The final version of this report was subsequently filed in the case record ('Expert Report').³
2. On 16 December 2016, the Chamber issued a decision rejecting the Original Request, but nevertheless ordered a psychiatric examination of the accused with a view to diagnose any mental condition or disorder that the accused may suffer and make specific recommendations on necessary measures or treatments of such condition or disorder ('Impugned Decision').⁴
3. On 27 December 2016, the Defence sought leave to appeal the Impugned Decision ('Request')⁵ for the following issue ('Issue'):

*'the appropriate standard and evaluation of proof applicable in determining an accused's fitness to stand trial.'*⁶

¹ Defence Request for a Stay of the Proceedings and Examinations Pursuant to Rule 135 of the Rules of Procedure and Evidence, 5 December 2016, ICC-02/04-01/15-620-Conf, paras 1 and 80, with public annex A and confidential annex B. A public redacted version of the request and annex B were filed on the same day.

² Original Request, ICC-02/04-01/15-620-Red, para. 41.

³ UGA-D26-0015-0004.

⁴ Decision on the Defence Request to Order a Medical Examination of Dominic Ongwen, ICC-02/04-01/15-637-Conf. A public redacted version was filed on the same day.

⁵ 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), ICC-02/04-01/15-644-Conf. A public redacted version was filed on 3 January 2017.

4. The Defence argues that the Issue arises from the Impugned Decision,⁷ that it significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial,⁸ and that an immediate resolution by the Appeals Chamber may materially advance the proceedings.⁹

5. It submits that the Chamber used a balance of probabilities standard of proof in the Impugned Decision,¹⁰ that ‘the Chamber may not have applied the appropriate facts to the standard,’¹¹ and that the Chamber ‘may have inadvertently misconstrued the nature of the Defence expert report and request’.¹²

6. On 3 January 2017, the Office of the Prosecutor filed its response, seeking that the Request be rejected.¹³

II. Analysis

7. The Chamber recalls the applicable law relating to Article 82(1)(d) of the Statute as set out in previous decisions.¹⁴

8. In respect of the first part of the Issue alleged by the Defence, the appropriate standard for the determination of fitness to stand trial, the Chamber notes that the Defence submits that it should be a ‘balance of probabilities’

⁶ Request, ICC-02/04-01/15-644-Red, para. 2.

⁷ Request, ICC-02/04-01/15-644-Red, paras 13-26.

⁸ Request, ICC-02/04-01/15-644-Red, paras 27-30.

⁹ Request, ICC-02/04-01/15-644-Red, paras 31-32.

¹⁰ Request, ICC-02/04-01/15-644-Red, para. 13.

¹¹ Request, ICC-02/04-01/15-644-Red, para. 15.

¹² Request, ICC-02/04-01/15-644-Red, para. 17.

¹³ 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, ICC-02/04-01/15-468-Conf. A public redacted version was filed on the same day.

¹⁴ *See*, Decision on Defence Request for Leave to Appeal Decision ICC-02/04-01/15-521, 2 September 2016, ICC-02/04-01/15-529, paras 4-8; Decision on Defence Request for Leave to Appeal the Decision on Article 56 Evidence, 9 September 2016, ICC-02/04-01/15-535, para. 7.

standard.¹⁵ However, it also states in the Request that ‘the Trial Chamber’s survey and approval of jurisprudence indicated that [...] the standard of proof is the balance of probabilities.’¹⁶ Since the standard the Defence assumes to be the appropriate one for the determination of the fitness to stand for trial and the one it considers the Chamber applied are the same, the Chamber finds that – irrespective of the correctness of the Defence’s assertion – the first part of the Issue is not substantiated. Consequently, there is no issue arising from the Impugned Decision as the Defence asserts.

9. In respect of the second part of the Issue alleged by the Defence, the applicable evaluation of proof, the Chamber notes that the Defence asserts that the Impugned Decision ‘misconstrued’ the Original Request and Expert Report, which might have impacted the evaluation of the evidence. The Defence argues that the Impugned Decision erred in finding that the Defence stated in its Original Request that the experts indicated in their report that Mr Ongwen is not fit to stand trial.¹⁷ However, the Chamber notes that the Original Request actually states twice that the ‘Experts [...] have determined that Mr Ongwen [...] is not fit to stand trial’.¹⁸ There is no ambiguity in these submissions, and the Defence cannot dissociate itself from its earlier assertions by simply claiming that the Chamber misinterpreted the Original Request. Thus, it is clear that the Defence’s line of argument is a mere disagreement with the Chamber’s finding in the Impugned Decision. As the Appeals Chamber previously stated, such general disagreement does not constitute an appealable issue within the meaning of Article 82(1)(d) of the Statute.

10. This overall disagreement with the outcome of the Impugned Decision is best summarised in the Defence’s submission that the ‘indicators available could

¹⁵ Request, ICC-02/04-01/15-644-Red, para. 26.

¹⁶ Request, ICC-02/04-01/15-644-Red, para. 13.

¹⁷ Request, ICC-02/04-01/15-644-Red, para. 17.

¹⁸ Original Request, ICC-02/04-01/15-620-Red, paras 76 and 78.

lead to an order directing the appointment of a medical professional to examine Mr Ongwen to determine his fitness to stand trial'.¹⁹ Accordingly, the Request does not fulfil the requirements of Article 82(1)(d) of the Statute.

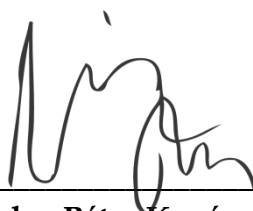
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY:

REJECTS the Request.

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



**Judge Bertram Schmitt
Presiding Judge**



Judge Péter Kovács



Judge Raul C. Pangalangan

Dated 12 January 2017

At The Hague, The Netherlands

¹⁹ Request, ICC-02/04-01/15-644-Red, para. 26.