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Pénale
Internationale**



**International
Criminal
Court**

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Date: 14 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 submissions on Registry's recommendations on psychological and
psychiatric experts, ICC-02/04/01/15-633**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the Regulations of the Court to:

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Introduction

1. The Prosecution hereby files its submissions in response to the Registry's recommendations on psychological and psychiatric experts pursuant to the Trial Chamber's oral order of 6 December 2016 ("the Registry Recommendations").¹
2. The Prosecution supports the appointment of Dr Joop de Jong as an expert to assess the Accused's continued fitness to stand trial. If the Chamber is inclined to appoint additional experts, the Prosecution recommends that the Chamber choose an expert with demonstrated experience in forensic examination and as an expert witness, such as Dr Adelheid Kastner or Dr Gillian Mezey. Finally, the Prosecution will meet this week with the Defence to discuss possible joint terms of reference, as suggested in the Registry Recommendations.

Background

3. On 6 December 2016, the Trial Chamber issued an oral decision in which it stated "the Chamber may order a psychological and psychiatric examination with a view to assessing Mr Ongwen's continued fitness to stand trial. The Registry, in consultation with the parties, must provide recommendations on experts to provide these examinations by Tuesday, 13 December 2016. By this same date, the parties must make their submissions on the Registry's recommendations."²
4. The Prosecution met with representatives of the Registry on 8 December 2016, at which time the Prosecution proposed three additional experts for the Registry's consideration, in addition to those individuals already on the Registry's list of available experts. The Prosecution also indicated its preliminary view that three experts already on the list appeared to be relevantly qualified.

¹ [ICC-02/04-01/15-633](#).

² [ICC-02/04-01/15-T-26-ENG ET WT 06-12-2016](#), p. 7; *see also* Email from the Trial Chamber dated 13 December 2016 at 10:11hrs (extending the deadline for Parties' submissions until 14 December 2016 at 16:00hrs).

5. The Registry Recommendations were filed on 13 December 2016.

Submissions on the Applicable Legal Standard

6. The selection of an expert or experts to examine the Accused, with a view to assessing his continued fitness to stand trial, should be informed by the applicable legal standard.
7. Pursuant to article 64 of the Rome Statute (“the Statute”) and rule 135 of the Rules of Procedure and Evidence (“the Rules”), the Chamber must satisfy itself that the Accused understands the nature of the charges against him. This assessment necessarily includes a determination that the Accused has the capacity to exercise his procedural rights, including with the assistance of his counsel, as enumerated under article 67(1) of the Statute.³
8. Pre-Trial Chamber I and Trial Chamber I, both in the *Gbagbo* case, have defined fitness to stand trial as the absence of any medical condition that would prevent an accused person from meaningfully exercising his fair trial rights.⁴ As Pre-Trial Chamber I emphasised, “the question before the Chamber is not merely the existence of particular medical conditions, or what their sources are, but primarily whether these medical conditions affect the capacities of the person concerned to meaningfully exercise his or her fair trial rights.”⁵
9. In order to be considered fit to stand trial, the Accused must have the capacity to:
 - a. understand the purpose, including the consequences, of the proceedings;
 - b. understand the course of the proceedings, including the nature and significance of pleading to the charges;

³ [ICC-02/11-01/15-349](#), para. 32.

⁴ [ICC-02/11-01/15-349](#), para. 33.

⁵ [ICC-02/11-01/11-286-Red](#), para. 51.

- c. understand the evidence;
- d. testify or give an unsworn statement (should the Accused so choose);
- and
- e. instruct counsel in the preparation and conduct of his Defence.⁶

10. Fitness to stand trial does not require that an accused's "understanding" of the charges, or his exercise of rights, be as sophisticated as that of the lawyers whose job it is to assist him.⁷ Trial Chamber I, in the *Gbagbo* case, was guided by the notion that an accused's ability to meaningfully participate in his trial should be assessed in a reasonable and common sense manner, and that meaningful participation in the trial requires a "broad understanding" of the trial process with a comprehension of the "general thrust" of what is said in court.⁸
11. The ICTY Appeals Chamber in *Strugar* similarly rejected a suggestion that the test for fitness should require an accused person to "fully comprehend the course of the proceedings in the trial, so as to make a proper defense, and to comprehend details of the evidence."⁹ The *Strugar* Appeals Chamber reviewed the practice of national jurisdictions from both civil law and common law traditions, as well as that of international jurisdictions including the post-WWII International Military Tribunals and the European Court of Human Rights, before concluding that a more modest understanding of "meaningful participation" was appropriate.¹⁰ It noted, for example, that the European Convention on Human Rights requires that an accused person have, *inter alia*, a "broad understanding of the nature of the trial process", an ability "to understand the general thrust of what is said in court", and a basic ability to assist his or her counsel in putting forward a

⁶ [ICC-02/11-01/15-349](#), para. 35.

⁷ [ICC-02/11-01/15-349](#), para. 34-36; see also *Prosecutor v. Strugar*, IT-01-42-A, Judgment, 17 July 2008 ("Strugar Appeal Judgment"), para. 60 (hyperlink last accessed 14 December 2016 at 14:25).

⁸ [ICC-02/11-01/15-349](#), para. 36.

⁹ *Strugar Appeal Judgment*, para. 60.

¹⁰ *Strugar Appeal Judgment*, para. 45-55, 60.

defence.¹¹ It also noted that the European Court of Human Rights has specifically underlined that an accused need not be “capable of understanding every point of law or evidential detail.”¹² The *Strugar* Appeals Chamber also noted the standard in some national jurisdictions that an accused need have only “a ‘limited cognitive capacity’ to understand the trial process and to communicate with counsel, and not a capacity to exercise ‘analytical reasoning.’”¹³

Submissions on the Registry’s Recommendations

12. The Prosecution agrees with the suggestion in the Registry Recommendations that only experts with both relevant expertise and availability should be considered for selection.¹⁴ The Prosecution would add that “relevant expertise” in these circumstances is not merely experience in psychiatry or psychology, but experience in forensic examinations within those disciplines, and ideally experience dealing with the specific issue of fitness to stand trial.
13. The purpose of an examination under rule 135(4) is not, primarily, to prescribe treatment, but rather to determine whether the accused suffers from a medical condition and, most importantly, whether such condition affects his ability to meaningfully participate in his trial. This is a specialised and highly specific inquiry which requires an understanding, on the part of the expert, of what constitutes meaningful participation by an accused person in his or her criminal trial. It also requires awareness of, and sensitivity to, the special circumstances of an examination conducted expressly for judicial or litigation purposes. In such

¹¹ [Strugar Appeal Judgment](#), para. 47 (citing *S.C. v. the United Kingdom*, no. 60958/00, para. 29, ECHR 2004-IV).

¹² *Id.*

¹³ [Strugar Appeal Judgment](#), para. 52 (citing *R. v. Whittle*, [1994] 2 S.C.R. 914, p. 917 (U.K.)). The Trial Chamber in the *Strugar* case similarly noted national case law distinguishing fitness to stand trial from “sufficient capacity to make an able defence, or to act wisely or in his own best interest.” *Prosecutor v. Strugar*, IT-01-42-T, Decision re the Defence motion to terminate proceedings, 26 May 2004 (“[Strugar Trial Decision](#)”), para. 34 (citing *Reg. v. Robertson*, (1968) 1 WLR 1767; *Reg. v. Berry*, (1997) 66 Cr App R 156 at 158) (hyperlink last accessed 14 December 2016 at 14:25).

¹⁴ [ICC-02/04-01/15-633](#), para. 9-10.

circumstances, the subject (the accused person) knows that the results of the examination may impact upon his case, and thus upon his freedom and his future, and that knowledge inevitably creates pressures and incentives which can affect the expert's work. For these reasons at least, the Prosecution urges the Chamber to select an expert with demonstrated forensic experience.

14. Consistent with that position, and assuming the Trial Chamber determines that appointment of an expert is appropriate, the Prosecution supports the selection of Dr Joop de Jong, either as a single expert or as a lead expert in a panel of experts. Dr de Jong is a very experienced forensic psychiatrist, with experience working in Uganda and elsewhere on the African continent, including with victims of conflict-related violence. Moreover, as noted by the Registry, Dr de Jong is based in the Netherlands, with all of the attendant practical and logistical benefits. Particularly as his selection is agreed by the Defence, Dr de Jong appears to be the strongest candidate available.

15. Based on the information available to the Prosecution, Dr de Jong appears qualified to undertake the proposed examination alone. However, if the Chamber concludes that a "second opinion" from another appropriately qualified expert would be of value, the Prosecution recommends the appointment of one (or two) of the following individuals, ranked by preference, for reasons stated in the following paragraphs:

- 1) Adelheid Kastner or Gillian Mezey;
- 2) John Yuille;
- 3) Gerard Niveau or Lutz Gretenkord.

16. If the Chamber is inclined to appoint another expert to work together with Dr de Jong, the Prosecution urges the Chamber to consider appointment of either Adelheid Kastner or Gillian Mezey, both of whom have been included on Annex

A to the Registry Recommendations at the Prosecution's suggestion. Dr Kastner, of Austria, is a specialist in forensic psychiatry who has testified before criminal courts on hundreds of occasions, including in major criminal cases like this one. Dr Mezey, of the United Kingdom, is also a specialist in forensic psychiatry with considerable experience as an expert witness in criminal cases. Either one of these highly experienced forensic practitioners would provide valuable knowledge and experience to complement Dr de Jong. Both are also based in Europe, which should facilitate their travel to The Hague to conduct an in-person examination of the Accused.

17. If the Chamber is not inclined to select Dr Kastner or Dr Mezey, the Prosecution would support the appointment of Dr John Yuille, of Canada, whose name was proposed by the Defence. Dr Yuille testified as an expert witness (called by the Prosecution) in the *Ntaganda* case, on an issue separate and distinct from fitness to stand trial. He is a forensic psychologist with considerable experience, including testifying in numerous legal proceedings on behalf of the prosecution and the defence. The Prosecution is not currently aware if Dr Yuille has performed fitness examinations. However, based on the information available to the Prosecution, and subject to his availability, Dr Yuille would appear to have the necessary qualifications.

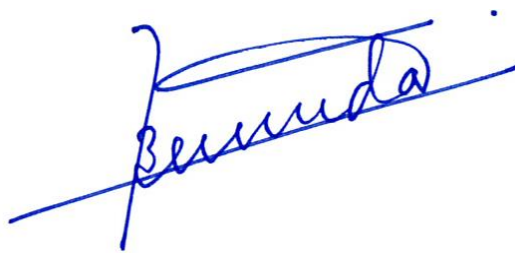
18. Finally, if the Chamber is not inclined to select Dr Kastner, Dr Mezey, or Dr Yuille, Annex A to the Registry's Recommendations includes the names of others who appear to have some relevant forensic experience. That was the basis for the Prosecution's indication, during consultation with the Registry, that it would not oppose the appointment of Gerard Niveau or Lutz Gretenkord, each of whom appears to have experience in conducting forensic psychiatric evaluations, although the Prosecution has not reviewed their CVs or other detailed information about their practice and experience. Chris Richardson, an Australian

forensic psychologist proposed by the Defence, also appears (based on a publicly available website) to have experience in forensic psychology and to have served as an expert witness, although the Prosecution has not been able to review her CV or other detailed information about her practice or experience.

19. Finally, the Prosecution notes that one potential expert referenced in the Registry Recommendations does not appear to have the relevant qualifications to conduct a fitness examination of the Accused. Based only on the publicly-available information reviewed by the Prosecution, Birgitte Beelen of the Netherlands does not appear to have any experience conducting forensic examinations or assessing the fitness of accused persons to stand trial. If that is indeed the case, the Chamber should pick one of the other available experts with more relevant experience.

Submissions regarding Terms of Reference

20. The Prosecution notes the Registry's recommendation that the Parties submit a joint mission statement, or joint terms of reference, for any expert or experts selected by the Chamber. The Prosecution and the Defence have scheduled a meeting for 15 December 2016 to exchange views on the matter.



Fatou Bensouda
Prosecutor

Dated 14th day of December 2016
At The Hague, The Netherlands