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**International
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Court**

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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

**Prosecution's Response to "Defence Request for Leave to Appeal Decision
on Ongwen Defence request in light of Decision 1443"**

Source: The 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 Defence Request for Leave to Appeal Decision on “Ongwen Defence request in light of Decision 1443” (“Defence Request”) should be denied because it does not identify any appealable issue. The issues proposed for certification do not arise from the Trial Chamber’s Email Decision of 12 February 2019 (“Impugned Email Decision”). The Defence Request misreads the Impugned Email Decision and merely disagrees with the Chamber’s reasoning. Furthermore, the Defence Request does not meet the two remaining cumulative requirements under article 82(1)(d) of the Rome Statute.

Relevant procedural background

2. On 11 February 2019, the Chamber rendered a decision granting the Prosecution’s Request for Disclosure of Material Provided to Defence Expert¹ and ordered the Defence to disclose the said material within three days.²

3. On the same day, the Defence requested the Chamber to suspend the deadline for disclosure to permit the Defence to seek leave to appeal Decision 1443.³

4. On 12 February 2019, the Chamber issued the Impugned Email Decision denying the Defence’s request and confirmed that the disclosure deadline set by Decision 1443 remained applicable.⁴

¹ ICC-02/04-01/15-1428 (“Prosecution Disclosure Request”).

² ICC-02/04-01/15-1443 (“Decision 1443”), para. 12.

³ The Defence’s request was sent on 11 February 2019 at 19:53 hrs via email (“Defence Requesting Email”).

⁴ Trial Chamber IX Communications sent on 12 February 2019 at 10:25 hrs via email. Both, the Defence Requesting Email and the Impugned Email Decision were confidentially annexed to the Defence Request for Leave to Appeal Decision on “Ongwen Defence request in light of Decision 1443”.

5. On 12 February 2019, the Defence communicated to the Prosecution, the Chamber and the Legal Representatives via email the material provided to D-0133 in accordance with Decision 1443.⁵

6. On 18 February 2019, the Defence filed the Defence Request for Leave to Appeal Decision on “Ongwen Defence request in light of Decision 1443”.⁶

Submissions

No appealable issue is identified

7. The Defence misreads the Impugned Email Decision and fails to identify an appealable issue genuinely arising from it. The two issues framed by the Defence are:

(i) Whether the standard of “exceptional basis” applied by the Trial Chamber in rejecting the Defence request to suspend the disclosure order is correct (“First Issue”).

(ii) Whether, or to what extent, the Trial Chamber has a discretionary power to enforce its order, before allowing the accused to exhaust its statutory right to request for leave to appeal the order under Article 82(1)(d), or possibly seeks its right to an effective appellate remedy against the order before the Appeals Chamber (“Second Issue”).⁷

8. To demonstrate that the First Issue is appealable, the Defence mischaracterises the Impugned Email Decision. The Chamber denied granting the suspensive effect request because the Defence had not specified the legal basis for it, nor properly motivated it.⁸ The Defence itself admits that it could have specified the legal basis for

⁵ Defence Email of 12 February 2019, at 18:34 hrs.

⁶ ICC-02/04-01/15-1451 (“Defence Request”).

⁷ Defence Request, para. 10.

⁸ Impugned Email Decision, second paragraph.

its request⁹ but chose not to do so. Nowhere in the Impugned Email Decision does the Chamber require the Defence to satisfy the “exceptional circumstances” test under article 81(3)(c)(i) of the Statute as the Defence wrongly alleges.¹⁰ By mentioning the notion of “exceptional *basis*” the Chamber was evidently not referencing article 81(3)(c)(i), but was merely pointing out that the disclosure order in Decision 1443 does not warrant the exceptional step of suspensive effect.¹¹

9. Additionally, there is a distinction between a “proper motivation” of the Defence’s suspensive effect request and Defence “intention” to seek leave to appeal Decision 1443. While the Defence’s intention to appeal Decision 1443 is clear, the Impugned Email Decision’s reference to a “proper motivation” was concerned with why the material provided to the Defence expert warranted an exceptional step which would enable the Chamber to grant suspensive effect of the disclosure deadline. Thus, the First Issue is based on the Defence’s misunderstanding of the Impugned Email Decision and is thus not an appealable issue.

10. In relation to the Second Issue, although the general thrust of the Defence complaint is clear, it does not arise from the Impugned Email Decision. The Impugned Email Decision dealt with the analysis of the “exceptional basis” standard that warrants the suspensive effect of the implementation of Decision 1443. The Chamber, in absence of any specific legal basis and proper motivations in the Defence Requesting Email demonstrating the existence of an “exceptional basis”, found that there are no issues of security or questions of central consequence if the disclosure order is implemented within three-day deadline.¹² The Defence’s reiteration of the arguments already stated in the Defence Requesting Email¹³

⁹ Defence Request, para. 18.

¹⁰ Defence Request, paras. 13, 17 and 18.

¹¹ Impugned Email Decision (“[I]rrespective of the possibility to grant such request on an exceptional basis, the Chamber is of the view that decision 1443 is not of the nature to warrant such an exceptional step”).

¹² Impugned Decision.

¹³ Defence Request, paras. 14-15.

demonstrates no more than a mere disagreement with the Chamber's assessment of an "exceptional circumstance". These arguments result from the Defence's misinterpretation of the scope of the Impugned Email Decision. The Prosecution notes that the exact issue has also been addressed by the Defence in the Defence Request for Leave to Appeal "Decision on Prosecution Request for Disclosure of Material Provided to Defence Expert".¹⁴ While the Defence copies and pastes the exact arguments¹⁵ from one to another decision, the Second Issue does not arise from the Impugned Email Decision and, therefore, is misplaced in the current Defence Request.

11. In conclusion, the Defence's proposed issues do not constitute an appealable issue. Given that the Article 82(1)(d) requirements are cumulative, and since failure to fulfil one of the requirements is fatal to an application for leave to appeal,¹⁶ the Defence Request should be rejected on this basis alone.

The remaining article 82(1)(d) criteria are not met

12. Even if any of the two issues arose from the Impugned Email Decision, they do not meet the remaining two cumulative requirements for an interlocutory appeal under article 82(1)(d) of the Statute. They would not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, nor would an immediate resolution by the Appeals Chamber materially advance the proceedings.

13. First, the issues proposed for certification would not "significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial".¹⁷ The Defence requested for the "suspensive effect" of the disclosure deadline imposed by Decision 1443 but provided no reasons as to why the disclosure of material in

¹⁴ ICC-02/04-01/15-1453.

¹⁵ See ICC-02/04-01/15-1453, paras. 27, 28, 29, 30, 31, 32, 33, 34, 35 and 39.

¹⁶ ICC-01/05-01/08-3273, para. 8; ICC-02/11-01/15-117, para. 26; ICC-02/11-01/15-132, para. 5.

¹⁷ Rome Statute, art. 82(1)(d).

question warrants an “exceptional basis” or an “extraordinary step”¹⁸ to enable the Chamber to decide on the Defence Requesting Email. By not motivating both its request for suspensive affect, and now the Defence Request, the Defence fails to demonstrate that a fair and expeditious trial would be affected. Moreover, the Defence speculated at the time of the Defence Request was filed that the material in question will be used by the Prosecution during the cross-examination of D-0133 and alleged that “if” the Appeals Chamber “were to find” that the Decision constituted “multiple errors”, the jeopardy of excluding parts of D-0133’s testimony is such that the outcome of the trial is significantly affected by the two issues raised.¹⁹ These assertions are unsupported and speculative.

14. Second, immediate resolution by the Appeals Chamber of the issues proposed for appeal would not “materially advance the proceedings”.²⁰ The Chamber makes very clear that the scope of the Impugned Email Decision is of limited scope, and thus rejected suspensive effect for disclosure ordered in relation to the material provided to D-0133.²¹ The Defence has since implemented the disclosure on 12 February 2019. Therefore, appellate intervention in the circumstances would delay rather than move the proceedings forward. The likely impact of an interlocutory appeal is, if anything, quite the opposite.

¹⁸ The requirements named by the Chamber in its Impugned Email Decision.

¹⁹ The Defence Request, paras. 23-24.

²⁰ Rome Statute, art. 82(1)(d).

²¹ Impugned Email Decision.

Conclusion

15. For the reasons set out above, the Defence Request for Leave to Appeal Decision on “Ongwen Defence request in light of Decision 1443” should be rejected.



Fatou Bensouda, Prosecutor

Dated this 22nd day of February 2019
At The Hague, the Netherlands