

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/11-01/11

Date: 16 April 2012

PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernandez de Gurmendi, Presiding Judge
Judge Hans-Peter Kaul
Judge Christine Van den Wyngaert

**SITUATION IN LIBYA
IN THE CASE OF
THE PROSECUTOR *v.*
*SAIF AL-ISLAM GADDAFI and ABDULLAH AL-SENUSSI***

Public and Redacted

**Application on behalf of the Government of Libya for leave to reply to the
'Response to the "Government of Libya's application for leave to appeal the
Decision regarding the second request by the Government of Libya for
postponement of the surrender of Saif Al-Islam Gaddafi"'**

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

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(Participation/Reparation)**

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**Victims Participation and Reparations
Section**

Other

Introduction

1. Pursuant to regulations 24(5), 28 and 65 of the Regulations of Court, the Government of Libya files this Application for leave to reply to the 'Response to the "Government of Libya's application for leave to appeal the Decision regarding the second request by the Government of Libya for postponement of the surrender of Saif Al-Islam Gaddafi"' ("the OPCD Response") filed on 12 April 2012.
2. Leave to reply is respectfully sought to respond to the several erroneous statements of both law and fact contained in the OPCD Response.

Submissions

(A) The OPCD is wrong to suggest that Libya has no standing to file an appeal under article 82(1)(d)

3. In its Response, the OPCD states that the Libyan Government's Request for leave to appeal pursuant to article 82(1)(d) of the ICC Statute is "irreceivable" because (a) Libya "cannot be considered a party to the present proceedings" and (b) the Impugned Decision which is the subject of the application for leave to appeal does "not relate to the conduct of the proceedings before the ICC".¹ This submission is manifestly wrong for two reasons as set forth below.
4. First, in other interlocutory appellate proceedings the Appeals Chamber has not interpreted article 82 of the Statute restrictively such that State representatives are excluded from the term "party"² and thus denied an

¹ OPCD Response, paragraphs 14-22.

² Decision on the admissibility of the "Appeal of the Government of Kenya against the 'Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence'", 10 August 2011, ICC-01/09-78.

opportunity to be heard.

5. Second, it is manifestly wrong to suggest that the Impugned Decision does not relate to proceedings before the ICC. The issue under appeal arising from the Impugned Decision relates to the surrender of Mr Gaddafi in advance of the determination of an admissibility challenge brought by the Libyan Government. There are therefore two types of ICC proceedings in play in the Impugned Decision – cooperation proceedings and admissibility proceedings. Contrary to the approach of the OPCD, there is no need for the Impugned Decision to relate to the “outcome of the trial”. Such an interpretation would make redundant the word “or” in article 82 (“a decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial”).
6. The OPCD in effect seeks to exclude States from proceedings where fundamental issues of both complementarity and cooperation under the Statute are involved. This argument has particularly far-reaching consequences where, as in the case of Libya, a State is both willing and able to investigate and prosecute, and where national trials of relevant persons are of paramount importance to post-conflict judicial capacity-building, national reconciliation, and the rights and demands of victims. The OPCD’s exclusionary approach would deny an essential “party” an opportunity to be heard, occasion a miscarriage of justice, and bring the proceedings into disrepute.
7. It is respectfully submitted therefore that the Libyan Government plainly has standing to file an appeal under article 82(1)(d) in relation to the matters in issue.

(B) The OPCD is wrong to suggest that the Libyan authorities have failed to comply with the criteria under article 82(1)(d)

8. Contrary to the submissions of the OPCD,³ the Libyan Government maintains that resolution of the issues on appeal will both enhance the expeditiousness of the proceedings and materially advance the proceedings.
9. It will enhance the expedition of the proceedings because in the event that the Libyan Government's admissibility challenge is granted, the investigation of Mr Gaddafi and Mr. Al-Senussi and their prosecution in Libya will not be delayed several months which would be the case if they had to be returned from the International Criminal Court back to Libya. If however, Mr Gaddafi had to be surrendered in advance of the admissibility challenge, there would be significant delays in the proceedings given the difficulties in effecting a transfer from Zintan to Tripoli and continuing on-going investigations in their absence. Moreover, as set forth in detail in the application for leave to appeal,⁴ resolving the postponement of surrender issue on appeal will materially advance the proceedings. Resolution at this juncture of whether surrender can be postponed pending determination of an admissibility challenge will benefit the substantive progress of the case: it would avoid the unhappy consequence of Libya being forced, under difficult security conditions, to surrender Mr Gaddafi to the Court, only for him to be returned to Libya in the event that Libya's admissibility challenge is, in accordance with the proper application of the principle of complementarity, successful.⁵
10. The OPCD is wrong to argue that the decision of the Appeals Chamber would have "no material impact" on whether Libya should be obliged to surrender

³ OPCD Response, paragraphs 23-35.

⁴ Application for leave to appeal decision regarding the second request by the Government of Libya for postponement of the surrender of Saif Al-Islam Gaddafi, ICC-01/11-01/11-102, 10 April 2012, 10 April 2012, paragraph 27.

⁵ Prosecutor v Lubanga, Decision on the Prosecution request for leave to appeal the "Decision on Intermediaries", 2 June 2010, ICC-01/04-01/06-2463, paragraph 29.

Mr Gaddafi prior to the Chamber's decision on admissibility because the Appeals Chamber "will not be in a position to render its determination until after Libya has filed its admissibility challenge".⁶ The Appeals Chamber would certainly be in a position to rule on the postponement of surrender appeal before the final resolution by the Appeals Chamber of the Libyan Government's admissibility challenge. Accordingly, the decision of the Appeals Chamber would have a substantive material impact on when Libya is obliged to surrender Mr Gaddafi, because such a decision would be bound to be made in advance of appellate determination of the admissibility challenge.

11. The OPCD is also wrong in its submission that the applicability of article 95 to surrender requests and the possibility of a two-step procedure under rule 58 for an admissibility challenge were not appealable errors of law,⁷ because they were not the basis of the Trial Chamber's decision. The fact that these issues were not considered by the Pre-Trial Chamber is the legal error now complained of.
12. The additional submission by the OPCD that the Appeals Chamber "clearly found in the Kenyan cases that rule 58 does not entitle a State to file a staggered admissibility challenge"⁸ is a misstatement of both the Appeals Chamber's prior rulings and the basis for the current application for leave to appeal. At no point in its detailed consideration of the Kenyan admissibility challenge did the Appeals Chamber consider the meaning of a "request" as distinct from an "application" for the purposes of rule 58⁹ – because this was

⁶ OPCD Response, paragraph 33.

⁷ OPCD Request, paragraphs 24-25.

⁸ OPCD Request, paragraph 29.

⁹ *Prosecutor v Ruto, Kosgey and Sang*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the application by the Government of Kenya challenging the admissibility of the case pursuant to article 19(2)(b) of the Statute', 30 August 2011, ICC-01/09-01/11-307.

not the basis upon which the Kenyan admissibility challenge was argued.¹⁰

(C) The OPCD is wrong to suggest that the Pre-Trial Chamber should make an immediate finding that Libya is in non-compliance with the orders of the Court

13. The unique circumstances faced by the Libyan Government have been briefly outlined in its Application for leave to appeal.¹¹ The Libyan Government is making considerable efforts to ensure effective genuine investigation of Saif Al-Islam Gaddafi and Abdullah Al-Senussi and a fair trial in accordance with the results of the investigation. The Libyan Government has no intention of holding a rushed trial of these two persons that would violate international minimum standards of due process. The OPCD suggestion that “Mr Gaddafi will be [sic] have been tried and executed before the ICC will be in a position to render a decision on admissibility”¹² is nothing more than speculation and a baseless affront to the good faith efforts of Libya despite the difficult circumstances prevailing in the aftermath of mass-atrocities committed by the Gaddafi regime.

14. The Libyan Government strongly refutes the numerous incorrect statements which the OPCD has made in other filings,¹³ and which it intends to address fully in other submissions. The failure of OPCD to even attempt to verify some of these absurd allegations (e.g. that Mr. Gadaffi has only been charged in relation to licensing of camels and fish farms) has unfairly prejudiced the Government of Libya in these proceedings. Libya is acting in good faith and

¹⁰ Prosecutor v Ruto, Kosgey and Sang, Appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the application by the Government of Kenya challenging the admissibility of the case pursuant to article 19(2)(b) of the Statute’, 6 June 2011, ICC-01/09-01/11-109; Prosecutor v Ruto, Kosgey and Sang, Document in support of the Appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the application by the Government of Kenya challenging the admissibility of the case pursuant to article 19(2)(b) of the Statute’, 20 June 2011, ICC-01/09-01/11-135.

¹¹ Application for leave to appeal decision regarding the second request by the Government of Libya for postponement of the surrender of Saif Al-Islam Gaddafi, ICC-01/11-01/11-102, 10 April 2012, 10 April 2012, paragraphs 5-6.

¹² OPCD Response, paragraph 38.

¹³ Addendum to the urgent report concerning the trip to Libya, ICC-01/11-01/11-70-Red2.

seeking to comply with the Court's orders; it is for this reason that the Libyan Government has engaged in this legal process and sought suspensive effect of the order to surrender pending a final determination of its admissibility challenge.¹⁴ For the Pre-Trial Chamber to make a finding of non-compliance in these circumstances would be premature, disproportionate, and counter-productive. It would significantly undermine the principle of complementarity, which is the pillar upon which the Court was founded, and stigmatize a Government that is both willing and able to eradicate impunity in relation to crimes against humanity committed against Libyan citizens.

(D) The approach of the OPCD with respect to the media

15. The OPCD complain in their Response about statements of "high level Libyan authorities" which they say "underscore the necessity of taking strong measures at the earliest possible juncture to ensure Libya's compliance with the Decision".¹⁵ Again, the OPCD has made no attempt to verify the official position of the Libyan Government. Like any other country recently emerging from armed conflict, mass-atrocities, and a complete change in government, the Libyan Government is progressively creating new institutions and allocating responsibility for dealing with certain tasks (including communications with the media) to appropriate officials. It is for this reason that certain statements made to the press do not necessarily represent the considered or official position of the Government with respect to the trial of Mr Gaddafi and Mr Al-Senussi.

16. It is also apparent that the media are being given access to the filings of the OPCD before they have been received by Libya: counsel for Libya have on at least one occasion received a copy of an OPCD filing from a media source a

¹⁴ Appeal against the Decision regarding the second request by the Government of Libya for postponement of the surrender of Saif Al-Islam Gaddafi, ICC-01/11-01/11-103, 10 April 2012, paragraphs 25-29.

¹⁵ OPCD Response, paragraph 38.

day before it was received from the Registry.¹⁶ It further appears that the OPCD may be sending filings – or extracts thereof – to selected media representatives, with a view to stirring controversy and litigating its case in the media. This conduct only compounds the effect of unverified and erroneous allegations that are falsely attributed to the Libyan Government.

17. Libya reserves the right to make an application in due course in relation to such manifestly inappropriate activities by the OPCD. The Libyan Government considers that it is not in keeping with judicial propriety for parties to be seen to be litigating their case in the media. The Government of Libya does not intend to litigate this important issue in such a manner and would likewise invite the OPCD to desist from its current practice of briefing the media as to its public filings in advance of those filings being notified and distributed by the Registrar, and from making sensationalist claims that are unsupported by evidence, without any attempt to verify facts in consultation with the Libyan Government. Such conduct is not befitting of the OPCD, which is bound to apply the highest professional standards in all of its activities. This behaviour further has the potential to affect the proper administration of justice and the integrity of the present proceedings before the Chamber.¹⁷ Libya too is entitled to proceedings before the ICC that meet the highest standards of fairness and integrity.

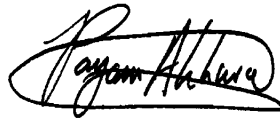
¹⁶ By way of example, the OPCD Response was sent by email from an officer of the OPCD to [REDACTED] at approximately 9:00pm CET on 11 April 2012 but was not notified by the Registrar as being filed until 10:18am CET on 12 April 2012.

¹⁷ Prosecutor v Muthaura, Kenyatta and Ali, Decision on the Defence “Application for Order to the Prosecutor regarding extra-judicial comments to the press”, 5 May 2011, ICC-01/09-02/11-83, paragraph 6.

Conclusion

18. For the reasons set forth above, the Government of Libya respectfully requests the Chamber to:

- i. Grant it leave to Reply to the OPCD Response; and
- ii. Grant the Government of Libya's application for leave to appeal the Decision regarding the second request by the Government of Libya for postponement of the surrender of Saif Al-Islam Gaddafi.



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Dated this 16th day of April 2012

At London, United Kingdom