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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

Libyan Government Response to OPCD Request for Leave to Appeal the “Decision on the “Submissions of the Libyan Government with respect to the matters raised in a private session during the hearing on 9-10 October 2012””

Source: The Government of Libya, represented by:
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Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. INTRODUCTION

1. The Libyan Government respectfully requests the Honourable Pre-Trial Chamber to reject the Request for Leave to Appeal filed by the Office of Public Counsel for the Defence (the “OPCD”) as the OPCD has not satisfied the cumulative requirements of Article 82(1)(d) of the Statute.

II. APPLICABLE LAW

2. An application for being granted leave to appeal under Article 82(1)(d) must be examined in light of the following three principles:
 - i. the restrictive character of the remedy provided for in Article 82(1)(d);
 - ii. the need for the applicant to satisfy the Chamber as to the existence of specific requirements stipulated by this provision; and
 - iii. the irrelevance of or non-necessity at this stage for the Chamber to address arguments relating to the merit or substance of the appeal.¹
3. Various Pre-Trial and Trial Chambers of the Court have clarified that leave to appeal pursuant to Article 82(1)(d) will only be granted if the party seeking leave to appeal establishes the existence of the following two cumulative criteria:

(a) the decision involves an issue that would significantly affect

(i) both the fair and expeditious conduct of the proceedings;

(ii) or the outcome of the trial; and

¹ Pre-Trial Chamber I, Situation in DRC, Decision on the Prosecution’s Application for Leave to Appeal the Chamber’s Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6’ issued on 31 March in the Situation in the Democratic Republic of Congo proceedings, ICC-01/04-103, 31 March 2006, para. 19; Pre-Trial Chamber II, Prosecutor v. Kony et al., Decision on Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Application for Warrants of Arrest under Article 58, ICC-02/04-01/05-US-EXP, 19 August 2005, para. 15.

(b) in the opinion of the Pre-Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.²

4. The Appeals Chamber also defined what an “issue” is: it is an identifiable subject or topic requiring a decision for its resolution which is essential for the determination of matters arising in the judicial cause under examination, not merely a question over which there is disagreement or conflicting opinion.³ In addition, “the issue must be such that its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial.”⁴
5. The Appeals Chamber also explained that the term “advance” means remove doubts about the correctness of a decision or map a course of action along the right lines⁵. If not remedied, the decision would be left with error to cloud or

² Pre-Trial Chamber I, Prosecutor v. Lubanga, Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges, ICC-01/04-01/06-915; Pre-Trial Chamber, Prosecutor v. Kony et al., Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, ICC-02/04-01/05-20, 19 August 2005; Pre-Trial Chamber, Prosecutor v. Kony et al., Decision on Prosecutor's Applications for Leave to Appeal Dated the 15th day of March 2006 and to Suspend or Stay Consideration of Leave to Appeal Dated the 11th day of May 2006, ICC-02/04-01/05-90, 10 July 2006; Trial Chamber I, Decision on the prosecution and the defence applications for leave to appeal the 'Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, ICC-01/04-01/06-2107, 3 September 2009; Trial Chamber II, Decision on the Prosecutor's Application for Leave to appeal the Decision on Redactions Rendered on 10 February 2009, ICC-01/04-01/07-946-tENG, 6 March 2009 ; Trial Chamber II, Decision on the 'Prosecution's Application for Leave to Appeal the 'Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol' and the 'Prosecution's Second Application for Extension of Time Limit Pursuant to Regulation 35 to Submit a Table of Incriminating Evidence and related material in compliance with Trial Chamber's Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol', ICC-01/04-01/07-1088, 1 May 2009; Appeals Chamber, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 June 2007; Pre-Trial Chamber II, Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure, ICC-01/05-01/08-75, 25 August 2008; Pre-Trial Chamber II, Prosecutor v. Bemba, Decision on the Prosecutor's Application for Leave to Appeal the “Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Jean-Pierre Bemba Gombo”, ICC-01/05-01/08-532, 18 September 2009.

³ Appeals Chamber, Situation in the DRC, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para. 9.

⁴ Appeals Chamber, Situation in the DRC, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para. 14.

⁵ Appeals Chamber, Situation in the DRC, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para. 15.

unravel the judicial process⁶.

6. As Trial Chamber II has recently observed in relation to appeals pursuant to Article 82(1)(d):⁷

The Chamber emphasises that the article deals with what is termed “interlocutory appeals”, that is, appeals against decisions termed “intermediate” that may, in any event, generally be contested in an appeal on the merits. Recalling that “the object of paragraph (d) of article 82 (1) of the Statute is to pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial”, the Chamber considers that appeals against such decisions are subject to the leave of the Trial Chamber because only the Trial Chamber is in a position to determine whether an immediate resolution of an issue by the Appeals Chamber is necessary to advance the proceedings. This mechanism ensures that appeals on issues that could be addressed, where necessary, only in an appeal against a final judgment, do not unduly delay the proceedings. Hence, this article unequivocally concerns decisions falling within the ambit of the conduct of the trial. [...] Finally, it must indeed be acknowledged that individuals or organs and institutions on which this decision has a direct impact may not appeal against it when appeals against the final judgment are lodged. The Prosecutor rightly emphasises, in fact, that there is no realistic likelihood that the Decision can be reviewed within the framework of an appeal against a final judgment. This is therefore a decision that seems entirely discrete from the proceedings.

⁶ Appeals Chamber, Situation in the DRC, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para. 16.

⁷ Prosecutor v. Katanga and Ngudjolo, Decision on three applications for leave to appeal Decision ICC-01/04-01/07-3003 of 9 June 2011, ICC-01/04-01/07-3073, at paras. 6 and 8.

III. SUBMISSIONS

7. The OPCD seeks leave to appeal the Decision in relation to two issues:
 - a. Whether the Chamber erred in its finding that the appointment of the OPCD in admissibility proceedings to represent the defendant is intrinsically problematic as it jeopardises the appearance of the impartiality of the Court (“Issue 1 – Impartiality of the Court”); and
 - b. Whether the Chamber erred by failing to take into consideration the express wish of the defendant to be represented by the OPCD during this stage of the proceedings (“Issue 2 – Choice of counsel”).
8. It is the position of the Libyan Government that these two issues do not meet the strict requirements outlined above for granting leave for an Article 82(1)(d) appeal. This is because the issues do not significantly affect the fair and expeditious conduct of the proceedings. Likewise, the Libyan Government takes the view that an immediate decision of the Appeals Chamber in relation to these two issues would not materially advance the proceedings.

A. The issues identified by the OPCD do not significantly affect the fair and expeditious conduct of the proceedings

9. The Libyan Government notes the clear views of the Court that “an appealable issue must emanate from the ruling of the decision concerned”.⁸ The purpose of interlocutory appeals is to address issues that have arisen for the Chamber’s consideration; it is not to allow the participants to have a “second bite at the cherry” or to correct any deficiencies in their initial pleadings. It is the position of the Libyan Government that the issues identified by the OPCD are independent of the merits or conduct of the proceedings and the issues therefore do not fall within the framework of interlocutory appellate review.

⁸ Prosecutor v. Bemba Leave to Appeal Confirmation Decision, para 17; Prosecutor v. Bemba, Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure, 25 August 2008, para. 11

10. Although the OPCD have asserted that the decision is “unfair” and “illogical”, they have failed to adduce compelling arguments as to how the issues in question impact on the fairness or expeditiousness of the proceedings. A decision cannot be properly characterized as unfair or lacking in expedition simply because a participant disagrees with its outcome.
11. The OPCD’s arguments as to unfairness in relation to its two issues (ie. Issue 1 - Impartiality of the Court; and Issue 2 - Choice of counsel) are misconceived. This is for several reasons. The Pre-Trial Chamber has provided a carefully considered and adequately reasoned decision on both issues. In this Decision it has painstakingly weighed up the arguments of all participants with respect to the impartiality of the Court,⁹ and it has explicitly taken into account the wishes of the Defendant (as outlined by the OPCD) as to his preferred choice of counsel.¹⁰
12. The OPCD’s arguments as to the perceived unfairness of the Decision with respect to both issues seem to be underpinned by unfortunate speculation as to information which is not outlined in the Honourable Pre-Trial Chamber’s Decision that the OPCD suggests may have been improperly taken into account by the Pre-Trial Chamber in reaching its conclusions on both issues.¹¹ This argument is made despite the fact that the Pre-Trial Chamber took the time and effort to issue two versions of its Decision – one public and one confidential – such as to ensure that the parties could avail themselves of a full understanding of the Pre-Trial Chamber’s reasoning which is not available more widely to members of the general public.
13. The OPCD’s other arguments as to the apparent unfairness of the Decision are hinged on further speculation as to apparent chilling impact that the Decision will have on the ability and willingness of replacement Counsel to represent Mr Gaddafi in an independent manner. There is no evidence whatsoever to support

⁹ ICC-01/11-01/11-233-Conf, paragraphs 11-26; 27-37.

¹⁰ ICC-01/11-01/11-233-Conf, paragraph 21.

¹¹ ICC-01/11-01/11-234, paragraph 19.

such a suggestion and it is in fact made plain by filings throughout these proceedings by those representing the family and friends of Mr Gaddafi that there are many other counsel who would be both able and willing to represent Mr Gaddafi's interests in a vigorous and independent manner. If the Libyan Government is mistaken on this point and there was any hesitation by suitably qualified counsel to take over the role of the OPCD then that is a matter for the Registrar to address the Pre-Trial Chamber on in due course. Pure speculation as to what might happen in the future does not give rise to an appellable issue at the current juncture.

14. The OPCD has also failed to provide a satisfactory explanation as to how the issues identified will significantly affect the expeditious conduct of the proceedings such as to meet the requirements of Article 82(1)(d). In the event that the OPCD were replaced, according to the Statute, Rules and Regulations of the Court their replacement would have to be a suitably qualified counsel who appears on the ICC list of counsel. Such an individual or individuals would therefore be experienced in conducting large scale litigation and would be well equipped to take instructions from the Defendant and to promptly familiarize themselves with the record of the admissibility proceedings to date. By virtue of their requisite skills and experience qualifying them for admission to the ICC list of counsel, such persons would be more than capable of liaising with the OPCD to ensure efficient handover of information; working with the Counsel Support Section in order to either confirm whether legal aid would be granted; and, if instructed to do so by their client, liaising with his family and friends to find out if private funding might be available.

15. There is therefore no basis for suggesting that the replacement of the OPCD would significantly impact on the expedition of the proceedings. The many counsel on the ICC list of counsel will be just as adequately equipped as the OPCD to represent Mr Gaddafi and to move the proceedings forward in an expeditious manner. Furthermore, given the temporary delay presently caused

by the need of the new Libyan Government to appoint a Prosecutor-General to take forward the proceedings against Mr Gaddafi in Libya, this may be the optimal time for the replacement of counsel in the ICC proceedings while ensuring that there is as minimal a disruption to those proceedings as possible.

B. Immediate resolution of the issues identified by the OPCD would not materially advance the proceedings

16. Rather than advancing the proceedings, subjecting this issue to appellate review would further delay the proceedings before the ICC. Until there is a final decision on Libya's admissibility challenge, the confirmation process before the ICC cannot start. Subjecting the present issue to appellate review would cause additional delays in concluding the admissibility proceedings and would therefore lead to an even longer period of time before Mr Gaddafi is brought to trial.

17. The OPCD's submissions on this limb of the test for Article 82(1)(d) appellate jurisdiction indicate that its principal reason for appearing to seek an appeal is not to protect the rights of Mr Gaddafi going forward but rather emanates from its concern with respect to the "validity and propriety of all the submissions tendered thus far on behalf of Mr Gaddafi".¹² Even if one accepted that the Decision has called into question the submissions made thus far by the OPCD – a suggestion which the Libyan Government refutes¹³ – a mere desire to uphold the OPCD's reputation, while understandable, is not a proper basis upon which to grant the OPCD leave to appeal.

18. The OPCD's other argument relating to the material advancement of the proceedings relates to the apparent failure by the Pre-Trial Chamber to take into account the views of the Defendant. As already explained, this argument is

¹² ICC-01/11-01/11-234, paragraph 32.

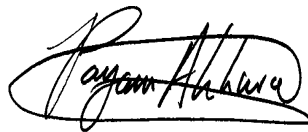
¹³ If one reads the Decision carefully it is apparent that the Pre-Trial Chamber has made no adverse findings relating to the conduct of the OPCD in these proceedings.

misconceived as the Pre-Trial Chamber expressly did take these into account when reaching its Decision.¹⁴

IV. CONCLUSION

19. For the reasons outlined above the Libyan Government respectfully requests the Honourable Pre-Trial Chamber to reject the Request for Leave to Appeal filed by the OPCD.

Respectfully submitted:


Professor Philippe Sands QC
 Professor Payam Akhavan
 Michelle Butler
 Counsel on behalf of the Government of Libya

Dated this 3rd day of December 2012
 At London, United Kingdom

¹⁴ ICC-01/11-01/11-233-Conf, paragraph 21.