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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

Response to the OPCD's "Request for Leave to Appeal the 'Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi'"

Source: Office of Public Counsel for Victims

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

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I. PROCEDURAL HISTORY

1. On 1 May 2012, the Government of Libya filed an Application pursuant to article 19 of the Rome Statute, whereby it requested Pre-Trial Chamber I (“the Chamber”) to: (i) postpone execution of the Surrender Request pursuant to article 95 of the Rome Statute and (ii) declare the case inadmissible and quash the Surrender Request (the “Admissibility Challenge”).¹

2. On 4 May 2012, the Chamber issued the “Decision on the Conduct of the Proceedings Following the ‘Application on behalf of the Government of Libya pursuant to Article 19 of the Statute’” wherein it decided, *inter alia*, to appoint, for the purpose of the admissibility proceedings, Paolina Massidda from the Office of Public Counsel for Victims (the “OPCV” or the “Office”) as legal representative of victims who have already communicated with the Court in relation to the case.²

3. On 7 December 2012, the Chamber issued the “Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi” (the “Decision”),³ in which it requested the Government of Libya to submit further information and evidence on several issues concerning the admissibility of the case by 23 January 2013, and authorized, *inter alia*, the OPCD and the OPCV to respond to these submissions by 11 February 2012.⁴

4. On 12 December 2012, the OPCD filed a “Request for Leave to Appeal the ‘Decision requesting further submissions on issues related to the admissibility of

¹ See the “Application on behalf of the Government of Libya pursuant to Article 19 of the Statute”, No. ICC-01/11-01/11-130-Red, 1 May 2012, paras. 107 and 108 (the “Admissibility Challenge”).

² See the “Decision on the Conduct of the Proceedings Following the ‘Application on behalf of the Government of Libya pursuant to Article 19 of the Statute’” (Pre-Trial Chamber I), No. ICC-01/11-01/11-134, 4 May 2012, par. 13. See also the “Notification of appointment of the Office of Public Counsel for Victims as legal representative of victim applicants in relation to the Admissibility Challenge pursuant to Article 19 of the Rome Statute”, No. ICC-01/01-01/11-161, 30 May 2012.

³ See the “Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi”, No. ICC-01/11-01/11-239, 7 December 2012 (the “Decision”).

⁴ *Ibid.*, p. 23.

the case against Saif Al-Islam Gaddafi” (the “OPCD Request”),⁵ arguing that “*the Chamber inappropriately exercised its discretion by requesting additional submissions on the admissibility of the case, rather than issuing a decision on the merits of the Admissibility Challenge*”.⁶

II. APPLICABLE LAW

5. In accordance with the jurisprudence of the Appeals Chamber, leave to appeal pursuant to article 82(1)(d) of the Rome Statute may only be granted if the party seeking leave to appeal establishes the existence of the following cumulative requirements:

- (a) the decision involves an “issue” that would significantly affect
 - (i) the fair and expeditious conduct of the proceedings, or;
 - (ii) the outcome of the trial; and
- (b) in the opinion of the Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.⁷

6. The Principal Counsel of OPCV, acting as legal representative of victims in the article 19 proceedings, submits that the OPCD Request does not identify any appealable issue for the purpose of article 82 (1)(d) of the Rome Statute and should therefore be rejected. However, should the Chamber consider that the OPCD has identified an appealable issue, the OPCD Request should nonetheless be rejected as it does not meet the requirements for leave to appeal.

⁵ See the “Request for Leave to Appeal the ‘Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi’” (Pre-Trial Chamber I), No. ICC-01/11-01/11-243-Conf, 12 December 2012 (the “OPCD Request”).

⁶ *Idem*, para. 85.

⁷ See the “Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal” (Appeals Chambers), No. ICC-01/04-168 OA 3, 13 July 2006, paras. 8-19

III. SUBMISSIONS

A. The OPCD has not identified an appealable issue within the meaning of Article 82(1)(d) of the Rome Statute

1. The OPCD disagrees with the Chamber's Decision requesting the parties and participants to provide further information and evidence on certain issues concerning the admissibility of the case.⁸ On that basis, the OPCD submits that the issue for which it seeks leave to appeal "*is whether Chamber inappropriately exercised its discretion by requesting additional submissions on the admissibility of the case, rather than issuing a decision on the merits of the admissibility challenge*".⁹

2. The Principal Counsel submits that the issue identified in the OPCD Request does not constitute an appealable issue. Indeed, the Appeals Chamber has defined the term "issue" as "*an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or a conflicting opinion. [...] An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. It may be legal or factual or a mixed one*".¹⁰ The Decision to request final¹¹ written submissions before issuing a decision on the merits cannot amount to an identifiable "subject" or "topic" that would constitute an "issue" within the meaning of article 82(1)(d) of the Rome Statute. It may only qualify as a mere difference of opinion as to the method applied by the Chamber. If such an alleged issue were to be considered as an appealable issue, that would *de facto* mean that any procedural step undertaken by the Chamber in the context of admissibility proceedings can qualify as an issue.

⁸ See the OPCD Request, para. 35.

⁹ *Idem*, para. 9.

¹⁰ See the "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", *supra* note 7, paras. 9 *et seq.*

¹¹ Although the Chamber has not stated in its Decision whether or not the requested submissions would be final, it has nevertheless indicated that it will decide on "the need to allow final written submissions on the Admissibility Challenge". See the "Order convening a hearing on Libya's challenge to the admissibility of the case against Saif Al-Islam Gaddafi", No. ICC-01/11-01/11-207, 19 September 2012, para. 14.

Such an interpretation would therefore render void the relevance of this criterion as a requirement for granting leave to appeal.

3. Moreover, the OPCD acknowledges that the Pre-Trial Chamber enjoys broad discretion in determining how to conduct the proceedings relating to the challenge to the admissibility of a case.¹² With respect to discretionary decisions, and in particular to those procedural decisions taken pursuant to Rule 58 of the Rules of Procedure and Evidence, the Appeals Chamber has determined that it will interfere with a Pre-Trial Chamber's decision only *"where [such] decision is so unfair and unreasonable as to constitute an abuse of discretion."*¹³ It therefore follows that a discretionary decision may be amenable to review only if the party seeking appeal alleges an abuse of discretion. Nowhere in its Request does the OPCD explicitly state that the Decision amounts to an abuse of discretion by the Chamber. Nor can the OPCD allegations that the Pre-Trial Chamber *"gave too much weight"* to Libya's request for extension of time and *"insufficient weight"* to the rights of Mr. Gaddafi¹⁴ be construed as an abuse of discretion. Assuming these allegations were true, they do not render the Decision so unfair or unreasonable as to constitute an abuse of discretion. There is therefore no appealable issue arising from the Decision and thus the OPCD fails to meet the main requirement for leave to appeal to be granted.

4. In addition, the OPCD relies on speculative arguments to substantiate its claims that the issue identified in the Request arises from the Decision. For instance, it asserts that it is *"possible that the Government of Libya might seek additional*

¹² See the OPCD Request, para 38.

¹³ See the "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', No. ICC-01/09-02/11-274, 30 August 2011, para. 87 and "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", No. ICC-01/09-01/11-307, 30 August 2011, para. 89.

¹⁴ See the OPCD Request, para. 40.

*delays as concerns its January deadline, or it may seek to file an additional reply to the February observations of the Prosecution, Defence, and OPCV.”*¹⁵ It also argues that Libya “*might seek to delay its observations in order to join them to a future challenge to the admissibility of the case against Mr. Abdullah Al-Senussi.*”¹⁶ The Principal Counsel submits that these hypothetical assertions are irrelevant for granting leave to appeal.

5. In the event that the Chamber considers that the OPCD has identified an appealable issue arising from the Decision, the Principal Counsel submits that the Request should nonetheless be rejected as it still does not meet the requirements for leave to appeal.

B. The OPCD has not demonstrated that the issue meets the criteria for leave to appeal under Article 82(1)(d) of the Rome Statute

6. The OPCD does not claim that the Chamber’s Decision would affect the outcome of the trial. However, it contends that the Decision is likely to impact on the fairness and expeditiousness of the proceedings *vis-à-vis* the Defence.¹⁷ The OPCD argues that a “*direct consequence of the protraction of the admissibility proceedings is that Libya is not obligated to surrender Mr. Gaddafi to the ICC for the duration of these proceedings*”.¹⁸ It also claims that the “*the Defence and defendant will face significant uncertainty regarding the possible forum for his trial, at a time when the defendant may need to be focussing on urgent preparation for an imminent domestic trial. It is inevitable that either the Defence or the Government will appeal the final decision of the Pre-Trial Chamber, which will in turn, extend this uncertainty for several more months.*”¹⁹

¹⁵ *Idem*, para. 85.

¹⁶ *Ibid.*, para. 85.

¹⁷ *Ibid.* paras, 68 *et seq.*

¹⁸ *Ibid.*, para. 73.

¹⁹ *Ibid.*, para. 76.

7. None of these arguments directly relate to the Chamber's Decision. In fact, the "*protraction of the proceedings*" and the "*uncertainty*" alleged by the OPCD both constitute practical and legal consequences which can arise from any challenge to the admissibility of a case before the ICC. Indeed, each and every admissibility challenge would, by its very nature, delay the progress of the proceedings and cause uncertainties as to appropriate *forum* for subsequent proceedings. What the Request clearly fails to demonstrate is how the additional time-limits accorded by the Chamber could have an identifiable and clear adverse impact on the rights of Mr. Gaddafi. In this respect, the Principal Counsel submits that the commencement of a domestic trial on 23 January 2013 does not constitute *per se* a violation of Mr. Gaddafi's rights to a fair trial. However, she reiterates that the Pre-Trial Chamber ought to reject the Admissibility Challenge and find that the case is admissible before the International Criminal Court.²⁰

8. Moreover, at this stage, an interlocutory appeal will not materially advance the proceedings. On the contrary, the triggering of an appellate procedure before the Pre-Trial Chamber issues its decision on the merits of the Admissibility Challenge would be detrimental to the efficient conduct of the admissibility proceedings and would cause undue delays, with little or no perceived benefits for Mr. Gaddafi.

²⁰ See *inter alia*, the "Observations on behalf of victims on the Government of Libya's Application pursuant to Article 19 of the Rome Statute", No. ICC-01/11-01/11-166-Corr, 4 June 2012.

For the reasons set out above, the Principal Counsel respectfully requests the Pre-Trial Chamber to reject the OPCD Request.

A handwritten signature in black ink, reading "Paolina Massidda". The signature is written in a cursive style with a horizontal line underneath the name.

Paolina Massidda
Principal Counsel

Dated this 17th day of December 2012

At The Hague, The Netherlands