



Original: English

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

Date: 17 December 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

Response of the Libyan Government 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: The Government of Libya, represented by:
Professor Philippe Sands QC
Professor Payam Akhavan
Ms Michelle Butler

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

The Office of the Prosecutor

Ms. Fatou Bensouda

Counsel for the Defence

Mr. Xavier-Jean Keita

Ms. Melinda Taylor

Legal Representatives of the Victims

Ms. Paolina Massidda

Ms. Sarah Pellet

Mr Mohamed Abdou

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

Mr. Xavier-Jean Keita

Ms. Melinda Taylor

States' Representatives

Professor Philippe Sands QC

Professor Payam Akhavan

Ms. Michelle Butler

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia

Counsel Support Section

Deputy Registrar

Mr. Didier Daniel Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section Other**

I. INTRODUCTION

1. The Government of Libya hereby files its 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" (OPCD Request) filed on 12 December 2012.

2. The Chamber rendered the "Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi",¹ to which the OPCD's application relates, on 7 December 2012. In this decision, the Chamber requested the Government of Libya to "provide the evidence on which it intends to rely for the purposes of its Admissibility Challenge and its submissions on the issues identified in paragraphs 14 to 47 of the present decision by 23 January 2013".² It sought, evidence as to *inter alia*
 - i. steps taken in the Libyan investigation since the filing of the Admissibility Challenge;
 - ii. scope of the investigation;
 - iii. nature of evidence obtained;
 - iv. contours of the case against Mr. Gaddafi;
 - v. progress of the domestic case including planned date of commencement of trial;
 - vi. various questions relating to the nature and fairness of Libyan process, including whether the People's Court procedures will apply;
 - vii. details of the custody of Mr. Gaddafi;
 - viii. progress of legal and institutional reform in Libya, including the incorporation into domestic law of international criminal law.

II. APPLICABLE LAW

3. Leave to appeal pursuant to Article 82(1)(d) may be granted only where:

¹ ICC-01/11-01/11-239 ("Decision of 12 December 2012").

²

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

4. It should be noted that the remedy provided for in Article 82(1)(d) is restrictive in character, and that the onus is on the party seeking leave to establish the fulfilment of these two cumulative criteria.³

III. SUBMISSIONS

A. *The OPCD Request does not raise an appealable issue*

5. The Court has made abundantly clear that “an appealable issue must emanate from the ruling of the decision concerned”.⁴ In analysing whether the matters raised by the prosecution in its Request constitute appealable issues, the Chamber “must first ascertain whether the issues identified actually arise from

³ 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.

⁴ 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

the impugned Decision”.⁵ The purpose of interlocutory appeals is therefore not to allow the participants to have a “second bite at the cherry” or to correct any deficiencies in previous pleadings.

6. In its Request, the OPCD gives an inconsistent description of the issue upon which it seeks leave to appeal. It appears that the OPCD’s complaint arises from the allegedly improper exercise of the Pre-Trial Chamber’s discretion under Rule 58 of the RPE in allowing the Government of Libya to submit additional observations and evidence in relation to admissibility.⁶ However, the substance of the OPCD’s complaint relates in actuality to many of the Chamber’s decisions as to the procedure and administration of the admissibility challenge to date, including: (a) the nature of the hearings before the Chamber on 9 and 10 October 2012; (b) the Chamber’s responses to progress reports submitted by the Libyan Government; and (c) the Chamber’s rejection of arguments previously made by the OPCD on such matters.⁷ Indeed, the real nub of the OPCD’s complaint appears to be that the Chamber has not yet “render[ed] a decision on the merits”:⁸ patently not an appealable issue which emanates from 7 December 2012 ruling.
7. Even if this were not the case, an appeal which takes issue with the absence of a determination with respect to admissibility is entirely outside the scope of Article 82(1)(d): a statutory provision which relates exclusively to applications for leave for *interlocutory* appeal. As Trial Chamber II has recently observed in relation to appeals pursuant to Article 82(1)(d)⁹

[...] the article deals with what is termed “interlocutory appeals”, that is, appeals against decisions termed “intermediate” that may, in any event,

⁵ Prosecutor v. Bemba, Decision on the Prosecution’s Request for Leave to Appeal the Trial Chamber’s Decision on Directions for the Conduct of the Proceedings, 15 December 2010, para. 17.

⁶ OPCD Request, paras 37, 38, 40.

⁷ See, for example, Decision on the OPCD Urgent Request Pursuant to Regulation 35 of the Regulations of the Court, 21 August 2012, ICC-01/11-01-203; Decision on OPCD Requests in relation to the hearing on the admissibility of the case, 2 October 2012, ICC-01/11-01-212.

⁸ OPCD Request, para. 7.

⁹ 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.

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.¹⁰

8. The OPCD takes the opportunity to advance a number of arguments alleging that following Libyan criminal procedure would impact upon the ability of the ICC to effectively prosecute.¹¹ None of these matters indicate that the Decision of 7 December 2012 impacts upon the fairness of the admissibility proceedings in any way.
9. One example of the OPCD’s arguments in this regard is that that “no-one approached by the Defence has indicated that they would be willing to testify in domestic proceedings”.¹² Even if this issue did relate to the fairness of admissibility proceedings (which it does not), the opaqueness of the OPCD’s submissions regarding the views of those persons concerning domestic criminal procedure, or whether they were asked about it, or indeed whether the persons concerned are reliable in any sense – renders them devoid of any significance as regards an application for leave to appeal the 7 December 2012 Decision.
10. Determining an application for leave to appeal must not involve determination of the merits of a potential appeal against an admissibility decision. It would plainly be irrelevant, improper and unnecessary for the Chamber to address arguments relating to the merit or substance of any potential appeal at this

¹⁰ *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.

¹¹ OPCD Request, paras 76, 77.

¹² OPCD Request, para. 78.

stage.¹³ The OPCD ostensibly recognises this point,¹⁴ as well as the fact that many of its submissions are flawed for this reason.¹⁵ It is, nonetheless, undeterred from making a plethora of arguments, throughout its application for leave, which would relate to the merits of a future appeal with respect to admissibility. The Libyan Government will not address the flaws in these arguments here, but will rather limit its response to the criteria as to leave to appeal with respect to the Decision of 7 December 2012.

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

11. The OPCD appears to assert that unfairness arises from the Decision of 7 December 2012 on the basis that some form of unfair advantage accrues to the Libyan Government from a decision in which “(i) the Chamber deems certain issues to be of key relevance to its determination of the admissibility of the case; and (ii) and the Government of Libya has failed at this point to adduce sufficient evidence in connection with these issues in order to satisfy the criteria under Article 17 of the Statute”.¹⁶ The latter is, of course, evident from the fact that the admissibility challenge has not yet been concluded. It is readily apparent that this is not a finding as to any element or aspect of the Admissibility Challenge, and nor is it in any sense unfair to the Defence.

12. As regards the OPCD’s point that the Decision of 7 December indicates that certain issues are to be of key relevance to the admissibility assessment, the notion that it is in any sense unfair for the Court to make clear the evidence that it seeks or the issues that it is seeking to clarify suggests a profoundly misguided view of fairness. Indeed, the very reason for conveying such information to the

¹³ 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.

¹⁴ OPCD Request, para. 69.

¹⁵ OPCD Request, para. 72.

¹⁶ OPCD Request, para. 41.

parties is to ensure that the proceedings are expedited to the extent possible while still ensuring fairness. Nonetheless, this flawed conception of fairness is reflected in the OPCD's concern that in the 7 December 2012 Decision the "Chamber has explicitly indicated to the Government of Libya the possible deficiencies in its former challenge, and the areas which require greater evidence".¹⁷

13. The OPCD also makes the related argument that the Chamber has "decided to accord the Government of Libya an additional opportunity to adduce information and evidence",¹⁸ i.e., accorded "the Government of Libya with an additional opportunity to try to meet the Article 17 criteria".¹⁹ The Chamber has already made abundantly clear that the approach taken to the assessment of admissibility does not entail granting to Libya additional opportunities to make an admissibility challenge. It is, rather, the adaptation of the single extant admissibility challenge to the facts reflected in the Libyan Government's submissions as to the absence of opportunity for counsel to take instructions, and the absence of a permanent occupant in the offices which would necessarily give such instructions.²⁰ This, in turn, was the result of the "exceptional circumstances engendered by the transition to a newly elected government in Libya".²¹ The Chamber has clearly stated that it would be unreasonable to disregard the prevailing circumstances by preventing Libya from addressing changes or developments in the factual circumstances underlying the admissibility challenge.²² There is no sense in which the Libyan Government has received multiple opportunities to make its admissibility challenge.

14. The OPCD's arguments in support of the notion that the Decision significantly

¹⁷ OPCD Request, para. 47.

¹⁸ OPCD Request, para. 7.

¹⁹ OPCD Request, para. 46.

²⁰ See, for example, Decision on the Libyan Government Request for Status Conference and Extension of Time to file a Reply to the Responses to its Article 19 Admissibility Challenge, 9 August, 2012, ICC-01/11-01/11-200, para. 16; and subsequent findings that the concerns stated therein remained operative and relevant.

²¹ *Ibid.*

²² Decision on OPCD Requests, ICC-01/11-01/11-212, para. 10.

affects the fair conduct of proceedings are among those which relate primarily to the substance of the appeal, which would be relevant only if leave were granted. The OPCD contends that “[t]o the extent that the Impugned Decision fails to take into consideration the impact of the Chamber's exercise of discretion on the rights of the defendant, as required by the case law of the ICC, the manner in which the Chamber resolved the Decision necessarily impacts on the fairness of the proceedings”.²³

15. Even if submissions are countenanced which are directed at the substance of the appeal, it is difficult to comprehend how the Decision of 7 December 2012 could sustain this argument. The majority of the information that the Chamber seeks is directed at assessing the treatment of Mr. Gaddafi in the Libyan criminal process for the purposes of gaining relevant information as regards the admissibility assessment. The Decision of 7 December 2012 seeks, *inter alia*, information as to the nature and fairness of Libyan process, including whether the People's Court procedures will apply; details of the custody of Mr. Gaddafi; and the progress of legal and institutional reform in Libya, including the incorporation into domestic law of international criminal law.

16. No doubt this information is deemed relevant by the Chamber not only in relation to the substance of the admissibility issue, but also for the purposes of assessing the impact upon the rights of the Defence of the process through which the Chamber continues with the admissibility assessment following receipt of this evidence by 23 January 2012. The only sense in which the Decision of 7 December 2012 affects fairness is that it forms one of the building blocks by which the Chamber is fulfilling its role in ensuring the fairness of the overall admissibility proceedings.

²³ OPCD Request, para. 72.

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

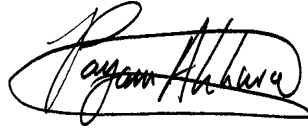
17. The OPCD's submissions as to material advancement of the proceedings repeat, to a large extent, its erroneous argument that the Decision of 7 December 2012 provides Libya with a second opportunity to challenge admissibility, which has already been addressed. In any event, rather than advancing the proceedings, subjecting this issue to appellate review would further delay the proceedings before the ICC. Moreover, as has already been noted, the Decision of 7 December is, itself, an attempt at materially advancing the process of the admissibility challenge.

18. 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.

IV. CONCLUSION

19. For these reasons, the Libyan Government respectfully requests the Chamber to reject 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 of 7 December 2012.

Respectfully submitted:



Professor Philippe Sands QC

Professor Payam Akhavan

Michelle Butler

Counsel on behalf of the Government of Libya

Dated this 17th day of December 2012

At London, United Kingdom