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Date: 14 March 2014

**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's Response to the Gaddafi Defence's "Request for Leave to Appeal  
the Pre-Trial Chamber's Failure to Issue a Decision"**

**Source:** The Government of Libya in the case of Mr Saif Al-Islam Gaddafi  
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. On 10<sup>th</sup> March 2014, the Gaddafi Defence filed its “Request for Leave to Appeal the Pre-Trial Chamber’s Failure to Issue a Decision”<sup>1</sup> (“Request”). The Libyan Government hereby submits its response thereto, arguing that the Request should be dismissed in its totality.

## II. SUBMISSIONS

2. Mr. Gaddafi seeks to seize the Appeals Chamber, and invokes Article 82(1)(d) as the purported basis for this. Indeed, any other provision is self-evidently inapplicable. It is submitted that Article 82(1)(d) does not provide any legitimate basis for Mr. Gaddafi’s request either.
3. Article 82(1), in its entirety, provides for the possibility of appeal in respect of the following:

- (a) A decision with respect to jurisdiction or admissibility;*
- (b) A decision granting or denying release of the person being investigated or prosecuted;*
- (c) A decision of the Pre-Trial Chamber to act on its own initiative under article 56, paragraph 3;*
- (d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.*

4. Leave to appeal on the basis of Article 82(1)(d) could be granted only if the application refers to a decision, that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings, *and*, in the opinion of the Pre-Trial Chamber, seizing the Appeals Chamber of the matter would materially advance the proceedings. Article 82(1)(d), it should be noted, is restrictive in character, and the onus is on the party seeking leave to establish the fulfilment of

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<sup>1</sup> ICC-01/11-01/11-522.

these cumulative criteria.<sup>2</sup> The Gaddafi Defence has failed to do so, for the following reasons.

5. The Court has made abundantly clear that “an appealable issue must emanate from the ruling of the decision concerned”.<sup>3</sup> In analysing whether the matters Request constitute appealable issues, the Chamber “must first ascertain whether the issues identified actually arise from the impugned Decision”.<sup>4</sup> Two principles of profound importance for present purposes emerge from this.
6. First, the purpose of interlocutory appeals is therefore not to allow the participants to have a “second bite at the cherry” or to correct deficiencies in previous pleadings – a point which will be addressed in more detail below.
7. Second, and more fundamentally, *there must be a decision*. The Gaddafi Defence seeks to elude this plain reality through a definition of ‘decision’ that is far removed

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<sup>2</sup> 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.

<sup>3</sup> 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

<sup>4</sup> 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.

from its plain meaning.<sup>5</sup> In the absence of this, it is impossible to determine the issues in respect of which appellate jurisdiction – which, vitally, can act only in a corrective fashion<sup>6</sup> – could be exercised. Granting leave to appeal in the present circumstances would, in effect, convert the Appeals Chamber into the Pre-Trial Chamber. The Appeals Chamber is a jurisdiction of absolutely final instance, in the sense that there is neither a mechanism of judicial review by another chamber nor recourse to another international court. Thus, the importance of maintaining the corrective nature of its jurisdiction could not be greater.

8. As the Gaddafi Defence has no choice but to recognise, the nature of the decision – that it asserts that the Pre-Trial Chamber has erred in law by not making – is *discretionary*.<sup>7</sup> In the absence of a decision, and in the absence of a legal error underpinning the absence of decision, there cannot, and should not, be any possibility of seizing the Appeals Chamber of the matter.

9. Regulation 45 states that

*The Pre-Trial Chamber shall be responsible for any matter, request or information arising out of the situation assigned to it, save that, at the request of a Presiding Judge of a Pre-Trial Chamber, the President of the Pre-Trial Division may decide to assign a matter, request or information arising out of that situation to another Pre-Trial Chamber in the interests of the administration of justice.*

10. Article 64 sets out the functions and powers of a Trial Chamber, but is applicable, by analogy, to the Pre-Trial Chamber. Article 64(6) states, *inter alia*, as follows (emphasis added):

*In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary [inter alia]*

*(f) Rule on any other relevant matters.*

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<sup>5</sup> Request, paras. 53-55.

<sup>6</sup> Decision on the “Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber’s Decision on Admissibility” ICC-01/09-01/11-234, para. 11.

<sup>7</sup> Request, para. 61.

11. Being “responsible” does not entail an obligation to address each and every request made no matter how unfounded. The same rationale applies to requests for leave to appeal: the very reason for requiring leave, rather than providing recourse to the Appeals Chamber as of right is to preclude the wasting of time and resources on unmeritorious applications. It is absolutely right, and essential to the Rule of Law within the ICC, that the Pre-Trial Chamber’s role as a gatekeeper in this sense is maintained. The only potential request that the Gaddafi Defence could make to the Pre-Trial Chamber in the present circumstances is a request for the Pre-Trial Chamber to issue a decision – a request which it has already made. Even if such requests were not *entirely* unfounded, the Chamber is perfectly entitled to take a different view of the urgency of the matter than the filing party, and, rather than making a decision at that time, keep the issues under review, provided that no provision of the Rules or Statute, or any other legal obligation is breached (the Defence’s arguments concerning a ‘right to be heard’ under Article 67(1) of the Statute, are addressed below).
  
12. Even if the Chamber were to accept the Gaddafi Defence’s contorted definition of ‘decision’, its arguments concerning the alleged significant effect upon the fair and expeditious conduct of the proceedings – as required by Article 82(1)(d) – must also be rejected. The Request vacillates between, and conflates, arguments as to the fair and expeditious conduct of (i) the domestic criminal proceedings; (ii) the ICC admissibility proceedings; and (iii) an – at present non-existent – ICC trial. Among these, the only *potentially* valid approach, for the purposes of an application for leave to appeal on the basis of Article 82(1)(d), would be to demonstrate such an impact upon the ICC admissibility proceedings. However, as noted below, the Gaddafi Defence’s arguments in this regard cannot be sustained. Before setting out its submissions in this regard, the Libyan Government will address the misplaced arguments concerning the quality of and impact upon criminal proceedings, both domestic and international.
  
13. As regards the plethora of baseless assertions concerning the quality of the

domestic criminal process,<sup>8</sup> the Libyan Government need not re-state, at this point, its Responses to the previous requests of the Gaddafi Defence. The Chamber is respectfully asked to bear in mind each argument set out therein. Without recounting each of them, it should be borne in mind that the Gaddafi Defence's previous filings, like the Request, are replete with allegations of the most serious nature.<sup>9</sup> As has been pointed out before, the myriad allegations appear to assert bad faith and professional misconduct, notwithstanding the absence of any adequate evidence to support such assertions. There is no basis for the assertion that Libya has no intention of co-operating with the ICC.<sup>10</sup> In the Request of 29 August 2013, for example, such assertions were based on a single fact – the progression of the domestic case to the Accusation Chamber and misrepresented Professor El-Gehani's words.<sup>11</sup> It is also illustrative, as noted in the Libyan Government's recent Response to the Al-Senussi Defence's 'Further Submissions on behalf of Abdullah Al-Senussi Pursuant to Regulation 28',<sup>12</sup> that three Libyan lawyers have been presented to the office of the Prosecutor General, and have been accepted as a team of defence counsel, representing both Mr. Al-Senussi and Mr. Gaddafi. They have, furthermore, received permission to visit both Mr. Al-Senussi and Mr. Gaddafi at the prisons where they are respectively detained.<sup>13</sup> The Gaddafi Defence's arguments are predicated upon the misguided presumption that Libya is acting in bad faith with respect to its international legal obligations.

14. However, more importantly, such arguments need not – and indeed, must not – be addressed at this juncture because the type of factual allegations made by the Gaddafi Defence in its Request are central to the appeal in respect of the

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<sup>8</sup> Request, paras. 1-43; 62-69; 79-84.

<sup>9</sup> ICC-01/11-01/11-424, paras 6, 7, 9, 12, 13; It variously asserts that the submissions made on behalf of the Libyan Government are "disingenuous at best"; "improper"; "ambiguous"; "contradictory" and "misleading". Similarly, it asserts that the Libyan Government has sought to make improper use of Article 97(7). Mr. Gaddafi goes on to contend, yet again, that Libya exhibits a "flagrant disregard of ICC orders".

<sup>10</sup> See, among many examples, Request, para. 10.

<sup>11</sup> ICC-01/11-01/11-424, para. 5 – this ignored the Libyan Government's submissions on relevant matters – e.g., complex dynamics of the relationship between Zintan and Tripoli in recent weeks: ICC-01/11-01/11-402, paras. 12, 13.

<sup>12</sup> ICC-01/11-01/11-519.

<sup>13</sup> *Ibid.*

admissibility decision, of which the Appeals Chamber is already seised. The Libyan Government will not address the factual flaws in Mr. Gaddafi's arguments here, but will rather limit its response to the criteria as to leave to appeal. There would be absolutely no point in allowing a further appeal on, in effect, precisely the same basis, other than to illegitimately allow the Gaddafi Defence 'a second bite at the cherry' in respect of that appeal.

15. Furthermore, by granting the Request, the unavoidable effect would be for the Pre-Trial Chamber to express a view as to the merits of the appeal. Determining an application for leave to appeal must not prejudice the determination of the appeal against the admissibility decision. It would plainly be irrelevant, improper and unnecessary for the Chamber to address arguments relating to the merit or substance of this appeal at this stage.<sup>14</sup>
16. The Gaddafi Defence combines its flawed arguments as to the domestic criminal process with equally flawed submissions concerning due process before the ICC. In actuality, the Gaddafi Defence's arguments revert to the issue of fairness on criminal proceedings. It refers, in this regard to (i) the jurisprudence of the ICTR and ECCC concerning *habeus corpus* in respect of their own detained accused persons; and (ii) a "right to be heard" with reference to Article 67(1) of the Statute.<sup>15</sup>
17. Mr. Gaddafi refers to Article (67)(1) of the Statute, of which the material passages state as follows:

*In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:*

[...]

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<sup>14</sup> 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.

<sup>15</sup> See, for example, Request, para. 46.



*(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;*

*[...]*

*(d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;*

18. The Libyan Government emphasises, once again, that it does not seek to argue for any diminution in the Gaddafi Defence's full participation in the present admissibility proceedings. Rather, it seeks clarity as to the nature of Article 67(1), upon which the Gaddafi Defence relies in its Request, in alleging that the Chamber's approach to its previous Requests was unlawful. The right to representation, as a matter of due process, does not require the Pre-Trial Chamber to make, or to have made, a decision on the repetitious requests of the Gaddafi Defence. Indeed, there is no analogy between the due process rights of the accused in the determination – at trial – of his/her criminal guilt or innocence; and the participation of the Defence in admissibility proceedings.

19. As previously argued, there is a key difference between proceedings which determine criminal responsibility, and those which determine other types of legal issues, such as the jurisdiction or forum in which criminal proceedings will take place, but do not themselves conclude as to whether a person is guilty of a crime. It is well established in international human rights law that a criminal trial “determines the civil rights” of the accused, whereas extradition proceedings, for example, in which the jurisdiction or forum in which criminal proceedings will take place is determined, do not.<sup>16</sup> At the core of the present proceedings, in which the

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<sup>16</sup> *Mamatkulov and Askarov v. Turkey* (2005) 41 EHRR 494; *Salgado v. Spain*, Application No. 65964/01; *EGM v. Luxembourg*, Application No. 24015/94; *GK and BJF v. The Netherlands*, Application No. 12543/86; *Kirkwood v. UK* (1984) 37 DR 158; *H v. Spain* (1983) 37 DR 93; *X v. Belgium*, Application No. 7256/75. See the Libyan Government's “Response to the ‘Document in Support of Appeal on behalf of Abdullah Al-Senussi against

Gaddafi Defence is acting, lies the delineation of the legal relationship between the state of Libya and the ICC as an international organisation.

20. In the language of the European Court of Human Rights, for example, the difference between the role of the defence in an admissibility challenge and in a criminal trial is that the latter entails “determination of the civil rights” of the accused – that is, the determination of criminal charges. This reflects the language of article 67(1), as cited above. The European Court is equally clear that the adjudication of whether a person will be transferred to another jurisdiction for the purposes of a criminal trial, as in extradition proceedings, *does not* involve determination of the civil rights of the accused.<sup>17</sup>
21. In other words, the nature of a person’s due process rights in a particular situation is a corollary of the type of decision being made, rather than the name/title assigned to the party concerned, whether ‘Defence’ or ‘Accused’ or otherwise. The ‘right’ in issue in admissibility proceedings is that of the domestic jurisdiction to carry out criminal proceedings.
22. This is reflected in the Pre-Trial Chamber’s finding that Libya is the “triggering force and main actor in [admissibility] proceedings”.<sup>18</sup> This determination was made in the context of deciding whether Libya should be permitted to file a reply to responses addressing admissibility issues, but it reflects the requirements of due process in admissibility proceedings as set out herein.

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Pre-Trial Chamber I’s ‘Decision on the admissibility of the case against Abdullah Al-Senussi’’, 26 November 2013 (‘Libyan Government’s Response of 26 November 2013’) paras. 13-20.

<sup>17</sup> *Mamatkulov and Askarov v. Turkey* (2005) 41 EHRR 494; *Salgado v. Spain*, Application No. 65964/01; *EGM v. Luxembourg*, Application No. 24015/94; *GK and BJJ v. The Netherlands*, Application No. 12543/86; *Kirkwood v. UK* (1984) 37 DR 158; *H v. Spain* (1983) 37 DR 93; *X v. Belgium*, Application No. 7256/75. The only minor caveat in this regard is the situation in which a national of the country concerned is to be extradited, in which case the proceedings can affect a citizen’s right to enter and remain in the country of citizenship. This was the situation faced by the UK Supreme Court in *Lukazewski v. The District Court in Torun, Poland* [2012] UKSC 20. See, in particular, para. 31, per Lord Mance. Note extradition is not a direct comparison because extradition involves a relationship in which there is no overarching jurisdictional claim that is provided by a UN Security Council Resolution – it is matter of bilateral relations between states. In the presence of jurisdiction which is already part of the domestic legal order, in the sense that it is on the basis of a Security Council Resolution, even less is in issue in terms of determination of rights.

<sup>18</sup> ICC-01/11-01/11-191, para. 8.

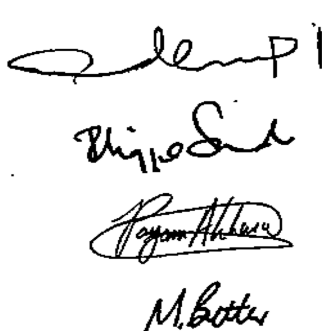
23. Notwithstanding the profoundly flawed factual and legal nature of these submissions, raising them through the present Request, as noted above, seeks to subvert the pending admissibility appeal. The proper channel for the Gaddafi Defence's argument would be through an application to make further submissions to the Appeals Chamber on the pending appeal. Shown in this light, the reason for the need to reject the Request becomes glaringly obvious.

24. In any event, rather than advancing the proceedings, subjecting this issue to appellate review would further delay the proceedings before the ICC, and 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.

### III. RELIEF SOUGHT

25. Libya therefore respectfully requests that the Pre-Trial Chamber reject the Gaddafi Defence filed its "Request for Leave to Appeal the Pre-Trial Chamber's Failure to Issue a Decision".

Respectfully submitted:




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Professor Ahmed El-Ghani  
 Professor Philippe Sands QC  
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ICC Focal Point and Counsel on behalf of the Government of Libya  
 (in the proceedings relating to Saif Al-Islam Gaddafi)

Dated this 14<sup>th</sup> day of March 2014  
 At London, United Kingdom