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PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernández 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

Prosecution's Response to the Defence 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: Office of the Prosecutor

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Introduction

1. The Office of Public Counsel for the Defence (“OPCD” or “Applicant”) appearing for Saif Al-Islam Gaddafi (“Mr. Gaddafi”), seeks leave to appeal (“OPCD Application”) 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” (“Impugned Decision”) issued by Pre-Trial Chamber I (“Chamber”).¹ The Prosecution submits that the OPCD Application should be rejected.
2. OPCD raises two issues. The First Issue queries whether the Chamber erred in finding that the appointment of the OPCD in admissibility proceedings to represent Mr. Gaddafi jeopardises the appearance of the impartiality of the Court. The Second Issue queries whether the Chamber erred by failing to consider the express wish of the defendant to be represented by the OPCD during this stage of the proceedings.²
3. The Prosecution submits that the issues do not arise from the Impugned Decision. Should the Chamber find that they do arise, they still do not meet the requirements for leave to appeal. None of the complaints contained in the issues significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial, and an immediate resolution by the Appeals Chamber will not materially advance the proceedings.

Procedural Background

4. On 16 April 2012, the Chamber appointed OPCD as counsel for Mr. Gaddafi as an interim step while also requesting OPCD “to continue to assist Mr. Gaddafi in acquiring counsel, consistent with his wishes”.³ The Chamber took note of

¹ ICC-01/11-01/11-233-Red.

² ICC-01/11-01/11-234, para.8.

³ ICC-01/11-01/11-113.

evidence that Mr. Gaddafi “...would like for the OPCD to fully represent him until such time as regular counsel is appointed.”⁴

5. On 11 October 2012, Counsel for Libya requested the Chamber to, inter alia, revoke the appointment of OPCD to Mr. Gaddafi and instead appoint (or instruct the Registrar to appoint) counsel who are independent of the Court and the OPCD.⁵
6. After being briefed by the parties and participants⁶ the Chamber decided in the Impugned Decision to, inter alia, *reject* Libya's request to revoke the appointment of counsel from the OPCD as counsel for Mr. Gaddafi.⁷ The Chamber noted in the same decision that it “...needs to explore at this stage the options that can be pursued with a view to securing the appointment of regular counsel by Mr. Gaddafi”.⁸
7. On 28 November 2012 OPCD sought leave to appeal the Impugned Decision.⁹ OPCD raises two issues:
 - (i) 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; and
 - (ii) 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.

⁴ ICC-01/11-01/11-113, para.5.

⁵ ICC-01/11-01/11-222-Conf, para. 15.

⁶ See the submissions listed in ICC-01/11-01/11-233-Red paras.7-10.

⁷ ICC-01/11-01/11-233-Red, p. 19.

⁸ ICC-01/11-01/11-233-Red, para. 37.

⁹ ICC-01/11-01/11-234.

Submissions

The Issues are not appealable issues within the terms of article 82(1)(d)

8. The Prosecution submits that neither of the two issues raised by OPCD arises from the Impugned Decision. Therefore, the OPCD Application should be dismissed.

First Issue

9. The First Issue is grounded on the erroneous premise that the Chamber terminated the mandate of OPCD as counsel for Mr Gaddafi in the Impugned Decision. This is incorrect. The Chamber only found that it “...needs to explore at this stage the options that can be pursued with a view to securing the appointment of regular counsel by Mr. Gaddafi”.⁴ In that regard, the OPCD’s Application is premature and the First Issue merely represents an abstract question or a hypothetical concern which does not constitute an appealable issue for the purposes of article 82(1)(d).

Second Issue

10. Contrary to what OPCD submits, the Chamber explicitly considered the wish of Mr. Gaddafi to be represented by the OPCD.¹⁰ At the same time, the Chamber found that Mr. Gaddafi’s wish in this regard was not necessarily dispositive, and that it could nonetheless explore an alternative appointment as was contemplated from the moment OPCD was appointed. It is incorrect to assert, however, that

¹⁰ ICC-01/11-01/11-233-Red, para. 21: The Chamber took note that “The OPCD further asserts that the Chamber does not possess the inherent power to revoke the appointment of the Defence “in circumstances in which it would directly conflict with the wishes of the defendant”, as previously acknowledged by the Chamber itself. [...] According to the OPCD, “[t]he revocation of the mandate of the Defence would therefore in these circumstances directly contravene the right of the defendant to freely choose his counsel”.

the Chamber failed even to consider the wishes of Mr. Gaddafi. Therefore, the Second Issue does not arise from the Impugned Decision.

11. In the alternative, and should the Chamber find that the two issues do arise from the Impugned Decision, the Prosecution submits that they still do not meet the requirements for leave to appeal.

The Issues do not affect the fair conduct of the Proceedings

First Issue

12. As is already established by the case law of the Court, a party seeking leave to appeal cannot simply speculate in the abstract that a decision causes prejudice to the rights of the accused to establish that the fairness of the proceedings are affected.¹¹ A purely general complaint does not suffice.¹²
13. The Applicant argues that, “[t]o the extent that the Decision implies that it is inappropriate for any section within the Court to actively advocate for the rights of the defendant in connection with admissibility proceedings, the Decision significantly affects the principle of equality of arms, by depriving the defendant of the right to an institutional platform, through which his views and concerns can be voiced.”¹³ Additionally, the Applicant claims that by “...revoking the mandate of the OPCD to represent Mr. Gaddafi in the admissibility proceedings [...] the Chamber is effectively penalising the Defence for complying with their duty [...]. This may have a chilling effect as concerns the ability and willingness of replacement Counsel [...]”.¹⁴
14. But the Decision nowhere curtails the rights of Mr. Gaddafi or OPCD and there is no suggestion whatsoever that either is being penalized. The Decision does not

¹¹ See ICC-01/04-168 OA3, para. 10; ICC-02/04-01/05-316, p. 6; ICC-01/09-02/11-211 para. 33 and 39; ICC-01/09-02/11-88, para. 25, see also paras. 23-27; ICC-01/04-01/06-2109, para.22; ICC-01/05-01/08-680, para. 36; ICC-01/09-02/11-275, paras. 28-29; ICC-01/09-01/11-301, para.30.

¹² ICC-01/04-01/07-2463, para.31.

¹³ ICC-01/11-01/11-234, para.15.

¹⁴ ICC-01/11-01/11-234, para.18.

terminate OPCD's mandate and if ever the OPCD's mandate is terminated, Mr. Gaddafi will be provided with another counsel who will express his "views and concerns". To the extent the OPCD imagines what might occur in the future, that is speculative. For now, the Decision only indicates that it will explore finding alternative counsel for Mr. Gaddafi in keeping with the envisioned temporary role of the OPCD. Accordingly, the Decision in no way impinges on the fairness of the proceedings.

15. The Applicant also submits, to the extent that the Impugned Decision "*could be interpreted to undermine the propriety of all submissions tendered thus far by Mr. Gaddafi's Defence*", that it "*also undermines Mr. Gaddafi's right to effective representation in these proceedings*". Here too, the Applicant has constructed a straw man and misconstrues the Chamber's ruling. The Impugned Decision does not in any way question the propriety of prior submissions made by the OPCD at any point or suggest that they will not be considered in assessing Mr. Gaddafi's claims.
16. Finally, OPCD improperly mischaracterizes both the import and the motivations of the Impugned Decision. OPCD claims that "*The manner in which the Chamber has resolved this issue also significantly impacts on the independence of the Defence [...] It would [...] be entirely inappropriate for the freedom of the Defence to voice their concerns regarding the transfer of the case to Libya to be curtailed due to external pressure applied by the Libyan Government or Libyan media.*"¹⁵ The rights of the Defence have been in no way "curtailed" and there is no evidence whatsoever to support the suggestion that the Chamber acted because of "external pressure".
17. Consequently, the Applicant has failed to demonstrate that that the first Issue significantly affects the fair conduct of the proceedings.

¹⁵ ICC-01/11-01/11-234, para.17.

Second Issue

18. As noted at paragraph 10 above, in the Impugned Decision the Chamber explicitly considered the wish of the Mr. Gaddafi to be represented by the OPCD.¹⁶ Consequently, the Applicant's Second issue as well as the allegation of unfairness¹⁷ made in the context of the Chamber's purported "failure" to take into consideration the defendant's wishes is a mischaracterization of the Impugned Decision.
19. OPCD notes that Mr. Gaddafi has not had an opportunity to provide instructions to counsel other than Counsel from the OPCD. Accordingly, OPCD claims that replacing OPCD in the admissibility proceedings would deprive Mr. Gaddafi of the right to effectively participate in these proceedings through instructed counsel.
20. These submissions do not show how the Decision impacts on the fairness. First, the OPCD has not been replaced nor has new counsel been appointed. Therefore, OPCD's submissions are premature and speculative in that regard. Second, any counsel that replaces the OPCD can also obtain instructions from Mr. Gaddafi and there is nothing in the Decision that suggests that the Chamber would decide otherwise.

The Issues do not affect the expeditious conduct of the proceedings¹⁸

21. OPCD argues that since the Impugned Decision has called into question the legitimacy of the OPCD's representation thus far, either the replacement Counsel or the Government of Libya are likely to request that certain issues be re-litigated,

¹⁶ ICC-01/11-01/11-233-Red, para.21: "*The OPCD further asserts that the Chamber does not possess the inherent power to revoke the appointment of the Defence "in circumstances in which it would directly conflict with the wishes of the defendant", as previously acknowledged by the Chamber itself.[...] According to the OPCD, "[t]he revocation of the mandate of the Defence would therefore in these circumstances directly contravene the right of the defendant to freely choose his counsel"*.

¹⁷ ICC-01/11-01/11-234, para.21.

¹⁸ OPCD has made no submissions on how the purported issues affect the outcome of the proceedings.

which will delay the ability of the Chamber to resolve the admissibility challenge.¹⁹

22. As noted at paragraph 15 above, this is a mischaracterization of the Impugned Decision, since the Chamber did not question the propriety of any prior submissions made by OPCD. Nor, indeed, has it suspended the mandate of OPCD as Mr. Gaddafi's counsel. The Chamber only indicated that it needs to explore the options to secure the appointment of regular counsel by Mr. Gaddafi, in consultation with the Registry. As stated previously, this ruling is in line with the Chamber's initial decision appointing OPCD. Moreover, there has been no suggestion that any decisions taken thus far would need to be reconsidered if Mr. Gaddafi obtained new counsel. The OPCD's claims are therefore both unfounded and speculative.
23. The Applicant also repeats in this context that new counsel will not have the benefit of instructions from Mr. Gaddafi, which will impede that counsel's ability to make decisions regarding the appropriate course for the Defence and which in turn will impact on counsel's ability to expeditiously react to developments in the case.²⁰ This argument is both hypothetical and unpersuasive. There is no reason to believe that replacement counsel cannot also obtain instructions from Mr. Gaddafi or that it will be unable to make expeditious decisions in the course of representing him.
24. Thus, OPCD fails to demonstrate that the issues significantly affect the expeditious conduct of the proceedings within the meaning of article 82(1)(d).

¹⁹ ICC-01/11-01/11-234.

²⁰ ICC-01/11-01/11-234, para.28.

Immediate resolution of the issues will not materially advance the proceedings

Issue 1

25. On this point, OPCD again claims that by finding that the OPCD's representation of Mr. Gaddafi in admissibility proceedings is 'intrinsically problematic', the Chamber has called into question the validity and propriety of all the submissions tendered thus far on behalf of Mr. Gaddafi. Hence, argues OPCD, an immediate decision of the Appeals Chamber is required to remove doubts concerning the correctness of the Impugned Decision.²¹
26. As noted above, this submission is based on the flawed assumption that the Chamber questioned the propriety of prior submissions made by OPCD Counsel. There is no indication that it did so. Accordingly, there is no reason to believe that a resolution by the Appeals Chamber would materially advance the proceedings.

Issue 2

27. OPCD claims that the Chamber's failure to take into consideration the wishes of Mr. Gaddafi also creates the appearance that Mr. Gaddafi has been effectively excluded from actively participating in the proceedings, and that the independence of the Defence has been undermined. Accordingly, OPCD claims, an immediate decision of the Appeals Chamber would eliminate any doubts concerning the correctness of this approach and preserve the integrity of any future decision on the admissibility of the case.²²

²¹ ICC-01/11-01/11-234, para.32.

²² ICC-01/11-01/11-234, para.33.

28. As noted earlier, this argument is based on the flawed assumption that the Chamber did not consider the wishes of Mr. Gaddafi. This is incorrect as the Chamber did note Mr. Gaddafi's wishes. In addition, OPCD's submissions regarding the purported impact of the Decision on the independence of the Defence and the Mr. Gaddafi's active participation in the proceedings lack any support in the Decision itself.
29. The Applicant has therefore failed to show that the immediate resolution of the issues by the Appeals Chamber will materially advance the proceedings.

Relief sought

30. For the reasons set out above, the Prosecution requests that the Chamber reject the OPCD Application.



Fatou Bensouda,

Prosecutor

Dated this 3rd day of December 2012

At The Hague, The Netherlands