

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/11-01/11
Date: 17 December 2012

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 requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi"

Source: Office of the Prosecutor

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

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Introduction

1. The OPCD seeks leave to appeal the Pre-Trial Chamber's decision requesting Libya to provide additional information in support of its Admissibility Challenge. The OPCD argues that the Chamber wrongly exercised its discretion pursuant to rule 58(2) and should have decided on the merits of the Challenge instead.
2. The Prosecution submits that the OPCD does not identify an appealable issue and merely disagrees with the Chamber's decision to request additional evidence. Further, none of the arguments advanced by the OPCD show that the requirements for leave to appeal under article 82(1)(d) are met. Therefore, the OPCD Application should be rejected.

Procedural Background

3. On 1 May 2012, the Libyan Government challenged the admissibility of the case against Mr. Gaddafi before the Court pursuant to article 19(2)(b) of the Rome Statute ("Admissibility Challenge").¹
4. On 4 June 2012, the Prosecution filed its response to the Application.² On 24 July 2012, the OPCD filed its confidential response to the Application.³ On 26 July 2012, the Chamber granted the Libyan government's application for leave to reply to any response to the Admissibility Challenge by no later than 13 August 2012.⁴
5. On 9-10 October 2012, the Chamber convened a hearing on the admissibility of the case against Saif Al-Islam.⁵

¹ ICC-01/11-01/11-130-Conf. A public redacted version was simultaneously filed.

² ICC-01/11-01/11-167-Red.

³ ICC-01/11-01/11-190-Conf. The public redaction version of the corrigendum to OPCD response was filed on 31 July 2012 (ICC-01/11-01/11-190-Corr-Red).

⁴ ICC-01/11-01/11-191.

⁵ ICC-01/11-01/11-T-2-CONF-ENG and ICC-01/11-01/11-T-3-CONF-ENG.

6. On 7 December 2012, the Pre-Trial Chamber issued a decision ordering the Libyan Government to provide additional evidence and submissions on specified topics by 23 January 2013. It invited the Prosecutor, the OPCD and the OPCV to provide any response to the Libyan Government's submissions by 11 February 2013 ("the Decision").⁶
7. On 12 December 2012, the OPCD filed an application for leave to appeal the Chamber's Decision on the ground 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." ("OPCD Application").⁷

Submissions

Preliminary Observations

8. As established by the jurisprudence of the Court, the sole question in an application for leave to appeal is whether there exists an issue meeting the criteria in article 82(1)(d).⁸
9. In its Application, the OPCD claims that the Chamber erred in the exercise of its discretion when it requested Libya to provide further evidence and information rather than issuing a decision on the merits of the Admissibility Challenge. The Prosecution notes that most of the OPCD's submissions do not address the requirements under article 82(1)(d) and instead improperly challenge the merits of the Chamber's ruling.⁹

⁶ ICC-01/11-01/11-239.

⁷ ICC-01/11-01/11-243-Conf. A public redacted version was simultaneously filed.

⁸ ICC-02/04-01/05-20, para.22.

⁹ See in particular OPCD Application, paras.46-47,52-53, 57-60 and 62-65.

The Issue does not arise from the Decision

10. The Issue as presented by the OPCD is “whether 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”.¹⁰
11. This is however not an issue, but a mere disagreement of the OPCD with the Pre-Trial Chamber’s decision to request Libya to provide further evidence and additional submissions for the purposes of the Admissibility Challenge. That alone does not constitute an appealable issue.¹¹
12. The Chamber’s ruling falls squarely within the Chamber’s discretion to decide on the procedure and appropriate measures for the conduct of the admissibility proceedings within rule 58(2) – as acknowledged by the OPCD.¹² However, even if the Chamber considers that the issue does arise from the Decision, the Prosecution submits that it does not fulfil the requirements for leave to appeal.

The issue does not meet the requirements under article 82(1)(d)

13. On *fairness*, the OPCD argues that the Pre-Trial Chamber failed to take into account the impact that the exercise of its discretion had on the rights of Mr. Gaddafi.¹³ The OPCD states that if its submissions on the purported violations of Mr. Gaddafi’s rights while in detention in Libya were true, this situation would have been unnecessarily protracted due to the Chamber’s postponement of its ruling on the admissibility of the case.¹⁴ In addition, and due to his current

¹⁰ OPCD Application, para.87.

¹¹ ICC-01/04-168 OA3, para.9; ICC-01/05-01/08-532, para.17; ICC-02/05-02/09-267, para.22; ICC-01/04-01/06-1557, para.30; ICC-01/04-01/07-2035, para.25; ICC-02/05-03/09-179, para.27.

¹² OPCD Application, para.38.

¹³ OCPD Application, para.70.

¹⁴ *Ibid.*, paras.71-72.

situation, Mr. Gaddafi cannot effectively exercise his right to effective representation under the Rome Statute.¹⁵

14. On *expeditiousness*, the OPCD argues that the protraction of the admissibility proceedings effectively delays Mr. Gaddafi's access to the rights afforded by the Rome Statute to an accused/ suspect person before this Court, which are more favourable than those envisaged in the Libyan legislation.¹⁶ Further, for the duration of the Challenge, the Prosecution is precluded from conducting any investigation and the Defence from preparing Mr. Gaddafi's defence, which will inevitably delay the conduct of the proceedings against Mr. Gaddafi before the ICC.¹⁷

15. Finally, the OPCD argues that the resolution of the issue by the Appeals Chamber would *materially advance the proceedings* because the Appeals Chamber will resolve the issue of whether the Pre-Trial Chamber should have ruled on the merits of the Admissibility Challenge at this point.¹⁸ Further, if the Pre-Trial Chamber does not rule on the merits of the Challenge now, the Libyan authorities may have remedied its judicial system to meet article 17 criteria by the time the Chamber decides. In that case, Mr. Gaddafi will be deprived of a trial before the ICC.¹⁹ Finally, the OPCD argues that Libya may request for additional delays.²⁰

16. In sum, the OPCD argues that fairness and expeditiousness would be promoted, and the proceedings materially advanced, if the Chamber simply ruled today on the Admissibility Challenge without seeking additional information. The paradox is, however, that an appeal would *postpone* rather than expedite the Chamber's decision on admissibility and would therefore prolong all of the

¹⁵ Ibid., para.73.

¹⁶ Ibid., paras.75-78.

¹⁷ Ibid., paras.79-80.

¹⁸ Ibid., para.81.

¹⁹ Ibid., para.82.

²⁰ Ibid., para.85.

harms the OPCD claims now exist. The Pre-Trial Chamber has set out short deadlines for Libya and for the parties and participants to respond (23 January and 11 February, respectively). Hence, the Chamber will rule on the merits of the Challenge before than the Appeals Chamber could decide on an appeal, should the matter be brought before it.

17. As any suggested unfairness at this stage is wholly speculative, an immediate resolution of the issue by the Appeals Chamber will not materially advance the proceedings.²¹ To the contrary, the proceedings will naturally – and more rapidly – move forward once the Pre-Trial Chamber issues its decision on the Challenge after receiving the additional information from Libya.

Relief sought

18. The Prosecution requests the Chamber to reject the OPCD's Application.



Fatou Bensouda,

Prosecutor

Dated this 17th day of December 2012

At The Hague, The Netherlands

²¹ ICC-01/04-01/06-2109, para.22.