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PRE-TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Sylvia Steiner
Judge Sanji Mmasenono Monageng

SITUATION IN THE LIBYAN ARAB JAMAHIRIYA

Public Document with Public Annex A

**Application concerning public statements made by the Prosecutor and respect for
the presumption of innocence principle**

Source: Office of Public Counsel for the Defence

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

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Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(participation/representation)**

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**Victims Participation and Reparations
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I. INTRODUCTION

1. The Office of Public Counsel for the Defence ("the OPCD") hereby requests the intervention of Pre-Trial Chamber I, to which the situation in the Libyan Arab Jamahiriya has been assigned, to ensure respect for the right to a fair trial and the integrity of the proceedings by remedying the prejudice caused to the rights of the defence and by preventing any such prejudice from occurring in future.
2. Various Chambers of the Court have already had occasion to rule on the public statements made to the press by the Prosecutor or members of his Office.¹ Nevertheless, at the press conference of 16 May 2011 announcing his request that the Chamber issue warrants of arrest in the situation in the Libyan Arab Jamahiriya and during an interview given to "The National" on 18 May 2011,² the Prosecutor made remarks which contravene the presumption of the innocence of the three persons named and amount to a clear pre-determination of the guilt of those persons. It is a matter for the Trial Chamber alone to determine the guilt or innocence of those persons, in the event that the Pre-Trial Chamber were itself to be persuaded of the need to issue warrants of arrest and subsequently to confirm the charges against

¹ Trial Chamber I, *The Prosecutor v. T. Lubanga, Decision on the Press Interview with Ms Le Fraper du Hellen*, ICC-01/04-01/06-2433, 12 May 2010; Pre-Trial Chamber I, *The Prosecutor v. C. Mbarushimana, Decision on the Defence Request for an Order to Preserve the Impartiality of the Proceedings*, ICC-01/04-01/10-51, 1 February 2011; Pre-Trial Chamber II, *Situation in the Republic of Kenya, Decision on the "Application for Leave to Participate in the Proceedings before the Pre-Trial Chamber relating to the Prosecutor's Application under Article 58(7)"*, ICC-01/08-42, 11 February 2011; Pre-Trial Chamber II, *the Prosecutor v. F. Muthaura, U. Kenyatta and M. Ali, Decision on the Defence "Application for Order to the Prosecutor regarding extra-judicial comments to the Press*, ICC-01/09-02/11-83, 5 May 2011.

² <http://www.youtube.com/watch?v=Q5XOorxeFUG>;
<http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/statement%20icc%20prosecutor%20press%20conference%20on%20libya%2016%20may%202011?lan=en-GB>;
<http://www.thenational.ae/news/worldwide/asia-pacific/q-a-with-luis-moreno-ocampo-chief-prosecutor-of-the-international-criminal-court?pageCount=0> (accessed on 23 May 2011).

them. Likewise, in an interview with “*El Pais*”,³ an employee of the Office of the Prosecutor discussed issues which are a matter for the judges of the Court alone.

3. The tasks of the OPCD include “representing and protecting the rights of the defence during the initial stages of the investigation” (regulation 77(4) of the Regulations of the Court). The Prosecutor’s remarks are prejudicial to the rights of the Defence, in particular, the presumption of innocence, in a situation which is still under investigation. The public nature of these remarks has the damaging effect of making the three persons named appear guilty of offences for which they have not yet been tried, of potentially influencing the decision of the Chamber and of biasing the evidence of potential Prosecution or Defence witnesses. Furthermore, these statements impair the integrity of the proceedings before the International Criminal Court by portraying as having been established issues which are for the Court to determine.
4. For the reasons set out above, the OPCD respectfully requests the Court to:
 - (i) ensure respect for the rights of the Defence, in particular the presumption of innocence and the integrity of the proceedings in the situation; (ii) instruct the Prosecutor to explain publicly that the guilt of the three persons named has not been established by a decision of the Court and that this will be a matter for the Judges of the Court alone; (iii) direct the Prosecutor to refrain from further public statements pertaining to any future cases suggesting any pre-determination of guilt of the persons he is seeking to prosecute; (iv) hold that the names of persons who are the subject of an application for the issuance of a warrant of arrest or a summons to appear shall not be published before the Pre-Trial Chamber has granted such application; (v) in the alternative, should the Chamber dismiss the OPCD’s request in point (ii), issue a public statement on the organisation of proceedings before the Court

³http://www.elpais.com/articulo/internacional/Investigamos/nombres/arbore/genealogico/represion/Libia/elpepiint/20110523elpepiint_4/Tes (accessed on 23 May 2011).

and state that, until found guilty, everyone is presumed innocent before the International Criminal Court.

II. BACKGROUND

5. By resolution 1970 (2011) of 26 February 2011,⁴ the United Nations Security Council referred the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Office of the Prosecutor of the International Criminal Court.
6. On 2 March 2011, the Prosecutor officially notified the President of the Court of the referral⁵ and issued a press release announcing the opening of an investigation in Libya.
7. On the same day, Mr Xavier-Jean Keïta, Principal Counsel of the OPCD, wrote⁶ to the Prosecutor expressing his concern as to the possibility of publicly naming the individuals who might be prosecuted at the press conference scheduled for the following day. The OPCD expressed the view that publication of those names amounts to a violation of the right to the presumption of innocence at a stage of the proceedings at which the Prosecutor is obliged to investigate both incriminating and exonerating circumstances and reminded the Prosecutor of the decision of Pre-Trial Chamber II in the situation in Kenya.⁷ The OPCD added that it was not able to bring the matter before the Chamber on account of the immediacy of the press conference but informed the Prosecutor that the OPCD would do so

⁴ S/RES/1970(2011).

⁵ Annex (ICC-01/11-1-Anx) to: The Presidency, Situation in the Libyan Arab Jamahiriya, Decision Assigning the Situation in the Libyan Arab Jamahiriya to Pre-Trial Chamber I, ICC-01/11-1, 21 March 2011.

⁶ Annexed hereto.

⁷ Pre-Trial Chamber II, Situation in Kenya, *Decision on the 'Application for Leave to Participate in the Proceedings before the Pre-Trial Chamber relating to the Prosecutor's Application under Article 58(7)'*, ICC-01/09-42, 11 February 2011.

should it appear that any further public statements by the Prosecutor required its intervention.

8. On 16 May 2011, the Prosecutor filed an application under article 58 seeking warrants of arrest against Mr M. Gaddafi, Mr Al-I. Gaddafi and Mr A. Al-Senussi.⁸
9. During the press conference which was held on the same day, the Prosecutor stated as follows:
 - “Muammar Gaddafi committed the crimes with the goal of preserving his authority, his absolute authority (...) and he uses his authority to commit the crime.”⁹
 - “Abdullah Senussi, Gaddafi’s brother-in-law, is his right-hand man, the executioner (...) he commanded personally some of the attacks.”¹⁰
10. The “Statement ICC Prosecutor Press Conference on Libya 16 May 2011”, which can be found on the Court’s website, contains the following sentence which is a particularly serious contravention of the presumption of innocence: “Muammar Gaddafi committed the crimes with the goal of preserving his absolute authority.”¹¹
11. In an interview published in “The National” on 18 May 2011, the Prosecutor made the following remarks:

⁸ Pre-Trial Chamber I, Situation in the Libyan Arab Jamahiriya, “Prosecutor’s Application pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi”, ICC-01/11-4-Red, 16 May 2011.

⁹ <http://www.youtube.com/watch?v=Q5XOorxeFUG> (3:00) (accessed on 23 May 2011).

¹⁰ <http://www.youtube.com/watch?v=Q5XOorxeFUG> (4:00) (accessed on 23 May 2011).

¹¹ <http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/statement%20icc%20prosecutor%20press%20conference%20on%20libya%2016%20may%202011?lan=en-GB> (accessed on 23 May 2011).

Q. But what about the charges of bias? That you're only going after weaker, developing countries?

A: I can just investigate crimes committed in the state parties territory [the countries that have signed and ratified the ICC treaty]. If you mention to me one country in my state parties that I'm not investigating then you can tell me something. The rest of the world is a Security Council decision and then you can say there are still double standards. I would not say there are no more double standards in the world, I would say you believe it's not true what we're saying on the Libya crimes? Is it not true what we say about the crimes committed by Lubanga, Joseph Kony or Jean-Pierre Bemba or president Bashir? (...) If you think the crimes are real, you should support the court, if not, you support the criminals."¹²

12. On 23 May 2011, Ms Dolores Delgado, an employee of the Office of the Prosecutor, stated in an interview with "*El Pais*" that "[TRANSLATION] Gaddafi does not want to experience what happened to the former presidents of Tunisia and Egypt. That is why he planned to crush any dissidence systematically, using murder and persecution. Now other people who are presumed to be guilty are to be investigated so as to add more names to the family tree of repression in Libya."¹³

III. LEGAL BASIS OF THE APPLICATION

A) The mandate of the Office of Public Counsel for the Defence

13. Regulation 77(4) of the Regulations of the Court stipulates that "[t]he tasks of the Office of Public Counsel for the Defence shall include representing and protecting the rights of the defence during the initial stages of the investigation".

14. In the situation in the Libyan Arab Jamahiriya, the proceedings have not progressed further than the initial stage of the investigation, since no warrant of arrest or summons to appear has been issued.

¹² <http://www.thenational.ae/news/worldwide/asia-pacific/q-a-with-luis-moreno-ocampo-chief-prosecutor-of-the-international-criminal-court?pageCount=0> (accessed on 23 May 2011).

¹³ http://www.elpais.com/articulo/internacional/Investigamos/nombres/arbol/genealogico/represion/Libia/elpepiint/20110523elpepiint_4/Tes (accessed on 23 May 2011).

15. Consequently, by submitting this application, the OPCD is fulfilling its mandate to protect the rights of the Defence during the initial stages of the investigation.

B) Violation of the rights of the Defence

16. The OPCD wishes to recall that respect for all the rights of the defence, in particular the right to the presumption of innocence, is essential for a fair trial before the International Criminal Court and in order for justice to be done.¹⁴ The OPCD further wishes to stress that it is only by respecting these rights that the Prosecutor can fulfil his obligation to investigate incriminating and exonerating circumstances (article 54(1)(a) of the Statute).

a. *Violation of the right to the presumption of innocence*

17. Article 66(1) of the Statute provides: “Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.”

18. Pre-Trial Chamber I has stated on various occasions that it is the ultimate guarantor of the rights of the defence, including the right to the presumption of innocence, in accordance with articles 55, 57 and 67 of the Statute.¹⁵ It has added that the right to be presumed innocent is afforded to all persons before the International Criminal Court and not to only suspects and accused

¹⁴ See, in this regard: Appeals Chamber, *The Prosecutor v. T. Lubanga, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006*, ICC-01/04-01/06-772, 14 December 2006, para. 37: “Where fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped.”

¹⁵ See: Pre-Trial Chamber I, *The Prosecutor v. C. Mbarushimana, Decision on the Defence Request for an Order to Preserve the Impartiality of the Proceedings*, ICC-01/04-01/10-51, 1 February 2011, para. 6, referring to the *Decision on the powers of the Pre-Trial Chamber to review proprio motu the pre-trial detention of Germain Katanga*, ICC-01/04-01/07-330, 18 March 2008, p. 8.

persons.¹⁶ Accordingly, the Chamber is the guarantor of the right to the presumption of innocence afforded to the three people named by the Prosecutor at his press conference on 16 May 2011 and the subsequent interviews he or his team granted to the press.

19. Pre-Trial Chamber I has held that “allegations of prejudice to suspects on account of public statements suggesting their guilt before a conviction by a court, such as the allegations made by the Defence in the Request, are primarily of relevance to the issue of presumption of innocence”.¹⁷ The Chamber must therefore consider the remarks made by the Prosecutor and his team in the present situation in the light of the presumption of innocence.

20. As the Chamber noted,¹⁸ the case law of the European Court of Human Rights holds that when the public is informed about criminal investigations in progress, all the necessary discretion and circumspection must be used if the presumption of innocence is to be respected. The European Court made a clear distinction between statements that the suspect is the guilty party and statements that the person is merely suspected. Statements that a person is suspected cannot be permitted insofar as they allow the public to believe the suspect to be guilty and prejudice the establishment of the facts by the competent judicial authority. The European Court of Human Rights was very firm in this regard, holding in 2000 that:

The Court recalls that the presumption of innocence enshrined in Article 6 § 2 of the Convention is one of the elements of a fair criminal trial required by Article 6 § 1. It will be violated if a statement of a public official concerning a person

¹⁶ Pre-Trial Chamber I, *The Prosecutor v. C. Mbarushimana, Decision on the Defence Request for an Order to Preserve the Impartiality of the Proceedings*, ICC-01/04-01/10-51, 1 February 2011, para. 8: “The Chamber notes that the right to be presumed innocent until proved guilty, set forth in article 66(1) of the Statute, is guaranteed to “everyone”, as opposed to a number of the other rights set forth in Part VI of the Statute, which are specifically addressed to the accused persons”.

¹⁷ Pre-Trial Chamber I, *The Prosecutor v. C. Mbarushimana, Decision on the Defence Request for an Order to Preserve the Impartiality of the Proceedings*, ICC-01/04-01/10-51, 1 February 2011, para. 7.

¹⁸ Pre-Trial Chamber I, *The Prosecutor v. C. Mbarushimana, Decision on the Defence Request for an Order to Preserve the Impartiality of the Proceedings*, ICC-01/04-01/10-51, 1 February 2011, paras. 10-11.

charged with a criminal offence reflects an opinion that he is guilty before he has been proved so according to law. It suffices, even in the absence of any formal finding, that there is some reasoning to suggest that the official regards the accused as guilty (see, *mutatis mutandis*, the *Allenet de Ribemont v. France* judgment of 10 February 1995, Series A no. 308, p. 16, § 35). In this regard the Court emphasises the importance of the choice of words by public officials in their statements before a person has been tried and found guilty of an offence.¹⁹

Consequently, conveying the mere opinion that the person is guilty, even in the absence of any formal finding, cannot be tolerated by virtue of the principle of the presumption of innocence.

21. In the instant case, the remarks of the Prosecutor and his team member far exceed conveying a mere opinion that the three persons named are guilty. The Prosecutor repeated several times that Mr M. Gaddafi had “committed” crimes. His team member listed the crimes. Likewise, according to the Prosecutor, Mr. A. Senussi was not suspected of crimes but “implemented” the crimes. Finally, the Prosecutor suggested in his interview with “The National” that anybody who called into question the existence of the crimes of which persons subject to a warrant of arrest or summons to appear before the Court were suspected or accused would be “against” the Court and “for” the criminals. That statement alone contravenes the right of all suspects and accused persons before the Court to the presumption of innocence since, to date, there have been no convictions.

22. The Prosecutor has, therefore, through his remarks and, indirectly, those of his team member, breached the presumption of the innocence of Mr M. Gaddafi, Mr A. Senussi and other suspects and accused persons before the Court. The breach of that fundamental right is highly prejudicial to the parties concerned as it deprives them of the effective exercise of a right enshrined in article 66 of the Statute and all the rights of the defence set forth in article 67, which can only be given effect if the presumption of innocence is fully respected.

¹⁹ ECHR, Case of *Daktaras v. Lithuania*, Application no. 42095/98, 10 October 2000, para. 41.

- b. *The prejudice caused to the exercise of the rights of the defence as a whole, in particular, the right to obtain the attendance and examination of exculpatory witnesses under the same conditions as for incriminating witnesses*

23. The Prosecutor's statements are particularly prejudicial to the right of the accused secured under article 67(1) of the Statute.

24. The Court's legal framework aims to strike a certain balance between the parties, which has been achieved by imposing upon the Prosecutor the obligation to investigate incriminating and exonerating circumstances and the obligation then to inform the Defence of all the exonerating evidence he has obtained.²⁰ It is unlikely that potential exculpatory witnesses will approach the Office of the Prosecutor if they perceive the Prosecutor as biased or as suggesting that the guilt of the persons named has already been established.

25. That is all the more true where, in view of the comments made by the Prosecutor in the interview with "The National", exculpatory witnesses will have reason to believe that they will be prosecuted before the Court if they provide exculpatory evidence. The Prosecutor's statements suggest that any person asserting the innocence of a person being prosecuted by the Prosecutor of the Court or calling into question the existence of the crimes alleged by the Prosecutor would be either supporting criminals or aiding and abetting them. If everyone holding an alternative view to the Prosecutor is deemed to be a criminal, then all Defence witnesses could be proceeded against before the ICC and before national courts. In those circumstances, no witness would dare to express an opinion at odds with that of the Prosecutor.

²⁰ See: Appeals Chamber, *The Prosecutor v. G. Katanga and M. Ngudjolo, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled "Decision on the Modalities of Victim Participation at Trial"*, ICC-01/04-01/07-2288, 16 July 2010, para. 75, citing in footnote 125: "United Nations General Assembly, Draft Report of the Preparatory Committee, 23 August 1996, A/AC.249/L.15, p. 14: 'Given the fact that the Prosecutor would have earlier access to evidence and other information, it was recommended that a mechanism be found that would neutralize any potential advantage to the Prosecutor over the Defence.'"

26. By discouraging exculpatory witnesses from coming forward and giving evidence, the Prosecutor is violating his obligation to investigate incriminating and exonerating circumstances and the right of the Defence “to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her” (article 67(1)(e)).

27. Moreover, the Prosecutor’s statement on the facts could have the serious consequence of influencing witnesses and making them doubt their own recollections. By offering a preconceived account of the facts, the Prosecutor does not allow any other perception of the facts to be offered and closes the door on anyone exercising the rights of the accused “to raise defences and to present other evidence admissible under this Statute” (article 67(1)(e)).

C) The prejudice caused to the administration of justice and integrity of the proceedings

28. The OPCD further stresses that the Prosecutor’s public remarks not only harm the rights of the Defence, but also the administration of justice by the International Criminal Court and the integrity of the proceedings in the situation in the Libyan Arab Jamahiriya, whereas it is also the duty of the Pre-Trial Chamber to ensure that these principles are respected.

a. *Pre-determination of matters which are for the Chamber to determine*

29. The OPCD respectfully submits to the Chamber that the mere fact that the Prosecutor discusses issues which are for the judges alone to determine is prejudicial to the administration of justice and the integrity of the present proceedings.

30. In the *Muthaura, Kenyatta and Ali* case, the Single Judge appointed by Pre-Trial Chamber II clearly stated that, as a matter of principle, the proper administration of justice and the integrity of the judicial proceedings required

any person involved in the proceedings to refrain from making public statements or to engage in any other activity which could have an impact on the evidence or outcome of the trial, or which could be perceived as showing a pre-determination of the cause pending.²¹ The single Judge relied upon a decision of Trial Chamber I in the *Lubanga* case,²² notably where that decision stated that “[i]n our judgment, respecting the Chamber, the judicial process and the other participants involves speaking publicly about the proceedings in a fair and accurate way, and avoiding any comment about issues that are for the Chamber to determine”.²³

31. In the present situation, the Prosecutor spoke publicly about ongoing proceedings, even as he was submitting to Pre-Trial Chamber I an application for the issuance of warrants of arrest. When it rules on such an application, the Pre-Trial Chamber applies article 58 and considers whether “there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court” (article 58(1)(a)). By his remarks, the Prosecutor clearly prejudged a matter currently under consideration by the Pre-Trial Chamber. Therefore, on the basis of the aforementioned decision of Trial Chamber I, he has failed to respect the Chamber, the judicial procedure or the other parties or participants. His statements have prejudiced the proper administration of justice before the International Criminal Court and the integrity of the proceedings, with which he nevertheless complies in writing and of whose requirements he is fully aware.

²¹ Pre-Trial Chamber II, *The Prosecutor v. F. Muthaura, U. Kenyatta and M. Ali, Decision on the Defence “Application for Order to the Prosecutor regarding extra-judicial comments to the Press”*, ICC-01/09-02/11-83, 5 May 2011, para. 6.

²² Pre-Trial Chamber II, *The Prosecutor v. F. Muthaura, U. Kenyatta and M. Ali, Decision on the Defence “Application for Order to the Prosecutor regarding extra-judicial comments to the Press”*, ICC-01/09-02/11-83, 5 May 2011, paras 7-8, citing Trial Chamber I, *The Prosecutor v. T. Lubanga, Decision on the press interview with Ms Le Frapper du Hellen*, ICC-01/04-01/06-2433, paras 36 and 39- 40.

²³ Pre-Trial Chamber II, *The Prosecutor v. F. Muthaura, U. Kenyatta and M. Ali, Decision on the Defence “Application for Order to the Prosecutor regarding extra-judicial comments to the Press”*, ICC-01/09-02/11-83, 5 May 2011, para. 8, citing Trial Chamber I, *The Prosecutor v. T. Lubanga, Decision on the press interview with Ms Le Frapper du Hellen*, ICC-01/04-01/06-2433, para. 40.

32. Moreover, the Prosecutor's remarks are prejudicial to the persons who are the subject of the application for the issuance of warrants of arrest. By potentially influencing the Chamber's perception, those remarks could prevent a fair and impartial consideration of the Prosecutor's application by the Pre-Trial Chamber. Suspects and accused persons before the International Criminal Court have the right to a fair hearing conducted impartially (article 67(1)), and this right must also be guaranteed to persons who are the subject of article 58 applications by the Prosecutor.

b. Undue and premature exposure to prejudicial publicity

33. The public disclosure of the names of the three people against whom warrants of arrest are sought exposes them unduly and prematurely to damaging publicity while impairing the proper administration of justice and the integrity of the proceedings.

34. In the situation in Kenya, Pre-Trial Chamber II expressed its strong disagreement as regards the public disclosure of the names of the suspects at the time of an application for the issuance of summonses to appear, as the suspects are thereby unduly exposed to prejudicial publicity before the Chamber has made a determination.²⁴ The circumstances in this case are identical, and the OPCD requests Pre-Trial Chamber I to espouse the position taken by Trial Chamber II and to harmonise the Court's jurisprudence on this point. This will ensure that the names of the persons subject to warrants of arrest or summonses to appear are made public only once the Pre-Trial Chamber has actually taken that decision and, therefore, after it has granted the Prosecutor's application. That would make it possible to prevent people from being unduly and prematurely exposed to prejudicial publicity and

²⁴ Pre-Trial Chamber II, Situation in the Republic of Kenya, *Decision on the "Application for Leave to Participate in the Proceedings before the Pre-Trial Chamber relating to the Prosecutor's Application under Article 58(7)"*, ICC-01/08-42, 11 February 2011, para. 22.

would safeguard the proper administration of justice and the integrity of the proceedings, as envisaged by the drafters of the Rome Statute.

35. The OPCD therefore respectfully submits to the Pre-Trial Chamber that it would be in the interest of the rights of the Defence, of the proper administration of justice and of the re-establishment of the integrity of the proceedings in the present situation for the Chamber to rule on the Prosecutor's remarks to the press on 16 and 18 May 2011 and by his team member on 23 May 2011.

IV. RELIEF WITHIN THE CHAMBER'S PURVIEW

36. Pre-Trial Chamber I has already issued the Prosecutor with the following general direction: "The Chamber is of the view that when making his future public statements, the Prosecutor should be mindful of the suspects' right to be presumed innocent until proved guilty."²⁵ The Chamber directed the Prosecutor to be mindful, when making public statements, of the right of all suspects before the Court to be presumed innocent. Although the persons who are implicated in the situation in Libya are not "suspects", they, like suspects, must be presumed to be innocent, as stated in paragraph 18.

37. The Prosecutor's remarks which have been highlighted above therefore contravene the direction given by the Chamber in its decision of 1 February 2011 in the *Mabarushimana* case. They can therefore be considered to amount to a "deliberate refusal to comply with [the Court's] directions" within the meaning of article 71 of the Statute²⁶ and a deliberate refusal "to comply with

²⁵ Pre-Trial Chamber I, *The Prosecutor v. C. Mabarushimana, Decision on the Defence Request for an Order to Preserve the Impartiality of the Proceedings*, ICC-01/04-01/10-51, 1 February 2011, para. 17.

²⁶ Article 71 – Sanctions for misconduct before the Court

1. The Court may sanction persons present before it who commit misconduct, including disruption of its proceedings or deliberate refusal to comply with its directions, by administrative measures other than imprisonment, such as temporary or permanent removal from the courtroom, a fine or other similar measures provided for in the Rules of Procedure and Evidence.

a [...] written direction of the Court” pursuant to rule 171 of the Rules of Procedure and Evidence.²⁷

38. Furthermore, in its judgment of 8 October 2010, the Appeals Chamber concluded that “recourse to sanctions enables a Trial Chamber [...] to cure the underlying obstacles to a fair trial”²⁸ while maintaining control of the proceedings and bringing about the compliance of the Prosecutor.²⁹

39. The OPCD however initially requests the Chamber to adopt the stance taken by Trial Chamber I in the *Lubanga* case and express to the Prosecutor its “strongest disapproval of the content of the interview[s]” granted and advise him that “if objectionable public statements of this kind are repeated, the Chamber will not hesitate to take appropriate action against the party

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2. The procedures governing the imposition of the measures set forth in paragraph 1 shall be those provided for in the Rules of Procedure and Evidence.

²⁷ Rule 171 – Refusal to comply with a direction by the Court

1. When the misconduct consists of deliberate refusal to comply with an oral or written direction by the Court, not covered by rule 170, and that direction is accompanied by a warning of sanctions in case of breach, the Presiding Judge of the Chamber dealing with the matter may order the interdiction of that person from the proceedings for a period not exceeding 30 days or, if the misconduct is of a more serious nature, impose a fine.
2. If the person committing misconduct as described in sub-rule 1 is an official of the Court, or a defence counsel, or a legal representative of victims, the Presiding Judge of the Chamber dealing with the matter may also order the interdiction of that person from exercising his or her functions before the Court for a period not exceeding 30 days.
3. If the Presiding Judge in cases under sub-rules 1 and 2 considers that a longer period of interdiction is appropriate, the Presiding Judge shall refer the matter to the Presidency, which may hold a hearing to determine whether to order a longer or permanent period of interdiction.
4. A fine imposed under sub-rule 1 shall not exceed 2,000 euros, or the equivalent amount in any currency, provided that in cases of continuing misconduct, a new fine may be imposed on each day that the misconduct continues, and such fines shall be cumulative.
5. The person concerned shall be given an opportunity to be heard before a sanction for misconduct, as described in this rule, is imposed.

²⁸ Appeals Chamber, *The Prosecutor v. T. Lubanga, Judgment on the Appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled “Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to disclose the Identity of Intermediary 143 or Alternatively, to Stay Proceedings Pending Further Consultations with the VWU”*, ICC-01/04-01/06-2582, 8 October 2010, para. 60.

²⁹ Appeals Chamber, *The Prosecutor v. T. Lubanga, Judgment on the Appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled “Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to disclose the Identity of Intermediary 143 or Alternatively, to Stay Proceedings Pending Further Consultations with the VWU”*, ICC-01/04-01/06-2582, 8 October 2010, para. 59.

responsible”.³⁰ The appropriate action in this case might be to use the powers granted to the Chamber under article 71 and rule 171.

40. The OPCD reserves the right to make a further application to the Chamber in the event that any future statements by the Prosecutor violate the rights of the Defence.

41. For the time being, the OPCD requests the Chamber to direct the Prosecutor to retract his remarks in a new press release and to make a verbal undertaking not to make any further statements violating the right to the presumption of innocence.

42. In the alternative, the OPCD requests Pre-Trial Chamber I to order, as was done in the situation in Kenya,³¹ the publication of a press release clarifying the procedure before the Court at this stage and recalling the principle of the presumption of innocence.

FOR THESE REASONS, MAY IT PLEASE THE PRE-TRIAL CHAMBER,

- (i) To exercise its duty to ensure respect of the rights of the Defence, the proper administration of justice, and the integrity of the proceedings;
- (ii) To direct the Prosecutor to issue a new press release stating that the three people in regard to whom he has applied for warrants of arrest in this situation are presumed innocent and that this will be a matter for the Chambers to determine;
- (iii) To direct the Prosecutor to refrain from making public statements which contravene the principle of the presumption of innocence and

³⁰ Trial Chamber I, *The Prosecutor v. T. Lubanga, Decision on the press interview with Ms le Fraper du Hellen*, ICC-01/04-01/06-2433, 12 May 2010, para. 53.

³¹ Public Affairs Unit, “Background information on the Chamber’s process of ruling on summons to appear or warrants of arrest”, 16 December 2010.

the rights of the Defence of the persons in regard to whom he has applied for warrants of arrest or summonses to appear, suspects and accused persons before the Court;

- (iv) To rule that the names of the persons who are the subject of an application for a warrant of arrest or summons to appear are not to be made public until the Pre-Trial Chamber considering the matter has granted the application;
- (v) In the alternative to the request made in (ii), to make a public announcement as to the conduct of the proceedings before the Court and to state that everyone is presumed innocent until proved guilty.

Without prejudice

And justice will be done.

[signed]

Xavier-Jean Keïta
Principal Counsel, OPCD

Dated this 25 May 2011

At The Hague, The Netherlands