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**International
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PRE-TRIAL CHAMBER I

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

SITUATION IN THE LIBYAN ARAB JAMAHIRIYA

Public Document

**Prosecution's Response to OPCD's "Requête relative aux propos publics de
Monsieur le Procureur et au respect de la présomption d'innocence"**

Source: Office of the Prosecutor

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I. Introduction

1. On 16 May 2011, the Prosecution filed its Application pursuant to Article 58 for the issuance of warrants of arrest for Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI (the “Application”).¹

2. On the same day, the Prosecutor held a press conference where he announced the filing before Pre-Trial Chamber I of the Application.²

3. On 18 May 2011, the newspaper from the United Arab Emirates (“UAE”) *The National* published an interview with the Prosecutor.³ On 23 May 2011, the Spanish newspaper *El País* published an interview with a representative of the Prosecution.⁴

4. On 25 May 2011, the Office of Public Counsel for the Defence (“OPCD”) filed its request “Requête relative aux propos publics de Monsieur le Procureur et au respect de la présomption d’innocence” (the “Request”),⁵ whereby it requests the Chamber to (i) exercise its duty to ensure respect for the rights of the Defence, good administration of justice and the integrity of the proceedings; (ii) order the Prosecutor to publish a new press release reminding the public that the three people named in the Application are presumed to be innocent and that the Chambers

¹ ICC-01/11-4-Conf-Exp. The Prosecution filed a public redacted version on the same day: ICC-01/11-4- Red.

² Libya situation: Press Conference, ICC Prosecutor - 16 May 2011, available at: <http://www.youtube.com/watch?v=Q5XOorxeFUG>, (last accessed on 16 June 2011) (“Press Conference of 16 May 2011”).

³ The National, Q&A with Luis Moreno-Ocampo, chief prosecutor of the International Criminal Court, <http://www.thenational.ae/news/worldwide/asia-pacific/q-a-with-luis-moreno-ocampo-chief-prosecutor-of-the-international-criminal-court?pageCount=0> (last accessed on 16 June 2011) (“The National interview”).

⁴ El País, “Investigamos más nombres en el árbol genealógico de la represión en Libia”, 23 May 2011, available at :

http://www.elpais.com/articulo/internacional/Investigamos/nombres/arbol/genealogico/represion/Libia/elpepiint/20110523elpepiint_4/Tes (last accessed on 16 June 2011) (“El País interview”). For the purpose of this filing, the Prosecution will refer to the three interventions as “Prosecution’s public statements”.

⁵ ICC-01/11-5.

decide guilt; or, in the alternative, explaining the proceedings before the Court and that all persons remain innocent until they are found guilty; (iii) order the Prosecutor to not make public statements that contravene the presumption of innocence; (iv) order that the identities of persons who are the subject of an application for a warrant for arrest or a summons to appear will not be made public until the Pre-Trial Chamber will have made a decision.⁶

5. The Prosecution submits that OPCD is neither a party nor an authorized participant at this current stage of the proceedings;⁷ thus, absent the required leave from the Chamber, its Request should be dismissed *in limine*.

6. Additionally, the Prosecution states that its public statements did not infringe any provision of the Rome Statute or any order from the Chamber, nor the relief sought falls within the inherent authority of the Court.

II. Submissions

(i) *OPCD is neither a party nor an authorized participant in the proceedings.*

7. The Prosecution submits that OPCD is neither a party nor an authorized participant at this current stage of the proceedings;⁸ thus, absent the required leave from the Chamber, its Request should be dismissed *in limine*.

⁶ OPCD Request, para.4, pp.14-15.

⁷ According to OPCD: “Whilst the OPCD is not, in general, a party to the proceedings, the OPCD respectfully submits that with respect to those specific proceedings for which it has been expressly tasked to represent the interests of the defence, it can be considered as a party to that proceeding.”, ICC-02/05-112, para. 16. (The Chamber did not address the merits of this submission: ICC-02/05-118). Also the Single Judge of Pre-Trial Chamber I rejected OPCD request to present legal submissions on the issue of the Court’s jurisdiction in the situation of Darfur for lack of standing under Article 19, ICC-02/05-111-Corr, para 25.

⁸ Ibid.

8. The right to participate in proceedings before this Court is a right that cannot be inferred; hence, only parties and authorized participants are allowed to litigate before this Court.⁹ OPCD relies on Regulation 77(4) of the Regulations of the Court (“RoC”) to submit its Request. Regulation 77(4) provides that OPCD’s tasks “shall include representing and protecting the rights of the defence during the initial stages of the investigation, in particular for the application of article 56, paragraph 2 (d), and rule 47, sub-rule 2”. However, this provision does not accord OPCD with an automatic right to initiate an unsolicited participation in the proceedings generally, much less at this arrest warrant application stage.

9. The Appeals Chamber has stated that provisions have to be interpreted in accordance with their ordinary meaning, in their context and in the light of their object and purpose.¹⁰ Hence, Regulation 77(4) should be read in light of the *ex parte* and non-adversarial nature of the proceedings under Article 58.¹¹ Had the drafters of the basic texts of the Court intended to give OPCD or the person identified in a warrant application the right to provide observations at this early stage of the proceedings, they would have expressly regulated it as they did in other instances, such as, *inter alia*, the participation of the States and victims pursuant to Article 19(3).

⁹ As noted by Judge Pikis: “Instances of participation of non-parties in proceedings, in a prescribed manner, may be traced in the Statute, such as the right of States referring a situation to the Prosecutor under article 13 of the Statute, or victims to submit observations on challenges to the jurisdiction of the Chamber and the admissibility of a case (article 19 (3)),” ICC-01/04-01/06-675 OA7, 11 July 2008, Dissenting opinion of Judge G.M. Pikis, para. 4. The Prosecution submits that Regulation 24 *bis* of the RoC, which was relied on in the majority’s decision to accept the Registry’s intervention in the proceedings, does not apply to the instant case, as it expressly refers to submissions by the Registrar, and OPCD is functionally independent from the registry pursuant to Regulation 77(2) of RoC.

¹⁰ ICC-01/04-168 OA3, para.33.

¹¹ “[...] [H]ad the drafters intended that the proceedings under article 58 of the Statute be conducted on an adversarial basis, they would have *expressis verbis* provided for it (*ubi lex voluit dixit, ubi noluit tacuit*), alongside the other instances wherein the voices of parties or participants shall or may be heard by a Chamber. [...]”: ICC-01/09-42, para.18. See also ICC-01/09-35, para.10; ICC-01/09-43, paras.4,9.

10. In cases where the participation of OPCD is expressly envisaged in the Regulations, namely Article 56(2)(d) and Rule 47(2), prior leave (or express appointment) from a Chamber is required.¹²

11. Finally, OPCD has generally participated in proceedings before this Court with either prior leave or appointment by the competent Chamber.¹³ The Chambers authorized OPCD to provide observations when they were satisfied that OPCD's participation at the relevant stage of the proceedings was appropriate to safeguard the interests of the Defence.¹⁴ In fact, OPCD knew and has respected this jurisprudence and in a similar scenario as the instant one (a press article by the Prosecutor with respect to the *Bashir* case) it sought leave from the Chamber prior to submit its observations.¹⁵ The Request does not advance any argument justifying its departure from this jurisprudence.

12. Hence, OPCD's unsolicited and volunteered observations without prior authorization of this Chamber should be dismissed *in limine* without entertaining its merits.

¹² Regulation 77(4).

¹³ OPCD has participated in the initial stages of the proceedings with the purpose to assist with the general interests of the Defence only after prior authorization. See for instance ICC-01/04-329 and ICC-02/05-85 whereby PTCI authorized OPCV to reply to victims' applications to participate in the proceedings. See also ICC-01/04-374, para.22, in which, Pre-Trial Chamber I provided a clear articulation of the application of Regulation 77(4) and of OPCD's role, which was appointed by the Single Judge to assist with the general interests of the Defence.

¹⁴ ICC-02/04-01/05-275, p.4: "Considering that, at the present" stage of the proceedings, *it is adequate and sufficient for the general interests of the Defence to be represented by the OPCD*" (emphasis added).

¹⁵ ICC-02/05-01/09-110 whereby OPCD acknowledged the need to seek the authorization of the Chamber. See in particular, paras.4,17,18 and 32. The Single Judge acting on behalf of the Chamber rejected the request without addressing its merits: ICC-02/05-01/09-112. Similarly, OPCD requested leave to file observations in the Situation of Uganda: ICC-02/04-115. Note that these requests were filed after the arrest warrants had been issued.

- (ii) *The Prosecution's public statements did not infringe any provision of the Rome Statute*

13. Additionally, the Prosecution submits that the Request selectively quotes extracts and takes out of context the public statements of the Prosecution. This Chamber has highlighted the importance of, and the need for, relying on the full text of public interventions in the *Mbarushimana* case.¹⁶

14. In the statements referred to by OPCD, the Prosecutor and his representative correctly presented the role and authority of the judges over the current proceedings and the presumption that the persons named in the Application are innocent.

15. For instance, the Prosecutor in the press conference of 16 May 2011 made it unequivocally clear that the case was before the judges, and they alone will decide on the issuance of the warrants after reviewing the evidence presented.¹⁷ He expressly stated that the judges have authority to reject the Application, order the production of additional evidence, call for a status conference, or accept the Application and issue the warrants. He indicated that the “case is now in [the judges’] hands”, that the time and the outcome of the Judges’ decision was unknown and that their review of the evidence is a guarantee of the impartiality and fairness of the proceedings before this Court.¹⁸ The Prosecutor expressly stressed that the

¹⁶ ICC-01/04-01/10-51, para.13: “The Chamber notes that the above-mentioned impression that certain facts have already been established is to some degree minimized by other information provided in the Press Release, [...] This information, which makes it clear that the proceedings are at an early stage and attributes the perpetration of crimes to an armed group, contributes to a better understanding of the Press Release and reduces the risk of misunderstanding of the alleged responsibility of Mr Mbarushimana for the listed crimes”.

¹⁷ Press Conference of 16 May 2011: the Prosecutor stated that “today the Office [of the Prosecutor] presented its *evidence* to the judges and is requesting the International Criminal Court to issue arrest warrants” (Time: 00:44 to 00:58); that “the *evidence* shows that Muammar Gaddafi, personally, ordered attacks on unarmed Libyan Civilians” (Time: 01:00 to 01:10); that “the *evidence* shows that such persecution is still ongoing [...] in the areas under Gaddafi control” (Time: 01:43 to 01:52). The Prosecutor further reiterated that “[b]ased on the *evidence* collected the Prosecution has applied to Pre-Trial Chamber I for the issuance for arrest warrants [...]” (Time: 4:22 to 4:50) (Emphasis added).

¹⁸ *Ibid.*: “Based on the evidence collected the Prosecution has applied to Pre-Trial Chamber I for the issuance for arrest warrants against Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi. The judges will decide. They can reject the request. They can accept the request, or they can ask for more evidence. ... The case is now in their hands.” (Time: 4:22 to 5:11). “The next steps are: the court deciding.

persons named in the Application are presumed innocent and that their rights are now and will be respected in this Court.¹⁹ He further clarified that even if arrest warrants were issued and the persons brought before the Court, the case would only go to trial if the judges confirm the charges.²⁰

16. Similarly, the Prosecution's representative, when asked about the possibilities of a trial in The Hague, answered that the judges have to decide on the Application and made therefore clear that the issuance of the warrant was neither within the authority of the Prosecution or pre-ordained: "[...] *si los jueces internacionales piden detenerle [...]*".²¹

17. In the extract of *The National's* interview quoted in the Request,²² the Prosecutor's response never referred to the persons named in the Application nor did he suggest their guilt. Indeed, the Prosecutor was asked about matters other than the Libya situation. The extract quoted concerns the Prosecutor's answer to a question about a purported bias of the Prosecution in its selection of cases, and in

As I said, they can reject the case. They can ask for more evidence or issue arrest warrant. If they issue arrest warrant we have to communicate the arrest warrant to the territorial state where ... the place the persons are. And if they are in Libya ... to Libya." (Time: 08:14 to 08:30). "When the judges will decide? I don't know. [...] probably it is a matter of weeks or months but I don't know. They will decide. Also [...] they can call for a status conference. They can do whatever they consider proper. but that is a guarantee of the system [...] we conducted investigation, we are impartial but the judges have to review the investigation and review the evidence and they will decide so the international criminal court gives guarantees to the people that [it] will be impartial and fair." (Time: 09:02 to 09:35)

¹⁹ *Ibid.*: "the rights of Mr. Gaddafi and everyone will be respected here. This is a court of justice. So, ... according [to the] law [they are] still innocent" (Time: 08:49 to 08:56)

²⁰ *Ibid.*: "The next steps are: the court deciding. As I said, they can reject the case. They can ask for more evidence or issue arrest warrant. if they issue arrest warrant we have to communicate the arrest warrant to the territorial state where ... the place the persons are. and if they are in Libya ... to Libya. If the Libyan authorities implement the arrest warrant they have to send ... surrender the persons to the court ... to the Hague, the first is an appearance before the Judges and after that is a confirmation of charges in which the judges review the evidence we have in order to decide if we can go to trial and after that we go to trial." (Time: 08:14 to 08:49)

²¹ El Pais Interview, para. 8: "If the international judges request to arrest him, the international community will be responsible of achieving it" (emphasis added).

²² OPCD Request, para.11.

particular the suggestion that the Prosecution “*only*” pursues cases arising in “*weaker developing countries*”.²³

18. Thus, in the three public interventions and the information provided therein, the Prosecutor and the Prosecution’s representative did not prejudge the guilt of the three persons named in the Application.²⁴ To the contrary, they provided a “clear and accurate description” as to the fact that the Application had to be decided by the Chamber, they did not “misdescribe” the functions of the Chamber,²⁵ and they explained the Court proceedings “in a fair and accurate way”.²⁶ On the presumption of innocence, the role of the judges, and the respect that the Prosecution pays to the judicial function, the statements were appropriate and unobjectionable.

19. Finally, naming the persons against whom an arrest warrant is being pursued falls squarely within the Prosecutor’s discretion, and is part of his independent role, and must be respected, so long as it does not obstruct the administration of justice and respects the due process rights of the persons sought before the Court and the role of the Judges.²⁷

²³ “Q But what about the charges of bias? That you're only going after weaker, developing countries?” The National Interview.

²⁴ ICC-01/04-01/10-51, para.13. See also the relevant ECtHR jurisprudence cited in paras.10-11.

²⁵ The Prosecution’s interventions are therefore in full compliance with the relevant jurisprudence, which has been selectively quoted by OPCD: see ICC-01/04-01/06-2433, para.39 - reiterated in ICC-01/09-02/11-83, para.8: “[...] It is important that in media statements there is a clear and accurate description as to whether issues that are reported have been decided or are still unresolved [and] not to misrepresent the evidence, to misdescribe the functions of the parties or the Chamber [...]”.

²⁶ A contrario, OPCD Request, para.30. The Prosecution therefore complies with the jurisprudence cited by OPCD in fn.23: ICC-01/04-01/06-2433, para.40 – quoted in ICC-01/09-02/11-83, para.8.

²⁷ A contrario, OPCD Request, para.4(iv) and p.14(iv).

III. Conclusion

20. For the reasons stated above, the Prosecution requests that the Chamber dismiss the OPCD's Request.



Luis Moreno-Ocampo
Prosecutor

Dated this 16th Day of June 2011

At The Hague, the Netherlands