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No.: ICC-01/11
Date: 17 June 2011

PRE-TRIAL CHAMBER I

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

SITUATION IN THE LIBYAN ARAB JAMAHIRIYA

Public Document

Request for Leave to Reply to “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 Public Counsel for the Defence

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

The Office of the Prosecutor

Mr. Luis Moreno-Ocampo, Prosecutor

Ms. Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
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**Victims Participation and Reparations
Section**

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Other

1. On 25 May 2011, the Office of Public Counsel for the Defence (“OPCD”) submitted its “Application concerning public statements made by the Prosecutor and respect for the presumption of innocence principle” in the situation of the Libyan Arab Jamahiriya.¹
2. On 16 June 2011, the Prosecution filed the “Prosecution’s Response to OPCD’s ‘Requête relative aux propos publics Monsieur de le Procureur et au respect de la présomption d’innocence,’”² submitting, *inter alia*, that the “OPCD is neither a party nor an authorized participant at this current stage of the proceedings.”³ The Prosecution further submitted that the OPCD requires prior authorisation in order to participate in the proceedings.⁴
3. The OPCD currently seeks leave to reply, pursuant to regulation 24(5) of the Regulations of the Court, in order to address the issue as to whether, pursuant to regulation 77(4) of the Regulations of the Court, the OPCD may request the Pre-Trial Chamber to take specific measures, which fall under the competence of the Chamber, in order to protect the rights of the Defence during the initial stages of the proceedings.
4. If granted leave to reply, the OPCD will compare and contrast regulations 77(4) and 77(5). For example, as concerns regulation 77(4), contrary to the submissions of the Prosecution, the OPCD recognises that it does not cloak the OPCD with the mantle of a party or an authorised participant in the general proceedings; its ambit is confined to discrete proceedings, which could potentially prejudice the rights of the Defence during the initial stages of the

¹ ICC-01/11-5-tENG.

² ICC-01/11-7.

³ ICC-01/11-7 at para. 5.

⁴ ICC-01/11-7 at para. 11.

proceedings. The terms ‘representing’ and ‘protecting’ in regulation 77(4) nonetheless underscores that the OPCD is vested with a mandate, and indeed, a duty to take appropriate measures to ensure that the rights of future suspects are not prejudiced during this period, when potential suspects do not have a general right to individual legal representation under the Statute. This mandate is subject to the Chamber’s power to take measures to ensure that conflicts of interest do not arise,⁵ and duty to avoid predetermining issues, which should properly be addressed within the context of a case.⁶

5. In contrast, whilst regulation 77(5) has a broader ambit in terms of the scope of potential issues that the OPCD may address, its reference to the OPCD’s role in supporting appointed Defence Counsel and persons entitled to legal assistance presupposes firstly, that this provision is applicable at a later stage of the proceedings (for example, after the issuance of an arrest warrant, or the initial appearance of a defendant before the Court), and secondly, that the OPCD’s mandate under regulation 77(5) is ancillary to the primary role of appointed Defence Counsel. The reference to the fact that the OPCD should only appear before the Chamber on specific issues, where appropriate, should therefore be construed in light of the presumption that the interests of the defendants before the Chamber will be represented by their chosen Counsel during this stage of the proceedings.

6. In light of the Prosecution’s reliance on principles of statutory construction,⁷ the OPCD would also address the principle of effective interpretation, which

⁵ This would be the case if the Chamber appointed an external *ad hoc* counsel for the defence to address factual issues, which the OPCD may not be able to address without creating a potential conflict of interest with its under regulation 77(5) to provide support and assistance to all defence teams before the Court.

⁶ For example, by precluding *ad hoc* counsel for the Defence or the OPCD from raising issues concerning jurisdiction or admissibility during the situation phase.

⁷ ICC-01/11-7, para. 9.

requires that that the OPCD should be able to both represent and protect the rights of the Defence at the initial stages of the proceedings in a manner which is real and meaningful, and not illusory.

7. The Pre-Trial Chamber has the duty and power to ensure the fairness of the proceedings, and to take certain measures on a *proprio motu* basis to achieve this.⁸ However, as the Chamber has no investigative function, it may be unaware of certain issues. If the Chamber were required to wait until the prejudice was sufficiently prolonged and pronounced to attract their attention, the range of possible remedies may have significantly narrowed by this point. Since the remedy of staying the proceedings and releasing the defendant has been termed a drastic remedy, which potentially deprives alleged victims of the right to the truth, it is more consistent with the object and purposes of the Court to address such issues in a proactive manner, in order to pre-empt further prejudice, which could irrevocably taint the proceedings.⁹
8. The absence of appointed Defence Counsel during the initial stages of the proceedings creates a situation in which Defence rights are left entirely vulnerable. The OPCD will argue that it is the clear intent of regulation 77(4) to place the OPCD as a bulwark against the infringement of these rights at the early stages of the proceedings. This vulnerability of Defence rights, coupled with the possibility that the Chamber itself is unaware of the alleged violation and can therefore not exercise its own *proprio motu* powers to protect the rights

⁸ For example, under article 56(3), the Pre-Trial Chamber may take measures to preserve evidence that may be essential for the defence.

⁹ In line with the principle of the right to an effective remedy and in response to the proactive intervention of the Defence Office at the Special Tribunal for Lebanon, the President of the Tribunal granted the potential suspects a remedy, notwithstanding the absence of explicit provisions. Order on Conditions of Detention, CH/PRES/2009/01/rev, 21 April 2009 at 10. The decision of the Head of the Defence Office to act in a proactive manner was subsequently praised by the President of the Tribunal as it demonstrated to the public and affected communities that “in our tribunal we have somebody who looks after the rights of the defense”. R, Bahnam, Hariri Tribunal Judge Antonio Cassese Talks to Asharq Al-Awsat’, 28 April, 2009.

of the Defence, creates a significant lacuna in the right to a fair and equitable trial.¹⁰

9. Accordingly, if the OPCD were to have no mechanism by which it could bring to the attention of the Chamber matters related to the discrete interests of the Defence during the initial stages of the proceedings, this would render regulation 77(4) completely inutile.

10. Finally, in line with the principles concerning effective access to justice,¹¹ the OPCD will address the extent to which the Rome Statute framework and jurisprudence of the Court permits persons and entities, who have been affected by the proceedings but have not been authorised to participate in the general proceedings, to move the Chamber for relief in connection with a discrete issues affecting their interests.¹²

11. The precise scope of regulation 77(4) of the Regulations of the Court, and the standing of the OPCD to move the Chamber for relief, have not been definitively adjudicated by the Court.¹³ Accordingly, given the fundamental

¹⁰ The OPCD observes that at the Extraordinary Chambers for the Courts in Cambodia, (ECCC), the Pre-Trial Chamber ruled that notwithstanding the absence of express statutory provisions, it would be in interests of justice to permit the Defence to be heard in connection with issues, which could impact on their rights during the initial stages of the proceedings. Ieng Sary case (Case 2) Decision On Ieng Sary's Appeal Against Co-Investigating Judges' Decision Refusing To Accept The Filing Of Ieng Sary's Response To The Co-Prosecutors' Rule 66 Final Submission And Additional Observations, And Request For Stay Of The Proceedings, 20 September 2010

¹¹ See for example, 'Order Relating to the Jurisdiction of the Tribunal to Rule on the Application by Mr El Sayed Dated 17 March 2010 and Whether Mr. El Sayed Has Standing Before the Tribunal', 17 September 2010, CH/PT/2010/005, 17 September 2010, at para 35, and the cases cited therein at footnote 80. See also 'Order Assigning Matter to Pre-Trial Judge', CH/PRES/2010/01, 15 April 2010, at paras 14-17.

¹² See for example, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, ICC-01/04-556, 19 December 2008, at para 50.

¹³ In the 'Decision on the "OPCD Request for authorization to submit observations concerning Guardian Article dated 15 July 2010"', ICC-02/05-01/09-112, which was cited by the Prosecution, the

importance of this issue to the rights of the Defence during the initial stages of the investigation, the OPCD submits that it would be in the interests of justice for the Pre-Trial Chamber to base its decision on all relevant arguments. There is thus good cause to grant the OPCD leave to reply in order to ensure that this crucial issue is fully litigated.

12. In the alternative scenario, in which the Chamber decides not to grant the OPCD leave to reply and finds that the OPCD has no standing to participate in this stage of the proceedings, this would not preclude the Pre-Trial Chamber from *proprio motu* taking notice of the Prosecution's comments, and granting an appropriate remedy to ensure the fairness of this stage of the proceedings.¹⁴

Relief Sought

13. For the reasons set out above, the Defence respectfully requests the leave of the Pre-Trial Chamber to file a reply to the "Prosecution's Response to

Honourable Single Judge considered on the basis of the merits of the OPCD's substantive observations, whether he would have the power to grant a remedy. In so doing, the Single Judge implicitly accepted the standing the OPCD. This can be contrasted to the Single Judge's decision concerning the filing by the ad hoc counsel for the Defence, in response to which the Single Judge clearly stated that the ad hoc counsel had not standing to raise the issue. Decision on the "Requête pour l'obtention d'une ordonnance condamnant les déclarations du Procureur en date du 15 juillet 2010", ICC-02/05-01/09-106, 24 August 2010.

The OPCD further notes that the case law concerning the OPCV cannot be applied automatically to the OPCD, as the OPCV has no equivalent provision to regulation 77(4).

¹⁴ Pre-Trial Chamber I has previously *proprio motu* taken notice of matters which impact upon the proceedings. Prosecutor v. Bashir, Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya, ICC-02/05-01/09-107 at footnote 1.

Moreover notwithstanding the fact that regulation 55 of the Regulations of the Court does not grant the parties or participant an explicit avenue by which they may petition the Chamber to exercise its powers under this Regulation, the decision of the majority of Trial Chamber I to provide notice concerning the requalification of the charges was triggered by observations filed by the Legal Representatives for Victims. Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, ICC-01/04-01/06-2049, 14 July 2009, para. 33.

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

14. Pursuant to regulation 35(2) of the Regulations of the Court, the Defence further requests the Chamber to extend the deadline for filing the reply until five days after the Chamber has issued its decision granting the Defence leave to reply.



Xavier-Jean Keïta, Principal Counsel of the OPCD

Dated this Friday, 17th Day of June 2011

At The Hague