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No.: **ICC-01/11-01/11**
Date: **28 November 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

IN THE CASE OF
***THE PROSECUTOR v. SAIF AL-ISLAM GADDAFI and ABDULLAH AL-
SENUSSI***

PUBLIC

**OPCD Request for Authorisation to Present Observations in Proceedings
Concerning Mr. Saif Gaddafi**

Source: The 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

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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)**

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Victims and Witnesses Unit

Counsel Support Section

Detention Section

**Victims Participation and Reparations
Section**

Other

1. Introduction

1. On Friday 25 November 2011, the Prosecutor updated the Honourable Pre-Trial Chamber in relation to his mission to Libya to coordinate the “arrest and ensure the proper coordination of the investigation and the timing of the eventual surrender of Saif Al-Islam”.¹
2. The Prosecutor informed the Pre-Trial Chamber that the Libyan authorities do not intend to transfer Mr. Gaddafi to the ICC at this point in time, but wish to investigate him for alleged embezzlement preceding the events of February 2011, and the events which form the subject matter of the proceedings before the ICC.
3. The Prosecutor has proposed to the Libyan authorities several courses of action, such as challenging admissibility before the ICC, or requesting the ICC to convene *in situ* hearings. The Prosecutor did not, however, propose or request that the Libyan authorities transfer Mr. Gaddafi to the custody of the ICC.
4. The Prosecutor has requested the Pre-Trial Chamber to convene a Status Conference to provide further details in relation to these proposed courses of action.
5. The Office of Public Counsel for the Defence (OPCD) has identified several issues arising from this filing, which have significant ramifications for the rights of Mr. Saif Gaddafi, and the general interests of the Defence. At this point in time, Mr. Gaddafi does not appear to have legal representation before the ICC. Pending the appointment of legal representation, the OPCD

¹ Prosecution’s Submissions on the Prosecutor’s Recent Trip to Libya, ICC-01/11-01/11-31, at para. 2.

respectfully requests the Pre-Trial Chamber to authorise the OPCD to appear before the Chamber or submit written observations in relation to the general interests of the Defence in connection with any litigation on these matters.

2. Issues Affecting the General Interests of the Defence

The present status of legal proceedings in Libya

6. The Prosecutor notes that the Libyan authorities wish to pursue Mr. Gaddafi's prosecution for crimes committed during the recent uprising after 15 February 2011.² He subsequently elaborates that the authorities have "started investigating the crimes committed during the uprising, after 15 February 2011".³
7. Although the Prosecutor and Libyan authorities appear to have discussed the possibility of a 'trial' in Libya,⁴ there is no indication that domestic investigations have advanced to such a stage that Mr. Gaddafi should be considered to be an 'accused' facing trial proceedings, rather than a suspect, who is under investigation.
8. In all previous admissibility proceedings, the Prosecution has advocated for a standard of admissibility that requires the party challenging admissibility to demonstrate the existence of concrete investigative steps.⁵ This was the standard, which was recently adopted by the Appeals Chamber in the Kenya cases.⁶

² At para. 2.

³ At para. 14.

⁴ See for example, paras. 9 and 12.

⁵ See for example, Prosecutor v. Ruto et al, Prosecution Response to "Application on behalf of the Government of the Republic of Kenya pursuant to Article 19 of the ICC Statute", 28 April 2011, ICC-01/09-01/11-69; Prosecutor v. Ruto et al, Prosecution's response to the "Appeal of the Government of Kenya against the Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", 12 July 2011, ICC-01/09-01/11-183.

⁶ Prosecutor v. Ruto, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", 30 August 2011, ICC-01/09-01/11-307.

9. The OPCD has no instructions or indication as to whether Mr. Gaddafi would prefer the case to be investigated by Libyan authorities or by the ICC.
10. Nonetheless, if the Libyan authorities eventually file a challenge to admissibility, it is in the general interests of the Defence that the standard and criteria for determining the existence of investigations and prosecutions be interpreted and applied uniformly throughout the different ICC cases: it would be unfair to apply a more stringent standard to cases in which admissibility is challenged by the Defence, whilst applying a more relaxed standard in the present case due to the apparent coalescence of Prosecution and State interests.

The criteria for determining whether a State is willing or able genuinely to carry out the investigation

11. Throughout the Prosecutor's filing, the Prosecution underscores that the Prosecution has no mandate to monitor the fairness of any domestic proceedings, if the Pre-Trial Chamber were to find that the ICC should defer to Libya.⁷
12. This raises an issue as to whether such a position deprives the defendant of the protections afforded by article 17(2)(c) and article 19(10) of the Statute.
13. Article 17(1) provides that a State will only have primacy if it is willing and able genuinely to carry out the investigation or prosecution in question. Article 17(2)(c) further elaborates that a State will be considered to be 'unwilling' if the domestic proceedings "were not or are not being conducted independently or impartially, and they were or are being conducted in a

⁷ At paras. 7 and 12.

manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice”.

14. The right to an independent and impartial trial is a cornerstone of the right to a fair trial. In terms of how the phrase ‘an intent to bring the person concerned to justice’ should be interpreted, the ICC Appeals Chamber has definitively ruled that “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.”⁸ Impunity will only be eliminated by fair, independent, and impartial proceedings.

15. It is also notable that in previous ICC cases, the Prosecution has argued that the Court’s complementarity regime encompasses witness protection matters, and the ability of witnesses to testify without fear of intimidation or retaliation.⁹ Trial Chamber III has also factored into consideration the ability of national authorities to implement protective measures in its determination of admissibility.¹⁰ Such concerns necessarily extend to the security of Defence witnesses, and the ability of the defendant to secure exculpatory evidence and testimony.

16. The Prosecution is mandated under article 19(10) to review domestic proceedings to determine if there is any indication that the domestic proceedings fail to comport with the above requirements.

⁸ Prosecutor v. 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, 14 December 2006, ICC-01/04-01/06-772 at paras. 37, 44 and 45.

⁹ See for example, Prosecutor v. Ruto et al, Prosecution’s Response to “Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194”, 10 May 2011, ICC-01/09-01/11-83; Prosecutor v. Bemba, Prosecution’s Response to Motion Challenging the Admissibility of the Case by the Defence for Jean-Pierre Bemba Gombo pursuant to Articles 17 and 19(2)(a) of the Rome Statute, 29 March 2010, ICC-01/05-01/08-739, at para. 62.

¹⁰ Prosecutor v. Bemba, Decision on the Admissibility and Abuse of Process Challenges, 24 June 2010, ICC-01/05-01/08-802, at para. 246.

17. The criteria for determining willingness and ability, and the issue as to whether the Prosecution has a mandate to monitor the fairness of any domestic proceedings therefore impact on the general interests of the Defence.

The present legal status of Mr. Gaddafi

18. Article 54(1)(c) obliges the Prosecution to “fully respect the rights of persons arising under this Statute”. This encompasses the rights of suspects. Although the phrasing ‘fully respect’ does not impose an obligation to ‘ensure’ such rights, the Appeals Chamber has held that in seeking the cooperation of States/NGOs/IGOs and entering into agreements with them, the Prosecutor should ensure that such cooperation and agreement is consistent with the rights of suspects.¹¹
19. The Prosecutor has informed the Pre-Trial Chamber that Mr. Gaddafi has been visited by the Minister of Justice and the ICRC, and is apparently in good health.¹² The Prosecutor also indicated that he was willing to provide further details to the Pre-Trial Chamber in a Status Conference.¹³
20. The Prosecutor’s filing does not address the following issues, which are germane to the rights of Mr. Gaddafi and the general interests of the Defence.
21. The Prosecutor has not specified whether Mr. Gaddafi was arrested pursuant to the arrest warrant issued by the ICC. If that was the case, has he been provided with a copy of the arrest warrant, and informed of his rights under the Statute? Has the Prosecution drawn the attention of the domestic authorities to their obligations under the Statute, in particular, as concerns

¹¹ Prosecutor v. Lubanga, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008”, ICC-01/04-01/06-1486, 21 October 2008 at para. 42.

¹² At para. 3.

¹³ At para. 16.

articles 55, 59 and 67(1)? Of particular importance are his right to be informed of the reasons for his arrest, his right to be brought promptly before the competent judicial authority, and his right to legal representation.

22. If Mr. Gaddafi has not been arrested pursuant to an ICC arrest warrant, what is the domestic legal basis for his arrest? If there is no legal basis, what would be the impact of such illegal detention on future admissibility proceedings, and the Chamber's determination as to whether Libyan authorities are willing and able to secure Mr. Gaddafi an independent and impartial investigation or prosecution, which comports with the criteria set out in article 17?

23. The issue as to whether Mr. Gaddafi is transferred to the ICC pending the resolution of any admissibility proceedings will also have implications for the enforcement of his rights under articles 55 and 67(1) of the Statute.

3. The Role of the OPCD in Representing the General Interests of the Defence

24. In case related proceedings, the primary mandate of the OPCD is to support and assist external Defence teams, and not to usurp their role before the Court. Nonetheless, in this particular case, Mr. Gaddafi has not appointed a Defence Counsel, and it is possible that his conditions of detention are such that he might not be in a position to designate one in an expeditious manner.

25. Although it is theoretically possible for the Chamber to designate the OPCD as counsel pursuant to Regulation 76(2) of the Regulations of the Court, the OPCD does not have any instructions from Mr. Gaddafi, and is not in a position to effectively represent him as his Defence Counsel before the Chamber in the absence of such instructions.

26. The OPCD nonetheless has a general mandate through regulation 77(4) to represent and protect the rights of the Defence during the initial stages of the investigation. Regulation 77(5) further permits the OPCD to appear, where appropriate, before a Chamber in relation to specific issues. This has been invoked by Trial Chamber II to invite the OPCD to submit observations concerning the general interests of the Defence in connection with specific issues arising in a particular case.¹⁴
27. As noted above, the courses of action proposed by the Prosecutor have significant ramifications for the general interests of the Defence. It would therefore be in the interests of justice that they are litigated in an adversarial context, and that the Chamber has the benefit of the perspective of the Defence in rendering its determination.
28. This would be consistent with the approach of Pre-Trial Chamber II to appoint an *ad hoc* Counsel for the Defence to represent the general interests of the Defence in connection with its *proprio motu* determination of admissibility issues in the Kony et al. case.¹⁵ The Pre-Trial Chamber recognised that the “appointment of a counsel tasked with representing the interests of the defence within the scope of the proceedings, whilst not mandatory, appears to be the procedurally appropriate way to ensure that fairness of the proceedings be preserved”.¹⁶
29. The Pre-Trial Chamber further confirmed that the submission of observations concerning the general interests of the Defence as concerns admissibility issues does not engender conflicts of interests between the rights of different

¹⁴ Prosecutor v. Katanga and Ngudjolo, ‘Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol’, ICC-01/04-01/07-956, 13 March 2009.

¹⁵ Prosecutor v. Kony et al., Decision on the admissibility of the case under article 19(1) of the Statute, ICC-02/04-01/05-377, 10 March 2009.

¹⁶ At para. 31.

defendants, nor does it prejudice the ability of defendants to challenge such admissibility matters in the future through their own legal representation.¹⁷

30. This decision was upheld on appeal.¹⁸

31. The appearance of the OPCD will also pose no prejudice to the Prosecution.

The Prosecution has raised these matters in a public filing, and has not indicated that there any security issues which would warrant the exclusion of the OPCD. In any case, the OPCD is bound by the highest standards of confidentiality, as set out in the Staff Rules and Code of Professional Conduct for Counsel. Since the OPCD does not represent specific clients or conduct investigations, there is no risk that confidential information could be divulged to third parties in violation of protective orders. For these reasons, the OPCD has been entrusted with highly sensitive and confidential information in the situation phase of proceedings before the ICC.¹⁹

32. Should Mr. Gaddafi designate a Defence Counsel before the Chamber issues its decision in relation to this OPCD request, then the Chamber should consider the present request as moot. The OPCD will fulfil its mandate under regulation 77 by providing support and assistance to his designated Defence Counsel.

¹⁷ At paras. 30-32.

¹⁸ Prosecutor v. Kony et al., Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19 (1) of the Statute" of 10 March 2009, 16 September 2011, ICC-02/04-01/05-408,

¹⁹ DRC situation, Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation, ICC-01/04-374, 17 August 2008.

4. Relief Sought

33. Pending the appointment of legal representation for Mr. Saif Gaddafi, the OPCD respectfully requests the authorisation of the Honourable Pre-Trial Chamber to present observations concerning the general interests of the Defence in any proceedings convened by the Pre-Trial Chamber in relation to the admissibility of the case, and the status of Mr. Saif Gaddafi.



Xavier-Jean Keïta, Principal Counsel of the OPCD

Dated this, 28th Day of November 2011

At The Hague, The Netherlands