



Original: **English**

No.: **ICC-01/11-01/11**

Date: **10 May 2012**

THE APPEALS CHAMBER

Before: Judge Sang-Hyun Song
Judge Akua Kuenyehia
Judge Eriki Kourula
Judge Anita Usacka
Judge Sanji Mmasenono Monageng

SITUATION IN LIBYA

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

**PUBLIC
With Public Annexes A-F**

**Prosecution's Comments to the Request to Disqualify the Prosecutor from
Participating in the Case against Mr. 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:

The Office of the 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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Introduction

1. The Office of Public Counsel (“OPCD”), representing Saif Al-Islam Gaddafi (“Saif Al-Islam”), requests the Court to disqualify the Prosecutor, alleging that he lacks impartiality and independence.
2. The OPCD bases its claim on the assertion that the Prosecutor is supporting Libya’s admissibility challenge, even though the Prosecutor has repeatedly and openly explained that he has not yet taken a position on this issue. As the OPCD itself concedes, the Prosecutor’s statements have carefully noted that he cannot comment on the merits until the challenge is made and that he will respond in a filing before this Court¹ and not by press release or public statements. Moreover, the Prosecutor repeatedly stated publicly that any admissibility challenge brought by Libya will be determined by the judges.²
3. Therefore, the OPCD has itself constructed the position that it now challenges. It has decided that the Prosecutor is supporting Libya’s challenge, and from this premise has concluded that the Prosecutor lacks independence. Because the premise of the argument is false, the conclusions are also false.
4. The OPCD also alleges that the Prosecutor is improperly aligned with Libya, and that he has made statements showing that he has prejudged admissibility and the guilt of the suspect. There is no evidence supporting these claims and the OPCD’s assertions are based on a distorted interpretation of a partial selection of fragmented Prosecutor’s remarks which ignores other public statements the Prosecutor has made which clearly contradict OPCD’s assertions. In his remarks, the Prosecutor has spoken only about the evidence before the Court, the judicial

¹ See eg., OPCD Application, Annex E and Annex F1; Al Jazeera, [“Moreno-Ocampo: Gaddafi son will face justice”](#), 18 April 2012, (Annex A); Al Jazeera, [“Libyan forces take control of Tripoli airport”](#), 21 April 2012, (Annex B).

² CNN, [“ICC backs down on Saif Gadhafi trial demand”](#), 23 November 2011, (Annex C); [Alagy - Occampo in a Press Conference at 0:1:40- 05:00](#), 24 November 2011, (Annex D); [Libya Can Try Gaddafi Son if Conditions Right - ICC \(1:45\)](#), 23 November 2011 (Annex E); see also [“Saif Al-Islam Could Be Tried in Libya” Says ICC Prosecutor, 22 November 2011](#), (Annex F).

process, and information that has been provided to him by others. For example, the OPCD refers to the Prosecutor's remarks concerning the Rome Statute's principle of complementarity that provides for primacy for genuine national proceedings and concludes "that the ICC Prosecutor supported Libya's position to try Mr. Gaddafi in Libya."³ But the OPCD does not distinguish between the recitation of the legal system and its application to the specific facts of the present case.

5. In sum, the OPCD has not presented a situation that falls under Article 42(7) of the Statute or Rule 34 of the Rules of Procedure and Evidence. Those provisions establish the norms for disqualification of a judge or prosecutor and provide a non-exhaustive list of examples. Both provisions require a showing of lack of impartiality or independence to disqualify the Prosecutor which the OPCD fails to demonstrate in this case.
6. The OPCD's request is factually baseless and not supported by the law. It should be summarily rejected.

Background

7. On 19 November 2011, Saif Al-Islam Gaddafi was arrested in Libya. On 22 November 2011, the Prosecutor conducted a mission to Libya.
8. On 25 November, 2011, the Prosecutor reported to the Court about his meetings with the Libyan authorities. His report stated, *inter alia*, that he explained to the Libyan authorities that the Rome Statute provides for the primacy of national jurisdictions, but that if the Libyan authorities wanted to assert jurisdiction they would have to challenge the admissibility of the case before the judges in order for this Court to make a final decision. The Libyan authorities sent a letter to the

³ OPCD Application, paras .59-60.

9. On 6 December 2011, the Pre-Trial Chamber requested submissions from the Libyan authorities regarding Saif Al-Islam, *inter alia*, (1) whether Saif Al-Islam was arrested on account of the Court's warrant of arrest; and (2) whether and when the Libyan authorities intended to surrender him to the Court.⁵
10. On 23 January 2012, the Libyan authorities advised the Court, *inter alia*, that it sought to postpone the surrender of Saif Al-Islam, invoking Article 94 of the Statute, to enable them first to prosecute him for crimes other than the crimes with which he is sought pursuant to the ICC arrest warrant.⁶ On 7 March 2012 the Court rejected the Libyan authorities' request to postpone Saif Al-Islam's surrender.⁷
11. On 22 March 2012, the Libyan authorities made a second request to postpone the surrender of Saif Al-Islam, this time pursuant to Article 95, and notified the Chamber of its intention to challenge admissibility on 30 April 2012. In this request the authorities stated that they were also investigating Saif Al-Islam for crimes against humanity.⁸ On 4 April 2012, the Pre-trial Chamber rejected the Libyan authorities second request to postpone the surrender of Saif Al-Islam.⁹ On 10 April 2012 the Libyan authorities sought leave to appeal this Decision¹⁰ and alternatively filed a direct appeal under Article 82(1)(a).¹¹ The direct appeal was rejected on 25 April 2012¹², but the leave to appeal application is still pending.

⁴ ICC-01/11-01/11-31.

⁵ "Decision Requesting Libya to file Observations Regarding the Arrest of Saif Al-Islam Gaddafi", ICC-01/11-01/11-39-Conf-Exp ,p. 6 and ICC-01/11-01/11-39-Red .

⁶ ICC-01/11-01/11-44.

⁷ ICC-01/11-01/11-72.

⁸ ICC-01/11-01/11-82.

⁹ ICC-01/11-01/11-100.

¹⁰ ICC-01/11-01/11-102.

¹¹ ICC-01/11-01/11-103.

¹² ICC-01/11-01/11-126 OA2.

12. On 17 April 2012, the OPCD brought a motion requesting the Pre-trial Chamber to “deprecate” the public statements of the Prosecutor, raising many of the same issues it raises in the present filing.¹³ On 23 April 2012, the Office of the Prosecutor submitted that the OPCD’s request and assertions were entirely unfounded.¹⁴ This matter is still pending before Pre-Trial Chamber I.
13. On 1 May 2012, the Libyan authorities brought an application seeking to challenge the admissibility of the case before Court pursuant to Article 19.

Submissions

14. A fundamental error in the OPCD’s submissions is that it is constructed on the OPCD’s prediction of the Prosecutor’s position on admissibility rather than a position he has in fact taken. The OPCD relies on this prediction to construct its claim of lack of impartiality. In fact, however, the Prosecutor has stated that he will not take a position on Libya’s admissibility challenge until he has reviewed the filings made on Libya’s behalf and he will only do so through his own filing in court. He has also repeatedly said, as the OPCD itself concedes, that it is for the judges to make the decision on admissibility.
15. In its filing, the OPCD says that the Prosecutor lacks impartiality because he has affiliated himself with the political cause and legal positions of Libya. Further, it claims that the Prosecutor has made statements predetermining admissibility and the suspect’s guilt. None of these assertions are supported by the evidence.
16. First, the OPCD contends that the Prosecutor is aligned with the Libyan government, even going so far as suggesting that he is acting under Libya’s instructions. In its filing, the OPCD pointedly notes that Article 42 requires that

¹³ ICC-01/11-01/11-115.

¹⁴ ICC-01/11-01/11-122.

members of the OTP “not seek or act on instructions from any external source,” and that the Prosecutor “should not be seen to change or vary his stance, depending on the wishes or views of particular States.”¹⁵

17. Further, the OPCD positively cites the example of the International Co-Investigating Judge who resigned his position at the Extraordinary Chambers for the Courts in Cambodia because of overt pressure exerted by the Cambodian authorities.¹⁶

18. Additionally, the OPCD alleges that the Prosecutor has “created the impression that he is acting as an advocate for Libya’s challenge,” and that his apparent position with regard to Libya’s admissibility challenge appears to be “predicated on the Prosecutor’s personal preferences or allegiance to the Libyan government.”¹⁷

19. In sum, the OPCD suggests that the Prosecutor is taking positions in the present case because he is somehow under the influence of, or seeking to please, the Libyan government. These allegations by the OPCD are completely unsubstantiated.

20. To support its claims, the OPCD contrasts the position that it imagines the Prosecutor will take on Libya’s admissibility challenge with the one that the OTP took in the *Bemba* and *Ruto* cases, and claims that the differing approaches can only be explained by a lack of independence and impartiality.¹⁸

21. This argument hardly merits a response. First, as noted above, the OPCD is itself claiming that the Prosecutor has taken a position on admissibility when he has done no such thing. Additionally, the OPCD ignores the differences between this case and those of *Bemba* and *Ruto*. Impartiality cannot mean that the Prosecutor

¹⁵ OPCD Application, paras. 29-30.

¹⁶ OPCD Application, para. 31.

¹⁷ OPCD Application, paras. 63-64.

¹⁸ OPCD Application, paras. 65-73.

must take the same position in every case, regardless of legal and factual differences among them.

22. The OPCD further attempts to support its claim of lack of impartiality by complaining about statements that it says the Prosecutor has made about Libya's admissibility challenge and the evidence against Saif Al-Islam, claiming that the Prosecutor has predetermined both issues.
23. As an initial matter, the OPCD appears to be confused about the Prosecutor's role. The Prosecutor is fully entitled, and is in fact expected, to take positions on issues that come before him and there is nothing improper in him commenting on stances he has taken. To this end, he has spoken about the evidence supporting the arrest warrant for Saif Al-Islam as well as the pending admissibility challenge process in this case.
24. In addition, the Prosecutor is mandated under Article 54 (3)(c) of the Statute to seek the cooperation of any State with respect to its competence or mandate. Likewise, Part 9 requires consultations between States and the Prosecutor and/or the Court in order to address and to resolve any issues related to international cooperation and judicial assistance.¹⁹ Issues of jurisdiction and admissibility, moreover, will often require consultation with relevant States asserting jurisdiction in order to provide early notification, consultation and/or coordination.²⁰ Accordingly, the mere fact that the Prosecutor has met with and participated in joint conferences with members of the national authority (NTC) does not in and of itself demonstrate the Prosecutor's partiality towards a State or that his actions contravene Article 42 of the Statute. On the contrary, the meetings

¹⁹ See also articles 14, 15, 18, 54(3), 87, 89, 93, 94, 96, 97 and 99 as well as other attendant provisions in the Rules of Procedure and Evidence.

²⁰ The Prosecutor is required to assess issues of jurisdiction, admissibility and the interest of justice as part of the article 53(1) determination, and continues to do so on an ongoing basis pursuant to Regulation 29(4) of the Regulations of the Office of the Prosecutor. Moreover, although the procedure outlined in article 18 do not apply to referrals by the United Nations Security Council pursuant to article 13(b), the provision indicates how the Statute seeks to promote notification, consultation and/or coordination between the Prosecutor/Court and States in relation to issues of admissibility.

show that the Prosecutor is properly carrying out his functions under the Statute. The Prosecutor has consistently promoted cooperation and consultations with all States in all the situations and cases before the Court, including in situations where the Prosecutor ultimately disagreed with the position of the national authorities on issues of admissibility.²¹ The mere fact of the existence of such consultations, therefore, is showing the Prosecutor exercising properly his role and is not indicative of a lack or impartiality on the part of the Prosecutor.

25. Likewise, pursuant to Regulation 15(1) of the Regulations of the Office of the Prosecutor, the Prosecutor is required to disseminate information and respond to enquiries from *inter alia*, States and the “general public, with particular focus on the communities affected by the work of the Office...”²² Therefore, any statements the Prosecutor has made in respect of the crimes that may have been committed or justice for the community are well within the Prosecutor’s mandate.

26. Furthermore, there is nothing improper in any of the statements made by the Prosecutor. The Prosecutor has not commented on the merits of Libya’s anticipated admissibility challenge but has only shared information about the judicial process and information that the Libyan authorities have provided to him about their ongoing investigations (which have also been provided by the Libyan government in its admissibility filing before the Pre-Trial Chamber). Regarding the case against Saif Al-Islam, the Prosecutor has commented only on the evidence relied upon by the Pre-Trial Chamber to issue an arrest warrant. The OPCD does not, and cannot, point to a single statement in which the Prosecutor has made remarks which deprive Saif Al-Islam of the presumption of innocence. It is notable that in support of its claims, the OPCD repeatedly cites comments made by media commentators or Libyan authorities but fails to explain how the Prosecutor can be held responsible for these remarks.

²¹ E.g. Kenya.

²² Regulation 15(1), Regulations of the Office of the Prosecutor.

27. Without responding to each specious allegation contained in OPCD's Application, the Prosecution submits that OPCD cites specific words or phrases as purported examples of the Prosecutor's alleged pre-determination of Saif Al-Islam's criminal responsibility which are deprived of their context, and on that basis, claims that the Prosecutor lacks impartiality.
28. For instance, in paragraph 39 of its Application, the OPCD claims that the Prosecutor has made remarks that show that he has pre-determined Saif Al-Islam's criminal responsibility based on unconfirmed media articles referenced in the OPCD's Application. First, in this article, appended as Annex A to the OPCD filing, when the Prosecutor referred to Saif Al-Islam as having been involved in the "recruitment of soldiers", "personally hiring people", "financing the operations", being "ready to crush demonstration" etc., he was specifically referring to the *evidence* evaluated by the arrest warrant issued by the Pre-Trial Chamber on 27 June 2011.²³ Indeed, this same article refers to the same evidence in the arrest warrant against Saif Al-Islam in the context of the Prosecutor's remarks.²⁴ The Prosecutor was explaining to the local communities the case he is presenting against Saif Al Islam.
29. Further, a simple reading of the Reuters article appended at Annex H to the OPCD filing reveals that the Prosecutor has publicly noted the Libyan authorities must ensure the well-being of Saif Al-Islam and respect his rights to a fair trial. Specifically, he stated that the Libyan authorities have reassured him that Saif Al-Islam had not been "mistreated" and that it is critical for the Libyan authorities to show that they "respect justice for a person like Saif". Contrary to the OPCD claim, these comments do not demonstrate that the Prosecutor was "situating

²³ ICC-01/11-01/11-1.

²⁴ OPCD Application, Annex A , p.4, paras. 1-2.

[Saif Al-Islam] with the “injustices of the Gaddafi regime”.²⁵ They were clearly made in relation with the request of an independent and impartial trial.

30. Finally, there is no provision in the Statute or the legal instruments of the Court for a temporary suspension of the Prosecutor’s duties pending the determination of this Application.

Conclusion

31. Accordingly the Prosecution requests that the OPCD Application be dismissed.



Luis Moreno-Ocampo,
Prosecutor

Dated this 10th Day of May 2012

At The Hague, the Netherlands

²⁵ OPCD Application, para. 44.