

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 27 May 2013

PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernández de Gurmendi, Presiding Judge
Judge Hans-Peter Kaul
Judge Christine Van den Wyngaert

SITUATION IN LIBYA

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

PUBLIC

Public Redacted Version of the “Request for Review of Registrar’s Decision”

Source: Defence for Mr. Saif Al-Islam Gaddafi

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

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REGISTRY

Registrar

Mr. Herman von Hebel, Registrar

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**Victims Participation and
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Other

1. Introduction

1. On 17 April 2013, the Pre-Trial Chamber authorised the Office of Public Counsel for the Defence (OPCD) to withdraw as Counsel for Mr. Saif Al-Islam Gaddafi, and appointed Mr. John R. W. D. Jones as Counsel for Mr. Gaddafi.¹
2. On 25 April 2013, the Counsel Support Section (CSS) officially confirmed the terms of payment of the Defence, namely, that the Registrar had agreed to afford legal aid to the Defence in the interests of justice, but payment would be confined to one Counsel (on an hourly basis) for this stage of the proceedings, which was in line with the Court's payment system for *ad hoc* counsel or duty counsel.²
3. On 2 May 2013, the Defence requested the Registrar to review this decision on the basis that the decision of CSS to remunerate the Defence in accordance with the payment scheme for duty counsel or *ad hoc* counsel failed to take into consideration the particular circumstances of Mr. Gaddafi's case, and the range of tasks which were both necessary and reasonable for the Defence to perform on behalf of Mr. Gaddafi.³
4. The Registrar issued his decision on 21 May 2013,⁴ in which he confirmed the position of CSS, citing the following factors:
 - i. The legal aid policy of the Court does not provide for the assignment of support staff prior to the initial appearance of the defendant;
 - ii. The scope of the mandate of Counsel was limited;

¹ICC-01/11-01/11-311-Red.

²Annex A.

³Annex B.

⁴Annex C.

- iii. A substantial amount of work had been performed by the OPCD, and Counsel could continue to benefit from the assistance of the OPCD;
 - iv. Counsel could benefit from the assistance of *pro bono* assistants; and
 - v. The tasks referred to by the Defence were not overly onerous, and could be performed by Counsel.
5. In accordance with Regulation 83(4), the Defence for Mr. Gaddafi hereby requests the Honourable Pre-Trial Chamber to review the decision of the Registrar on the grounds that:
- i. The Registrar has fettered his discretion incorrectly and unreasonably by relying upon the fact that Mr. Gaddafi has not been transferred to the seat of the Court as justification for restricting his allotment of legal aid;
 - ii. The Registrar has committed an unreasonable error by reading restrictions into the appointment of Counsel, which are not supported by the decision of the Chamber appointing Counsel, or the past mandate of the Defence in this case; and
 - iii. The Registrar's decision is unreasonable insofar as it fails to comply with the Registrar's obligation under Regulation 83(1) to allocate such funds as are necessary and reasonable to ensure an effective and efficient Defence, which in turn, will impact on the overall efficiency and expeditiousness of the proceedings.⁵

⁵ [Redacted].

2. Submissions

The Registrar has fettered his discretion incorrectly and unreasonably by relying upon the fact that Mr. Gaddafi has not been transferred to the seat of the Court as justification for restricting his allotment of legal aid.

6. The texts of the Court do not permit the Registrar to impose arbitrary limitations on the ability of the Defence to receive whatever funds are necessary and reasonable to ensure the defendant's right to fair proceedings.
7. Article 67(1)(b) of the Statute enshrines the right of the Defence to adequate time and facilities for the preparation of the defence. Article 67(1)(f) sets out the right of the Defence to have, free of any costs, the assistance of a competent interpreter and such translation as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Court are not in a language which the accused fully understands and speaks.
8. Regulation 83(1) of the Regulations of the Court further specifies that:

Legal assistance paid by the Court shall cover all costs reasonably necessary as determined by the Registrar for an effective and efficient defence, including the remuneration of counsel, his or her assistants, as referred to in regulation 68 and staff, expenditure in relation to the gathering of evidence, administrative costs, translation and interpretation costs, travel costs and daily subsistence allowance.

9. Although Regulation 83(1) affords the Registrar some level of discretion to determine what costs are necessary and reasonable, it does not give the Registrar any discretion to withhold legal aid funds for any reason other than that the funds are neither necessary nor reasonable.
10. In this regard, it is not the location of the defendant or the phase of the proceedings, which should ultimately determine the legal aid allotment, but

the actual workload that the Defence must undertake to provide the defendant with effective representation.

11. In the present case, if Mr. Gaddafi had been transferred to the seat of the Court, the workload of the Defence would not have been greater. To the contrary, if Mr. Gaddafi had been transferred to the physical custody of the ICC, it would not have been necessary for the Defence to engage in substantial litigation concerning Mr. Gaddafi's protection and privileges and immunities in Libya. His detention in a proper detention facility – as opposed to being held incommunicado in isolation – would have also minimised the imperative for ensuring an expeditious resolution to the admissibility proceedings. The fact that Mr. Gaddafi has not had his initial appearance before the Court is therefore not a relevant factor in determining the level of funds are necessary and reasonable in the particular circumstances of Mr. Gaddafi's case.
12. It is also arbitrary and unreasonable to condition the scope of Mr. Gaddafi's allotment of legal aid to factual circumstances, which are related to the failure of the Libyan Government to fulfill its obligations under the Rome Statute. Although Mr. Gaddafi has not had his first appearance before the ICC, he is not 'at large' and therefore cannot be assimilated to the typical client of an *ad hoc* counsel. Mr. Gaddafi's express desire to surrender to the ICC was frustrated by the failure of the Libyan authorities to comply with the Pre-Trial Chamber's decisions of 7 March 2012 and 4 April 2012, which requested the Libyan authorities to execute the ICC arrest warrant and surrender Mr. Gaddafi to the ICC.⁶ Had Libya done so (as obligated), Mr. Gaddafi would have had his initial appearance before the ICC, which in turn, would have triggered his right to the pre-confirmation legal aid allotment.
13. The Pre-Trial Chamber has observed in this regard that Mr. Gaddafi's rights under the Statute should not be made contingent on whether Libya has

⁶ICC-01/11-01/11-72 and ICC-01/11-01/11-100.

complied with its obligation to execute the arrest warrant.⁷ Similarly, it would be patently unfair to reduce the scope of Mr. Gaddafi's right to effective legal assistance due to Libya's failure to comply with its earlier obligations to surrender Mr. Gaddafi to the ICC.

14. It would also be an unintended and significantly prejudicial consequence of Article 95 of the Statute if the deferral of the defendant's surrender to the ICC had such a detrimental impact on the defendant's right to adequate time and resources to prepare his case. The application of such a legal aid policy would have the consequence that a State could invoke Article 95 for the sole purpose of restricting the means of the Defence, which in turn, would favour the ability of the State to pursue its admissibility challenge at the direct expense of the Defence.

15. In the present case, the impact on the Defence is far more drastic by virtue of the fact that Mr. Gaddafi has no domestic legal representation as concerns the ICC-related allegations. If the Registry's interpretation of the scope of legal aid before the ICC were to be accepted by the Chamber, it would mean that Libya would be able to successfully invoke Article 95 to diminish the means available to Mr. Gaddafi's ICC defence, whilst simultaneously denying him access to any legal advice or effective representation for the duration of the admissibility challenge.

16. Given that Mr. Gaddafi has been held in detention (in isolation, and incommunicado) for the last 17 months under the overall supervisory jurisdiction of the ICC, there is a corresponding obligation on all ICC authorities to pursue his case with due diligence. This cannot occur unless his rights before the ICC are represented in an effective manner, by a properly resourced Defence.

17. Although it is possible that the Pre-Trial Chamber might grant the admissibility challenge and transfer the case to Libya, this possibility does

⁷ICC-01/11-01/11-129 at para. 11

eliminate the Defence's duty to take measures to preserve the rights of Mr. Gaddafi before the ICC in the interim, in particular, to identify evidential and testimonial leads, which are at risk, or which might become unavailable subsequently. Trial Chamber I has also recognised that there is a positive duty on the Defence to prepare for the next stages in the proceedings, even if the outcome of the present stage is unknown.⁸

18. The Registrar's assessment as to the amount of necessary and reasonable funds in this case must therefore take into consideration Mr. Gaddafi's right to expeditious proceedings before the ICC, and the Defence's corollary duty to undertake key preparatory steps to preserve Mr. Gaddafi's rights in connection with the confirmation phase of the proceedings. To adopt any other approach would result in Mr. Gaddafi's rights before the ICC being suspended in a vacuum for the entire duration of the admissibility proceedings, which is likely to have been over a year and a half, by the time that the Appeals Chamber issues its final judgement on the challenge.
19. The Registrar's discretion to determine the level of necessary and reasonable resources must therefore be guided by the defendant's right to a fair and expeditious trial under article 67(1) of the Statute and internationally recognised human rights, and not by the rigid dictates of a legal aid policy. As observed by Trial Chamber I in the Lubanga case,

53. The Chamber accepts that the Registrar has a mandate to ensure that the Court's limited resources, to the extent that they are her responsibility, are managed carefully. In this regard, it is of importance that the sections of the Registry that have authority in this area should ensure that the Court's funds are not squandered. However, the overarching consideration in this context is the accused's right to a fair trial under Article 67 of the Statute.

54. Furthermore, it is necessary to observe that the guarantee of a fair trial is, in essence, an indispensable element of international justice. This fundamental, internationally-recognized human right, as enshrined in the Statute and in international human rights instruments

⁸ICC-01/04-01/06-2800 at para. 59.

cannot be infringed and certainly not on the basis of a Report prepared for the Assembly of State Parties (the Adjustments). If the accused's right to an effective defence is infringed, a fair trial for the accused is no longer possible.⁹

20. The Chamber further opined that it was unreasonable for the Registrar to rely upon its legal aid policy in circumstances in which the policy failed to take into consideration key activities, which the Defence were required to perform during that phase of the proceedings.¹⁰ Similarly, in limiting legal aid in the present case, the Registrar has failed to take into consideration either the complexity of the present admissibility challenge, or other key procedural developments, such as matters concerning the protection of Defence witnesses, or the impact of the Zintan proceedings on the rights of the Defence.

21. In the present case, the allotment of additional resources is required to enable Counsel to appoint someone to:

- i. [Redacted];
- ii. [Redacted];
- iii. [Redacted];
- iv. [Redacted];
- v. [Redacted];
- vi. [Redacted];
- vii. [Redacted]; and
- viii. [Redacted].

22. It is not feasible for one Counsel to perform the above tasks in a timely manner, in addition to drafting motions, conducting research, interviewing witnesses and collecting evidence. This is particularly the case given that the

⁹ICC-01/04-01/06-2800. See also paras. 43 and 44.

¹⁰ICC-01/04-01/06-2800 at para. 52.

monthly allotment of hours assigned to Counsel only covers a maximum of 12.6 working days *per month*.¹¹

23. [Redacted].

24. [Redacted].

25. In terms of the issue of interpretation and translation, it is the understanding of the Defence that the Court translation section would not perform the above tasks for the Defence. [Redacted]. For these reasons, it is necessary for an Arabic speaker to be available on a continuous basis to liaise with these persons on the behalf of the Defence.

26. Failure to accord the requested resources to the Defence would result in the Defence being placed at a significant disadvantage vis-à-vis the Libyan Government in the admissibility proceedings, and the Prosecution in general, given that the Prosecution is aided by an in-house language assistance unit.

The Registrar has committed an unreasonable error by reading restrictions into the appointment of Counsel, which are not supported by the decision of the Chamber appointing Counsel, or the past mandate of the Defence in this case.

27. In his letter of 20 May 2012, the Registrar opines that a “rational reading based on a contextual interpretation of the Chamber’s Decision leads to the conclusion that [Counsel’s] mandate – at this stage – is confined mainly – though not exclusively – to the admissibility challenge proceedings”. The Registrar then cites this factor in support of his conclusion that the request for additional resources was not reasonably justified.

¹¹ The inadequacy of such an allotment is illustrated by the fact that the Regulations of the Court allocates participates 21full days to respond to motions. Due to the maximum monthly cap of 12.6 working days, Mr. Gaddafi will only have the benefit of legal assistance for 12.6 of those days, and potentially less, if the Defence has utilised the monthly allotment for other filings or Defence activities. The same restriction applies as concerns the deadline for either filing an appeal brief or responding to one filed under article 82(1)(a) of the Statute.

28. There is, however, nothing in either the 17 April 2013 Decision of the Chamber or the particular circumstances of this case which would warrant imposing such an artificial restriction on the mandate and tasks of Counsel.
29. In the Decision, the Chamber refers to the need to appoint 'regular counsel'.¹² Although the Chamber invokes Regulation 76 to appoint Counsel, the Chamber anticipates that should Mr. Gaddafi obtain the ability to communicate his wishes in the future, he would also be able to appoint counsel in accordance with his right under Article 67(1) to freely choose Counsel.¹³ In this sense, the 'provisional' appointment of Counsel *via* Regulation 76 is directly linked to the particular circumstances of Mr. Gaddafi's incommunicado detention, rather than any particular restriction concerning the mandate of Counsel.
30. The Registrar also appears to accept that the appointment of Counsel constitutes a continuation of the role of the OPCD in representing Mr. Gaddafi before the ICC. In this connection, neither the December 2011 decision appointing the OPCD to represent the interests of Mr. Gaddafi in the proceedings nor the April 2012 decision appointing Counsel from the OPCD to represent Mr. Gaddafi in the proceedings imposed any implicit or explicit restriction on the mandate of the Defence, or delimited the role of the Defence to admissibility proceedings. To the contrary, in its decision of 22 November 2012, the Pre-Trial Chamber emphasised that it had appointed Counsel from the OPCD to represent Mr. Gaddafi before the admissibility challenge was lodged.¹⁴
31. The multi-faceted character of the OPCD's representation of Mr. Gaddafi is also demonstrated by the variety of filings, which have been submitted thus far in the proceedings. The OPCD has submitted motions on a range of topics, including disclosure, the impartiality of the proceedings, the disqualification

¹² ICC-01/11-01/11-311-Red at para. 17.

¹³ At para. 20.

¹⁴ ICC-01/11-01/11-233-Red at para 36.

of the Prosecutor, protective measures, and privileges and immunities of the Defence. At no point has either the Pre-Trial Chamber or the Appeals Chamber found that the OPCD lacked standing to raise these matters.

32. Many of these matters have triggered ongoing litigation, to which the present Counsel is required to respond. The Defence has also been required to raise certain issues before the Chamber, such as the return of privileged documents, and [Redacted].
33. The Registrar therefore plainly committed a fundamental error by averring that the mandate of Counsel for Mr. Gaddafi was confined mainly to admissibility proceedings, and citing this conclusion as a relevant factor in rejecting Counsel's request for additional resources.

The Registrar's decision is unreasonable insofar as it fails to comply with the Registrar's obligation under Regulation 83(1) to allocate such funds as are necessary and reasonable to ensure an effective and efficient Defence, which in turn, will impact on the overall efficiency and expeditiousness of the proceedings.

34. It is neither reasonable nor efficient to require a Counsel – who is paid on an hourly basis – to perform case management and legal assistance tasks. Nor are these objectives met by outsourcing translation and interpretation requirements to external professional translators, who are remunerated at a much higher level than Defence support staff.
35. In terms of the first aspect, although the mandate of Counsel is indeed time limited in the sense that if Mr. Gaddafi is transferred to the ICC, it will be for him to either ratify his family's selection of counsel or choose another Counsel, either possibility requires the current Counsel to maintain proper order as concerns all filings, correspondence and materials received in his capacity as Counsel.

36. Under the Code of Conduct, the present Counsel has an obligation to transfer the case file to any future Counsel.¹⁵ Since Counsel has a duty to act in the best interests of the client, the obligation to transfer the case file exists even if jurisdiction is ceded to the Libyan authorities.¹⁶
37. As exemplified by the Krajisnik case at the ICTY, in which the shoddy state in which the case file was maintained occasioned significant delays and impediments for the subsequent Defence team and necessitated substantial additional legal aid payments for the new team,¹⁷ a failure to maintain a properly organised case file can incur additional costs for the legal aid scheme, and for the Court as a whole due to the costs associated with delays in the proceedings. It would therefore be both inefficient and a derogation of Counsel's duties to fail to record all Defence related tasks in a transparent and well-organised manner, in order to facilitate the ability of any other Counsel to take over the case in an expeditious manner.
38. The implementation of a proper case management system for the Defence also directly promotes the expeditiousness and efficiency of the current proceedings. For example, in the Uganda situation, the *ad hoc* counsel for the Defence – who was not assisted by a case manager or legal assistant – missed a key deadline due to formatting issues and other organisational issues, which would normally have been overseen by a case manager.¹⁸
39. In the present case, irrespective of the outcome of the decision of the Pre-Trial Chamber in relation to the admissibility challenge, it is likely to be appealed by either the Libyan Government or the Defence.

¹⁵Article 18(5) of the Code of Professional Conduct for Counsel.

¹⁶It is notable in this regard that the ICTY has imposed a strict obligation on Defence counsel to ensure the orderly transfer of the case file to domestic counsel, if the case is referred to a domestic court pursuant to rule 11 *bis* of the Rules of Procedure and Evidence. Memorandum of Understanding between OKO and OLAD, 9 May 2006, at paras. 4-5 www.okobih.ba/files/docs/Memorandum-OKO-OLAD-e.pdf

¹⁷Prosecutor v. Krajisnik, Appeals Judgement, 17 March 2009, at paras 45-47.

¹⁸ICC-02/04-148.

40. Given that the appeal will encompass the record of the admissibility proceedings in its entirety, it will be necessary for the Defence to be familiar with and cite the numerous filings and admissibility exhibits, which have been submitted in the case thus far. In this connection, the clarity of the present Court record is also obscured by the fact that the Libyan Government has submitted many filings, which have been the subject of multiple reclassifications. The efficiency and expeditiousness of the appeal proceedings would be promoted by Defence submissions, which cross-reference these submissions and exhibits in an accurate and precise manner.
41. In this regard, the fact that a significant amount of work has been performed thus far by the OPCD increases the present workload of the Defence as it is necessary for Counsel to review the significant number of filings in the case,¹⁹ and consult with the OPCD on an ongoing basis to ensure that Mr. Gaddafi's interests are represented in a coherent manner.
42. It will also be necessary for the Defence to prepare both confidential and public redacted versions of its filings, in order to meet the Court's obligation to ensure public and transparent proceedings. As recognised by Trial Chamber I, this time-consuming task is essential to the Court's mandate, and can in itself, justify the retention of support staff.²⁰
43. The hourly invoice system also acts as a safeguard in ensuring that the defence is only reimbursed for work which is necessary and reasonable. If the work performed by the case manager or legal assistant is directly relevant to necessary defence preparation, then it follows that there was no rational basis for imposing a blanket refusal on the appointment of such persons in the first place. Alternatively, if the specific tasks, which have been performed, are superfluous or irrelevant, then it follows that CSS would not approve the work plan in advance or remunerate the hours.

¹⁹There are currently 339 filings in the case record. Many of these filings have multiple annexes.

²⁰ICC-01/04-01/06-2800 at para. 59.

44. The use of *pro bono* assistants is also not an adequate alternative to the appointment of remunerated staff, for the following reasons. From discussions with CSS, it would appear that *pro bono* members are essentially interns, who are not required to apply through the official internship scheme. The Defence is restricted to two *pro bono* members *per* team, irrespective of the number of hours worked by persons in question. No justification has been advanced by CSS in support of this restriction.
45. In the same manner that internships are essentially stepping stones in the professional career of young lawyers, it will be difficult if not impossible for the Defence to retain the services of *pro bono* members for any substantial length of time. Any expertise or familiarity with the case gained by these persons inevitably will be lost. This is a very inefficient result for a fledgling Defence team, that is attempting to familiarise itself with a case which has been proceeding for over a year and a half, and to establish efficient case management protocols.
46. Should the challenge to admissibility be rejected, any temporary legal aid savings made during this phase of the proceedings will also be exceeded by the delays occasioned during the confirmation phase due to the time required by the Defence to recruit both a case manager and legal assistant (one of whom should be conversant in both English and Arabic), establish case management protocols, and organise and review the voluminous case file and case materials.
47. The Registrar's position that the use of *pro bono* assistants is an adequate alternative to the appointment of support staff also constitutes an abdication of the Registrar's obligation to cover necessary and reasonable costs required for an effective and efficient Defence. Regulation 83(1) does not afford the Registrar any discretion to allocate the Defence with non-financial means, such as *pro bono* assistants, in lieu of legal assistance. If the tasks are necessary and reasonable, then the Registrar must assign legal aid funds to the Defence –

the possibility to recruit interns or pro bono assistants is an irrelevant consideration for the purposes of Regulation 83(1).

48. It would also be a fundamental violation of the principle of equality of arms to take into consideration the potential output of interns and *pro bono* assistants in connection with Defence funding, when their contribution to other sections of the Court is completely disregarded in the Court's budgetary processes.

3. Relief Sought

49. For the reasons set out above, the Defence for Mr. Saif Al-Islam Gaddafi respectfully requests the Honourable Pre-Trial Chamber to order the Registrar to allocate funds for a case manager and legal assistant.



John R.W.D. Jones QC, Counsel for Mr. Saif Al-Islam Gaddafi

Dated this, 27th Day of May 2013

At London, England