

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: **22 March 2012**

PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernandez 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**

**Confidential
With Confidential Annexes A, B, C and D**

OPCD Request for Disclosure

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

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
Victims**

**The Office of Public Counsel for the
Defence**

Mr. Xavier-Jean Keïta, Principal Counsel
Ms. Melinda Taylor, Counsel

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia, Registrar

Deputy Registrar

Mr. Didier Daniel Pereira, Deputy
Registrar

Victims and Witnesses Unit

Counsel Support Section

Detention Section

**Victims Participation and Reparations
Section**

Other

1. Introduction

1. The Office of Public Counsel for the Defence (OPCD) has requested the Prosecution to disclose information, which is of central importance to the ability of the OPCD to oversee the effective implementation of Mr. Saif Al-Islam Gaddafi's rights at this point in time.
2. The Prosecution has nonetheless refused to provide such information on the sole ground that it contests the authority of the OPCD to act on behalf of Mr. Gaddafi.
3. The OPCD has a valid mandate until the Chamber otherwise decides. There has been no indication from the record that would militate against the continuation of this mandate. The Prosecution can not unilaterally refuse to disclose information because it disagrees with a matter, which falls under the competence of the Chamber to determine.
4. This right to effective representation also exists irrespective as to whether Mr. Gaddafi has the capacity to designate his own counsel. Indeed, the fact that Mr. Gaddafi has been kept in detention for 124 days without being brought before a judge, and without having any means for maintaining communication with a lawyer, heightens rather than diminishes his need for effective representation. It is therefore extremely prejudicial for the Prosecution to denude the right to effective representation of any meaning by depriving the OPCD of access to information, which the OPCD requires to effectively represent the interests of Mr. Gaddafi.

2. Procedural History

5. On 25 November 2011, the Prosecution informed the Pre-Trial Chamber in a public filing that it had met with National Transitional Council (NTC) to discuss the status of the execution of the arrest warrant against Mr. Saif Al-

Islam Gaddafi. During this meeting, the NTC indicated that they wished to initiate domestic proceedings against Mr. Gaddafi, and to that end, had discussed the possibility of invoking Article 94 or initiating admissibility proceedings.¹

6. In light of the potential impact of such issues on the rights of the defendant and pending the appointment of legal representation for Mr. Gaddafi, the OPCD requested the Chamber to authorise the OPCD to present observations in connection with any proceedings concerning admissibility or the status of Mr. Saif Al-Islam Gaddafi.²
7. The Prosecution, in its response, contested the standing of the OPCD, and submitted that the OPCD should not be granted authorisation to represent the interests of Mr. Gaddafi in these proceedings.³
8. On 6 December 2011, the Honourable Pre-Trial Chamber issued its 'Decision Requesting Libya to file Observations Regarding the Arrest of Saif Al-Islam Gaddafi',⁴ in which the Chamber appointed the OPCD "to represent the interests of the Defence in all instances related to the proceedings against Saif Al-Islam Gaddafi in the present case until otherwise decided by this Chamber".⁵
9. The Representatives of the Registry and the OPCD met with Mr. Gaddafi on 3 March 2012 to "ensure that Saif Al-Islam Gaddafi is well informed about the current stage of the proceedings before the Court and of the appointment of the OPCD to represent his interests until he decides, should he wish to be

¹ Prosecution's Submissions on the Prosecutor's recent trip to Libya, ICC-01/11-01/11-31

² 'OPCD Request for Authorisation to Present Observations in Proceedings Concerning Mr. Saif Gaddafi', ICC-01/11-01/11-33.

³ Prosecution Response to the "OPCD Request for Authorisation to Present Observations in Proceedings Concerning Mr. Saif Gaddafi", ICC-01/11-01/11-36, 1 December 2011.

⁴ Public Redacted Version of Decision Requesting Libya to file Observations Regarding the Arrest of Saif Al-Islam Gaddafi, 6 December 2011, ICC-01/11-01/11-39-Red.

⁵ At p. 6.

represented in the Court's proceedings, to appoint counsel of his choosing".⁶

Confidential *ex parte* reports were subsequently filed before the Chamber.⁷

10. On 7 March 2012, the OPCD wrote to the Prosecution to request the Prosecution to disclose any minutes or *procès verbaux* of meetings, or correspondence with the Libyan authorities, which may be relevant to the admissibility of the case or the Article 94 request for suspension, and any information or documentation concerning the domestic proceedings against Mr. Gaddafi.⁸
11. The OPCD further referred to the existence of credible reports concerning human rights violations in Libya, in particular, as concerns persons being questioned and detained by the Libyan authorities. The OPCD noted that the Prosecutor's obligation under Article 54(1)(c) of the Statute to respect the rights of all persons arising under the Statute, including defendants and potential Defence witnesses, would be contravened if the Prosecution were to provide assistance, evidence or information to the Libyan authorities, which could be used subsequently to illegally detain or interrogate the defendant, or potential Defence witnesses.
12. The OPCD therefore inquired as to whether the Prosecution intended to provide assistance or cooperation to the Libyan authorities in connection with the domestic proceedings, and if so, what safeguards it had in place to ensure that such cooperation or assistance will not be used by the Libyan authorities in connection with violations of the rights of Mr. Saif Al-Islam Gaddafi, his family, and acquaintances, who may be potential Defence witnesses.
13. On 13 March 2012, the Prosecution responded that although the Pre-Trial Chamber had appointed the OPCD to represent the interests of Mr. Saif Al-

⁶ ICC-01/11-01/11-52-Conf-Exp, 3 February 2012 at p. 4.

⁷ ICC-01/11-01/11-71-Conf-Exp; ICC-01/11-01/11-70-Conf-Exp.

⁸ The letter is attached as Confidential Annex A. All correspondence has been filed on a confidential basis due to the fact that they cite from confidential decisions, and or filings from the NTC. If these decisions and filings are made public, then the correspondence could also be filed publicly.

Islam Gaddafi in connection with these proceedings, until otherwise decided by the Chamber, the NTC had indicated in their observations of 23 January 2012 that Mr. Gaddafi was refusing representation. The Prosecution therefore indicated that they would not disclose the requested information to the OPCD unless the OPCD first provided "written confirmation that, during or following the OPCD meeting with Mr. Gaddafi on 3 March, he agreed that you should act on his behalf (or if in the alternative he indicated that he did not wish to be represented by OPCD)".⁹

14. In light of this response, the OPCD drew the attention of the Prosecution to the fact that the Pre-Trial Chamber had appointed the OPCD to represent the interests of Mr. Gaddafi "until otherwise decided by this Chamber", and therefore requested the Prosecution to clarify whether they would not effectuate disclosure because they disputed the mandate, which the Pre-Trial Chamber had vested in the OPCD.¹⁰

15. In its letter of 15 March 2012, the Prosecution further elaborated that since the OPCD had met with Mr. Gaddafi on 3 March 2012, the OPCD should be in a position to apprise the Chamber as to any relevant information concerning Mr. Gaddafi's preferences regarding representation. Finally, the Prosecution noted that the OPCD response did not address:

whether Mr. Gaddafi agreed that you may take actions on his behalf. If he did not agree, that raises the issue whether providing information about him to a person whose representation he has refused to accept is consistent with his rights. Until this concern is resolved, the Prosecution continues to have reservations about providing the information about him that you request.

16. The OPCD has filed the present Request on a confidential ex parte basis (OTP, OPCD, Registry only) due to the fact that it cites information from confidential

⁹ The letter is attached as Confidential Annex B.

¹⁰ This letter is attached as Confidential Annex C.

NTC observations, and confidential ex parte decisions and filings. The OPCD will simultaneously file a public redacted version, which omits all such references.

3. Submissions

17. The Prosecution has not disputed, at any point, that the requested information falls within the Prosecution's disclosure obligations; the sole point of contention appears to be whether the OPCD has a valid mandate to request the disclosure in order to represent the interests of Mr. Gaddafi in these proceedings. In effect, the Prosecution are asserting a right to unilaterally withhold disclosure, if the Prosecution disagrees with the validity of counsel's mandate, or if the Prosecution's considers that the counsel in question is not acting in the interests of the client.
18. As a matter of principle, the approach of the Prosecution constitutes an unjustified and inappropriate interference with the independence of the Defence. There is nothing in the Statute, Rules, Regulations or Code of Conduct, which permits the Prosecution to fashion its disclosure obligations according to its own views concerning the particular counsel assigned to represent the interests of the defendant.
19. The requested information is also not necessary to resolve the matter. Regulation 74(1) of the Regulations of the Court stipulates that:

Defence counsel shall act in proceedings before the Court either when chosen by the person entitled to legal assistance in accordance with rule 21, sub-rule 2, or when the Chamber has appointed counsel in accordance with the Statute, Rules or these Regulations.

20. Notably, the Regulation does not specify that the rights and standing of a counsel appointed by a Chamber differ in any regard from a counsel, freely chosen by a defendant. In this regard, Mr. Gaddafi's inability to make an

effective selection of counsel is due to factors beyond his control; the expeditious implementation of his rights should therefore not be sacrificed due to his inability to exercise his right to freely choose counsel in an effective manner.

21. There is also no basis for disputing the validity of the mandate of the OPCD. The Pre-Trial Chamber appointed the OPCD "to represent the interests of the Defence in all instances related to the proceedings against Saif Al-Islam Gaddafi in the present case until *otherwise decided by this Chamber*" (emphasis added).¹¹ Both the OPCD and the Registry have placed all information before the Chamber, which may be relevant to the representation of Mr. Gaddafi.¹² The Chamber has not decided to revoke or modify the mandate of the OPCD. The OPCD is therefore required by the terms of article 17(1)(c) of the Code of Professional Conduct to continue representing the interests of Mr. Gaddafi until its assignment is revoked by the Court.
22. It is also notable that the Prosecution did not seek leave to appeal the Chamber's decision of 6 December 2012, nor has it requested reconsideration of the appointment subsequently. The Prosecution cannot interpret its disclosure obligations through the lens of how it views the validity of the OPCD's mandate; if the Prosecution were to have such discretion, then the Prosecution could effectively refuse to recognise Court-appointed mandates, without having to first seek leave to appeal, or satisfy the legal criteria for reconsideration. As emphasised by the Appeals Chamber in the Lubanga case:¹³

¹¹ Public Redacted Version of Decision Requesting Libya to file Observations Regarding the Arrest of Saif Al-Islam Gaddafi, 6 December 2011, ICC-01/11-01/11-39-Red at p. 6.

¹² ICC-01/11-01/11-71-Conf-Exp; ICC-01/11-01/11-70-Conf-Exp.

¹³ Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU", 8 October 2010, ICC-01/04-01/06-2582 at paras. 1 and 2.

Orders of the Chambers are binding and should be treated as such by all parties and participants unless and until they are suspended, reversed or amended by the Appeals Chamber or their legal effects are otherwise modified by an appropriate decision of a relevant Chamber.

Even if there is a conflict between the orders of a Chamber and the Prosecutor's perception of his duties, the Prosecutor is obliged to comply with the orders of the Chamber.

23. Nor can the Prosecution seek to use its role as the gateway for disclosure as leverage to obtain information, which was filed on a confidential *ex parte* basis, and which it would not otherwise be entitled to in the absence of a decision from the Chamber. The Appeals Chamber has clearly stated that:¹⁴

Article 67 (2) and rule 77 place mandatory disclosure obligations on the Prosecutor. The Appeals Chamber notes the absence in these provisions of any requirement that an accused provide advance revelation of his or her defences in order to receive full prosecution disclosure. The lack of any correlation between the right to receive prosecution disclosure and any disclosure obligations of the Defence is evident in that the Prosecutor is duty-bound to provide full disclosure even if an accused elects to remain silent or does not raise a defence.

24. In line with this jurisprudence, the Prosecution cannot require the Defence to provide information, concerning its privileged relationship with its client, as a precondition for disclosure.

25. The Prosecution has also sought to justify its non-compliance by questioning "whether providing information about him to a person whose representation he has refused to accept is consistent with his rights." However, apart from a reference to an unsubstantiated allegation contained in the NTC observations of 23 January 2012, the Prosecution has not provided any evidence of

¹⁴ Prosecutor v. Lubanga, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, ICC-01-04-01-06-1433, 1 July 2008, at para. 50.

explanation as to why the receipt of the requested information would be contrary to the interests of Mr. Gaddafi.

26. As set out in regulation 144(2) of the Regulations of the Registry, in addition to being officers of the Court, the OPCD is also bound by the Code of Professional Conduct for the Defence, and is well aware of its obligations therein. Counsel are in general, presumed to perform its obligations in good faith, in the absence of any concrete evidence to the contrary.¹⁵ The ICC has also extended this presumption to the Offices of Public Counsel.¹⁶

27. Without prejudice to the above principle that the Defence is not required to reveal its strategy in order to obtain the disclosure of relevant and exculpatory information, the type of information requested by the OPCD also falls squarely within the general interests of Mr. Gaddafi. Mr. Gaddafi has been kept in detention for 124 days, and there is no indication that he has been brought before a judge during this time period, nor has he had the assistance of a Libyan lawyer. It is therefore somewhat astounding for the Prosecution to assert that it would not be in the interests of Mr. Gaddafi for his court-appointed lawyers to obtain information concerning the purported legal basis for his continued detention in Libya.

28. Information concerning the nature of the domestic proceedings against Mr. Gaddafi (the type of crimes, the advancement of the proceedings, the extent to which there is any linkage to the allegations which form the basis for the ICC arrest warrant) is directly relevant to the ability of the OPCD to take appropriate actions to ensure that Mr. Gaddafi's rights under article 55(1) and

¹⁵ Prosecutor v. Prlic et al, 'Decision On Prosecution's Appeal Against Trial Chamber's Order On Contact Between The Accused And Counsel During An Accused's Testimony Pursuant To Rule 85(C)', 5 September 2008, at para 18; Prosecutor v. Taylor, Decision on Prosecution Motion for an Order Restricting Contact Between the Accused and Defence Counsel During Cross-Examination', 20 November 2009, at page 3.

¹⁶ See for example, Prosecutor v. Lubanga, Decision on the legal representative's application for leave to tender into evidence material from the "bar table" and on the Prosecution's Application for Admission of three documents from the Bar Table Pursuant to Article 64 (9), 2 March 2011, ICC-01/04-01/06-2694, at para. 16.

(2) of the Statute are respected. For example, as noted in the OPCD report, the NTC prosecutors informed the OPCD that Mr. Gaddafi has met with prosecution investigators.¹⁷ In order for his privilege against self-incrimination under article 55(1)(a) to be effective, it is necessary for the OPCD to have as much information as possible concerning possible overlaps between the two investigations.

29. The existence of correspondence or minutes of meetings between the Prosecution and NTC is also relevant to establish:

- *firstly*, whether the ICC Prosecution has received information or assistance from domestic authorities, which may have been obtained in connection with procedures, which violated Mr. Gaddafi's rights or the rights of other persons related to Mr. Gaddafi, who may be potential Defence witnesses;
- *secondly*, whether the Libyan authorities have been assisted in conducting their proceedings, which have violated the rights of Mr. Gaddafi, by information, advice, or assistance provided by the ICC Prosecution; and
- *thirdly*, whether the Libyan authorities would have the capacity to investigate or prosecute Mr. Gaddafi in a manner that is consistent with their obligation to bring him to justice.

30. Information and correspondence, which is relevant to a possible abuse of process, or the admissibility of the case, falls squarely within the Prosecution's disclosure obligations.¹⁸ The obligation to disclose such documents exists, irrespective as to whether the Defence has actually filed an admissibility challenge, or whether the defendant has been brought into the custody of the

¹⁷ ICC-01/11-01/11-69-Conf-Exp at para. 24. The Prosecution received this report.

¹⁸ Prosecutor v. Mbarushimana, Decision on the Defence Request for Disclosure, 27 January 2012, ICC-01/04-01/10-47; Prosecutor v. Bemba, 'Decision on the defence application for additional disclosure relating to a challenge on admissibility', 2 December 2009, ICC-01/05-01/08-632; Prosecutor v. Bemba, Second decision on disclosure relating to an admissibility challenge, 15 December 2009, ICC-01/05-01/08-655.

ICC.¹⁹ In this regard, the ability of Mr. Gaddafi to instruct the OPCD to file related motions is necessarily contingent on the ability of the OPCD to first, effectively advise him on such matters. In turn, the disclosure of relevant information is the *sine qua non* for the OPCD to be able to formulate accurate and relevant advice.

31. In any case, even if the OPCD were to refrain from advancing a positive defence strategy at this point in time, the provision of the requested information is necessary to enable the OPCD to determine which reactive strategy is in the best interests of Mr. Gaddafi; for example, if the NTC were to refuse to transfer Mr. Gaddafi to the ICC or challenge admissibility, or if the Chamber were itself to determine admissibility on a *proprio motu* basis.
32. Finally, a fundamental aspect of the OPCD's mandate to represent the best interests of Mr. Gaddafi is to attempt to mitigate any prejudice that Mr. Gaddafi has suffered and may continue to suffer by virtue of the fact that the NTC has, contrary to its obligations under Security Council Resolution 1970, failed to transfer him to the custody of the ICC. A possible area of future prejudice is the disappearance or corruption of potential Defence evidence.
33. The Prosecution has an obligation under Article 54(3)(f) to take necessary measures to ensure the protection of any person or any evidence. This article is not restricted to Prosecution witnesses or evidence, but, in line with the Prosecution's obligation to investigate incriminating and exonerating circumstances equally, also extends to potential Defence witnesses and evidence. There have been several recent reports concerning reprisals and interrogations conducted by the NTC and *thuwar* against persons, who may have a perceived linkage to the Gaddafi regime.²⁰ Such persons are an obvious

¹⁹ Prosecutor v. Mbarushimana, Decision on the Defence Request for Disclosure, 27 January 2012, ICC-01/04-01/10-47.

²⁰ For example, in the recent Commission of Inquiry report, the Commission referred to the existence of killings, arbitrary detention, enforced disappearances, and torture against Gaddafi forces or anyone associated with the Gaddafi security regime. Report of the International Commission of Inquiry on Libya, 2 March 2012, A/HRC/19/68 at paras 30, 3, 36, 41, 49-51 *inter alia*. See also, See, e.g., Navi Pillay,

source of exculpatory information for the Defence. However, the ability of the Defence to obtain relevant and reliable information from such persons in the future will be extremely impeded if these persons are subjected to coercion, or intimidation in the interim.

34. The ICC does not currently have a field office in Libya, nor has the Registry entered into any memoranda of understanding with the Libyan authorities concerning cooperation in relation to witness and protection matters at this point in time. In the absence of any mechanism for actively protecting Defence witnesses, it is, at the very least, important that the actions of the ICC (in particular, the Prosecution) do not exacerbate the protection of such persons. It is therefore imperative that the Prosecution develops and implements safeguards for ensuring that any information or cooperation provided by the ICC Prosecution is not used by the Libyan authorities to subsequently illegally detain or interrogate the defendant, or potential Defence witnesses, or otherwise destroy potentially exculpatory evidence.
35. In turn, it is necessary for the OPCD to be apprised of the nature of these safeguards (insofar as they relate to potential Defence witnesses or evidence) so that it can determine whether they are adequate, and if not, whether it might be necessary for the Chamber to take measures under Article 57(3)(c), or potentially, Article 56(3) of the Statute.
36. In terms of a practical prejudice, which deferred disclosure could cause, it is evident from the Prosecution's submissions concerning the trip of the Prosecutor and the Deputy Prosecutor to Libya that the Prosecutor has

"Statement to the Security Council by Navi Pillay, High Commissioner for Human Rights [Libya] 25 January 2012, New York", to be found at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11782&LangID=E>; Al-Jazeera, "Prisoners Being Tortured in Libya, UN Says", 26 January 2012, to be found at: <http://www.aljazeera.com/news/africa/2012/01/2012126601863986.html>; Reuters, "MSF Quits Prisons in Libya City over 'Torture'", 26 January 2012, to be found at: <http://www.reuters.com/article/2012/01/26/us-libya-torture-idUSTRE80P1KN20120126>; and BBC News Africa, "UN Concerns over Libya Militias and Secret Detention", 26 January 2012, to be found at: <http://www.bbc.co.uk/news/world-africa-16735217>.

personally conducted meetings and communications with the Libyan authorities.²¹ The Prosecutor is therefore in the best position to identify the existence of minutes, letters, emails et cetera, which could fall within the Prosecution's disclosure obligations. The deferral of the present request until after the departure of the Prosecutor could therefore result in key information being unavailable (i.e. through the closure of email or computer accounts) or overlooked.

4. Relief Requested

37. For the reasons set out above, the OPCD respectfully requests the Honourable Pre-Trial Chamber to order the Prosecution to disclose the information requested in the OPCD's letter of 7 March 2012.



Xavier-Jean Keïta, Principal Counsel of the OPCD

Dated this, 22nd Day of March 2012

At The Hague, The Netherlands

²¹ ICC-01/11-01/11-31