

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

**No. ICC-01/11-01/11 OA 3
Date: 12 June 2012**

THE APPEALS CHAMBER

Before:

**Judge Sang-Hyun Song, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Akua Kuenyehia
Judge Erkki Kourula
Judge Anita Ušacka**

SITUATION IN THE LIBYAN ARAB JAMAHIRIYA

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

Public document

Decision on the Request for Disqualification of the Prosecutor

shs

Decision 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

Mr Xavier-Jean Keïta
Ms Melinda Taylor

States Representatives

Mr Philippe Sands, Libya
Mr Payam Akhavan, Libya
Ms Michelle Butler, Libya

REGISTRY

Registrar

Ms Silvana Arbia

shb

The Appeals Chamber of the International Criminal Court,

Having before it the “Request to Disqualify the Prosecutor from Participating in the Case Against Mr. Saif Al Islam Gaddafi” of 3 May 2012 (ICC-01/11-01/11-133),

After deliberation,

Renders unanimously the following

DECISION

The request to disqualify the Prosecutor is rejected.

REASONS

I. PROCEDURAL HISTORY

1. On 3 May 2012, Mr Saif Al-Islam Gaddafi (hereinafter: “Mr Gaddafi”) filed the “Request to Disqualify the Prosecutor from Participating in the Case Against Mr. Saif Al Islam Gaddafi”¹ (hereinafter: “Request for Disqualification”), in which he requests the Appeals Chamber to disqualify the Prosecutor, Mr Luis Moreno-Ocampo, from the case against him and to order the Prosecutor’s temporary suspension pending the decision on disqualification.²

2. On 4 May 2012, in accordance with article 42 (8) (b) of the Statute, the Appeals Chamber issued the “Order on the submission of comments by the Prosecutor on the ‘Request to Disqualify the Prosecutor from Participating in the Case Against Mr. Saif Al Islam Gaddafi’”,³ ordering the Prosecutor to submit by 10 May 2012 any comments on the Request for Disqualification. On 10 May 2012, the Prosecutor filed the “Prosecution’s Comments to the Request to Disqualify the Prosecutor from Participating in the Case against Mr. Saif Al-Islam Gaddafi”⁴ (hereinafter: “Comments on the Request for Disqualification”). On 11 May 2012, he filed a

¹ ICC-01/11-01/11-133 (OA 3).

² Request for Disqualification, para. 81.

³ ICC-01/11-01/11-136 (OA 3).

⁴ ICC-01/11-01/11-139 (OA 3).



corrigendum to the Comments on the Request for Disqualification (hereinafter: “Corrigendum”).⁵

3. On 11 May 2012, the Appeals Chamber issued the “Decision on the request to temporarily suspend the Prosecutor from conducting any prosecutorial activities related to the case pending the determination of the request for disqualification”⁶ (hereinafter: “Decision on the Request to Temporarily Suspend the Prosecutor”) in which it rejected the request to temporarily suspend the Prosecutor and indicated that the reasons for this rejection would be given in the present decision.

II. REASONS FOR THE DECISION ON THE REQUEST TO TEMPORARILY SUSPEND THE PROSECUTOR

4. Mr Gaddafi argued that an immediate, temporary suspension of the Prosecutor was necessary for two reasons. First, Mr Gaddafi was concerned that the Prosecutor, in his report to the United Nations Security Council on 16 May 2012, would not report impartially and comprehensively, thereby failing to influence the Security Council to take necessary steps to enforce its resolution 1970 (*i.e.*, to ensure the cooperation of Libya with the Court).⁷ Second, he argued that he would be prejudiced and the integrity of proceedings would be damaged if the Prosecutor were not to act independently and impartially in relation to a challenge to the admissibility of the case which was pending before Pre-Trial Chamber I (hereinafter: “the Pre-Trial Chamber”).⁸

5. The Appeals Chamber found that a temporary suspension was not warranted in the circumstances for the following reasons. Mr Gaddafi’s arguments for a temporary suspension rested on the assumption that the Prosecutor would not act impartially in his future participation in the case. In rejecting the request for a temporary suspension, the Appeals Chamber considered that it was not sufficiently clear that the Prosecutor would, in fact, act in the manner predicted by Mr Gaddafi. In addition, even if the Prosecutor were to act partially, the Appeals Chamber considered that it was not demonstrated that this would result in any irreparable damage before the Appeals Chamber decided on the request for disqualification. To the extent that it

⁵ ICC-01/11-01/11-139-Corr (OA 3).

⁶ ICC-01/11-01/11-140 (OA 3).

⁷ Request for Disqualification, paras 76-77.

⁸ Request for Disqualification, para. 78.

shs

might have been necessary to take any measures to preserve the impartiality of proceedings in the interim, the Appeals Chamber considered that the Pre-Trial Chamber dealing with the case could adopt any appropriate and necessary measures.

III. CORRIGENDUM TO THE COMMENTS ON THE REQUEST FOR DISQUALIFICATION

6. The Prosecutor submitted the Corrigendum one day after the time limit for the submissions of his comments expired. The Corrigendum adds 15 words to the end of an obviously incomplete sentence.⁹ He explains that these words were omitted due to malfunctioning software.¹⁰

7. The Appeals Chamber has held that the purpose of a corrigendum is to correct typographical errors.¹¹ The Prosecutor's Corrigendum clearly goes beyond the proper scope of a corrigendum. Nevertheless, the Appeals Chamber notes that the addition is minimal, that it is necessary to comprehend the relevant, obviously incomplete sentence in the Comments on the Request for Disqualification and that Mr Gaddafi has not objected to the Corrigendum. The Appeals Chamber therefore accepts the corrigendum on an exceptional basis.¹²

IV. FACTS

8. The facts underlying the Request for Disqualification are not in dispute between the parties. They consist of the Prosecutor's comments and statements, whether made in public or subsequently published by journalists and his participation in joint press conferences with representatives of the Libyan Government. They include, in particular, statements made by the Prosecutor in an interview with Mr Philippe Sands (hereinafter: "Mr Sands"), currently counsel for Libya in the case against Mr Gaddafi. This interview was incorporated into an article (hereinafter: "Vanity Fair Interview")

⁹ See Comments on the Request for Disqualification, para. 8.

¹⁰ Annex to the Corrigendum, ICC-01/11-01/11-139-Corr-Anx (OA 3).

¹¹ *Prosecutor v. Jean-Pierre Bemba Gombo*, "Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's 'Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa'", 2 December 2009, ICC-01/05-01/08-631-Red (OA 2), para. 38.

¹² See *Prosecutor v. Callixte Mbarushimana*, "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges'", 30 May 2012, ICC-01/04-01/10-514, para. 12.

published in August 2011 in the magazine Vanity Fair.¹³ The Prosecutor's other statements to the media and his joint press conferences with the Libyan authorities occurred in connection with the Prosecutor's visits to Libya just after the arrest of Mr Gaddafi in November 2011¹⁴ and, again, in April 2012.¹⁵ The contents of these statements are discussed below. The Prosecutor does not dispute the accuracy of any of the reports of his statements, but he disclaims responsibility for any comments made by members of the media or by the Libyan authorities.¹⁶

A. Statements which may relate to the Prosecutor's respect for the presumption of innocence and rights of Mr Gaddafi

9. In the Vanity Fair Interview, Mr Sands reported having reviewed and discussed evidence in the case with the Prosecutor, and he quoted several statements of the Prosecutor regarding the culpability of Mr Gaddafi and that of Mr Al-Senussi. Excerpts from the Vanity Fair Interview quoting the Prosecutor include the following:

"We have information that before February 15, Qaddafi met regularly with al-Senussi and Saif to plan the operation."

[...]

"Saif's name first appeared because he was involved in the recruitment of soldiers from outside, particularly from Chad, because they distrusted the Libyan army."

[...]

"We found evidence that Saif was deeply involved . . . before the demonstrations started, before the speech [...] [in] the hiring and organizing the transport and the logistics. They had a West African company. They were hiring planes. . . . He was involved in the planning of its operation in advance."

[...]

¹³ Annex A to Request for Disqualification, 3 May 2012, ICC-01/11-01/11-133-AnxA (OA 3).

¹⁴ Annex B to Request for Disqualification, 3 May 2012, ICC-01/11-01/11-133-AnxB (OA 3); Annexes C-F to Comments on the Request for Disqualification, 10 May 2012, ICC-01/11-01/11-139-AnxC (OA 3), ICC-01/11-01/11-139-AnxD (OA 3), ICC-01/11-01/11-139-AnxE (OA 3), ICC-01/11-01/11-139-AnxF (OA 3).

¹⁵ Annexes C-I to Request for Disqualification, 3 May 2012 ICC-01/11-01/11-133-AnxC (OA 3), ICC-01/11-01/11-133-AnxD (OA 3), ICC-01/11-01/11-133-AnxE (OA 3), ICC-01/11-01/11-133-AnxF1 (OA 3), ICC-01/11-01/11-133-AnxF2 (OA 3), ICC-01/11-01/11-133-AnxG (OA 3), ICC-01/11-01/11-133-AnxH (OA 3), ICC-01/11-01/11-133-AnxI (OA 3); Annexes A, B to the Comments on the Request for Disqualification, 10 May 2012, ICC-01/11-01/11-139-AnxA (OA 3), ICC-01/11-01/11-139-AnxB (OA 3).

¹⁶ Comments on the Request for Disqualification, para. 26.

Shb

“Saif was personally hiring people, he was financing the operations. . . . and then al-Senussi went to Benghazi, and Senussi was in charge of the killing and the shooting.”

[...]

“Of course he cannot call Senussi to stop [...] He was in the planning with al-Senussi.” Moreno-Ocampo believes the logistics were in place well before the Benghazi demonstrations erupted.

[...]

“It may have been bigger than they were expecting, but they were planning. They were ready to crush the demonstration.”

[...]

What [the Prosecutor] did know, and what he did care about, is that “[Mr Gaddafi] is involved in the operation to kill the civilians on the streets ... that he was deliberately and with knowledge organizing the system”.

[...]

[With reference to Mr Gaddafi’s apparent statement that there was a “confrontation” between demonstrators and government forces:] “He’s lying,” said Moreno-Ocampo. “In some places there were confrontations. In Benghazi it was just shooting,” with al-Senussi ordering heavy weapons to be targeted on a funeral procession. “There was no battle. It was people going to a funeral. That’s a crime against humanity.” Moreno-Ocampo cited other episodes: of killings in supermarkets, of snipers shooting worshippers as they left their mosques.

[...]

“We know the meeting and we know the acceptance, discussing the planning operations, and we have information about Saif heading the transport of the soldiers coming from Chad.” There were documents “confirming his involvement, confirming his leadership role.” There was evidence that “when Saif talks and threatens, things happen after.”

[...]

There was no ambiguity. Did Moreno-Ocampo buy the notion that Saif was at a personal crossroads, that the speech could have gone a different way? “No, that is not what my evidence is saying. The information shows that he was involved well before that, that he was involved from the beginning, in the planning before the 15th of February”.¹⁷

¹⁷ Vanity Fair Interview, pp. 11-13.

Shw

10. After Mr Gaddafi's arrest, the Prosecutor discussed the evidence against and culpability of Mr Gaddafi in front of several media sources. Illustrative statements include the following: At a press conference in Libya in November 2011, the Prosecutor informed the audience that he "collect[ed] information of evidence proving that [...] Saif Al Gaddafi [*sic*] [...] [was] managing an operation to kill civilians in Libya and [...] persecute people, abducting them, torturing them, [unintelligible] these were the two charges, murder and persecution as a crime against humanity, that the Court took into consideration to issue the arrest warrant".¹⁸ On 5 April 2012, he was quoted by the Associated Press as stating "the good thing here is one year ago Saif Gaddafi was threatening people ... now he's arrested and the court is discussing his destiny".¹⁹ On 19 April 2012, the Prosecutor was reported to have stated that his office had "evidence linking [Mr Gaddafi] to supervising and planning recruitment of mercenaries to fight the uprising".²⁰

B. Statements related to the challenge to the admissibility of the case

11. The Prosecutor made statements to various news agencies regarding the challenge made by Libya to the admissibility of the case against Mr Gaddafi. For example, during a visit to Libya in November 2011, he was quoted as having stated:

"Saif is captured, so we are here to ensure co-operation [...] In May, we requested an arrest warrant because Libyans could not do justice in Libya. Now, as Libyans have decided to do justice, they could do justice and we'll help them to do it – that is the system. [...] The law says the primacy is for the national system. If they prosecute the case here, we will discuss with them how to inform the judges and they can do it. But our judges have to be involved".²¹

On 5 April, the Prosecutor was quoted by CNN as stating, "Libya has the primacy to prosecute Saif, so if they present this to the International Criminal Court judges, probably they will get an approval".²² Later that month, he was quoted referring in general terms to the evidence which Libyan prosecutors had informed him was in

¹⁸ Annex D to Comments on the Request for Disqualification, 10 May 2012, ICC-01/11-01/11-139-AnxD (OA 3), at 8:16.

¹⁹ Annex C to Request for Disqualification, 3 May 2012, ICC-01/11-01/11-133-AnxC (OA 3), p. 3.

²⁰ Annex I to Request for Disqualification, 3 May 2012, ICC-01/11-01/11-133-AnxI (OA 3), p. 2.

²¹ Annex B to Request for Disqualification, 3 May 2012, ICC-01/11-01/11-133-AnxB (OA 3), p. 2.

²² Annex D to Request for Disqualification, 3 May 2012, ICC-01/11-01/11-133-AnxD (OA 3), p. 2.

their possession.²³ In his comments, the Prosecutor repeatedly indicated that the judges of the Court would ultimately be the ones to decide upon the admissibility challenge.²⁴

V. SUBMISSIONS

A. Submissions by Mr Gaddafi

12. Mr Gaddafi argues that the Prosecutor's statements to the media provide a "reasonable basis for concluding that there is an objective perception that the ICC Prosecutor's [*sic*] lacks the requisite impartiality to direct the investigations and prosecutions of [the case against Mr Gaddafi]".²⁵ Mr Gaddafi contends that the Prosecutor's lack of impartiality prejudices his right to a fair and impartial trial and may have implications for his personal security in Libya.²⁶ He puts forward two grounds for disqualification of the Prosecutor on the basis of an apparent lack of impartiality.

13. First, he argues that there is an objective appearance that the Prosecutor has failed to respect the presumption of innocence and the rights of the defendant.²⁷ In particular, he avers that the Prosecutor has made public statements reflecting a predetermined view of Mr Gaddafi's criminal responsibility,²⁸ has endorsed the position of the current Libyan authorities in a conflict which is being litigated before the Court²⁹ and has condoned Libya's failure to comply with orders of the Court.³⁰

²³ See, e.g., Annex F1 to Request for Disqualification, 3 May 2012, ICC-01/11-01/11-133-AnxF1 (OA 3); Annex G to Request for Disqualification, 3 May 2012, ICC-01/11-01/11-133-AnxG (OA 3); Annex H to Request for Disqualification, 3 May 2012, ICC-01/11-01/11-133-AnxH (OA 3); Annex I to Request for Disqualification, 3 May 2012, ICC-01/11-01/11-133-AnxI (OA 3).

²⁴ See, e.g., Annex C to Request for Disqualification, 3 May 2012, ICC-01/11-01/11-133-AnxC (OA 3), p. 3 ("Libyans [...] will engage the court to have the court make the final decision"); Annex D to Request for Disqualification, 3 May 2012, ICC-01/11-01/11-133-AnxD (OA 3), p. 2 ("if they present this to the International Criminal Court judges"); Annex E to Request for Disqualification, 3 May 2012, ICC-01/11-01/11-133-AnxE (OA 3), p. 2 ("They believe they can do it, it's not my call. The decision here is for the judges, not for me"); Annex F2 to Request for Disqualification, 3 May 2012, ICC-01/11-01/11-133-AnxF2 (OA 3), at 0:53 ("They have to present this position to the ICC judges [...] the judges will decide"); Annex C to Comments on the Request for Disqualification, 10 May 2012, ICC-01/11-01/11-139-AnxC (OA 3), p. 1 ("The only condition is they have to present their position to the International Criminal Court judges and the judges will decide").

²⁵ Request for Disqualification, para. 27.

²⁶ Request for Disqualification, para. 28.

²⁷ Request for Disqualification, paras 28, 34-55.

²⁸ Request for Disqualification, paras 39-42.

²⁹ Request for Disqualification, paras 43-50.

³⁰ Request for Disqualification, paras 51-54.

Shs

14. Second, Mr Gaddafi argues that there are reasonable grounds to believe that there is an objective appearance that the Prosecutor is affiliated with the positions of Libya in relation to the admissibility of the case.³¹ He asserts that the Prosecutor's lack of impartiality is further demonstrated by the "stark contrast" between the Prosecutor's positions in the present case and his positions in previous cases with similar circumstances.³² He contends that "there is an appearance that the Prosecutor is not applying legal and factual criteria to his assessment of the admissibility of this case in an independent and impartial manner".³³

B. Submissions of the Prosecutor

15. The Prosecutor does not deny his alleged statements, but he argues that, when considered in context, they were not improper.³⁴ The Prosecutor claims that article 42 (7) of the Statute and rule 34 of the Rules of Procedure and Evidence "require a showing of lack of impartiality or independence to disqualify the Prosecutor".³⁵ He contends that there is no evidence supporting Mr Gaddafi's claims that he has prejudged the admissibility of the case or the guilt of Mr Gaddafi and that these claims 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 [Mr Gaddafi's] assertions".³⁶

16. Concerning the allegations of not respecting the presumption of innocence or the rights of the defendant, the Prosecutor argues that he is "fully entitled, and is in fact expected, to take positions on issues that come before him".³⁷ He claims that, in his statements, he has only spoken about "the evidence before the Court, the judicial process, and information that has been provided to him by others".³⁸

17. With respect to the admissibility of the case, the Prosecutor argues that Mr Gaddafi erroneously bases his claim of an appearance of a lack of impartiality on a "prediction of the Prosecutor's position on admissibility rather than [on] a position he

³¹ Request for Disqualification, paras 28, 56-64.

³² Request for Disqualification, paras 65-70.

³³ Request for Disqualification, para. 73.

³⁴ Comments on the Request for Disqualification, paras 25-29.

³⁵ Comments on the Request for Disqualification, para. 5.

³⁶ Comments on the Request for Disqualification, para. 4.

³⁷ Comments on the Request for Disqualification, para. 23.

³⁸ Comments on the Request for Disqualification, para. 4.

has in fact taken”.³⁹ The Prosecutor avers that the mere fact of his consultations and joint press conferences with members of the Libyan Government does not demonstrate his partiality, but rather shows that he is properly carrying out his functions under the Statute.⁴⁰ In response to Mr Gaddafi’s allegations of differential treatment of other cases, the Prosecutor reiterates the fact that he has not taken a position on admissibility and submits that “[i]mpartiality cannot mean that the Prosecutor must take the same position in every case, regardless of legal and factual differences among them”.⁴¹

VI. DETERMINATION BY THE APPEALS CHAMBER

18. The Prosecutor is expected at all times to act impartially.⁴² Article 42 (7) of the Statute provides specifically that “[n]either the Prosecutor nor a Deputy Prosecutor shall participate in any matter in which their impartiality might reasonably be doubted on any ground”. Pursuant to article 42 (8) of the Statute, any question as to the disqualification of the Prosecutor shall be decided by the Appeals Chamber.

19. Article 42 (7) of the Statute and rule 34 (1) of the Rules of Procedure and Evidence provide a non-exhaustive list of grounds which require the disqualification of the Prosecutor. Of particular relevance to the present decision is rule 34 (1) (d) of the Rules of Procedure and Evidence which provides that the grounds for disqualification “shall include [...] [e]xpression of opinions, through the communications media, in writing or in public actions, that, objectively, could adversely affect the required impartiality of the person concerned”.

20. The use of the term “objectively” in rule 34 of the Rules of Procedure and Evidence and the phrase “might reasonably be doubted” in article 42 (7) of the Statute indicates that it is not necessary to establish an actual lack of impartiality on the part of the Prosecutor.⁴³ Rather, the question before the Appeals Chamber is whether it

³⁹ Comments on the Request for Disqualification, para. 14.

⁴⁰ Comments on the Request for Disqualification, para. 24.

⁴¹ Comments on the Request for Disqualification, para. 21.

⁴² See article 45 of the Statute (“Before taking up their respective duties under this Statute, the judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall each make a solemn undertaking in open court to exercise his or her respective functions impartially and conscientiously”).

⁴³ See Presidency, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Annex II to “Decision on the request of Judge Sanji Mmasenono Monageng of 25 February 2010 to be excused from reconsidering whether a warrant of arrest for the crime of genocide should be issued in the case of *The Prosecutor v. Omar*

reasonably appears that the Prosecutor lacks impartiality.⁴⁴ In determining whether there is such an appearance of partiality, the Appeals Chamber considers that this determination should be based on the perspective of a reasonable observer, properly informed.⁴⁵

21. In accordance with the standard set out in article 42 of the Statute and further illustrated by rule 34 of the Rules of Procedure and Evidence, the Appeals Chamber will assess separately the two grounds of disqualification put forward by Mr Gaddafi.

A. Alleged objective appearance that the Prosecutor has failed to respect the presumption of innocence and the rights of Mr Gaddafi

22. Mr Gaddafi argues that there is an objective appearance that the Prosecutor has failed to respect the presumption of innocence and the rights of the defendant in that his statements reflect a predetermined view of Mr Gaddafi's criminal responsibility, an endorsement of the position of the current Libyan authorities in a conflict which is being litigated before the Court and a condoning of Libya's failure to comply with orders of the Court. From this alleged objective appearance of failure to respect the presumption of innocence and his rights, Mr Gaddafi draws the further conclusion that there is a reasonable appearance that the Prosecutor will not act impartially. Before turning to the facts of this case, the Appeals Chamber will address, first, the scope of the Prosecutor's duties to respect the presumption of innocence and the rights of persons under the Statute and, second, the connection between these duties and the impartiality of the Prosecutor.

23. Article 54 (1) (c) of the Statute obliges the Prosecutor to "[f]ully respect the rights of persons arising under this Statute", including the right to be presumed innocent as guaranteed by article 66 of the Statute and reflected, *inter alia*, in articles 55 and 67 of the Statute.

24. Pursuant to article 21 (3) of the Statute, the interpretation of the Prosecutor's duty to respect the presumption of innocence must be consistent with internationally

Hassan Ahmad Al Bashir, pursuant to article 41(1) of the Statute and rules 33 and 35 of the Rules of Procedure and Evidence", 19 March 2010, reproduced as ICC-02/05-01/09-76-Anx2, pp. 4-5.

⁴⁴ *Ibid.*

⁴⁵ *See Ibid.*, p. 5.

Shs

recognized human rights. The presumption of innocence has two aspects,⁴⁶ explained below, each of which must be respected.

25. The first aspect of the presumption of innocence provides that, within the context of court proceedings, the accused shall be presumed innocent until proven guilty beyond a reasonable doubt and shall not have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.⁴⁷ In this sense, the presumption of innocence does not oblige the Prosecutor to refrain from expressing an opinion on the evidence in support of the guilt or innocence of a suspect or accused, at least within court proceedings. To the contrary, article 66 of the Statute, entitled “Presumption of innocence”, recognises explicitly that “[t]he onus is on the Prosecutor to prove the guilt of the accused”. The Prosecutor is responsible, *inter alia*, for initiating an investigation,⁴⁸ requesting arrest warrants or summonses to appear,⁴⁹ seeking the confirmation of charges⁵⁰ and proving the guilt of the accused beyond a reasonable doubt.⁵¹ At each stage of the proceedings, the Prosecutor should be, and is reasonably and objectively expected to be, convinced by the evidence in support of his claims and to seek to persuade the judges. The requirement of impartiality thus imposes different obligations on the Prosecutor and on the judges. The Prosecutor is not only expected but required to make statements within the context of court proceedings which would be inappropriate if made by a judge in an ongoing trial.

26. The second aspect of the presumption of innocence extends beyond, and applies even independently of any pending court proceedings. As reflected consistently in the comments, decisions or judgments of, *inter alia*, the United Nations Human Rights Committee, the African Commission on Human and Peoples’ Rights and the European Court of Human Rights, relevant authorities, including prosecutors, must respect the presumption of innocence in their public statements and must “refrain from prejudging the outcome of a trial”.⁵² One commentator has described the

⁴⁶ See S. Trechsel, *Human Rights in Criminal Proceedings*, (Oxford University Press, 2005), p. 163.

⁴⁷ Article 67 (1) (i) of the Statute.

⁴⁸ Articles 15 and 53 of the Statute.

⁴⁹ Article 58 of the Statute.

⁵⁰ Article 61 of the Statute.

⁵¹ Article 66 of the Statute.

⁵² United Nations Human Rights Committee, *General Comment 13*, 13 April 1984, HRI/GEN/1/Rev.9 (Vol. I), para. 7; See also United Nations Human Rights Committee, *Gridin v. Russian Federation*, “Communication No. 770/1997, Gridin v. Russian Federation (Views adopted on 20 July 2000, sixty-ninth session)”, 27 June 1996, GAOR, A/55/40 (part II), p. 176; African Commission on Human and

shs

purpose of this second aspect of the presumption of innocence as being to “protect the good reputation” of persons against perceptions of guilt created by the State.⁵³

27. In its second sense, the presumption of innocence does not necessarily require that a prosecutor remain silent and not comment on pending cases, but it imposes limitations on what he or she may say. As the European Court of Human Rights has explained, the presumption of innocence cannot “prevent the authorities from informing the public about criminal investigations in progress, but it requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected”.⁵⁴ The Appeals Chamber notes that, while the Statute does not ascribe any public information role to the Prosecutor, such a role has been acknowledged by other international criminal courts and tribunals.⁵⁵ Given his responsibility for carrying out investigations and collecting evidence, the Appeals Chamber considers that the Prosecutor may play an important role in informing affected communities and the public at large about ongoing investigations and prosecutions. In doing so, however, he is constrained by his duty to respect the presumption of innocence.

28. The Appeals Chamber notes that, in distinguishing between acceptable statements by public authorities and those which violate the presumption of innocence, the European Court of Human Rights has distinguished between statements which describe allegations of suspicion and declarations of guilt.⁵⁶ As an

Peoples’ Rights, *International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jr.) v. Nigeria*, 31 October 1998, 137/94-139/94-154/96-161/97, para. 96; African Commission on Human and Peoples’ Rights, *Law Office of Ghazi Suleiman v. Sudan*, 3 May 2003, 222/98-229/99, paras 54-56; European Court of Human Rights (hereinafter: “ECtHR”), *Alenet de Ribemont v. France*, “Judgement”, 10 February 1995, application no. 15175/89, paras 39-41; ECtHR, *Butkevičius v. Lithuania*, “Judgement”, 26 March 2002, application no. 48297/99, paras 26-30, 49-54; ECtHR, *Fatullayev v. Azerbaijan*, “Judgement”, 22 April 2010, application no. 40984/07, paras 36-37, 157-163.

⁵³ S. Trechsel, *Human Rights in Criminal Proceedings*, (Oxford University Press, 2005), p. 164

⁵⁴ ECtHR, *Alenet de Ribemont v. France*, “Judgement”, 10 February 1995, application no. 15175/89, para. 38.

⁵⁵ See, e.g., International Criminal Tribunal for the Former Yugoslavia (hereinafter: “ICTY”), Trial Chamber I, *Prosecutor v. Ramush Haradinaj and others*, “Decision on Idriz Balaj’s Request for Evidentiary Hearing Regarding Interview of Carla Del Ponte”, 29 January 2008, IT-04-84-T; Special Court for Sierra Leone (hereinafter: “SCSL”), President, *Prosecutor v. Issa Hassan Sesay*, “Decision on Complaint Pursuant to Article 32 of the Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone”, 20 February 2006, SCSL-4-15-CCC32.

⁵⁶ See, e.g., ECtHR, *Fatullayev v. Azerbaijan*, “Judgement”, 22 April 2010, application no. 40984/07, para. 160; ECtHR, *Alenet de Ribemont v. France*, “Judgement”, 10 February 1995, application no. 15175/89, para. 38.

elected official of the Court and given his specific role under the Statute, which includes the duty to investigate incriminating and exonerating circumstances equally in order to establish the truth,⁵⁷ the Prosecutor must take particular care to respect the presumption of innocence. With respect to the behaviour of prosecutors specifically, the Appeals Chamber notes that the codes of conduct or prosecution standards of other international jurisdictions indicate that a prosecutor should refrain from expressing any opinion on the guilt or innocence of the accused or the merits of issues which are *sub judice*, outside of court proceedings.⁵⁸ Whether particular statements of the Prosecutor violate the presumption of innocence needs to be considered in light of all of the relevant circumstances.⁵⁹

29. The Appeals Chamber notes, however, that not every inappropriate statement or violation of this second aspect of the presumption of innocence by the Prosecutor necessarily provides a basis for his/her disqualification. The presumption of innocence and the impartiality of the Prosecutor, while related, protect different interests and are evaluated under different standards. It is only where his/her statements give rise to reasonable doubts as to the impartiality of the Prosecutor that disqualification is necessary and appropriate.

30. Turning to the facts of the matter at hand, the Appeals Chamber notes that the Prosecutor's statements reproduced in the Vanity Fair Interview were made in the context of his discussion of the evidence against Mr Gaddafi and are not alleged to exceed the scope of the evidence in the Prosecutor's possession. Nevertheless, the Appeals Chamber considers that the Prosecutor's right to comment on such evidence is not without restriction and that he must respect the presumption of innocence. The Appeals Chamber considers that the high-profile nature of cases before the Court in general and of the case against Mr Gaddafi in particular, as well as the widespread or

⁵⁷ See article 54 (1) (a) of the Statute.

⁵⁸ See, e.g., SCSL, article 24 (A) of the Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone; SCSL, President, *Prosecutor v. Issa Hassan Sesay*, "Decision on Complaint Pursuant to Article 32 of the Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone", 20 February 2006, SCSL-4-15-CCC32, paras 31-33 (finding the Code of Professional Conduct applicable to the Prosecutor); ICTY and International Criminal Tribunal for Rwanda, *Standards of Professional Conduct for Prosecution Counsel*, 14 September 1999, para. 2 (k).

⁵⁹ See ECtHR, *Fatullayev v. Azerbaijan*, "Judgement", 22 April 2010, application no. 40984/07, para. 160; ECtHR, *Butkevicius v. Lithuania*, "Judgement", 26 March 2002, application no. 48297/99, para. 49; *Karakaş and Yeşilirmak v. Turkey*, "Judgement", 28 June 2005, application no. 43925/98, para. 51.

systematic nature of the crimes against humanity for which Mr Gaddafi is allegedly responsible, increase the importance of providing public information about the Court's ongoing activities. However, they also reinforce the need for caution as well as accuracy in any public comments. As the Prosecutor is a public face of the Court, there is a risk that public statements of the Prosecutor will be imputed to the Court as a whole. The Prosecutor must therefore exercise due caution in his statements and refrain from creating the appearance of prejudging issues which are *sub judice*.

31. The Appeals Chamber finds that, with respect to the Vanity Fair Interview, the content of which has been summarised above,⁶⁰ the Prosecutor did not exercise sufficient caution, either in the manner in which the interview was conducted or in the content of his statements. The Prosecutor discussed the case in depth and specific evidence against Mr Gaddafi. For nearly three hours, the Prosecutor and Mr Sands reviewed and analysed a 38 minute speech of Mr Gaddafi, with the Prosecutor frequently commenting on the veracity of Mr Gaddafi's statements or on the evidence against him.⁶¹ The Appeals Chamber considers that this detailed discussion of evidence was inappropriate in the context of a media interview. The in-depth discussion of evidence should generally be left to the courtroom. In relation to the content of the Prosecutor's statements, the Appeals Chamber notes that, on several occasions, the Prosecutor stated, as fact, material elements of the allegations against Mr Gaddafi or Mr Al-Senussi, saying, for example, "There was no battle. It was people going to a funeral. That's a crime against humanity".⁶² On other occasions, the Prosecutor passed judgment on the credibility of Mr Gaddafi's statements, stating, point blank, "He's lying".⁶³ The Appeals Chamber finds that the Prosecutor's statements on these *sub judice* matters were inappropriate in that they gave the impression that factual issues yet to be determined by the judges had been determined or could not be contested.

32. The Appeals Chamber is also concerned with the way in which the Prosecutor's statements and the interview are recounted in the Vanity Fair Interview. There is no indication that the Prosecutor clarified that the case was at an early stage or that it

⁶⁰ See *supra* para. 9.

⁶¹ Vanity Fair Interview, p. 13.

⁶² Vanity Fair Interview, p. 12.

⁶³ Vanity Fair Interview, p. 12.

would be up to the Pre-Trial Chamber to decide whether to confirm charges and, if charges were confirmed, for the Trial Chamber to decide on Mr Gaddafi's criminal responsibility. To the contrary, the Vanity Fair Interview says that it is the Prosecutor "who may decide [Mr Gaddafi's] fate".⁶⁴ While the Prosecutor did not publish the Vanity Fair Interview himself, the Appeals Chamber considers that it appears that the Prosecutor failed to exercise due caution in how his interview was reported.

33. For the aforementioned reasons, the Appeals Chamber finds that the Prosecutor's behaviour was clearly inappropriate in light of the presumption of innocence. Such behaviour not only reflects poorly on the Prosecutor but also, given that the Prosecutor is an elected official of the Court and that his statements are often imputed to the Court as whole, may lead observers to question the integrity of the Court as a whole.

34. Nevertheless, the Appeals Chamber finds that the Prosecutor's statements do not amount to grounds for his disqualification. A reasonable observer, properly informed, is aware of the functions of the Prosecutor. Such observer would have understood that the Prosecutor's statements were based on the evidence available to him and that the judges would ultimately take the relevant decisions on the evidence. That the Prosecutor manifested a certain conviction about the evidence is to be expected. A reasonable observer, properly informed, would not conclude that the Prosecutor's conviction was not based on the evidence, was otherwise biased or would lead to the neglect of his duties under article 54 (1) (a) and (c) of the Statute. As such, the Appeals Chamber finds that the Prosecutor's statements do not lead to the conclusion that his impartiality might reasonably be doubted.

35. The Appeals Chamber recalls that it is the responsibility of the Pre-Trial and Trial Chambers to ensure fair and expeditious proceedings and that this responsibility empowers these Chambers to take measures where the Prosecutor's conduct is inappropriate.⁶⁵ Statements which may be inappropriate in light of the presumption of

⁶⁴ Vanity Fair Interview, p. 2.

⁶⁵ See Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, "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 (OA 18).

innocence but which do not cast doubt on the Prosecutor's impartiality may be subject to, and may require the taking of other measures by the Pre-Trial or Trial Chamber responsible for the case. Such measures may include orders directing the Prosecutor to limit his/her public statements, various remedial measures to address any damage done by such statements, the issuing of a reminder to the Prosecutor of his/her obligations,⁶⁶ a judicial reprimand or expression of discontent⁶⁷ or, where appropriate and subject to the provisions of the Statute and the Rules of Procedure and Evidence and the protections of due process guaranteed therein, the institution of proceedings for misconduct under articles 46, 47 or 71 of the Statute, including where the Prosecutor fails to comply with any directions or orders of the relevant Chamber in this regard.⁶⁸ To the extent that the Prosecutor's conduct in relation to the Vanity Fair Interview was inappropriate but not grounds for disqualification, the Appeals Chamber considers that it is the responsibility of the Pre-Trial Chamber to address such conduct, and it notes that the Pre-Trial Chamber is already seized with one request to address allegations of inappropriate statements by the Prosecutor.⁶⁹

36. In addition, the Appeals Chamber finds that the Prosecutor's impartiality may not reasonably be doubted on the basis that he has appeared to endorse Libya's positions or to condone its non-compliance with orders of the Court. Mr Gaddafi has provided no indication which would lead a reasonable observer to conclude that the Prosecutor is in some way beholden to the Libyan Government or would otherwise not carry out his duties with the required impartiality. As to Libya's non-compliance with orders of the Court, Mr Gaddafi has not alleged that the Prosecutor has questioned Libya's obligation to cooperate with the Court. At most, according to Mr Gaddafi's arguments, the Prosecutor has not publicly emphasised Libya's obligations. The Appeals Chamber notes that responsibility for ensuring compliance with a Chamber's orders rests with the Chamber itself. The Prosecutor has no general

⁶⁶ See Pre-Trial Chamber I, *Prosecutor v. Callixte Mbarushimana*, "Decision on the Defence Request for an Order to Preserve the Impartiality of the Proceedings", 31 January 2011, ICC-01/04-01/10-51.

⁶⁷ See Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the press interview with Ms Le Fraper du Helen", 12 May 2010, ICC-01/04-01/06-2433; Pre-Trial Chamber II, *Situation in Kenya*, "Decision on the 'Application for Leave to Participate in the Proceedings before the Pre-Trial Chamber relating to the Prosecutor's Application under Article 58(7)'" , 11 February 2011, ICC-01/09-42.

⁶⁸ See article 71 (1) of the Statute, rule 25 (1) (a) (ii) of the Rules of Procedure and Evidence.

⁶⁹ "OPCD Application in Relation to Public Statements of the Prosecutor", 17 April 2012, ICC-01/11-01/11-115.

obligation to ensure the compliance of States with the Chamber's orders, let alone to issue public statements in that regard. The Appeals Chamber further notes that the Prosecutor may require extensive cooperation and support from the Libyan Government on a wide range of issues and that public criticism of the Government may limit that support and cooperation. In these circumstances, the Prosecutor's public silence on the issue of Mr Gaddafi's arrest and surrender does not give rise to reasonable doubts as to his impartiality.

B. Alleged objective appearance that the Prosecutor is affiliated with the positions of the Libyan Government concerning the admissibility of the case

37. Mr Gaddafi's second ground for disqualification is that the Prosecutor appears to be affiliated with the positions of the Libyan Government concerning the admissibility of the case against him. As recounted above, he bases his arguments on statements of the Prosecutor in relation to Libya's right to investigate and prosecute Mr Gaddafi, the Prosecutor's comments on the evidence in the hands of the Libyan authorities, the interpretation of the Prosecutor's position by the media and others and the "stark contrast" between the Prosecutor's position in this case as opposed to others. The Appeals Chamber finds that the Prosecutor's impartiality may not reasonably be doubted on these bases.

38. The preamble and articles 1 and 17 (1) (a) and (b) of the Statute lay down that the Court is complementary to national criminal jurisdictions, *i.e.*, that the Court only investigates and prosecutes if a State having jurisdiction does not investigate or prosecute a case, or, if it investigates or prosecutes a case, the State is or was "unwilling or unable genuinely to carry out the investigation or prosecution".⁷⁰ The Prosecutor's statements that Libya has the right to prosecute Mr Gaddafi merely restate the principle of complementarity as contained in the Statute. The Appeals Chamber notes that, in discussing the possibility of prosecution by Libya, the

⁷⁰ Article 17 (1) (a) of the Statute.

Prosecutor repeatedly stated that the admissibility of the case is for the judges to decide.⁷¹

39. The Appeals Chamber finds further that it is not inappropriate for the Prosecutor to discuss issues related to the admissibility of the case with the relevant State for two reasons. First, in order to ascertain whether a case is, at any given moment, admissible, the Prosecutor will have to inquire into the activities of States, including their intentions and their progress in investigating and prosecuting particular cases. This will require the Prosecutor to have contact with such States. Second, pursuant to article 93 (10) of the Statute, the Court, including the Prosecutor, may cooperate with and provide assistance to States in their investigation or trial of crimes within the jurisdiction of the Court. Even if the Prosecutor's cooperation or assistance would have the effect of rendering a case before the Court inadmissible, this would not render such action improper.

40. To the extent that the Prosecutor informed the public of the status of these discussions, the Appeals Chamber finds that his statements do not cast any reasonable doubt on his impartiality. To the extent that Libyan authorities and members of the media may have ascribed positions to the Prosecutor,⁷² the Appeals Chamber considers that the Prosecutor cannot be held responsible for these other individuals' comments and that a reasonable observer would be able to distinguish between the comments of others and the statements of the Prosecutor himself.

41. As recounted above, there is no indication that the Prosecutor is beholden to or can be expected to endorse the views of Libya. The Appeals Chamber notes that the Prosecutor has refrained from endorsing Libya's challenge to the admissibility of the case and has indicated that he will only take a position on admissibility in the course of judicial proceedings.⁷³ In light of the new development of the admissibility challenge by Libya, it is entirely appropriate that the Prosecutor would reflect on this challenge and withhold comment thereon. Far from casting any doubt on his impartiality, the Prosecutor's refusal to take a public position on the validity of

⁷¹ See Annexes C-F to Comments on the Request for Disqualification, 10 May 2012, ICC-01/11-01/11-139-AnxC (OA 3); ICC-01/11-01/11-139-AnxD (OA 3); ICC-01/11-01/11-139-AnxE (OA 3); ICC-01/11-01/11-139-AnxF (OA 3).

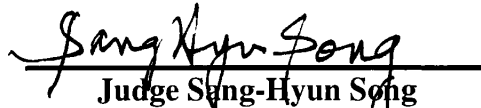
⁷² See Request for Disqualification, paras 60-63.

⁷³ See Comments on the Request for Disqualification, para. 14.

Libya's challenge to the admissibility of the case suggests that he is carrying out his duty to weigh the merits of the admissibility challenge before taking a position thereon. The fact that the Prosecutor ultimately may take a different position in this case from the positions he has taken in other cases does not necessarily cast doubt on his impartiality. Impartiality cannot mean that the Prosecutor must take the same position in each case. Rather, it means that each case must be viewed on its own merits.

42. For the above reasons, the Appeals Chamber finds that the Prosecutor's statements do not give rise to objective, reasonable doubts as to his impartiality. The request for disqualification is therefore rejected.

Done in both English and French, the English version being authoritative.


Judge Sang-Hyun Song
Presiding Judge

Dated this 12th day of June 2012

At The Hague, The Netherlands