

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/11-01/11**
Date: **1 December 2011**

PRE-TRIAL CHAMBER I

Before: Judge Sanji Mmasenono Monageng, Presiding Judge
Judge Sylvia Steiner
Judge Cuno Tarfusser

SITUATION IN THE LIBYAN ARAB JAMAHIRIYA

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

Public

**Prosecution Response to the “OPCD Request for Authorisation to Present
Observations in Proceedings Concerning Mr. Saif Gaddafi”**

Source: Office of the Prosecutor

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

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Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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Victims**

**The Office of Public Counsel for the
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Introduction

1. The Prosecution opposes the request by the Office of Public Counsel for the Defence (“OPCD”) to present observations on the Prosecution’s factual submissions regarding the Prosecutor’s recent trip to Libya.¹ OPCD makes factual and legal submissions, notwithstanding that it is not a party or participant and has not been authorized to do so. Furthermore, the Prosecution did not raise any of the legal issues addressed by OPCD. Accordingly, its substantive submissions are premature and do not respond to the Prosecutor’s filing. Finally, OPCD makes incorrect factual assertions that bear correcting.

Background

2. On 19 November 2011, representatives of the Libyan government (National Transitional Council (“NTC”)) announced that Saif Al-Islam Gaddafi had been arrested in Libya. The Libyan Minister of Justice also announced that the Libyan authorities would retain custody of Saif Al-Islam to pursue his prosecution for crimes committed during the recent uprising.
3. Following this announcement, the Prosecutor contacted the Libyan Minister of Justice to confirm Saif Al-Islam’s arrest and ensure proper coordination of the investigation and the timing of his eventual surrender. The Libyan authorities invited the Prosecutor to visit Libya to further discuss position of the NTC with respect to the pending proceedings against Saif Al-Islam before this Court.
4. From 22 November through 23 November, the Prosecutor, the Deputy Prosecutor and other members of the Office of the Prosecutor travelled to Libya and met with the Chairman of the NTC, the Prime Minister and the Justice Minister, among

¹ ICC-01/11-01/11-33. The Prosecutor’s filing referred to is ICC-01/11-01/11-31 (“Prosecution’s Submissions on the Prosecutor’s recent trip to Libya”).

others. The Libyan authorities informed the Prosecutor that they wanted to hold the trial against Saif Al-Islam in Libya and they were willing and able to conduct a fair trial.

5. On 23 November, the Prosecutor received a letter from the Chairman of the NTC addressed to the President of Pre-Trial Chamber I in which the Libyan authorities confirmed their intent to invoke Article 94 and to seek to postpone the surrender of Saif Al-Islam pending discussions with the Court. The Prosecution faxed the letter and an *ad hoc* translation to the President of the Chamber.²
6. On 25 November, the Prosecutor informed the Chamber of his recent trip to Libya and his discussions with the Libyan authorities.³ Specifically, the Prosecutor stated that the Libyan authorities had expressed their intention to prosecute Saif Al-Islam in Libya. According to the Libyan authorities, its investigation is focusing on the violent crimes committed during the uprising after February 2011 and unrelated allegations of corruption and embezzlement. In the context of informing the Chamber about his meetings, the Prosecutor requested a status conference to provide further details.⁴
7. On 28 November 2011, OPCD requested to appear before Pre-Trial Chamber I or to submit written observations in response to the Prosecutor's filing ("OPCD's Observations"). According to OPCD, the Prosecutor's filing raises issues related to: (1) the status of the legal proceedings in Libya and whether any concrete investigative steps had been taken by the Libyan authorities; (2) the criteria for determining Libya's willingness and ability to prosecute the case; and (3) the legal basis for Saif Al-Islam's arrest. OPCD requests authorization to respond on these

² The Prosecutor received the official translation from the Registry on 29 November 2011.

³ ICC-01/11-01/11-31.

⁴ *Ibid.*, para.16.

issues pursuant to its mandate under Regulations 77(4) and (5) of the Regulations of the Court (“RoC”).⁵

Submissions

8. OPCD ignores the purpose of the Prosecutor’s filing, which was to inform the Chamber of the rapidly developing events immediately after Saif Al-Islam’s arrest and the Prosecutor’s meetings with the Libyan authorities. Instead, in the guise of seeking the right to participate in any proceedings convened by the Chamber, OPCD argues numerous abstract legal issues, including admissibility, the role of the Prosecutor, and the legitimacy of the Libyan authorities’ arrest and detention of Saif Al-Islam.

9. The OPCD arguments are premature in two respects: its substantive participation has not been authorized, and the issues it addresses are also not before the Court. It also misstates the facts, incorrectly attributing to the Prosecution statements or omissions that are contrary to the Prosecutor’s in-court submission.

10. On the first, notwithstanding that OPCD formally asked the Chamber for authorisation to make submissions “in any proceedings convened by the Pre-Trial Chamber”,⁶ it also included unauthorized substantive arguments in the body of its filing.⁷ The right to participate in proceedings before this Court cannot be inferred. Only parties and authorized participants are allowed to litigate before this Court. The Prosecution submits that OPCD is neither a party nor has it been granted leave to participate in these proceedings. Accordingly, OPCD should not be permitted to make substantive submissions without prior authorization.

⁵ ICC-01/11-01/11-33.

⁶ OPCD’s Observations, para.33.

⁷ OPCD’s Observations, paras.6-23.

11. OPCD's reliance on Regulation 77(4) and (5) of the RoC is misplaced. These provide that the OPCD will be available to represent and protect the rights of the Defence during initial stages (Regulation 77(4)) and to provide support and assistance (Regulation 77(5)). Neither provision confers on it the automatic right to initiate or participate in proceedings. Indeed, Regulation 77(4) specifically identifies two early stages in which OPCD participation is contemplated (proceedings under Article 56(2)(d) and Rule 47(2)), but in each instance prior leave or express appointment from a Chamber is required. And OPCD has generally participated in the initial stages of the proceedings, to assist with the general interests of the Defence, only after prior authorization⁸ and upon a finding that its participation was appropriate to safeguard the interests of the Defence.⁹

12. Additionally, OPCD's reliance on the *Kony* case to justify its participation in the instant proceedings is misplaced.¹⁰ The Pre-Trial Chamber in the *Kony* case decided *proprio motu* to assess the admissibility of the case under the Chamber's authority pursuant to Article 19(1). But that decision did not automatically authorize the participation of defence counsel. Rather, the Chamber only appointed a defence counsel (not OPCD) after it first determined that the defence should be represented.¹¹

13. Substantively, OPCD's Observations are also premature. OPCD is not responding to any legal arguments presented by the Prosecution, since the Prosecution made none, but presented only a factual recitation of the events to date. And OPCD is

⁸ See for instance ICC-01/04-329 and ICC-02/05-85 whereby PTCI authorized OPCD to reply to victims' applications to participate in the proceedings. See also ICC-01/04-374, para.22, in which Pre-Trial Chamber I explained Regulation 77(4) and OPCD's role following its appointment by the Single Judge to assist with the general interests of the Defence.

⁹ ICC-02/04-01/05-275, p.4: "Considering that, at the present" stage of the proceedings, *it is adequate and sufficient for the general interests of the Defence to be represented by the OPCD*" (emphasis added).

¹⁰ OPCD's Observations, paras.28-29.

¹¹ ICC-02/04-01/05-377, para.31, cited in OPCD Observations, para.28.

not attempting to correct the Prosecution's version of the meetings with Libyan authorities. In addition, there is no legal issue yet before the Chamber. Unlike in *Kony*, where representation of the interests of the absent suspects was authorized once the Chamber determined that the question of admissibility was squarely before it, admissibility is not yet a ripe issue in this case. Crucially, the Libyan authorities have not formally challenged admissibility. They may do so in the future, but the early representations are that they seek to postpone Saif Al-Islam's surrender pursuant to Article 94 to allow it to continue its ongoing investigation.

14. Finally, the OPCD incorrectly states that the Prosecutor had not requested the surrender of Saif Al-Islam after he had been arrested by the Libyan authorities.¹² On the contrary, the Prosecutor noted in his filing that he contacted the Libyan Minister of Justice to confirm the arrest and the timing of the eventual surrender of Saif Al-Islam.¹³ OPCD also erroneously claims that the Prosecutor had not informed the Libyan authorities of their legal obligations before the Court.¹⁴ The Prosecutor noted in his filing that he informed the Libyan authorities that they must challenge the admissibility of the case and the Judges must make a final decision. He also explained that Article 94 addresses the possibility of sequencing trials if they relate to crimes that are different from those crimes pending before the Court and it is the responsibility of the Libyan authorities to invoke Article 94.¹⁵

¹² OPCD Observations, para.3.

¹³ ICC-01/11-01/11-31, para.2

¹⁴ OPCD Observations, para.21.

¹⁵ ICC-01/11-01/11-31, paras.7-8.

Conclusion

15. For the reasons stated above, the Prosecutor requests that the Chamber dismiss OPCD's Observations.



Luis Moreno-Ocampo,
Prosecutor

Dated this 1st Day of December 2011

At The Hague, The Netherlands