

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 10 April 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*

Public Redacted version

Prosecution's Response to the OPCD Request for Disclosure

Source: Office of the Prosecutor

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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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Counsel for the Appellant

REGISTRY

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Detention Section

**Victims Participation and Reparations
Section**

Other

INTRODUCTION

1. The Office of the Public Counsel for the Defence (“OPCD”) seeks disclosure of material on behalf of Saif Al-Islam Gaddafi (“Saif Al-Islam” or “the Suspect”) in order to respond to a future admissibility challenge. The Prosecution acknowledges that on 6 December 2011, the Chamber appointed OPCD to represent the Suspect’s interests unless otherwise decided by it. OPCD met with the Suspect on 3 March 2012. When the OPCD thereafter requested disclosure of the material that is the subject of this request, the Prosecution twice inquired whether the Suspect accepted OPCD’s representation. OPCD did not respond. The Prosecution submits that, absent a court order, it cannot disclose information regarding the Suspect to OPCD unless the Suspect agrees implicitly or expressly that OPCD can act on his behalf.

PROCEDURAL BACKGROUND

2. On 27 June 2011 the Pre-Trial Chamber issued a warrant for the arrest and surrender to this Court of Saif Al-Islam. It was subsequently reported that he was arrested by rebel militants in Zintan, Libya. On 6 December 2011, Pre-Trial Chamber I requested submissions from the Libyan authorities regarding Saif Al-Islam’s arrest and detention. The Chamber also authorised OPCD to represent the interests of the defence “in all instances related to the proceedings against Saif Al-Islam until otherwise decided by the Chamber.” The Chamber declined to appoint a lawyer who was retained by REDACTED to represent him, without confirmation that the Suspect had assigned a power of attorney to that person.¹

¹ ICC-01/11-01/11-39-Red.

3. On 23 January 2012, the National Transitional Council (“NTC”), through its coordinator for the ICC, submitted a response (“Libyan Response”).² In its filing, the NTC stated *inter alia* that “Saif Al-Islam is still refusing to be visited or assisted by any international or local lawyer. Saif Al-Islam Gaddafi has also declared very firmly that he will not cooperate with any visitor from the ICC.”³
4. On 24 January 2012, the Chamber instructed the Prosecution and OPCD to provide observations to the Libyan Response.⁴ On 2 February, 2011, OPCD filed their observations on Libya’s submissions regarding the arrest of Saif Al-Islam. In it, OPCD address the general interests of the defence and Mr. Gaddafi’s right to counsel. ⁵
5. On 3 February 2012, the Chamber authorized a “personal visit from the Registry and OPCD” as “the best mechanism to ensure that Saif Al-Islam Gaddafi is well informed about the current stage of proceedings before the Court and of the appointment of OPCD to represent his interests until he decides, *should he wish to be represented in the Court’s proceedings, to appoint counsel of his choosing*”.⁶ (emphasis added)
6. On 3 March 2012, OPCD met with Saif Al-Islam in Zintan, Libya and subsequently apparently made an *ex parte* filing informing the Chamber of its meeting with the Suspect.
7. On 7 March 2012 OPCD sought disclosure from the Prosecution of any correspondence with national authorities, *procés verbaux*, minutes from meetings with national authorities, and any documents pertaining to the

² ICC-01/11-01/11-44 and ICC-01/11-01/11-44-Conf-Anx1.

³ ICC-01/11-01/11-44 and ICC-01/11-01/11-44-Conf-Anx1, para. II.

⁴ ICC-01/11-01/11-45.

⁵ ICC-01/11-01/11-51-Red

⁶ ICC-01/11-01/11-52-Conf-Exp. p.4.

domestic file against Saif Al-Islam. While acknowledging the Chamber's 6 December 2011 appointment of OPCD to represent the Suspect's interests, the Prosecution declined to produce the information until it received clarification as to whether the Suspect, having been informed that the Chamber appointed OPCD, agreed that OPCD continues to represent him.

SUBMISSIONS

8. The Prosecution submits that OPCD's request for disclosure can only be addressed once the precise parameters of the OPCD mandate "to represent the interests of the defence" have been clarified, particularly in light of the subsequent meeting between OPCD and the Suspect.
9. The Statute and legal instruments of the Court contemplate three forms of legal representation for the defence, namely, 1) the traditional counsel-client relationship where counsel is instructed by his or her client;⁷ 2) *ad hoc* or duty counsel who acts in the general interests of the defence, does not act on behalf of the individual, and is therefore not entitled to disclosure;⁸ and 3) OPCD, which may be appointed as representing and protecting the general rights of the defence including during the initial stages of the investigation or to provide support and assistance to defence counsel of the person.⁹
10. Article 67(1)(d) of the Statute provides *inter alia* for the right of an accused person "to conduct the defence....through counsel of the accused's choosing." An important characteristic of defence counsel under Article 67(1)(d) of the Statute is that counsel represents the individual entitled to

⁷ Regulation 74 of the Regulations of the Court.

⁸ Regulation 73.

⁹ Regulation 77(4).

legal assistance. Under this form of representation, a client and counsel relationship exists, and counsel acts for and acts as agent of the client.¹⁰

11. Regulation 74(2) describes this relationship between defence counsel and the person entitled to legal assistance as permitting the individual to “act before the Court through his or her counsel.” Article 14 of the Code of Professional Conduct for Counsel also lays down rules and principles for such representation and provides *inter alia* that “counsel shall abide the client’s decisions concerning the objectives of his or her representation.”
12. In other words, the underlying presumption of the counsel-client relationship is that the client instructs counsel to act on his or her behalf. OPCD has declined to clarify whether Mr. Gaddafi requested, or even accepted, that OPCD can act on his behalf when they met on 3 March 2012. It could also be relevant if the OPCD failed to raise the subject of representation at all when it met with Mr. Gaddafi. Further, the Prosecution is unaware of any privilege or legal basis for the OPCD to refuse to clarify this simple matter before demanding disclosure from the Prosecution.¹¹
13. If OPCD is representing the general interests of the defence, but against the wishes of the Suspect himself, the Prosecution submits that it cannot provide disclosure to OPCD of information personal to the Suspect, in order to allow OPCD to litigate an issue on the Suspect’s behalf in opposition to the Suspect’s specific instructions.¹²
14. Moreover, the authority of OPCD to take on the representation of the Suspect in the upcoming litigation is itself unclear. The functions of OPCD,

¹⁰ ICC-02/04-01/05OA 3, paras. 55-56.

¹¹ A client’s consent to representation or rejection of representation does not fall within the privilege contained within Rule 73 of the Rules of Procedure and Evidence.

¹² ICC-02/04-01/05OA 3, paras. 55-56.

set out in Regulations 77(4) and 77(5) of the Regulations of the Court, are limited. OPCD is separate and apart from “duty counsel”. It represents and protects “the rights of the defence during the initial stages of the investigation”, and “provide[s] support and assistance to the person entitled to legal assistance”, but the regulation does not further contemplate that OPCD will actively represent the person in ongoing proceedings, particularly when over the person’s objection and in contravention of the person’s instructions. To the contrary, the Appeals Chamber held in *Prosecutor v. Kony et. al.*,

“The mandate of “counsel to attend and represent the interests of the defence” is of a *sui generis* nature and must be understood differently from the mandate of counsel who has been appointed to represent suspects as individuals. In circumstances where the suspects are at large and counsel is appointed to represent their interests generally in proceedings, such counsel cannot speak on their behalf. A client and counsel relationship does not exist between them, and counsel does not act for or as agent of the suspects. Counsel’s mandate is limited to merely assuming the defence perspective, with a view of safeguarding the interests of the suspects in so far as counsel can, in the circumstances, identify them.”¹³

15. The Prosecution also notes that the Chamber ordered OPCD, together with the Registry, to visit the Suspect in order 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 represented in the Court’s proceedings, to appoint counsel of his choosing*,” (emphasis added). Thus, the Chamber’s mandate to OPCD appears to be limited to informing the Suspect of his rights and representing his “general interests”.

¹³ ICC-02/04-01/05OA 3, para. 56

16. Accordingly, contrary to the OPCD submission, the Prosecution submits that the Chamber's appointment of OPCD to represent the interests of the defence is not sufficient to permit the Prosecution to disclose to it confidential information that could implicate privacy or other rights of the Suspect over his objections.



Luis Moreno-Ocampo,
Prosecutor

Dated this 10th Day of April 2012

At The Hague, The Netherlands