

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **13 April 2012**

PRE-TRIAL CHAMBER I

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

SITUATION IN LIBYA

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

**Public
With Public Annexes A and B**

**Response to the “Prosecution’s Supplemental Submissions on the 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:

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Ms. Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
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**Victims Participation and Reparations
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Other

1. Introduction

1. The Office of Public Counsel for the Defence (OPCD) has requested the Prosecution to disclose information which is directly relevant to the ability of the OPCD to represent the interests of Mr. Saif Al-Islam Gaddafi in connection with any admissibility proceedings before the ICC, in particular, the forthcoming challenge by the Libyan authorities, and to ensure that Mr. Gaddafi's rights under Article 55 of the Statute are protected in an effective manner (the Request).
2. Notwithstanding the fact that the Prosecution has been accorded multiple occasions to address the merits of this request, the Prosecution has refused to grant disclosure on the sole basis that it disputes the mandate of the OPCD to request such disclosure.
3. The Prosecution has now requested filed supplementary submissions, in which the Prosecution informs the Chamber that if the Chamber finds that the OPCD has a valid mandate to submit the disclosure request, the Prosecution will address the merits of the disclosure request.
4. The Prosecution was not authorized to defer its submissions on the merits of the request until after the resolution of the issue concerning the mandate of the OPCD.
5. At no point in time has the Prosecution provided any reasons as to why it was not in a position to address the merits of the OPCD's Request for disclosure, contemporaneously with its submissions concerning the mandate of the OPCD.
6. By failing to assert its position concerning the merits of the Request in a diligent and expeditious manner, the Prosecution has waived its right to do so.

7. Granting the Prosecution a supplementary opportunity to address the merits would delay the resolution of the Request, and thus frustrate the aforementioned objective of the Request.

2. Procedural History

8. 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
9. 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
10. 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
11. 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

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.

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

12. 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 represented in the Court's proceedings, to appoint counsel of his choosing".⁶ The OPCD subsequently filed its Report to the Chamber.⁷
13. 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
14. 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.
15. The OPCD therefore inquired as to whether the Prosecution intended to provide assistance or cooperation to the Libyan authorities in connection with

⁵ At p. 6.

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

⁷ ICC-01/11-01/11-70-Red2.

⁸ ICC-01/11-01/11-81-AnxA-Red

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.

16. 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-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
17. 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
18. In their responding 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.¹¹ Finally, the Prosecution noted that the OPCD response did not address:

⁹ CC-01/11-01/11-81-AnxB-Red.

¹⁰ ICC-01/11-01/11-81-AnxC-Red.

¹¹ ICC-01/11-01/11-81-AnxD-Red.

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.

19. On 22 March 2012, the OPCD filed its Request for Disclosure (the Request), in which the OPCD informed the Pre-Trial Chamber that the requested disclosure was necessary in order to enable the OPCD to effectively represent the interests of Mr. Gaddafi before the ICC, and to ensure that his future rights and strategy before the ICC were not prejudiced.¹²
20. In particular, the OPCD averred that the disclosure of materials concerning communications between the Libyan authorities and the Prosecution would be directly relevant to the admissibility of the case – in particular, the capacity of the Libyan authorities to try Mr. Gaddafi without any ongoing assistance from the ICC Prosecution, the protection of potential defence witnesses and preservation of defence evidence, and potential abuse of process motions.¹³ It was also necessary for the OPCD to obtain information concerning the nature of the domestic proceedings against Mr. Gaddafi in order to ensure that his privilege against self-incrimination could be protected in an effective manner, to ensure his right to be promptly informed of the charges, and to ascertain any overlap between the proceedings before the ICC and domestic proceedings.¹⁴
21. In this filing, the OPCD also underscored that “[t]he 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

¹² ICC-01/11-01/11-81

¹³ At para. 29.

¹⁴ At para. 28.

whether the OPCD has a valid mandate to request the disclosure in order to represent the interests of Mr. Gaddafi in these proceedings.”¹⁵

22. On 22 March 2012, the Libyan authorities notified the Pre-Trial Chamber of their intention to challenge admissibility, on the grounds that they were investigating Mr. Gaddafi for allegations of crimes against humanity falling under the scope of Article 7 of the Statute.¹⁶ The Libyan authorities indicated that they intended to file such a challenge by 30 April 2012.
23. In light of this information, the OPCD filed an Addendum to the Request for Disclosure, in which the OPCD noted that the requested documentation was directly relevant to the ability of the OPCD to respond to the future admissibility challenge, and therefore requested the Chamber to vary the deadline for the Prosecution to respond, so that the request could be resolved in advance of the admissibility challenge.¹⁷
24. The Prosecution filed its Response on 10 April 2012.¹⁸ Notwithstanding the fact that the Prosecution was aware of the OPCD request that the disclosure request be addressed before the 30 April 2012, the Response did not refer to any grounds for refusing disclosure other than the fact that the Prosecutor contested the mandate of the OPCD.
25. Following reports that the ICC had officially requested Italian authorities to seize assets, the OPCD inquired with the Prosecution as to whether, in light of the fact that the Prosecutor had not indicated that it would contest the ability of the Libyan authorities to try Mr. Gaddafi, the Prosecutor had undertaken

¹⁵ At para. 17.

¹⁶ Notification and Request by the Government of Libya in Response to 'Decision on Libya's Submissions

Regarding the Arrest of Saif Al-Islam Gaddafi", ICC-01/11-01/11-82

¹⁷ ICC-01/11-01/11-84.

¹⁸ Prosecution's Response to the OPCD Request for Disclosure, ICC-01/11-01/11-88-Red, 10 April 2012.

investigative acts, with a view to providing assistance to the Libyan authorities pursuant to Article 93(10) of the Statute.¹⁹

26. The OPCD further noted that information concerning whether the ICC Prosecution is providing assistance to the Libyan authorities is directly relevant to the issue as to whether a future admissibility challenge is well-founded. If the Libyan authorities are basing their investigations on evidence, information or assistance provided by the ICC Prosecution, this could provide a misleading appearance concerning their capacity and willingness to investigate the case. Similarly, the assistance provided by the ICC Prosecution to domestic investigators and prosecutors could result in the prospect of a manifest inequality of arms as concerns the resultant domestic proceedings. The prosecutorial aspects of the case would be enhanced through the assistance of ICC Prosecution, but there may be no or very little prospect for the capacity of the domestic defence team to be enhanced in an equivalent manner through international assistance.
27. Finally, the OPCD stated that the afore-mentioned information concerning cooperation requests fell directly within the scope of the information sought in the OPCD Request for Disclosure.
28. In their response dated 3 April 2012, the Prosecution asserted that they could not disclose the requested information until the issue of the OPCD's mandate was resolved by the Court. The Prosecution did not provide any reasons for non-disclosure other than this issue concerning the mandate of the OPCD.²⁰
29. On 12 April 2012, the Prosecution filed the 'Prosecution's Supplemental Submissions on the OPCD Request for Disclosure' (the Supplemental Submissions), in which the Prosecution reiterated that "if, based on the OPCD Addendum, this Chamber agrees that OPCD has the current mandate to represent Saif Al- Islam sufficient to entitle it to make the disclosure request,

¹⁹ This letter is attached as Annex A.

²⁰ This letter is attached as Annex B.

thus resolving OTP's threshold concern, the Prosecution will address the merits of the disclosure request."²¹

3. Submissions

30. As set out in the above procedural history, the Prosecutor has had multiple opportunities to address the merits of the OPCD's request, but chose not to do so for strategic reasons. Indeed, in its letter of 14 March 2012, the OPCD deliberately requested the Prosecution to clarify its stance concerning the basis for the Prosecutor's refusal to effectuate the requested disclosure, in order to ascertain whether the Prosecution had any further grounds for refusing disclosure.
31. In both its correspondence and its Request, the OPCD made it very clear that all relevant information concerning the visit between Mr. Gaddafi and the OPCD had been put before the Pre-Trial Chamber.²² The OPCD also emphasised in its Request for Disclosure that it was acting in accordance with its obligations under the Code of Professional Conduct for Counsel, and that the requested information was directly related to the interests of Mr. Gaddafi.²³
32. Rather than accepting the good faith assurances of a party to the proceedings, the Prosecution exclusively focussed its Response on the mandate of the OPCD. At the same time, the Prosecution provided no reasons as to why it was not in a position to contemporaneously address the merits of the request in the same Response. Similarly, in the Supplementary Submissions, the Prosecution did not provide any reasons as to why it would not have been possible to address the merits of the Request at an earlier point.

²¹ 12 April 2012, ICC-01/11-01/11-105.

²² Request at para. 9.

²³ Request at paras. 26 and 27.

33. The parties to the proceedings are expected to act in a diligent manner, and to assert their rights and position before the Chamber in a timely manner.²⁴ The parties do not have an entitlement to reserve or delay putting their position before the Court for strategic reasons.²⁵ To the contrary, “a party to a proceeding who claims to have an enforceable right must exercise due diligence in asserting such a right”.²⁶ If the Prosecution was of the position that they had an enforceable right not to disclose the requested materials for reasons, other than the mandate of the OPCD, then the Prosecution should have asserted that right in a diligent manner.
34. Before filing its response, the Prosecutor did seek the leave of the Chamber to address the issue of the standing of the OPCD separately from the question of the merits of the Request; the Prosecution simply asserted that it would do so. In the absence of any prior authorisation from the Chamber, the Prosecutor had no legitimate expectation that it would be accorded a further opportunity to address the merits of the Request, in further filings.
35. Granting the Prosecutor a supplementary opportunity to address the merits of the Request would also be deleterious to the expeditious resolution of the Request. The underlying basis of the OPCD request to receive information, which is relevant to the admissibility of the case, would be frustrated if the OPCD is not in a position to analyse the material, and ascertain whether any follow up inquiries may be necessary, sufficiently in advance of the admissibility proceedings.

²⁴ “The Statute and the Rules of Procedure and Evidence place an onus on all those involved in the trial to act in a diligent and expeditious manner in the performance of their obligations”. Prosecutor v. Katanga and Ngudjolo, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings”, 19 July 2010, at para. 43.

²⁵ Prosecutor v. Katanga and Ngudjolo, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings”, 19 July 2010 at para. 77.

²⁶ Prosecutor v. Katanga and Ngudjolo, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings”, 19 July 2010 at para. 54.

36. Moreover, as set out in the Request, the information sought by the OPCD concerning the status and nature of domestic proceedings is necessary for the OPCD to ensure that the defendant's rights under Article 55, in particular, the privilege against self-incrimination, are adequately protected. The urgency of this aspect of the Request is heightened by the fact that the Libyan authorities have announced to the Appeals Chamber that they wish to retain control over Mr. Gaddafi so that they can question him.²⁷

4. Relief Sought

37. For the reasons set out above, the OPCD respectfully requests the Honourable Pre-Trial Chamber to reject the "Prosecution's Supplemental Submissions on the OPCD Request for Disclosure".



Xavier-Jean Keïta, Principal Counsel of the OPCD

Dated this, 13th Day of April 2012

At The Hague, The Netherlands

²⁷ Government of Libya's Appeal against the "Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi", 10 April 2012, ICC-01/11-01/11-103, at para. 27.