

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: 28 November 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 Annex A and B

Request for Leave to Appeal the “Decision on the “Submissions of the Libyan Government with respect to the matters raised in a private session during the hearing on 9-10 October 2012””

Source: Defence

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

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Introduction

1. Mr. Saif Al Islam Gaddafi, who is the subject of an ICC arrest warrant, has been held in incommunicado detention – in what appears to be isolation – for over a year. There is no evidence that he has ever been brought before a judge, or that he has had any opportunity to challenge the legality of his detention. The Libyan authorities have also conceded that he does not currently have legal representation. Under the ‘special’ and unconstitutional legal regime which is being applied to him, he would not have a right to receive visits from a legal representative in any case.¹
2. Given these dire circumstances, it is of heightened importance that Mr. Gaddafi is vigorously and independently represented before the ICC by Counsel whom he trusts and has confided his instructions, and that there are no unnecessary delays as concerns the ultimate decision of the Pre-Trial Chamber as to whether Mr. Gaddafi should continue to be maintained in such deplorable conditions.
3. It is also imperative that Mr. Gaddafi is aware that the Chamber is willing to accord him the protection of the law, and that his fundamental rights are not being sacrificed in the name of some misconceived adherence to the appearance of ‘neutrality’ or ‘impartiality’, or that they have not been bargained away in order to allay unreasonable and unfounded proclivities of States. After all, if this esteemed international Chamber will not enforce his rights under the Statute and treat them with the gravitas they deserve, who will?
4. Nonetheless, in its decision of 22 November 2012 (the Decision), the Honourable Pre-Trial Chamber averred that:

the representation of a suspect by OPCD in admissibility proceedings is intrinsically problematic as it appears to be extremely difficult to dispel confusions in the public perception in relation to the role of OPCD as opposed to the role of the Court. Indeed, under regulation 11 of the Regulations of the Court, the OPCD has a dual status by virtue of which it functions as a "wholly independent office" in its "substantive work", while falling at the same time within the remit of the Registry of the Court for administrative purposes. In these circumstances, the positions expressed by the OPCD can be easily

¹ See Annex A, ICC-01/11-01/11-216-Anx3.8, and Articles 106 and 187 *bis* (A) of the Libyan Criminal Procedure Code, ICC-01/11-01/11-190-Anx1 p.4.

mistaken for positions of the entire Court and thus have the potential of compromising the perception of the institution's impartiality.²

5. The Pre-Trial Chamber further stated that “the Chamber appointed counsel from the OPCD for Mr Gaddafi before the admissibility challenge was lodged and, as expressly stated, did not, in any case, intend to do so on a permanent basis.”³ The Chamber therefore indicated that “it needs to explore at this stage the options that can be pursued with a view to securing the appointment of regular counsel by Mr Gaddafi, in consultation with the Registry, taking into account the responsibilities of the latter pursuant to rules 20(1)(c) and 22(2) of the Rules and regulation 75 of the Regulations.”⁴
6. Accordingly, whilst the dispositive section of the decision appears to reject the request of the Libyan Government, it is clear from the above paragraphs that the Chamber granted it in substance, insofar as the Chamber has indicated its intention to revoke the appointment of the OPCD in the admissibility proceedings, in line with the submissions of the Government of Libya that the continued representation of Mr. Gaddafi by the OPCD would adversely impact on the ‘neutrality of the Registry’.⁵
7. By finding that the OPCD’s representation of Mr. Gaddafi in admissibility proceedings is intrinsically problematic, the Pre-Trial Chamber has also called into question the status of the submissions of the Defence submitted on behalf of Mr. Gaddafi thus far. Such an ambiguity is fundamentally incompatible with Mr. Gaddafi’s right to be effectively represented throughout these proceedings. The Chamber also appears to indicate that Mr. Gaddafi is unable to designate the OPCD as his counsel in connection with admissibility proceedings, notwithstanding the absence of any Statutory or Regulatory prohibition on him doing so.
8. The Defence for Mr. Gaddafi therefore respectfully seeks leave to appeal the Decision pursuant to Article 82(1)(d) of the Statute in relation to the following issues, which derive from the Decision:
 - i. Whether the Chamber erred in its finding that the appointment of the OPCD in admissibility proceedings to represent the defendant is intrinsically problematic as it jeopardises the appearance of the impartiality of the Court; and

² ICC-01/09-01/11-307 at para. 35.

³ At para. 36.

⁴ At para. 37.

⁵ At para. 33.

- ii. Whether the Chamber erred by failing to take into consideration the express wish of the defendant to be represented by the OPCD during this stage of the proceedings.

Submissions

The issues significantly affect the fairness of the proceedings

9. In finding that the appointment of the OPCD, which is located within the Registry solely for administrative purposes, to represent the defendant in admissibility proceedings is 'intrinsically problematic', the Chamber unfairly discriminates between different sections of the Court, in a manner which is deleterious to the overarching rights and independence of the Defence.
10. The mandate of the OPCD, and the fact of its administrative dependence on the Registry, is almost identical to the situation of the OPCV, which, incidentally, has adopted strong positions in favour of the Court exercising jurisdiction in every admissibility challenge in which it has participated.
11. In its decision concerning the conduct of the admissibility proceedings, the Chamber expressly found that "it is appropriate for the proceedings relating to the Admissibility Challenge to appoint, under regulation 80 of the Regulations, Paolina Massidda from the Office of Public Counsel for victims ("OPCV") to represent the victims who have communicated with the Court in relation to the case." It is completely illogical that it is appropriate for the OPCV, which is located in the Registry, to represent victims in admissibility proceedings (irrespective as to whether the victims have given their consent to such representation), but it is apparently not appropriate for the OPCD to represent a defendant who has consented to such representation.
12. As noted in the *Thlimmenos v. Greece* case, discrimination arises whenever the Court treats like entities in an unlike manner.⁶ The absence of any objective difference between the OPCD and OPCV necessarily creates the appearance that the Chamber is discriminating against the Defence, which in itself, significantly impacts on the fairness of the proceedings. In essence, by stating that the participation of the OPCD in admissibility proceedings impacts on the appearance of the impartiality of the Court whereas the OPCV does not, the Chamber is implying that it is problematic for the

⁶ *Thlimmenos v. Greece*, Judgment, 6 April 2000, No. 34369/97, para 44.

position of the Court to be aligned with the rights of the defendant, but not as concerns the interests and wishes of the victims.

13. The fact that an entity within the Court advances strong positions in support of a particular party cannot, in itself, be considered to impact on the appearance of the impartiality of the Court. If applied in a consistent manner, this would mean that the fact that the Prosecutor – as an organ of the Court – quite vigorously challenged the admissibility challenge submitted by the Government of Kenya, would also inappropriately affect the appearance of the impartiality of the Court.
14. Given the extremely small size and low profile of the OPCD, any impact it may have on the appearance of the impartiality of the Court in this particular case is extremely minimal, and completely overridden by the countervailing impact of the views of the Prosecution, as an organ of the Court (which the OPCD is not). This is demonstrated by the fact that the impression which has been created in the media and in the eyes of Libyan authorities is not that the Court is in any way predisposed towards the Defence. To the contrary, by virtue of the fact that Prosecutor, as an organ of the Court, has supported the challenge filed by the Government of Libya, and has not advocated for the surrender of either Mr. Saif Al Islam Gaddafi or Mr. Abdullah Al-Senussi, the impression which has been created is that the Court as a whole either has or will inevitably cede the two cases to Libya.⁷
15. In such circumstances, the problem is not that a part of the institutional structure of the Court is advocating for the interests of the Defence, but that the OPCD has insufficient presence and authority in order to ensure that the ongoing processes before the Court are viewed as truly adversarial. To the extent that the Decision implies that it is inappropriate for any section within the Court to actively advocate for the rights of the defendant in connection with admissibility proceedings, the Decision significantly affects the principle of equality of arms, by depriving the defendant of the right to an institutional platform, through which his views and concerns can be voiced.
16. Trial Chamber IV has also held in the Banda and Jerbo case that the issue as to whether the participation of a staff member from a particular section of the Court in a Defence team is appropriate, significantly impacts on the fairness of the proceedings.⁸

⁷ See for example, Annex B, and V. Walt, 'Why Libya – and not The Hague – will try Gaddafi's son', Time 10 October 2012, <http://world.time.com/2012/10/10/why-libya-and-not-the-hague-will-try-gaddafis-son>.

⁸ ICC-02/05-03/09-179 at para. 17.

17. The manner in which the Chamber has resolved this issue also significantly impacts on the independence of the Defence. Unlike Judges or the Prosecutor, the Defence are not required to act in an impartial manner –it is their duty to advance the best interests of their client in as effective manner as possible, consistent with their obligations under the Code of Professional Conduct for Counsel. One of these obligations is that the Defence must act independently, and freely – and must not permit his or her independence, integrity or freedom to be compromised by external pressure.⁹ It would therefore be entirely inappropriate for the freedom of the Defence to voice their concerns regarding the transfer of the case to Libya to be curtailed due to external pressure applied by the Libyan Government or Libyan media.
18. By revoking the mandate of the OPCD to represent Mr. Gaddafi in the admissibility proceedings due to the impact on the appearance of the impartiality of the Court, the Chamber is effectively penalising the Defence for complying with their duty to vigorously defend the interests of their client in a fully independent manner. This may have a chilling effect as concerns the ability and willingness of replacement Counsel to represent Mr. Gaddafi in a similarly independent manner, lest the Libyan Government threaten to withhold cooperation, for similarly spurious reasons, which in turn, could provoke the Chamber to once again replace the Defence.
19. The Chamber also based its findings concerning the impact of the OPCD's appointment on the appearance of impartiality on submissions made by the Prosecution – to which the Defence never had any opportunity to respond, due to the fact that these submissions had been filed as a response to the Government of Libya's motion. In the absence of sufficient reasoning, it cannot be discounted that the Pre-Trial Chamber may even have taken into consideration *ex parte* information submitted by the Prosecution. In this regard, to replace the Defence on the basis of information to which the Defence was not accorded an opportunity to respond constitutes a fundamental violation of the independence and rights of the Defence – in particular, the right to adversarial proceedings.
20. The failure of the Chamber to elucidate any legal test or factual findings in support of its conclusion that the appointment of the OPCD impacts on the neutrality, and 'appearance of impartiality of the Court' also constitutes a denial of the defendant's right to have adequate reasons in support of such a significant decision concerning his legal representation before the ICC. To the extent that the Decision could be

⁹ Article 6(2) of the Code of Professional Conduct for Counsel.

interpreted to undermine the propriety of all submissions tendered thus far by Mr. Gaddafi's Defence, it also undermines Mr. Gaddafi's right to effective representation in these proceedings; if it is currently inappropriate for the OPCD to represent Mr. Gaddafi in relation to admissibility proceedings – then it was always inappropriate for them to do so.

21. In terms of the second appealable issue, the Chamber's failure to take into consideration the fact that the defendant verbally requested the continued appointment of the OPCD at this juncture of the proceedings constitutes a complete denial of the defendant's right to be represented by counsel of his choice, as enshrined in Article 67(1)(d) of the Statute.
22. The defendant is held in incommunicado detention. During the June 2012 visit, the Libyan authorities actively prevented the defendant from exchanging any documents with the ICC delegation, and confiscated anything signed by the defendant. Mr. Gaddafi's right to freely choose his counsel should be interpreted in a manner which is effective, and which takes into consideration the difficult circumstances in which he is being held.¹⁰ Nonetheless, by disregarding the oral preferences expressed by Mr. Gaddafi because they were not transcribed in a formal power of attorney, the Chamber has rendered his right to choose counsel illusory.
23. Even if the Chamber considered that the oral preferences expressed by Mr. Gaddafi could not constitute a formal designation for the purposes of Regulation 75 of the Regulations of the Court, Regulation 76(1) specifies that the Chamber should, when appropriate, hear from the person entitled to legal assistance before appointing Counsel. It therefore follows that in withdrawing the appointment of Counsel, the Chamber should also, when appropriate, hear from the person entitled to legal assistance. By vesting the Representative of the Registry with the task of meeting with Mr. Gaddafi to discuss his preference concerning legal representation, the Chamber had already determined that it was appropriate for Mr. Gaddafi to be directly concerned in matters concerning his legal representation. It was therefore completely arbitrary and unfair for the Chamber to disregard these preferences in withdrawing the appointment of the OPCD.
24. The fact that Mr. Gaddafi designated the OPCD as his Counsel for this juncture of the proceedings is also intrinsically linked to the fact that Mr. Gaddafi has confided in the OPCD and explicitly instructed them in connection with the admissibility proceedings.

¹⁰ *Artico v. Italy*, App. No. 6694/74, 13 May 1980, para. 33.

25. This Pre-Trial Chamber has also repeatedly recognized the importance of Counsel acting with instructions from their client, and on that basis, has accorded the Government of Libya with multiple extensions of time to enable Counsel to obtain instructions. Prior to the visit to Zintan, the Chamber also expressly noted that “it would be beneficial for the OPCD to obtain direct instructions from Mr Gaddafi prior to filing its observations on the Admissibility Challenge”.¹¹
26. Mr. Gaddafi has not had an opportunity to provide instructions to any Counsel other than Counsel from the OPCD. The replacement of the OPCD as his counsel in the admissibility proceedings would therefore deprive Mr. Gaddafi of the right to effectively participate in these proceedings through instructed Counsel.

The issues significantly affect the expeditiousness of the proceedings

27. The replacement of Mr. Gaddafi’s Counsel at this juncture necessarily impacts on the expeditiousness of the proceedings. Since the Decision has called into question the legitimacy and propriety of the OPCD’s representation thus far, either the replacement Counsel or the Government of Libya are likely to request that certain issues be re-litigated, which will delay the ability of the Chamber to resolve the admissibility challenge. The current ambiguity concerning the ultimate forum of the trial means that Mr. Gaddafi’s Defence is effectively in a holding pattern as concerns their ability to expeditiously advance his case before the ICC.
28. Although the OPCD has been involved in this case for almost a year, new Counsel will be required to familiarise themselves with a voluminous record, which will inevitably impact on their ability to respond to issues in an expeditious manner. The fact that the new Counsel will not have the benefit of any instructions from the defendant will also impede their ability to make informed decisions concerning the appropriate course for the Defence, which in turn, will impact on their ability to expeditiously react to developments in the case, in a manner which is coherent with the course adopted thus far.
29. Given that the Chamber has termed the OPCD’s representation of Mr. Gaddafi in admissibility proceedings as ‘intrinsically problematic’, the replacement Counsel may also be loathe to either liaise with the OPCD in order to ensure a smooth handover or

¹¹ ICC-01/11-01/11-165 at para. 6.

benefit from any support assistance, lest their representation of Mr. Gaddafi become tarred by the same brush.

30. The replacement of the OPCD prior to the issuance of a decision on the merits of the admissibility challenge will thus fundamentally disrupt Defence strategy. In this connection, Trial Chamber IV has found that the expeditiousness of the proceedings will be significantly affected if a party's ability to design its strategy is impacted as a result of legal representation issues.¹²
31. Mr. Gaddafi has also orally indicated that he is indigent, and would require legal aid. It is, however, the position of CSS that Mr. Gaddafi will not be entitled to legal aid unless he submits a formal request declaring his indigency. Given that there are likely to be possible delays in resolving this matter, the appointment of an unfunded external Counsel would constitute an illusory fulfilment of Mr. Gaddafi's right to representation, and would also engender delays due to the fact that the Defence would have insufficient means to effectively participate in the proceedings.

An immediate decision of the Appeals Chamber in relation to these issues would materially advance the proceedings

32. By finding that the OPCD's representation of Mr. Gaddafi in admissibility proceedings is 'intrinsically problematic', the Chamber has called into question the validity and propriety of all the submissions tendered thus far on behalf of Mr. Gaddafi. An immediate decision of the Appeals Chamber is therefore required to remove doubts concerning the correctness of the Decision, and map "a course of action along the right lines [which] provides a safety net for the integrity of the proceedings".¹³
33. The Chamber's failure to take into consideration the wishes of the defendant, in deciding to withdraw the appointment of the OPCD in the admissibility proceedings, also creates the appearance that the defendant has been effectively excluded from actively participating in the proceedings, and that the independence of the Defence has been undermined. Again, an immediate decision of the Appeals Chamber would eliminate any doubts concerning the correctness of this approach, and preserve the integrity of any future decision on the admissibility of the case.

¹² ICC-02/05-03/09-179 at para. 19.

¹³ ICC-01/04-168 at para. 15.

34. Immediate resolution of this issue would also ensure that the Defence is in a position to move the proceedings forward,¹⁴ in the manner which is most advantageous for the defendant, and which is in full compliance with his rights under the Statute.

Relief Sought

35. For the reasons set out above, the Defence for Mr. Saif Al Islam Gaddafi respectfully requests the Honourable Pre-Trial Chamber to grant leave to appeal the Decision in relation to the issues as to:

- i. Whether the Chamber erred in its finding that the appointment of the OPCD in admissibility proceedings to represent the defendant is intrinsically problematic as it jeopardises the appearance of the impartiality of the Court; and
- ii. Whether the Chamber erred by failing to take into consideration the express wish of the defendant to be represented by the OPCD during this stage of the proceedings.



Xavier-Jean Keïta, Counsel for Mr. Saif Al Islam Gaddafi

Dated this, 28th Day of November 2012

At The Hague, The Netherlands

¹⁴ ICC-01/04-168 at para. 15.