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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 Redacted**

**With Confidential *Ex Parte* Annex A, Defence and Chamber Only, and Public  
Annex B and C**

**Public Redacted Version of the "Request for Reconsideration of 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:

**The Office of the Prosecutor**

Ms. Fatou Bensouda

**Counsel for the Defence**

Mr. Xavier-Jean Keïta, Principal  
Counsel

Ms. Melinda Taylor, Counsel

**Legal Representatives of the Victims**

Ms. Paolina Massida

Ms. Sarah Pellet

Mr. Mohamed Abdou

**Legal Representatives of the  
Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms. Silvana Arbia, Registrar

**Deputy Registrar**

Mr. Didier Daniel Pereira, Deputy  
Registrar

**Victims and Witnesses Unit**

**Counsel Support Section**

**Detention Section**

**Victims Participation and  
Reparations Section**

**Other**

## Introduction

1. The Defence for Mr. Saif Al Islam Gaddafi hereby requests the Pre-Trial Chamber to reconsiders its decision of 22 November 2012 (the Decision).<sup>1</sup>
2. Through its ongoing silence concerning fundamental violations of the rights of the Defence, the Chamber has failed to accord Mr. Gaddafi the protection of the law. At the same time, by actively intervening to order the Registry to replace the OPCD as his counsel in admissibility proceedings, it appears that Mr. Gaddafi's right to be represented in this process by Counsel of his choice has been sacrificed in the name of some misconceived adherence to the appearance of 'neutrality' or 'impartiality', or that it may have been bargained away in order to allay unreasonable and unfounded proclivities of States.
3. To remain silent in relation to Libya's non-compliance and ongoing violations of the rights of the defendant, whilst actively intervening to replace the Defence does not constitute 'impartiality'. To the contrary, it creates the impression that the Court may have been pressured into a "behind the scenes" deal with Libya, which allows the Court to engage in a token manner as concerns the domestic process against Mr. Gaddafi.
4. In its Decision, the Chamber indicated that it was 'intrinsically problematic' for the OPCD to represent Mr. Gaddafi in admissibility proceedings due to the impact that such representation could have on the neutrality and appearance of the impartiality of the Court<sup>2</sup> The Chamber therefore emphasised that the appointment of the OPCD was temporary, and announced its intention to engage the Registry with the task of replacing the OPCD with 'regular counsel'.<sup>3</sup>
5. The Defence has absolutely no objection to the finding that the appointment of the OPCD was temporary, and would be content to relinquish its mandate to represent Mr. Gaddafi under the following conditions:
  - i. The replacement counsel is either selected by Mr. Gaddafi or appointed in accordance with the delegation of his power of attorney, provided during the March 2012 visit;

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<sup>1</sup> [Redacted].

<sup>2</sup> ICC-01/09-01/11-307 at para. 35.

<sup>3</sup> At para. 37.

- ii. The replacement of counsel at this juncture has no impact on the legitimacy of any submissions previously submitted on Mr. Gaddafi's behalf during the admissibility proceedings;
  - iii. The replacement of counsel does not constitute a justification either for further delays in the admissibility proceedings, a basis to enable the Government of Libya to submit additional evidence or submissions, or an excuse as concerns its failure to do so during the October admissibility hearing;<sup>4</sup>
  - iv. There are no further admissibility hearings or written submissions at first instance, which Counsel would be required to participate in or respond to without the benefit of instructions from the defendant; and
  - v. The replacement counsel is accorded adequate legal aid resources to represent Mr. Gaddafi in an effective manner, notwithstanding Mr. Gaddafi's inability to submit a formal indigency form due to the conditions of his detention.
6. By failing to address such matters, the Decision opens the door to the possibility that the replacement of Counsel could be exploited by the Government of Libya to the detriment of the defendant.
7. The Defence therefore respectfully requests the Honourable Pre-Trial Chamber to reconsider the Decision on the grounds that it is manifestly unsound, and has manifestly unsatisfactory consequences as concerns the rights of the defendant. In particular, the Chamber:
- i. Incorrectly prioritised the 'neutrality' and 'appearance of the impartiality of the Court' over its positive duty to uphold the rights of the defendant;
  - ii. Created an appearance of partiality by taking into consideration patently irrelevant considerations, and discriminating between different parties and participants in the proceedings;
  - iii. Improperly circumscribed the independence of the defence; and
  - iv. Failed to uphold the right of the defendant to freely choose his counsel.
8. In the alternative, the Chamber should revise its decision due to the existence of new circumstances, in particular, the [Redacted].

### **Submissions**

#### *Legal basis for the Request for Reconsideration*

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<sup>4</sup> [Redacted]. See Annex A.

9. By averring that the assignment of Counsel from the OPCD to represent the defendant in the current admissibility proceedings is “intrinsicly problematic”, the Chamber effectively reconsidered its previous decision appointing Counsel from the OPCD. The Chamber has therefore implicitly recognised the existence of a power to reconsider previous decisions. Having exercised this power to the detriment of the Defence, the Chamber cannot now refuse to do so in order to uphold the rights of the defendant.
10. Although the Pre-Trial Chamber has sought to justify its present stance by asserting that “Chamber appointed counsel from the OPCD for Mr Gaddafi before the admissibility challenge was lodged”,<sup>5</sup> it is clear from the record of proceedings that the Chamber expressly intended that Counsel from the OPCD would represent Mr. Gaddafi in connection with the admissibility proceedings.
11. When Mr. Gaddafi was first arrested by the Libyan authorities, the OPCD requested the Chamber to authorise the OPCD to “present observations concerning the general interests of the Defence in any proceedings convened by the Chamber in regard to the admissibility of the case and the status of Saif Al-Islam Gaddafi”.<sup>6</sup> The Chamber granted the request, and in fact – gave the OPCD a broader mandate to “represent the interests of the Defence in all instances related to the proceedings against Saif Al-Islam Gaddafi” (emphasis added).<sup>7</sup>
12. In a subsequent decision, the newly constituted Pre-Trial Chamber repeated this broad language, by appointing the OPCD to “fully represent him until such time as regular counsel is appointed.”<sup>8</sup> Given that the Government of Libya had already explicitly announced its intention to challenge the admissibility of the case by the 30 April 2012,<sup>9</sup> the Chamber must have envisaged that the representation of Mr. Gaddafi would include admissibility proceedings, as evidenced by a later decision in which the Chamber indicated that as “Counsel for Mr. Gaddafi, the OPCD shall accordingly be allowed to submit written observations” as concerns the admissibility of the case.<sup>10</sup>
13. In a subsequent decision, the Chamber expressly envisaged that the OPCD would file its response to the admissibility challenge after both the Registry representative and

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<sup>5</sup>At para. 36.

<sup>6</sup>ICC-01/11-01/11-39-Red at para. 5.

<sup>7</sup>At p. 6.

<sup>8</sup>ICC-01/11-01/11-113 at para. 5.

<sup>9</sup>ICC-01/11-01/11-82 at para. 3.

<sup>10</sup>ICC-01/11-01/11-134 at para. 11.

the OPCD had visited Mr. Gaddafi, and discussed his choice of counsel with him.<sup>11</sup> In so doing, the Chamber failed to refer to any legal impediments concerning the ability of the OPCD to represent Mr. Gaddafi in the admissibility proceedings – to the contrary, the Chamber 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”.<sup>12</sup>

14. After the release of the ICC officials, the Chamber continued to mandate the OPCD to file its admissibility response,<sup>13</sup> and to participate in the subsequent admissibility hearing.<sup>14</sup>
15. It is impossible to interpret these decisions other than as an endorsement of the eligibility of Counsel from the OPCD to represent Mr. Gaddafi in the admissibility proceedings. The sudden reversal of the Chamber’s position necessarily constitutes a reconsideration of these findings, albeit one in which the Chamber has failed to clearly elucidate the legal or factual grounds for its reversal (which in itself, constitutes grounds for reconsideration of the present Decision).
16. In the Lubanga case, Trial Chamber I found that there is an inherent right to reconsider a decision if the findings are manifestly unsound, or the consequence are manifestly unsatisfactory.<sup>15</sup> Even those Chambers or Judges which have declined to recognise a remedy of reconsideration, have indicated their willingness to revise previous decisions in circumstances in which new factual circumstances have arisen.<sup>16</sup>

*The Chamber incorrectly prioritised the ‘neutrality’ and ‘appearance of the impartiality of the Court’ over its positive duty to uphold the rights of the defendant*

17. In reaching its finding that the appointment of the OPCD in admissibility proceedings is intrinsically problematic, the Chamber observed that:

all efforts should be deployed to preserve the perception of neutrality of the Court, particularly within the context of an admissibility challenge on complementarity grounds, where the Court shall settle a dispute between itself

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<sup>11</sup>ICC-01/11-01/11-165.

<sup>12</sup>ICC-01/11-01/11-165 at para. 6.

<sup>13</sup>ICC-01/11-01/11-184.

<sup>14</sup>ICC-01/11-01/11-207.

<sup>15</sup>ICC-01/04-01/06-2705, para.18.

<sup>16</sup>ICC-01/09-01/11-301, paras. 17-20; Separate opinion of Judge Blattman, ICC-01/04-01/06-2707 at para.13; Prosecutor v. Bemba, Transcript of 2 December 2010; ICC-01/05-01/08-T-42-Red-ENG WT; pages. 1-4.

and a State. [...] the Court should not engage and not be perceived to engage in a competition for the exercise of jurisdiction over a case.<sup>17</sup>

18. Such findings fail to take into consideration the positive duty of the Chamber to preserve, and where necessary, advance the rights of the parties before the ICC pending the resolution of the admissibility challenge. In the words of the Appeals Chamber, an admissibility challenge only properly arises if there is a “conflict of jurisdictions” - that is, a conflict between the jurisdiction of the Court and that of domestic courts.<sup>18</sup> In adjudicating such a ‘conflict’ – the judges must remain impartial and independent, but they can not and should not remain neutral.
19. This conflict of jurisdictions also requires the ICC Pre-Trial Chamber to actively exercise jurisdiction over Mr. Saif Al Islam Gaddafi until such time as a decision on the merits of the admissibility of the case has been issued.<sup>19</sup> Such jurisdiction imposes positive obligations on the Pre-Trial Chamber to ensure the protection of persons who have been arrested under Article 57(3)(c) of the Statute, to ensure compliance with the rights of the defendant under Articles 55 and 67(1), and to ensure appropriate protection for victims and witnesses, pursuant to Article 68(1). These obligations are not suspended in the event of an admissibility challenge. The Chamber cannot remain neutral as concerns the question as to whether the Government of Libya has and continues to respect these rights.
20. To say nothing in the face of such repeated and flagrant violations of the rights of the defence is not to be impartial –it is to derogate from the duties of the Chamber. By remaining silent and failing to take a positive stance to uphold the rights of the defence or to condemn any violations, the Chamber risks creating an appearance that it has become complicit in these violations through its acquiescence.
21. The replacement of the Defence at this critical juncture of the admissibility proceedings creates the very real impression that rather than addressing the violations of the rights of the Defence which occurred in Zintan or the Government of Libya’s subsequent threat to withhold cooperation because of the identity of the Defence, the Court might be simply sweeping them under the carpet and giving Libya a ‘clean slate’ as concerns its relationship with the Defence and the Court.

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<sup>17</sup>At para. 34.

<sup>18</sup>ICC-01/09-01/11-307 at paras.37 and 41.

<sup>19</sup> ICC-01/09-01/11-62 at paras.8 and 9.

22. This impression is bolstered by the fact that the Chamber remained silent when the Defence for Mr. Gaddafi was arrested in the course of a mission, which was ordered by this Chamber, when it was clear that the Libyan authorities had failed to comply with the explicit terms of the Chamber's order (that is, that the visit must be privileged), and had furthermore taken privileged and confidential documents and items by force, in violation of Article 67(1)(b), Rule 73(1), and the procedure set out in Article 93(10) of the Statute.
23. At other Courts and Tribunals, when the defence have been arrested or their privileges and immunities violated, the Judges seised of the case have directly intervened to enforce the rights of the persons appearing before it.<sup>20</sup> This is not a matter which should be farmed out to diplomatic processes, which are inherently susceptible to compromise – the duty to enforce legal rights inheres in the Chamber, and as such, the Chamber should execute this duty.
24. The Pre-Trial Chamber also has a very onerous duty to ensure the safety and protection of potential witnesses, and persons at risk on account of the activities of the Court. As found by the ICTY Appeals Chamber,

Witness intimidation of the type described by the Trial Chamber undermines the fundamental objective of the Tribunal [...]: to ensure that trials are fair, expeditious, and conducted with due regard for the protection of victims and witnesses. Countering witness intimidation is a primary and necessary function of a Trial Chamber. While a Trial Chamber is always required to “provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case”, this obligation is especially pressing when outside forces seek to undermine the ability of a party to present its evidence at trial. For the Tribunal to function effectively, Trial Chambers must counter witness intimidation by taking all measures that are reasonably open to them, both at the request of the parties and *proprio motu*.<sup>21</sup>

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<sup>20</sup> Prosecutor v. Ante Gotovina et al, IT-06-90-AR73.5, ‘Decision on Gotovina Defence Appeal Against 12 March 2010 Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia’, 14 February 2011; Prosecutor v. Bagasora et al., Decision On Aloys Ntabakuze’s Motion For Injunctions Against The Government Of Rwanda Regarding The Arrest And Investigation Of Lead Counsel Peter Erlinder 6 October 2012.

<sup>21</sup> Prosecutor v. Haradinaj, Appeals Judgment, 19 July 2010, at para 35. See also Prosecutor v. Renzaho, Appeals Judgment, at para. 209.



25. As the Chamber is aware, the Libyan authorities took by force information concerning potential Defence witnesses, and interrogated Counsel on these issues, which resulted in potential witnesses withdrawing their willingness to cooperate with the Defence.<sup>22</sup> The Chamber was also informed that a person assisting the Defence received an extremely intimidating message warning that there would be serious consequences if this person continued to assist the Defence.<sup>23</sup>
26. Notwithstanding this duty, either in previous decisions or in the present Decision, the Chamber has expressed no views or concern regarding these blatant instances of Defence and witness intimidation. The Chamber also appears to have taken no position on the fact that the Government of Libya obtained a copy of a confidential Defence document, and has refused to disclose the source. When confidential information concerning Prosecution arrest warrants was leaked in 2005, the Court ordered an inquiry.<sup>24</sup> Are the integrity and security of Defence files any less important than those of the Prosecution?
27. It would also be a fundamental error to claim that such violations have no bearing on the Chamber's duty to adjudicate the admissibility of the case in an impartial manner. As set out in a draft Prosecution policy paper on preliminary examinations, in considering whether the 'inability' Article 17 criteria are met, "the Office may consider, *inter alia*, the absence of conditions of security for witnesses, investigators, prosecutors and judges or lack of adequate protection systems".<sup>25</sup> Defence teams and Defence witnesses are intrinsic elements of any criminal trials; without adequate security for the Defence, a State cannot be considered to be 'able' to conduct criminal trials. 'Unwillingness' should also be assessed in light of "intimidation of victims, witnesses or judicial personnel", and refusal to "cooperate with the Court".<sup>26</sup>
28. This poses the question: if deliberately deceiving the ICC delegation concerning the privileged nature of the visit, taking Defence documents and items by gun point, refusing to comply with a request from the ICC to immediately surrender the officials, forcing the ICC officials to undergo interrogations in relation to confidential and privileged matters, and informing the ICC officials that these measures were

<sup>22</sup> ICC-01/11-01/11-T-3-Red-ENG WT, p. 10, lines 1-14.

<sup>23</sup> ICC-01/11-01/11-228-Conf-Anx7.

<sup>24</sup> ICC-02/04-01/05-221-Anx A

<sup>25</sup> Policy Paper on Preliminary Examinations 4 October 2010, at para. 59, [http://www.icc-cpi.int/NR/rdonlyres/E278F5A2-A4F9-43D7-83D2-6A2C9CF5D7D7/282515/OTP\\_Draftpolicypaperonpreliminaryexaminations04101.pdf](http://www.icc-cpi.int/NR/rdonlyres/E278F5A2-A4F9-43D7-83D2-6A2C9CF5D7D7/282515/OTP_Draftpolicypaperonpreliminaryexaminations04101.pdf)

<sup>26</sup> At para. 61.

‘retaliation’ for the previous report submitted by the Defence, do not constitute intimidation of judicial personnel or a refusal to cooperate with the Court, what would?

29. The Government of Libya cannot seriously claim that it is cooperating with the Court simply because it eventually released the four officials – 26 days later, after having first obtained all the information it wanted through coercive means, and after having used the officials as hostages to extract concessions and an apology from the Court.
30. The Government of Libya’s repeated unsubstantiated and defamatory allegations made against the Defence, and threats not to cooperate unless the Defence is replaced cannot but constitute intimidation of the Court and an unwillingness to genuinely cooperate with the Court.
31. It would be a derogation of the Chamber’s duty to impartially adjudicate an admissibility challenge to to maintain that actions, which impact on the security of both the Defence and Defence witnesses, and reflect on the unwillingness of the Libyan authorities to genuinely cooperate with the Court, have no relevance to the admissibility of the Court constitutes.
32. The Chamber’s silence on such matters has also had an extremely deleterious impact on the rights of the defendant both in the case of Mr. Gaddafi, and the case of Mr. Al-Senussi. In this regard, the fact that there have been no consequences for Libya’s failure to bring Mr. Gaddafi before a judge, as required by Article 59, to surrender him to the ICC when required to do so, or as concerns the fact that the Libyan authorities effectively took four ICC officials hostage, appears to have given Libya the green light to replicate these violations in the case of Mr. Al-Senussi.
33. As concerns the latter case, when there is a public ICC arrest warrant stipulating that a defendant must be brought before a judge and surrendered to the ICC, remaining silent about Libya’s non-compliance does not constitute ‘impartiality’. To the contrary, it gives the very real impression that the Court has ceded jurisdiction to Libya.<sup>27</sup> The fact that neither Mr. Gaddafi nor Mr. Al-Senussi have been brought before a judge, as required by Article 59, has deprived both of them of a transparent legal forum for expressing their preferences as concerns the admissibility of the case, any concerns regarding their health or conditions of detention, or their wishes as concerns legal representation. As will be discussed below, if, in such circumstances, the Chamber were to ignore the views on legal representation expressed by Mr. Gaddafi to the

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<sup>27</sup> See Annex B.

OPCD and the Chief of CSS, the Chamber would be aggravating this violation of his rights.

34. In the same manner that the Defence was arrested on trumped up charges in order to silence both the defence and the defendant, the Libyan authorities have also arrested the daughter of Mr. Al-Senussi on trumped up charges in order to send an extremely chilling message to anyone who attempts to visit Mr. Al-Senussi or facilitate his ability to select legal representation.<sup>28</sup> If the Chamber were to ignore the very real difficulties faced by the defendants and the defendants' families in obtaining formal powers of attorney, the Chamber would once again become complicit in the egregious efforts by the Libyan authorities to deny these defendants the right to effectively participate in the proceedings through counsel of their choice.

*The Chamber has created an appearance of partiality by taking into consideration patently irrelevant considerations, and discriminating between different parties and participants in the proceeding*

35. In reaching its assessment concerning the impact on the appearance of the impartiality of the Court, the Chamber has failed to employ any legal test – notwithstanding the fact that ICC jurisprudence has set out clearly elaborated thresholds for ascertaining whether the appearance of impartiality might be affected through the actions of a participant.<sup>29</sup>
36. The Chamber also failed to reach any findings that the Defence has through own its actions or statements purported to act on behalf of the Court, and thereby affected the appearance of the impartiality of the Court.<sup>30</sup> The Appeals Chamber has held in this regard that:

To the extent that Libyan authorities and members of the media may have ascribed positions to the Prosecutor, 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.<sup>31</sup>

<sup>28</sup> Ms. Al-Senussi undertook the desperate step of attempting to visit her father in order to help him secure his legal rights, such as a lawyer. In light of the fact that Mr. Al-Senussi had not been brought before a judge, as required by Article 59, the family also had significant concerns regarding his health and well-being. I. Black 'Gaddafi spy chief should be tried by ICC not Libya, says family', *The Guardian*, 19 October 2012, H. Al Shalchi, 'Daughter of Gaddafi's ex-spy chief says jailed father very sick', *Reuters*, 7 November 2012.

<sup>29</sup> See for example, ICC-01/11-01/11-175 at para. 20.

<sup>30</sup> ICC-01/11-01/11-175 at para. 35.

<sup>31</sup> ICC-01/11-01/11-175 at para. 40.

37. Any imputation of the actions of the OPCD to the Court was deliberately done by the Libyan authorities in order to create spurious grounds to justify their non-cooperation with the Court.<sup>32</sup> If the Chamber were to be influenced by such libellous reporting, the Chamber would allow the Libyan authorities to directly benefit from their own turpitude, at the direct expense of the rights of the defendant, in violation of the principle, *ex turpi causa non oritur actio*.
38. When the Chamber rendered its recent decision that it was inappropriate for the OPCD to represent Mr. Gaddafi in admissibility proceedings, it had no information before it of which it was not aware during earlier decisions endorsing the participation of the OPCD in the admissibility proceedings.<sup>33</sup> The only new factor was the Libyan Government's refusal to cooperate with the Court unless Counsel from the OPCD were replaced as the Defence for Mr. Gaddafi.
39. The absence of any objective legal or factual basis for reversing its previous position therefore creates the impression that the Chamber is simply citing concerns regarding 'neutrality' and appearance of 'impartiality' (which have never been raised previously by the Chamber) to create a facade for the fact that the Chamber is in reality, acquiescing to the threat of the Government of Libya to cease any cooperation with the Court if Counsel from the OPCD continue to represent Mr. Gaddafi.
40. To allow such overtly political considerations to influence the decisions of this Court is to sacrifice the independence and integrity of the Court in order to obtain what is in reality, a chimera. The Libyan authorities have at no point in time indicated that they would ever be willing to surrender Mr. Gaddafi to the ICC, if their challenge is unsuccessful. At best, the Libyan authorities have indicated that they might permit the ICC to be involved in domestic proceedings against Mr. Gaddafi.<sup>34</sup> Given the absence of any concrete details concerning the modalities of such involvement, even such *de minimis* cooperation should be viewed with extreme scepticism.
41. Rather than promoting the appearance of the impartiality of the Court, the Decision creates the appearance that in order to 'save face', the Court has capitulated as concerns its duty to uphold fundamental rights of the Defence, and that the outcome of the admissibility proceedings is accordingly a *fait accompli*: all that remains is to give Libya sufficient time to try to create an appearance that they are meeting the

<sup>32</sup> ICC-01/11-01/11-228-Conf-Red at paras.70-75.

<sup>33</sup> ICC-01/11-01/11-114-Conf-Exp, and ICC-01/11-01/11-185-Conf-Exp-Anx22.

<sup>34</sup> ICC-01/11-01/11-T-3-Red-ENG WT, p.49, line 13 – p.51 line 8.

Article 17 criteria, without the ‘troublesome’ intervention of specific Defence Counsel, who are in a position to both speak to the express wish of the defendant to be tried before the ICC, and to demonstrate the multiple occasions on which the Libyan authorities appear to have misled this Court and violated the rights of the Defence.

42. The Chamber also committed fundamental legal errors by misconstruing the mandate of the OPCD, and directly discriminating between other entities situated within the Court. Although the OPCD is financed by the Court, it is wholly independent in its substantive functions. It is never neutral – in performing its mandate under Regulation 77, it always advocates for the interests of the Defence at large, or a specific defendant.
43. The distinction between the OPCD and ‘regular counsel’ is completely arbitrary: the fact that the OPCD is financially and administratively dependent on the Registry is the same situation as ‘regular’ external legal aid funded lawyers, who are also fully dependent on the Registry as concerns their finances and administrative needs. The OPCD arguably has greater independence due to the fact that OPCD Counsel receive a fixed salary, which is independent of their involvement in this case, whereas the right of external counsel to receive remuneration is directly linked to the continued willingness of the Chamber to maintain their involvement in the case.
44. The mandate of the OPCD is also almost identical to that of the OPCV, which has adopted strong positions in favour of the Court exercising jurisdiction in every admissibility challenge that it has participated in. Nonetheless, in its decision concerning the conduct of the admissibility proceedings, the Chamber expressly found that it was appropriate for the OPCV to represent victims who had communicated with the Court in connection with the admissibility proceedings.<sup>35</sup>
45. Discrimination arises whenever the Court treats like entities in an unlike manner.<sup>36</sup> The absence of any objective difference between the OPCD and OPCV necessarily creates the appearance that the Chamber is discriminating against the defence. By finding that the participation of the OPCV in admissibility proceedings is ‘appropriate’, whereas the participation of the OPCD is ‘intrinsically problematic’, the Chamber is implying that it is problematic for the position of the Court to appear to be aligned with the rights of the defendant, but not as concerns the interests and wishes of the victims.

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<sup>35</sup> ICC-01/11-01/11-134.

<sup>36</sup> *Thlimmenos v. Greece*, ECHR Judgment, 6 April 2000, No. 34369/97, para 44.

*The Decision improperly circumscribes the independence of the defence*

46. 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.<sup>37</sup> 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.
47. By citing ‘impartiality concerns’ in order to revoke the mandate of the OPCD to represent Mr. Gaddafi in the admissibility proceedings, the Chamber has effectively penalised 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.

*The Chamber failed to uphold the right of the defendant to freely choose his counsel*

48. Notwithstanding the fact that the Defence expressly brought to the attention of the Chamber the fact that Mr. Gaddafi had indicated his wish to be represented by Counsel from the OPCD at this juncture to both the OPCD and the Chief of CSS, the Chamber manifestly erred by failing to either refer to this fact or taking it into consideration in its Decision.
49. Although the appointment of Counsel from the OPCD pursuant to Regulation 76 was time-limited in the sense that the OPCD mandate would run “until such time as regular counsel is appointed”,<sup>38</sup> in the same decision, the Chamber explicitly recognised that any such replacement should be appointed in accordance with the wishes of Mr.

<sup>37</sup>Article 6(2) of the Code of Professional Conduct for Counsel.

<sup>38</sup>ICC-01/11-01/11-233-Red at para. 36.

Gaddafi.<sup>39</sup> In a subsequent decision, in which the Pre-Trial Chamber requested the Registry to “discuss further with [Mr. Gaddafi] the option to appoint counsel of his own choosing,”<sup>40</sup> the Chamber did not impose any limitations on Mr. Gaddafi’s ability to appoint counsel of his own choosing, apart from the criteria set out in Rule 21. The prior decisions of the Chamber mandating the OPCD to participate in the admissibility proceedings created a legitimate expectation for both the OPCD and Mr. Gaddafi that there was no legal impediment as concerns Mr. Gaddafi’s ability to maintain the appointment of the OPCD during this stage of the proceedings. Prior to the trip to Zintan, the Chief of the Counsel Support Section (CSS) had also indicated to the OPCD that there was no impediment to Mr. Gaddafi selecting the OPCD as his Counsel for this period.

50. Although Mr. Gaddafi instructed the ICC interpreter to complete a power of attorney designating the OPCD as his Counsel (until such time as he is surrendered to the ICC), the circumstances of the meeting were such that it was not possible for the power of attorney to be completed during the meeting, and the signed documents were subsequently confiscated by the Libyan authorities, notwithstanding the absence of any legal basis for seizing such documents.
51. After the meeting between Mr. Gaddafi and Counsel from the OPCD was abruptly terminated, Mr. Gaddafi met with the Representatives of the Registrar. After this meeting, the Chief of CSS informed Counsel from the OPCD that Mr. Gaddafi had orally expressed his preference to his continued representation by the OPCD. The Chief of CSS also recently confirmed Mr. Gaddafi’s preferences to the OPCD.
52. Although the Chief of CSS did not obtain a written power of attorney from Mr. Gaddafi, the Chamber had not specified that it was necessary for the Representatives of the Registry to obtain written confirmation of Mr. Gaddafi’s views. Indeed, the word ‘discuss’ implied that an oral preference would suffice. Moreover, as implicitly acknowledged by the Chamber, the ability of Mr. Gaddafi to provide such a power of attorney was directly frustrated by the Libyan authorities.<sup>41</sup> In such circumstances, if the Chamber were to refuse to take notice of Mr. Gaddafi’s clear attempt to express his preference to be represented by the OPCD during this stage of the proceedings, the Chamber would in effect become complicit in the continuous attempts by the Libyan

<sup>39</sup>“REMINDS the OPCD to continue to assist Mr Gaddafi in acquiring counsel, consistent with his wishes.”ICC-01/11-01/11-113 at p. 4.

<sup>40</sup>ICC-01/11-01/11-129 at para. 12.

<sup>41</sup>ICC-01/11-01/11-233-Red at para. 36.

authorities to utilise illegal means to prevent Mr. Gaddafi from either being able to effectively participate in the proceedings or being able to designate counsel of his choice.

53. The rights of the defendant must also be interpreted in a manner which is effective and not illusory.<sup>42</sup> To refuse to take notice of the oral views expressed by Mr. Gaddafi would be to allow form to triumph over substance, and would render nugatory Mr. Gaddafi's Statutory right to freely choose his Defence.
54. The Rome Statute also clearly limits the ability of the Chamber to disturb a defendant's choice of counsel, who is otherwise qualified to act as counsel.<sup>43</sup> Whilst a Chamber may review the appointment of Counsel in order to protect the integrity of the proceedings, the Chamber's power to do so is expressly tied to its duty to ensure the fairness and expeditiousness of the proceedings.<sup>44</sup> In the current case, there is no indication that the continued representation of Mr. Gaddafi by Counsel from the OPCD would affect either the fairness or expeditiousness of the proceedings. To the contrary, whilst neither Mr. Gaddafi nor the OPCD wish for Counsel from the OPCD to represent Mr. Gaddafi *ad infinitum*, the replacement of Counsel prior to the issuance of a decision on the admissibility of the case could potentially delay the resolution of the admissibility proceedings, and thereby adversely impact on both the fairness and the expeditiousness of the proceedings.
55. It cannot be stressed enough that Mr. Gaddafi has been held in incommunicado detention – in what appears to be isolation – for over a year: subsequent to the June mission to Zintan, the Court has received no further information concerning Mr. Gaddafi's health or detention conditions, and is therefore not in a position to exercise its duty under Article 57(3)(c) of the Statute
56. Justice delayed is justice denied. Although no-one approached by the Defence has indicated that they would be willing to testify in domestic proceedings, there are several persons who have highly exculpatory evidence, who are willing to testify before the ICC. The Defence has recently been informed that there is a high possibility that the testimony of some of these persons might become unavailable with the effluxion of time. The ability to resort to Article 56 does not offer an effective remedy in circumstances in which the Defence has not yet received any disclosure, and cannot

<sup>42</sup>*Artico v. Italy*, App. No. 6694/74, 13 May 1980, para. 33.

<sup>43</sup> ICC-01/04-01/06-834.

<sup>44</sup> ICC-02/05-03/09-252 at para. 30.



make an informed decision as to the relevance of all information that might be in the possession of the witness. The further protraction on the admissibility proceedings would irretrievably prejudice Mr. Gaddafi's putative right to a fair trial before the ICC.

57. Due to the impact on the proceedings before the Court, Article 19(5) enjoins a State to challenge admissibility at the earliest opportunity. It has been opined by Bitti and El Zeidy that this should be interpreted as requiring a State to challenge admissibility within 6 months of the surrender of the defendant to the ICC.<sup>45</sup> This time period should be interpreted even more restrictively in the case of a defendant, who has not been surrendered, and who has no means to participate in or advance his case before the ICC. If the replacement of Mr. Gaddafi's counsel at this point in time were to be used as a pretext to obtain further delays or to tender further submissions, the Decision will have aided the Government of Libya to evade the Article 19(5) time limit, to the detriment of the rights of the defendant.
58. The Chamber can only ignore such factors if the outcome of the admissibility challenge is a *fait accompli*. In any case, since it is possible that any decision could be overturned on appeal, the Pre-Trial Chamber should also ensure that its actions do not pre-empt a possible appellate finding against Libya.
59. Even if Article 64(2) were to create a basis for the Pre-Trial Chamber to review Ms. Gaddafi's designation of the OPCD as counsel of his choice, the parameters of such a review would be confined to assessing whether there are any impediments under the Regulations of the Court or the Code of Conduct which would render Counsel from the OPCD ineligible.
60. Through its previous appointment of Counsel from the OPCD to represent Mr. Gaddafi, the Pre-Trial Chamber implicitly recognised that Counsel met the eligibility requirements to represent a defendant before the ICC. The Chamber's concerns regarding the impact on the appearance of the impartiality of the Court are also not valid grounds to refuse the appointment of Counsel freely selected by a defendant. This is consistent with the fact that the Appeals Chamber rejected arguments from the Prosecution that "Counsel should be disqualified when his or her appointment creates an appearance of impropriety"; the Appeals Chamber refused to impose any barriers on the ability of an otherwise qualified staff member of the Court (including members

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<sup>45</sup>G. Bitti, M. El-Zeidy, 'The *Katanga* Trial Chamber Decision: Selected Issues' *Leiden Journal of International Law*, 23 (2010), pp. 319–329, at p. 326.

of the Prosecution) to represent a defendant, beyond those set out in Article 12 of the Code of Conduct for Counsel.<sup>46</sup> In the present case, Counsel for the OPCD have not been privy to any confidential information beyond that which Mr. Gaddafi's Defence team would have been entitled to receive in the normal course of his representation, and as such, Article 12(2) is not triggered.

61. Even if the Chamber declined to find that Mr. Gaddafi's express verbal appointment of the OPCD constituted a designation for the purposes of Rule 22(2) or Regulation 75, it would still be incumbent on the Chamber to take into consideration the wishes of the defendant as a highly relevant factor. The European Commission observed in *Goddi v Italy* that a defence which is conducted with the assistance of chosen counsel is certainly the best of the three alternatives offered by article 6 (3).<sup>47</sup> Regulation 76(1) of the Regulations of the Court further specifies that the Chamber should, when appropriate, hear from the person entitled to legal assistance. The Chamber's decision is therefore manifestly deficient insofar as the Chamber makes absolutely no reference to the express wishes of the defendant.
62. This Pre-Trial Chamber has also repeatedly recognised 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. 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.
63. It also cannot be presumed that any counsel appointed to replace the OPCD will have an effective opportunity to obtain instructions. After discovering that his last meeting with Counsel was deceptively filmed, Mr. Gaddafi would obviously be very reticent to actively participate in any future meeting. Any assurances provided by the Libyan authorities on such matters must also be weighed in light of the fact that none of the other Gaddafi officials in the custody of the Libyan authorities have been entitled to privileged visits with the Counsel prior to the commencement of the trial, due to the unconstitutional, exceptional measures which have been applied to their cases.<sup>48</sup> It is

<sup>46</sup>ICC-02/05-03/09-252 at para. 12,

<sup>47</sup> Francesco Goddi Against Italy : Application No. 8966/80. Strasbourg: The Commission, 1982, p.25.

<sup>48</sup> See Annex C, ICC-01/11-01/11-216-Anx3.8, and Article 106 and Article 187 *bis* (A) of the Libyan Criminal Procedure Code, ICC-01/11-01/11-190-Anx1; H. Mzioudet, 'Baghdadi Al-Mahmoudi trial adjourned as defence lawyer decries extradition as "illegal"', *Libya Herald*, 12 November 2012.

therefore clear that the unwillingness of the Libyan authorities to implement privileged visits is a systemic issue, which is not related to the particular identity of the Counsel.

*The Chamber should revise its decision in order to take into consideration [Redacted]*

64. [Redacted].<sup>49</sup> [Redacted].<sup>50</sup>

65. [Redacted].

66. [Redacted].

67. [Redacted].

68. [Redacted].<sup>51</sup>

### **Relief Sought**

69. For the reasons set out above, the Defence for Mr. Saif Al Islam Gaddafi respectfully requests the Honourable Pre-Trial Chamber to:

- i. reconsider its decision that it is intrinsically problematic for Counsel from the OPCD to represent Mr. Gaddafi in connection with admissibility proceedings; and
- ii. recognize either the designation provided by Mr. Gaddafi or [Redacted].




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

Dated this, 28<sup>th</sup> Day of November 2012

At The Hague, The Netherlands

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<sup>49</sup> IC-01/11-01/11-70-Conf-Exp-Anx1

<sup>50</sup> ICC-01/11-01/11-113 at p. 4.

<sup>51</sup> [Redacted].