

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **21 June 2013**

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

Defence Requests for Urgent Ruling and Leave to Reply

Source: Defence for Mr. Saif Al-Islam Gaddafi

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

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Registrar

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**Victims Participation and
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Other

Introduction

1. The Pre-Trial Chamber is currently seized of the Defence 'Request for Review of Registrar's Decision' filed on 27 May 2013.¹
2. On 28 June 2013, the Registry filed its "Observations of the Registrar pursuant to Regulation 24 bis of the Regulations of the Court on the "Request for Review of Registrar's Decision" dated 27 May 2013".²
3. The Defence further seeks leave to reply in relation to the following discrete issues:
 - a. The Registrar's failure to exercise his discretion to take into consideration the particular circumstances of this case;
 - b. The availability of assistance from the OPCD; and
 - c. The Registrar's consideration of irrelevant factors.
4. It is submitted that leave to reply should be granted in this instance in light of the exceptional circumstances which impact upon Mr. Gaddafi's ability to exercise his rights in an effective manner. If granted leave to reply, the Defence's submissions would be limited to the following submissions below.

Submissions

Urgent request for allocation of funds prior to 24 June 2013

5. On 31 May 2013, the Pre-Trial Chamber issued its "Decision on the admissibility of the case against Mr. Saif Al-Islam Gaddafi"³ ("Admissibility Decision"), ruling that the case is admissible before the International Criminal Court (ICC). The Admissibility Decision is 91 pages in length and was issued following thirteen months of deliberations.
6. On 7 June 2013, the Government of Libya filed its "Appeal against Pre-Trial Chamber I's 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi'" ("Notice of Appeal"). Pursuant to Regulation 64(2) of the Regulations of the Court, the deadline for the filing of Government of Libya's main document in support of its appeal is on 24 June 2013.

¹ ICC-01.11-01/11-341-Red

² ICC-01/11-01/11-360

³ ICC-01/11-01/11-344-Red

7. Although not required to do so, the Government of Libya omitted to include notice of the factual and/or legal grounds of appeal it would seek to rely on in its Notice of Appeal. It is therefore expected that the grounds of appeal as well as the legal and/or factual reasons in support of each ground of appeal will be included in the Government of Libya's document in support of its appeal.
8. The Defence for Mr. Saif Al-Islam Gaddafi will thereby have to submit its response to the Government of Libya's appeal by 16 July 2013 ("Response to the Appeal").⁴ Although it is currently working through the complex arguments raised within the Admissibility Challenge, it will only be able to begin comprehensive work on the response after 24 June 2013, thereby decreasing the amount of time the Defence has to deal with the large volume of work.
9. Furthermore, admissibility challenges do not suspend the continuation of the substantive proceedings before the Court.⁵ Consequently, the Defence is obliged to conduct pre-confirmation preparations in support of Mr. Gaddafi which will take place at the same time as the research and drafting needed for the Response to the Appeal. This will include, *inter alia*, securing the surrender of Mr. Gaddafi, arrangements for the protection of potential witnesses and review of the status of disclosure.
10. In light of the volume of work required for the Response to the Appeal, with particular consideration of the magnitude of the appellate record, as well as the work required in preparation of the confirmation stage, it is untenable for the Defence of Mr. Gaddafi to continue to operate on the basis of one counsel.
11. The number of counsel representing the Government of Libya and Mr. Al-Senussi, four and five respectively, is indicative of the volume of work required and the complexity therein and thus the need for larger teams. The provision of funding for one counsel without any provision for a legal assistant or case manager, to represent Mr. Saif Al-Islam Gaddafi is therefore woefully inadequate.

⁴ Pursuant to Regulation 64(4) and Regulation 33(1)(d) of the Regulations of the Court.

⁵ The pre-confirmation phase and Prosecution disclosure obligations are not suspended pending admissibility proceedings, *see* ICC-01/09-01/11-62 and ICC-01/09-02/11-64

12. The urgent need for the allocation of funds for a case manager and legal assistant has only been exemplified following the issuance of the Admissibility Decision and the subsequent appeal of the Government of Libya to be filed on 24 June 2013.

The Registrar's failure to exercise his discretion to take into consideration the particular circumstances of this case

13. Although the Registrar averred in his letter to the Defence that his decision had taken into consideration the particular circumstances of Mr. Gaddafi's case, his Response indicates to the contrary.

14. In essence, the Response postulates that the Defence should not be given any more resources than any other ad hoc counsel or duty counsel (Response at para. 38), even though the particular circumstances in this case are radically different from those cases. The Response accuses the Defence of asking for special treatment (Response, at para. 8). In fact, the Defence is only asking for equal treatment, according to the specific circumstances of the present case. Nor, obviously, is the Defence seeking "to change the Court's legal aid system" (Response, paragraphs 40-44). This is patently incorrect, and an unjust accusation, given that the Defence is only seeking additional resources based on the particular circumstances of this case, and this case alone, and has never proposed any change to the general legal aid scheme.

15. The Registrar is patently wrong in his assertion that the mandate of the Defence is mainly confined to the admissibility proceedings, and his position, if accepted, would create a vacuum as concerns Mr. Gaddafi's right to effective representation as concerns all aspects of his case before the ICC. This right is of particular importance now that the Chamber has found that the case is admissible before the ICC. The Defence will not revisit this issue as it has already done so in its Request. Nonetheless, even as concerns the admissibility proceedings themselves, the workload and complexity in this case far exceeds which was entrusted to ad hoc counsel in previous cases.

16. For example, in the Kony admissibility proceedings, the Pre-Trial Chamber was merely reconsidering its earlier ruling on admissibility, and it did so, under the caveat that its decision would not prejudice the ability of the Defence to challenge all

aspects of this ruling at a later stage. The consequences for the Defence were therefore minimal. In fact, the ad hoc Counsel for the Defence declined to raise any submissions on the merits of admissibility either before the Pre-Trial Chamber or the Appeals Chamber. Due to the fact that the suspects were at large, and the ad hoc Counsel had no instructions, he was also not required to make any submissions concerning the welfare of the defendants.

17. In contrast, the Defence in this case is representing a client who faces the death penalty after a show trial if tried in Libya. This places a heavy onus on the Defence to act with diligence in raising any matters to the Court, which could advance his case. For this reason, the American Bar Association model rules stipulate that:

The Legal Representation Plan should provide for assembly of a defense team that will provide high quality legal representation.

The defense team should consist of no fewer than two attorneys, qualified in accordance with Guideline 5.1, an investigator, a mitigation specialist.

[..]

B. The Legal Representation Plan should provide for counsel to receive the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high quality legal representation **at every stage** of the proceedings (emphasis added).

[...]

Counsel in death penalty cases should be fully compensated as a rate that is commensurate with the provision of high quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation.

Flat fees, caps on compensation, and lump-sum contracts are improper in death penalty cases.

[...]

D. Additional compensation should be provided in unusually protracted or extraordinary cases.⁶

18. In assessing the level of workload, the Registrar has also completely failed to refer to the number of filings or issues that have come up in the case, despite the direct relevance that such matters would have on the Registrar's assessment as to the level of resources that would be necessary and reasonable in order to provide Mr. Gaddafi with effective representation in the particular circumstances of this case.

⁶ American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, February 2003, Guidelines 4.1 and 9.1.

The availability of assistance from the OPCD

19. As expressly noted in the Defence request to review the Registrar's decision, the Defence requires an Arabic speaking assistant in order to assist it to contact and liaise with Defence sources and potential witnesses, and to translate potential items of evidence. Such matters concern directly Defence strategy and other sensitive issues, and for that reason, should be conducted by an in-house Defence assistant in order to avoid conflicts of interests arising between the OPCD's assistance to the Gaddafi and the Al-Senussi team.
20. Moreover, as concerns the native Arabic speaker employed by the OPCD (Response at para. 31), the Defence has verified that the consultancy contract of this person will expire in July, and will not be renewed. From this date onwards, the OPCD will not be in a position to provide any Arabic language assistance to the Defence. If the Defence were to dedicate its 3000 euros expense budget to this purpose, it would not have any funds for travelling to the ICC, or meeting with witnesses or person who may have information which is relevant to the admissibility proceedings.
21. Similarly, in terms of the Registrar's assertion at paragraph 32 that the capacity of the OPCD has not been diminished in any way, the Defence has also verified that whereas the legal complement of the OPCD was previously comprised of a P5, P4, P2, and P1 – the P4, P2 and P1 who are all scheduled to be on maternity leave, will only be replaced by a P3 and P2 on SSA contracts (which afford less remuneration and benefits to the persons in question).
22. The Defence also notes that by stressing that the Registry did not request any legal budget for the Gaddafi case due to the prior representation of Mr. Gaddafi by the OPCD, the Registrar is basing its decision on an irrelevant consideration. Given that the 2013 budget would have been finalised in the first part of 2012, and the Chamber had ordered representatives of the Registrar to meet with Mr. Gaddafi in order to assess his wishes concerning legal representation, it was plainly unreasonable for the Registrar to assume that the OPCD would continue to represent Mr. Gaddafi for the duration of 2013. The Registry's budgetary failure should not operate to the detriment of the defendant's rights under the Statute. If the appointment of current

Counsel was an 'unforeseen circumstance', the Registry cannot wash its hand of the matter, but must adapt properly to the new circumstances. For example, the Registry can also avail itself of contingency funds.

The Registrar's consideration of irrelevant factors.

23. The Response is littered with a range of arguments, which are completely irrelevant to the Registrar's duty to issue a decision as to the level of resources, which are necessary and reasonable in the particular circumstances of this case.
24. In particular, the Registrar's citation of the fact that Mr. Gaddafi has not submitted an indigency form is only relevant to the threshold question as to whether he is entitled to legal aid. Having decided to grant him legal aid in the interests of justice, it is unfair and inappropriate to curtail this allotment by referring to an issue which has absolutely no bearing on the level of resources required to provide Mr. Gaddafi with effective legal representation.
25. If Mr. Gaddafi is surrendered to the Court, and the Registrar determines that he is not indigent, then the Registrar possesses the power to recover these funds, in accordance with Regulation 85. The Regulations nonetheless include strictly due process provisions, which enable a defendant to contest such a decision (Regulations 85(2) and (3)). The Registrar must also base such a decision on actual evidence, as set out in Regulation 84, and not a mere suspicion that the defendant *could* have means. These requirements are not satisfied in the current case.
26. The Registrar has also asserted that the Chamber possesses no competence to review aspects of the legal aid scheme. It should first be noted that the ICTY case law cited by the Registrar has never been approved by the ICC, as demonstrated by the willingness of the Lubanga Trial Chamber to review aspects of the legal aid scheme, which obstructed the fair and expeditious conduct of the proceedings.
27. The standard of review of Registry decisions, which the Registrar sets out at footnote 13 of the Response, also does not require the Chamber to defer to the strictures of a legal aid policy, which fails to take into consideration relevant factors, results in a lack of due process, or results in an unreasonable decision.

28. Finally, the Registrar's calculations of the "*financial implications*" are patently misconceived (Response, paragraphs 35-38). Given that there is already an allocation for Counsel and for expenses, the *additional* cost of having a legal assistant and case manager will be – according to Annex 2 to the Response - € 71,334, not the € 167,153 referred to by the Registry. In other words, the Registry's estimates are off by nearly €100,000. The fact that the Registry's estimates are so wildly inaccurate means that the Chamber should approach the Registry's submissions with considerable caution.

Relief sought

29. The Defence for Mr. Saif Al-Islam Gaddafi respectfully requests the Honourable Pre-Trial Chamber to grant the present leave to reply and in any event to issue a ruling on the Defence 'Request for Review of Registrar's Decision' prior to 24 June 2013.



John R.W.D. Jones QC, Counsel for Mr. Saif Al-Islam Gaddafi

Dated this, 21st Day of June 2013

At London, United Kingdom