

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/11-01/11
Date: 21 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

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"

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Fatou Bensouda

Counsel for the Defence

Xavier-Jean Keïta

Melinda Taylor

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Paolina Massidda

Sarah Pellet

Mohamed Abdou

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

States Representatives

Philippe Sands

Payam Akhavan

Michelle Butler

Amicus Curiae

REGISTRY

Registrar

Silvana Arbia

Deputy Registrar

Didier Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Pre-Trial Chamber I (the “Chamber”) of the International Criminal Court (the “Court”) issues the following 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” (the “Request”).¹

I. Procedural history

1. On 16 April 2012, the Chamber, pursuant to regulation 76(2) of the Regulations of the Court (the “Regulations”), appointed Xavier-Jean Keïta and Melinda Taylor from the Office of Public Counsel for the defence (the “OPCD”) as counsel for Saif Al-Islam Gaddafi (“Mr Gaddafi”) and reminded them to continue to assist Mr Gaddafi in acquiring counsel consistent with his wishes.²

2. On 27 April 2012, the Chamber, *inter alia*, ordered the Registrar to make the necessary arrangements for the representatives of the Registry to visit Mr Gaddafi in order to discuss further with him the option to appoint counsel of his own choosing in accordance with rule 21 of the Rules of Procedure and Evidence (the “Rules”).³

3. On 1 May 2012, the Chamber received the “Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute”, challenging the admissibility of the case against Mr Gaddafi.⁴

4. On 6 June 2012, a delegation of four staff members of the Court, including two Registry representatives entrusted with the task of discussing issues of legal representation, travelled to Libya and, the day after, met with Mr Gaddafi in Zintan. The visit, however, was interrupted before an

¹ ICC-01/11-01/11-221-Conf.

² ICC-01/11-01/11-113.

³ ICC-01/11-01/11-129, para. 12 and operative part.

⁴ ICC-01/11-01/11-130-Red.

appointment of counsel and a power of attorney could be obtained from Mr Gaddafi.

5. On 9 and 10 October 2012, a hearing on the admissibility of the case against Mr Gaddafi was held.⁵ In the course of a private session of the hearing,⁶ [REDACTED]

6. On 11 October 2012, Counsel for Libya requested the Chamber to:

(i) [REDACTED]
[REDACTED]; (ii) [REDACTED]
[REDACTED]
[REDACTED]; and (iii) revoke the appointment of the OPCD as assigned counsel to Mr Gaddafi and instead appoint (or instruct the Registrar to appoint) counsel who are completely independent of the Court and the OPCD.⁸

7. In relation to this request, on 12 October 2012, the Chamber ordered a number of issues to be specifically addressed by the OPCD, the Prosecutor and the Registrar.⁹ [REDACTED]
[REDACTED]

⁵ ICC-01/11-01/11-T-2-CONF-ENG and ICC-01/11-01/11-T-3-CONF-ENG, respectively.

⁶ ICC-01/11-01/11-T-3-CONF-ENG, pp. 30-36.

⁷ ICC-01/11-01/11-218-Conf-AnxA.

⁸ ICC-01/11-01/11-222-Conf, para. 15.

⁹ ICC-01/11-01/11-222-Conf and annexes attached thereto.

[REDACTED]

[REDACTED]¹⁰

8. On 18 October 2012, the Chamber received the report of the Registrar,¹¹ the observations of the Prosecutor¹² and the response of the OPCD.¹³

9. On 24 October 2012, Libya filed an application for leave to reply and reply to the OPCD Response, including short submissions replying to a few points raised in the OPCD Response.¹⁴ *Inter alia*, Libya submits that [REDACTED]

[REDACTED]

[REDACTED]¹⁵

10. On 25 October 2012, the OPCD filed its response to Libya's application for leave to reply to the OPCD Response, requesting the Chamber to reject the application.¹⁶ Responding to Libya's submission that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁷

II. Submissions of the parties

A. *Libya*

11. Libya submits that [REDACTED]

[REDACTED]

[REDACTED]

¹⁰ *Ibid.*

¹¹ ICC-01/11-01/11-226-Conf-Exp.

¹² ICC-01/11-01/11-227-Conf-Exp (the "Prosecutor's Observations").

¹³ ICC-01/11-01/11-228-Conf-Exp (the "OPCD Response").

¹⁴ ICC-01/11-01/11-229-Conf.

¹⁵ *Ibid.*, para. 2.

¹⁶ ICC-01/11-01/11-230-Conf.

¹⁷ ICC-01/11-01/11-230-Conf-Exp-Anx1.

[REDACTED]
[REDACTED]
[REDACTED]¹⁸

12. Libya thus argues that [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]¹⁹ In Libya's submission, [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]²⁰ Furthermore, Libya asserts that [REDACTED]
[REDACTED]
[REDACTED]²¹ Indeed,

according to Libya, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]²² Based on these reasons, Libya asserts that [REDACTED]
[REDACTED]

[REDACTED]²³ Accordingly, Libya's first request
is that the Chamber [REDACTED]
[REDACTED]

¹⁸ Request, para. 10.
¹⁹ *Ibid.*, para. 11.
²⁰ *Ibid.*
²¹ *Ibid.*
²² *Ibid.*, para. 12.
²³ *Ibid.*

13. In the same vein, and as noted above, Libya further requests that the Chamber, [REDACTED]

[REDACTED]. In particular, as clarified at the hearing, Libya submits this request in the event that the Chamber [REDACTED]

[REDACTED]²⁴

14. Finally, Libya requests the Chamber to revoke the appointment of the OPCD as assigned counsel to Mr Gaddafi. According to Libya it would “fall within the Chamber’s inherent jurisdiction to reconsider [the appointment of counsel from the OPCD] due to counsel’s breach of its duties to the Court”.²⁵

In particular, Libya argues that “the combination of this pattern of conduct” (which, according to Libya, includes [REDACTED])

[REDACTED] gives rise to an allegation by the Libyan Government of serious misjudgment by the OPCD” that is “of such gravity that it calls into question whether or not the OPCD can be said to be in compliance with its duties to the court under article 24” of the Code of Professional Conduct for counsel (the “Code of Conduct”).²⁶ Notably, Libya submits that because “the OPCD’s behaviour is both ‘prejudicial to the ongoing proceedings’ and ‘brings the court into disrepute’”, the Chamber

²⁴ ICC-01/11-01/11-T-3-CONF-ENG, p. 35, lines 7-21.

²⁵ Request, para. 8.

²⁶ *Ibid.*, paras 7-8.

should revoke the appointment of counsel from the OPCD as counsel for Mr Gaddafi.²⁷

B. The Prosecutor

15. The Prosecutor “supports Libya’s requests to [REDACTED]
[REDACTED]
[REDACTED] [...] [and] does not oppose
Libya’s request to rescind the interim appointment of the [...] OPCD”.²⁸

16. In particular, with respect to the first part of Libya’s Request, the Prosecutor submits that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

30

17. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

31

²⁷ *Ibid.*, para. 8.

²⁸ Prosecutor’s Observations, para.1.

²⁹ *Ibid.*, para. 9.

³⁰ *Ibid.*, para. 7.

³¹ *Ibid.*, para. 10.

18. With respect to the request to revoke the appointment of OPCD as counsel for Mr Gaddafi, the Prosecutor submits that “without taking a position on the Libyan Government’s claim that the OPCD displayed poor judgment [REDACTED], [she] does not oppose the request that new counsel be appointed”.³² This is so because: (i) “it is generally beyond the mandate of the OPCD to assume, and particularly for an extended period, the representation of an individual suspect in protracted legal proceedings before the Court”;³³ (ii) given that “the OPCD is an entity within the Registry, its continuing active representation of a particular suspect in ongoing litigation before the Court also potentially compromises the neutrality, as well as the appearance of neutrality, of the Registry itself”;³⁴ (iii) “though the Prosecut[or] does not dispute that Saif Al-Islam [Gaddafi] consented to being represented by the OPCD, there is in fact no registered power of attorney”;³⁵ and (iv) the decision of the Chamber, dated 16 April 2012, to appoint the OPCD “appears to have contemplated that the appointment was intended to be provisional, to provide immediate but temporary interim assistance pending the appointment of ‘regular counsel’”.³⁶ On this basis, the Prosecutor concludes that “in the unique situation presented here, [she] agrees that the Chamber has the authority and would properly exercise its discretion to rescind the interim appointment of the OPCD and to appoint independent counsel to represent Saif Al-Islam [Gaddafi]”.³⁷

³² *Ibid.*, para. 11.

³³ *Ibid.*, para. 12.

³⁴ *Ibid.*, para. 13.

³⁵ *Ibid.*, para. 14.

³⁶ *Ibid.*, para. 15.

³⁷ *Ibid.*, para. 16.

C. *The OPCD*

19. The OPCD opposes Libya's Request in its entirety, on the ground that it lacks any legal and factual basis.

20. First, the OPCD makes reference to a decision issued by the Chamber on 9 August 2012,³⁸ whereby the Chamber noted that "[i]n light of the regime set out in Chapter 4 of the Code of Conduct, in particular articles 31, 33, 34, 37 and 39, the procedure related to investigations into the alleged misconduct by counsel does not fall within the competence of the Chamber".³⁹ In this respect, the OPCD further submits that the position expressed by the Chamber in said decision is "consistent with the fact that as confirmed by the Trial Chamber in [the] Lubanga case, the Chamber does not have the power to suspend Counsel [as] this power is vested exclusively in the Disciplinary Board, and may only be exercised after a finding of misconduct, which has been reached in accordance with the procedures set out in the Code of Conduct".⁴⁰

21. The OPCD further asserts that the Chamber does not possess the inherent power to revoke the appointment of the Defence "in circumstances in which it would directly conflict with the wishes of the defendant", as previously acknowledged by the Chamber itself.⁴¹ Indeed, according to the OPCD, although the Chamber reminded Mr Keita and Ms Taylor of their duty to assist Mr Gaddafi to obtain counsel consistent with his wishes, "the ability of the Defence to obtain a power of attorney from Mr Gaddafi during the meeting of 7 June 2012 was [...] directly frustrated" by factors attributable to the Libyan authorities.⁴² The OPCD submits that, [REDACTED]

³⁸ OPCD Response, para. 12.

³⁹ "Decision on the 'Libyan Government Request for Status Conference and Extension of Time to file a Reply to the Responses to its Article 19 Admissibility Challenge'", ICC-01/11-01/11-200, para. 15.

⁴⁰ OPCD Response, para. 13.

⁴¹ *Ibid.*, para. 16.

⁴² *Ibid.*, para. 17.

[REDACTED]
 [REDACTED]
 [REDACTED]⁴³ According to the OPCD, “[t]he revocation of the mandate of the Defence would therefore in these circumstances directly contravene the right of the defendant to freely choose his counsel”.⁴⁴

22. Furthermore, the OPCD asserts that, together with the absence of any procedural basis for considering Libya’s Request, there is also no legal basis for [REDACTED]

[REDACTED].⁴⁵ According to the OPCD, Libya has not adduced any evidence or information to suggest that [REDACTED]

[REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]⁴⁷

23. In particular, the OPCD makes reference to the fact that, [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]

⁴³ *Ibid.*, para. 18.

⁴⁴ *Ibid.*, para. 18.

⁴⁵ *Ibid.*, para. 19.

⁴⁶ *Ibid.*, para. 21.

⁴⁷ *Ibid.*, para. 22.

[REDACTED]

[REDACTED] According to the OPCD,
[REDACTED]

[REDACTED]⁴⁸ OPCD
notes that, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁴⁹

24. Furthermore, the OPCD, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁵¹ In this
respect, the OPCD submits that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁵²

25. According to the OPCD, the Request also lacks any factual basis and Libya's "failure to adduce concrete and probative evidence, should in itself, result in the dismissal of the Request *in limine*".⁵³ In the alternative, the OPCD submits that "the Request should be dismissed because the allegations and media reports submitted by [Libya] are entirely lacking in credibility and do

⁴⁸ *Ibid.*, paras 23-24.

⁴⁹ *Ibid.*, para. 24.

⁵⁰ *Ibid.*, para. 27.

⁵¹ *Ibid.*, paras 27-28.

⁵² *Ibid.*, para. 29.

⁵³ *Ibid.*, para. 42.

not support any grounded findings of wrongdoing, which would justify [REDACTED]
[REDACTED]".⁵⁴

26. Finally, with respect to Libya's claim that the actions of the Defence are impeding the cooperation between the Court and Libya, the OPCD submits that "cooperation with the Court is not something that the Libyan government can decide to unilaterally withhold or withdraw" as it is bound by an obligation to cooperate with the Court by virtue of Security Council Resolution 1970.⁵⁵

III. Analysis and conclusions

27. For the purposes of the present decision, the Chamber notes articles 17, 19, 57 and 71 of the Statute, rules 20, 21, 22, 58 and 171 of the Rules, regulations 23 *bis*, 24, 74, 75, 76 and 77 of the Regulations, [REDACTED]
[REDACTED], and articles 24, 27, 31, 32, 33, 34 and 39 of the Code of Conduct.

Appointment of OPCD

28. Libya's request to revoke the appointment of counsel from the OPCD and to appoint counsel for Mr Gaddafi independent of the Court is mainly based on two arguments: (i) serious misjudgement of Counsel for Mr Gaddafi that could amount to a breach of duties under the Code of Conduct; and (ii) the adverse impact of the retention of the OPCD as counsel for Mr Gaddafi on Libya's willingness to cooperate with the Court for the purposes of the admissibility proceedings.

29. With respect to the first argument, the Chamber recalls that complaints of misconduct may be filed by the Libyan representatives to the

⁵⁴ *Ibid.*, para. 43.

⁵⁵ *Ibid.*, para. 76.

Commissioner through the Registry, in accordance with article 34(1)(c) of the Code of Conduct. In this regard, the Chamber reiterates that according to the regime set out in Chapter 4 the Code of Conduct, the responsibility to investigate alleged misconduct by a counsel falls exclusively within the competence of the Commissioner appointed for such purpose.⁵⁶ The Chamber does not have the competence to determine misconduct by counsel, neither can it declare a temporary suspension of counsel subject to a complaint, unless, in accordance with article 39(8) of the Code of Conduct, when – in the presence of “exceptional circumstances” and “where the alleged misconduct is of such a nature as to seriously prejudice the interests of justice” – the Commissioner decides to lodge an urgent request to this effect. Similarly, according to article 71 of the Statute and rule 171 of the Rules, the Presiding Judge of the Chamber can order the interdiction of defence counsel from exercising his or her functions only when the misconduct before the Court consists of “deliberate refusal to comply with an oral or written direction by the Court [...] and that direction is accompanied by a warning of sanctions in case of breach” and only for a period not exceeding 30 days. A longer or permanent period of interdiction under the same conditions can only be imposed by the Presidency.

30. The Chamber is also entitled, according to article 34(1)(a) of the Code of Conduct, to submit to the Commissioner – through the Registry – a complaint of misconduct which “shall describe in sufficient detail the alleged misconduct”. However, the Chamber is of the view that the allegations presented by Libya against the OPCD do not warrant a filing of a complaint of misconduct by the Chamber.

⁵⁶ “Decision on the “Libyan Government Request for Status Conference and Extension of Time to file a Reply to the Responses to its Article 19 Admissibility Challenge”, ICC-01/11-01/11-200, para. 15.

31. The Chamber notes that the representatives of Libya fall short of specifically and clearly asserting that Counsel for Mr Gaddafi has breached a duty under the Code of Conduct. Rather, as detailed above, they point at the elements that could demonstrate a misjudgement “of such gravity that it calls into question whether or not the OPCD can be said to be in compliance with its duties to the court under article 24 of the Code of Professional Conduct”.⁵⁷ At the hearing, Counsel for Libya indicated that they were not necessarily making an allegation of professional misconduct, but they were certainly making an allegation of professional misjudgement.⁵⁸

32. The Chamber also notes that under the duties towards the Court pursuant to article 24 of the Code of Conduct, counsel is indeed personally responsible for the conduct and presentation of the client’s case and must exercise personal judgement on the substance and purpose of statements and questions made. However, the Chamber is not persuaded that the information provided by Libya, in the absence of supporting evidence, is sufficient to substantiate an allegation of a breach of such duties on the part of counsel from the OPCD.

33. In relation to the second set of arguments concerning the consequences that the OPCD representation would have on the proceedings, the Chamber takes note of the various concerns expressed by the representatives of Libya and the Prosecutor with respect to the potentially adverse impact of continuing active representation of a particular suspect by OPCD – an entity within the Registry – on the neutrality and appearance of neutrality of the Registry.⁵⁹

⁵⁷ Request, paras 7-8.

⁵⁸ ICC-01/11-01/11-T-3-CONF-ENG, p. 36, lines 5 to 14.

⁵⁹ Prosecutor’s Observations, para. 13.

34. The Chamber is of the view 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 and a State. Consistent with the very nature of the complementarity system, the Court should not engage and not be perceived to engage in a competition for the exercise of jurisdiction over a case. It is thus essential that the positions of the parties are clearly distinguished from those of the Court.

35. In this regard, the Chamber considers 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 77 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 mistaken for positions of the entire Court and thus have the potential of compromising the perception of the institution’s impartiality.

36. The Chamber emphasises 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 so on a permanent basis. On the contrary, consistent with the mandate of the OPCD, as envisaged by the Regulations of the Court as well as with its structure and resources, the appointment of counsel from the OPCD was only made *ad interim* until regular counsel would otherwise be appointed in accordance with rule 21 of

the Rules.⁶⁰ The frustrated visit to Mr Gaddafi by Registry representatives was organised in June 2012 in order to achieve this purpose.

37. For these reasons, it is the view of the Chamber 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.

[REDACTED]

38. Libya requests the Chamber to [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

39. The OPCD disputes these arguments on a factual and legal ground. Most notably, as already indicated, the OPCD maintains that there is no ground to conclude that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].⁶²

40. The Chamber considers, however, [REDACTED]

[REDACTED]

[REDACTED]

⁶⁰ ICC-01/11-01/11-113.

⁶¹ *Ibid.*, para. 21.

⁶² *Ibid.*, para. 22.

[REDACTED]

41. The Chamber notes that [REDACTED]

[REDACTED]

[REDACTED] In light of

the above, the Chamber is of the view that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

42. Finally, the Chamber turns to Libya's request that the Chamber, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

43. The Chamber notes that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

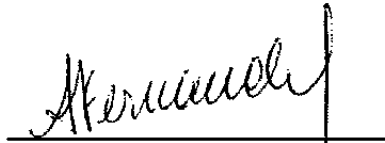
[REDACTED]
[REDACTED]
[REDACTED]

FOR THESE REASONS, THE CHAMBER

REJECTS Libya's request to revoke the appointment of counsel from the OPCD as counsel for Mr Gaddafi;

[REDACTED]

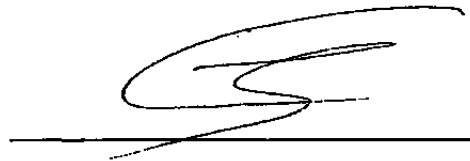
Done in both English and French, the English version being authoritative.



Judge Silvia Fernández de Gurmendi
Presiding Judge



Judge Hans-Peter Kaul



Judge Christine Van den Wyngaert

Dated this 21 November 2012

At The Hague, The Netherlands