

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 18 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  
with two public annexes**

**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**

**Source: Registrar**

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

**The Office of the Prosecutor**

Mrs Fatou Bensouda

**Counsel for the Defence**

*Counsel for Saif Al-Islam Gaddafi*

Mr John Jones

*Counsel for Abdullah Al-Senussi*

Mr Ben Emmerson

Mr Rodney Dixon

Ms Amal Alamuddin

Mr Anthony Kelly

Professor William Schabas

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**

Ms Paolina Massidda

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

Mr Xavier-Jean Keita

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Mr Herman von Hebel

**Counsel Support Section**

Mr Esteban Peralta Losilla

Mr Sam Sasan Shoamanesh

**Deputy Registrar**

Mr Didier Daniel Preira

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

**THE REGISTRAR OF THE INTERNATIONAL CRIMINAL COURT (“the Registrar”)**

**NOTING** the “Decision requesting Libya to file Observations regarding the Arrest of Saif Al-Islam Gaddafi” of 6 December 2011 (“the 6 December 2011 Decision”),<sup>1</sup> by which Pre-Trial Chamber I (“the Chamber”) authorized the Office of Public Counsel for the Defence (“OPCD”) to represent the interests of the Defence related to the proceedings against Mr Saif Al-Islam Gaddafi until otherwise decided by the Chamber;

**NOTING** OPCD’s “Addendum to the Urgent Report Concerning the Visit to Libya” of 5 March 2012 (“OPCD’s Report of 5 March 2012”), in which OPCD reported that Mr Saif Al-Islam Gaddafi requested OPCD to either select a counsel or help him in this matter<sup>2</sup> and the declaration signed by Mr Gaddafi annexed to this Report;<sup>3</sup>

**NOTING** the “Decision Appointing Counsel from OPCD as Counsel for Saif Al-Islam Gaddafi” of 17 April 2012 (“the 17 April 2012 Decision”),<sup>4</sup> by which the Chamber appointed Counsel from OPCD as Counsel for Mr Gaddafi under Regulation 76.2 of the Regulations of the Court (“RoC”) and requested OPCD to continue to assist Mr Gaddafi in acquiring a Counsel, consistent with his wishes;

**NOTING** OPCD’s “Request to Withdraw” filed by OPCD on 4 March 2013 (“the Request”);<sup>5</sup>

**NOTING** the Registrar’s observations on the “Request to Withdraw” filed on 12 March 2013 (“the Registry’s Observations on the Withdrawal Request”);<sup>6</sup>

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<sup>1</sup> ICC-01/11-01/11-39-Conf-Exp.

<sup>2</sup> ICC-01/11-01/11-70-Conf-Exp, para. 41.

<sup>3</sup> ICC-01/11-01/11-70-Conf-Exp-Anx1.

<sup>4</sup> ICC-01/11-01/11-113.

<sup>5</sup> ICC-01/11-01/11-292-Conf-Exp.

<sup>6</sup> ICC-01/11-01/11-292-Conf-Exp.

**NOTING** the Chamber's "Decision on the 'Request to Withdraw',"<sup>7</sup> rendered on 17 April 2013, appointing Mr John Jones, member of the List of Counsel, as Counsel for Mr Gaddafi as a "provisional measure" pursuant to Regulation 76.1 of the RoC, deferring the question of legal assistance paid by the Court to the Registrar in conformity with Rule 20 of the Rules of Procedure and Evidence ("Rules") and Regulation 83 of RoC ("Decision on the Request to Withdraw");<sup>8</sup>

**NOTING** the Registrar's letter dated 25 April 2013,<sup>9</sup> formalizing Mr Jones' appointment, and by which the Registrar, in promoting the rights of the defence and in the interests and proper administration of justice, decided exceptionally and on a provisional basis to assume the cost of legal representation of the suspect on the basis of resources allocated under the Court's legal aid system for this preliminary stage of the proceedings until an assessment of Mr Gaddafi's disposable means has been conducted and a decision on his indigence can be established following the normal procedures ("Registrar's provisional decision on legal assistance");

**NOTING** Counsel's request for additional resources dated 2 May 2013 (the "Request for Additional Means");<sup>10</sup>

**NOTING** the Registrar's decision dated 20 May 2013, finding Counsel's request to be granted additional legal aid resources to cover the cost of recruiting additional team members as not reasonably justified at this stage of the proceedings in view of the reasons cited in the Registrar's decision, appended to Counsel's Request for Review of the Registrar's Decision as Annex C ("The Registrar's Decision");

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<sup>7</sup> ICC-01/11-01/11-311-Red.

<sup>8</sup> *Ibid.*, para. 21.

<sup>9</sup> See Annex A to the Counsel's "Request for Review," *infra* note 11.

<sup>10</sup> See Annex B to the Counsel's "Request for Review," *infra* note 11.

**NOTING** Counsel's request for judicial review of the Registrar's Decision dated 27 May 2013, insisting that the Court ought to grant him additional funds for the remuneration of a case-manager and a legal assistant at this preliminary stage of the proceedings ("Request for Review");<sup>11</sup>

**NOTING** Article 67 of the Rome Statute, Regulations 23*bis*, 24*bis*, 75 to 78, 83 and 84 of the RoC and Regulation 132 of the Regulations of the Registry ("RoR");

**HEREBY SUBMITS** the present observations pursuant to Regulation 24*bis* (1) of the RoC:

1. The Registrar has filed his observations "Public" in view of the redacted public version of the Request for Review.
2. The Registrar respectfully submits that, in the management and implementation of the Court's legal aid system in this case, as will be demonstrated below, at all material times his decisions were taken within his jurisdiction,<sup>12</sup> with full respect for due process and propriety of established procedures, in conformity with the applicable legal aid texts and policies of the Court, as adopted by the Assembly of States Parties ("ASP"), and based on the pertinent facts present, leading to a reasonable and concretely founded administrative decision in response to the Request for Additional Means.<sup>13</sup>

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<sup>11</sup>ICC-01/11-01/11-341-Red; ICC-01/11-01/11-341-Conf-Exp.

<sup>12</sup> Similar to the jurisprudence rendered by the *ad hoc* tribunals, the Chambers and the Presidency of the Court have confirmed that it is "the Registrar in whom primary responsibility for managing the legal assistance scheme of the Court is vested, including overseeing the scheme of legal assistance by the Court [...]": The Presidency, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-937, 29 June 2007 at para. 16.

<sup>13</sup> Guided by established jurisprudence at the *ad hoc* tribunals, the Presidency of the Court has established a clear test to be applied in all cases where a request for review of an administrative decision of the Registrar is sought. The Presidency has articulated the test as follows: "It is recalled that the judicial review of decisions of the Registrar concerns the propriety of the procedure by which the latter reached a particular decision and the outcome of that decision. It involves a consideration of whether the Registrar has: acted without jurisdiction, committed an error of law, failed to act with procedural fairness, acted in a disproportionate manner, taken into account irrelevant factors, failed to take into account relevant factors, or reached a conclusion which no sensible person who has properly applied his or her mind to the issue could have reached" [underline is ours]: see decisions of the Presidency of the Court, dated 20 December 2005, ICC-Pres-RoC72-02-5 at para. 16, and supplemented

## I. Preliminary considerations on legal aid granted in this case

3. The Registrar respectfully submits that following the Chamber's Decision on the Request to Withdraw, in its decision of 25 April 2013, it extended legal aid resources to Mr Gaddafi on an exceptional and provisional basis as the normal procedures for requesting legal aid funds could not, at the present, be met in the case.

4. The Registrar recalls that at the Court, as with any other international criminal jurisdiction and most domestic legal systems, legal aid is not an automatic *ad infinitum* entitlement. There are established procedures, rules and regulations which govern how legal aid is claimed, assessed and, when warranted, granted within the scope and confines set by the applicable legal and policy provisions which apply to that given legal aid system. The legal aid regime at the Court, as endorsed by the ASP and clearly established by the legal and policy texts of the Court, is no different.<sup>14</sup> The same legal and policy canons governing the Court's legal aid system do not, as a rule, allow for a presumption of indigence at the Court.

5. The Court's publicly funded legal aid system covers the reasonably necessary costs of legal representation in proceedings before the ICC of indigent persons – those who lack sufficient means to pay their legal costs. In conformity with Regulation 84 of the RoC, before legal aid can be granted the Registrar must make an

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in its decision of 27 November 2006, ICC-01/04-01/06-731-Conf, at para. 24. See also the decision of 10 July 2008, ICC-Pres-RoC72-01-8-10 at para. 20.

<sup>14</sup> See in particular Article 67.1.d of the Rome Statute; Chapter 4, Section 4 of the RoC and Chapter 4, Section 3 of the RoR. For principal documents outlining the Court's legal aid system see, *inter alia* "Report to the Assembly of States Parties on options for ensuring adequate defence counsel for accused persons" (ICC-ASP/3/16) dated 17 August 2004; "Report on the principles and criteria for the determination of indigence for the purposes of legal aid (pursuant to paragraph 116 of the Report of the Committee on Budget and Finance of 13 August 2004)" (ICC-ASP/6/INF.1) dated 31 May 2007; "Report on the operation of the Court's legal aid system and proposals for its amendment" (ICC-ASP/6/4) dated 31 May 2007; "Report to the Assembly of States Parties on options for ensuring adequate defence counsel for accused persons (ICC-ASP/3/16) Update to Annex 2: Payment details of the ICC legal aid scheme" (ICC-ASP/5/INF/1.) dated 31 October 2006; "Interim report on different legal aid mechanisms before international criminal jurisdictions" (ICC-ASP/7/23), dated 31 October 2008; The Decision of the Bureau on legal aid, (ICC-ASP-2012) dated 23 March 2012; "Supplementary Report of the Registry on four aspects of the Court's legal aid system", (ICC-ASP/11/43) dated 1 November 2012; "Registry's single policy document on the Court's legal aid system", (ICC-ASP/12/3) dated 4 June 2013.

informed determination on a legal aid applicant's means and decipher whether or not he or she is eligible to receive payment of legal assistance.

6. For suspects implicated in the Court's proceedings against whom warrants of arrest or a summons to appear have been issued, in the ordinary course, the right to receive legal assistance paid by the Court crystallizes when two conditions are met: (i) in accordance with Regulation 132 of the RoR, the legal aid claimant must furnish to the attention of the Registrar a duly completed "standard form for legal assistance paid by the Court" to enable the Registry to conduct an assessment into the means of the claimant, and (ii) there must be a decision by the Registrar declaring the person indigent.<sup>15</sup>

7. In the present case, no formal request for legal aid has been made by Mr Gaddafi and, as a result of this formal requirement not having been met, the Registrar has been unable to make a determination on the means of the suspect in accordance with Regulation 84 of the RoC. Notwithstanding this fact, the Registry is mindful of the special circumstances of the present case, particularly that Mr Gaddafi remains *incommunicado* and that his assets are subject to freezing orders, making the determination of his means a practical challenge in the near term. Given these circumstances, the interests and the proper administration of justice required an exceptional response from the Registry to ensure that the rights of Mr Gaddafi to legal representation are safeguarded in accordance with the legal texts of the Court. As such, the Registry decided to provisionally assume the costs of Mr Gaddafi's legal representation until such time an assessment of his disposable means has been conducted and a decision on his indigence rendered following the normal procedures.

8. Once the decision was made to extend legal aid funds to Mr Gaddafi, the Registrar was bound to provide resources in accordance with specific entitlements in conformity with the Court's legal aid system. What is impermissible is to disregard these specific and to give a favoured treatment to a beneficiary of legal aid resources over others, as is being asked by Counsel in his Request for Review.

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<sup>15</sup> Regulation 85 of the RoC and Regulation 132.2 of the RoC.

## II. Resources made available to Counsel

9. Counsel liberally charges that the Registrar in his Decision was guided solely by the “rigid dictates of a legal aid policy” without paying heed to the “defendant’s right to a fair and expeditious trial under article 67(1) of the Statute and internationally recognized human rights.”<sup>16</sup> Contrary to this assertion, the actions and decisions of the Registrar in this case unequivocally demonstrate otherwise.

10. As detailed above, the Registrar, with full respect for the rights of the suspect, adopted a flexible position to ensure Mr Gaddafi’s right to an effective and efficient defence is not jeopardized. The provisional decision to extend legal aid funds to Mr Gaddafi was taken in, *inter alia*, the interests and proper administration of justice, notwithstanding that it is trite law that as a general rule there is no presumption of indigence at the Court, and further, that a suspect who wishes to benefit from legal aid must demonstrate that he or she is in fact indigent (there are established procedural requirements for this purpose as required by the Court’s legal texts). This latter requirement remains to be fulfilled in Mr Gaddafi’s case, and yet he benefits from legal aid funds. This fact refutes Counsel’s unfounded allegation, and serves as proof of the Registrar’s principled approach towards the implementation of the Court’s legal aid system, which he does in full conformity with the applicable legal texts of the Court, including Article 67 rights of suspects and accused persons, as well the principles governing the Court’s legal aid system.

11. The resources provided to Counsel and the way his requests for assistance have been dealt with by the Registry provide added support for the notion that he benefits from ample resources for the due execution of his mandate as defined by the Chamber in conformity with the Court’s legal aid system and generally as provided by the Registry (e.g., assistance by the OPCD), as well as confirm the flexibility exercised by the Registry to ensure Mr Gaddafi’s effective and efficient defence.

12. The resources Counsel has received are no different than the resources any other similarly situated counsel would receive under the Court’s legal aid system. To

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<sup>16</sup> Request for Review, para. 19.



be sure, the resources extended to Counsel are the same legal aid entitlements that would be payable under the Court's legal aid system for a mandate given by the Chamber pursuant to Regulation 76.1 of the RoC, as is the case here. The terms of such resources are detailed in the Registry's letter dated 25 April 2013,<sup>17</sup> and bear repeating here with further elaboration.

**(1) Resources granted at this stage of the proceedings**

13. In accordance with the Court's legal aid system, the Registrar's Decision confined the resources to be provided for the benefit of Mr Gaddafi's legal representation to the payment of Counsel's fees and necessary expenses.

14. A defence team operating under the Court's legal aid scheme is provided resources for a core team. This core team operates throughout the proceedings with the exception of two periods when counsel is required to act alone. As stipulated in, the Court's legal aid system<sup>18</sup> these instances are: the period from the start of the investigation phase of the proceedings until the first appearance before the Pre-Trial Chamber, and the period between the conclusion of closing statements and judgment.<sup>19</sup> Counsel for Mr Gaddafi's current situation, mandate and workload fall within the first of these two exceptions (for core human-resources of the defence during phases of the proceedings, see Annex 1).

15. Should Mr Gaddafi continue to benefit from legal aid, contingent upon a conclusive determination of his means, the resources granted in terms of team composition will be – as it is in all cases – in accordance with the Court's legal aid system as the case progresses throughout the proceedings.

16. It is the Registry's understanding that Pre-Trial Chamber not only brought its mind to the issue of legal aid resources to be afforded to the would-be appointed counsel – as the matter was *sub judice* at the time – but more importantly, that its decision to grant OPCD's Request to Withdraw and to *provisionally* appoint Mr Jones

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<sup>17</sup> *Ibid.*

<sup>18</sup> See *e.g.*, ICC-ASP/12/3, 4 June 2013, at page 11.

<sup>19</sup> "Report on the operation of the Court's legal aid system and proposals for its amendments", No. ICC-ASP/6/4, 31 May 2007, para. 29

with a defined mandate was done with the full appreciation that should external counsel be appointed to replace OPCD, the funds under the Court's legal aid system would be confined only to the fees and expenses of a counsel acting alone.

(2) *Fees & Expenses of Counsel*

17. As stated in the Registrar's Decision, only the fees and expenses deemed "reasonably necessary as determined by the Registrar for an effective and efficient defence" in conformity with Regulation 83 of the RoC would be extended to Counsel to execute his mandate.

18. Counsel erroneously submits that the Registry has arbitrarily given him "a monthly allotment of hours" for which he would be paid up to a "maximum of 12.6 working days per month."<sup>20</sup> While this submission is not directly relevant to the redress sought in the Request for Review, it is done in an attempt to support the request to have the added cost of a legal assistant and a case-manager paid under the Court's legal aid system at this preliminary stage of the proceedings – an unprecedented demand.

19. The Registrar informs that Counsel's remuneration on an hourly basis is no different than any other person appointed pursuant to Regulation 76 of the RoC and is in strict conformity with the Court's legal aid system. Table 1 below details the system of remuneration applicable to Counsel on the basis of a *net fee* scheme<sup>21</sup> as approved by the Decision of the Bureau, dated 23 March 2012, and adopted by the ASP.<sup>22</sup> The last column from the right also provides a total amount for each team member who is also eligible and demonstrated to have incurred professional charges to cover the totality of taxes or other relevant charges payable due to their intervention before the Court and under the Court's legal aid system. The percentage for professional charges would be included in this total *global* amount.

<sup>20</sup> Request for Review, para. 22.

<sup>21</sup> "Proposal for a review of legal aid system of the Court in accordance with resolution ICC-ASP/10/Res.4 of 21 December 2011" dated 15 February 2012, in *Report of The Hague Working Group on legal aid*, 23 March 2012, Appendix II, as subsequently adopted as "First report of the Bureau on legal aid", No. ICC-ASP/11/2/Add.1, 8 November 2012 ("First Report"), at page 11.

<sup>22</sup> See First Report.

**Table 1: Revised fees scheme based on net base salary**

<i>Category</i>	<i>Revised Payment Under Decision of the Bureau</i>		
	<i>Net base salary (€)</i>	<i>Max. percentage (%) compensation for charges</i>	<i>Maximum total monthly payment (€)</i>
<b>Counsel</b>	8,221	30	10,687
<b>Associate counsel</b>	6,956	30	9,043
<b>Legal assistant</b>	4,889	15	5,622
<b>Case manager</b>	3,974	15	4,570

20. The above revised system of remuneration (based on a net monthly fees payment) applies to counsel appointed in accordance with Regulations 73 and 76 of the RoC. Such appointments are by definition limited in both time and scope. When the Court's legal aid system assumes the remuneration of such appointments, the following payment scheme will apply.

21. As it concerns remuneration, counsel will be paid €86.53 per hour,<sup>23</sup> with an upper limit of €649 per day, with an upper limit of €8,221 *per month*. Counsel will also be eligible to receive compensation for professional charges as per the terms of Table 1.

22. As with all Regulation 76 of the RoC-appointments, counsel are paid on an hourly basis for work conducted in the execution of their mandate up to the maximum monthly cap specified in Table 1. Therefore, based on an hourly payment fee structure of €86.53 per hour, the €8,221 fees per month represents the maximum ceiling of remuneration counsel may receive irrespective of the actual number of days worked in any given month. If Counsel reaches or surpasses the threshold of hours worked, he will receive the maximum €8,221 fees per month. If the hours worked are less than the threshold, he will be remunerated for the precise hours or days worked. This payment modality was not designed to limit the hours counsel can work in a given month, as Counsel erroneously suggests, but rather to allow for the Registry to pay counsel appointed pursuant to Regulation 76 of the RoC, who by virtue of the limits of their mandate in time and scope, may work less than required

<sup>23</sup> This rate applies when the counsel works in his/her place of residence; when counsel is on mission and therefore required to work outside his/her place of residence, the daily rate is applied.

to reach the monthly cap. As stated, when the cap is reached, there is no prejudice to counsel, and he or she will then receive the maximum allotment of fees.

23. While counsel who have been freely chosen by suspects to represent them before the Court are not paid on an hourly basis, but rather on a lump-sum monthly basis, they equally receive a maximum of €8,221 per month as fees (which, similar to the case of Counsel, can be supplemented with an additional amount for compensation for professional charges).

24. In sum, the monthly cap of €8,221 as fees does not mean that Counsel should work no more than “12.6 working days per month”, but that the maximum he can receive for services rendered under the Court’s legal aid system is €8,221 per month (in addition to compensation for professional charges, if warranted). Receiving €8,221 per month (and potentially, up to €10,687 per month with compensation for professional charges) is more than fair compensation under a publically funded legal aid system and amply allows Counsel – who by his acceptance of the mandate has in effect confirmed his availability to robustly assume the legal representation – to discharge his obligations to his client at this early stage of the proceedings.

25. Hence, Counsel’s submission aimed at raising questions about the purported insufficiency of his own remuneration, and meshing this subjective claim to the need for additional means<sup>24</sup> at a stage of the proceedings where they are not justified, and in contradiction of the specific terms of the Court’s legal aid system, is misconstrued at best and without merit.

### (3) *Expenses*

26. In addition to legal fees for Counsel, Mr Gaddafi’s legal representation benefits from a monthly expenses budget of €3,000 to cover the costs of reasonable and necessary expenses incurred in the course of the execution of the Court-granted mandate. Unused amounts from this budget are carried over to the following month for Counsel’s use. To date, €9,000 has been added to Counsel’s expenses budget with an additional €3,000 added monthly.

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<sup>24</sup> In the form of a case-manager and legal assistant.

27. This budget covers, *inter alia*, the costs of travel and stay of Counsel in The Hague as required, and other “costs reasonably necessary as determined by the Registrar for an effective and efficient defence” in accordance with Regulation 83.1 of the RoC. Such costs include payment for translation and interpretation services when the relevant services of the Registry cannot provide these needs itself.

28. The Registry has processed the expenses of Counsel incurred to date, including for trips carried out outside of the Headquarters for the purposes of gathering information and testimony related to the admissibility challenge.

**(4) Additional “support and assistance” furnished by OPCD**

29. Counsel’s submissions concerning the assistance to be provided by OPCD<sup>25</sup> are not persuasive and detract from the founded basis of the Registrar’s Decision.

30. As stated in the Registrar’s Decision, the OPCD can continue and is mandated by Regulation 77.4(b) of the RoC to provide “support and assistance to defence counsel [...], including legal research and advice [...].” This added support and assistance is available to Counsel in the execution of his mandate, and by Counsel’s own admission to the Counsel Support Section, he is already receiving such services and added support from the OPCD. The Office has similarly confirmed this fact and is amenable to continue its assistance to Counsel, including case-managerial support where necessary.

31. The Registrar notes that in the Request to Withdraw, the OPCD asked the Court to withdraw from the case largely to be able to meet its Regulation 77 legislated mandate to defence teams requiring the Office’s assistance.<sup>26</sup> After the OPCD’s request was granted, the Office was placed in a position to furnish Counsel for Mr Gaddafi assistance within the framework of Regulation 77 of the RoC. Further, in view of the Principal Counsel’s intimate familiarity with the case and the fact that OPCD employs a native Arabic speaker, the Office is ideally suited to provide this added assistance.

<sup>25</sup> As set out in paragraph 41 of his Request for Review.

<sup>26</sup> ICC-01/11-01/11-292-Conf-Exp, paras 4-5.

32. Similarly, the Registrar finds relevant to highlight the OPCD's capacity and legal mandate to provide additional assistance to Counsel in accordance with Regulation 77.4(b) of the RoC. Although the Pre-Trial Chamber granted OPCD's Request to Withdraw on the ground that two instances of leave within the Office deprived it from the ability to represent Mr. Gaddafi any longer, staff has since been recruited to fill the temporary vacancies at the OPCD. This fact only reinforces the Registry's position that the OPCD has the legal mandate, but also the ability and specific competence to provide additional assistance to Counsel in accordance with Regulation 77.4(b) of the RoC.

(5) *Pro bono members*

33. The regime of *pro bono* members and the Registry's policy rationale behind facilitating their appointments has been explained in detail in Registry-filings before the Chamber.<sup>27</sup> Suffice it to state here that contrary to Counsel's assertions, the Registry has not abdicated his obligations under Regulation 83 of the RoC in establishing the regime of *pro bono* members, nor are all *pro bono* members appointed are interns or young professionals. On the contrary, many of the *pro bono* members chosen by counsel to assist legal teams have been experienced professionals – lawyers or professors – who have made the voluntary decision to work for a legal team on a *pro bono* basis for a myriad of reasons. Furthermore, Counsel is mistaken when he states that legal teams are restricted to two *pro bono* members. That is only the case when two additional *pro bono* members work in the same office assigned at the Seat of the Court which houses the entire team. This limitation is necessitated by the practical realities of the limited space at the Court premises. Nothing prevents counsel to benefit from the services of more than two *pro bono* members if they work from a distance.

34. More importantly, in practice, *pro bono* members are simply added-value to the defence above and beyond the resources deemed "reasonably necessary as determined by the Registrar for an effective and efficient defence" and accorded to

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<sup>27</sup> ICC-01/04-01/06-2811-Conf-Exp dated 16 September 2011, paras. 39-44.

legal aid recipient in accordance with Regulation 83 of the RoC and the Court's legal aid system. In other words, the Registry does not suggest, contrary to Counsel's submissions, "that the use of *pro bono* assistants is an adequate alternative to the appointment of support staff,"<sup>28</sup> but rather, once resources deemed reasonably necessary as determined by the Registrar have been granted to the legal aid recipient based on the requirements of the case and in accordance with the Court's legal aid system, counsel can still benefit from the services of qualified *pro bono members* chosen by counsel himself. This facilitation can only be seen as a useful, additional mechanism established by the Registry for the promotion and support of the legal representation of defendants before the Court.

### III. Financial implications

35. As stated in the Registry's previous filing,<sup>29</sup> legal aid funds for Mr Gaddafi for budgetary purposes were not envisaged for 2013 due to OPCD's involvement in the case, and therefore not budgeted.

36. The existing unforeseen costs of Mr Gaddafi's legal representation are for the time being absorbed by the 2013 legal aid budget. Should the Chamber grant Counsel's Request for Review, in addition to sanctioning resources above and beyond what is contemplated by the Court's legal aid system, the additional cost consequences until the end of the year alone will be €167,153.00 (please see Annex 2).

37. It is important for the Chamber to be informed of the financial impact of a decision granting the Request for Review. This is all the more important given that Counsel's request (i) requires a change to an established aspect of the Court's legal aid system as adopted by the ASP through a judicial review application, (ii) is for additional legal aid funds to cover the costs of a legal assistant and a case-manager at the preliminary stage of the proceedings, constituting an unprecedented request in the Court's history, and (iii) the workload cited by Counsel in support of his request

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<sup>28</sup> Request for Review, at para. 47.

<sup>29</sup> ICC-01/11-01/11-299-Conf-Exp, para 29.

does not justify the granting of additional means in view of the resources already his disposal, including the assistance of the OPCD.

38. The Registrar further observes that, while it manages the Court's legal aid system in a judicious manner, the Registry, in paying homage to the guarantees of accused persons as enshrined in Article 67 of the Statute, has and does not hesitate to grant additional resources in response to requests made pursuant to Regulation 83.3 of the RoC when the facts and the workload of the case justify doing so. The Registrar notes that since January 2013 alone it has granted additional resources in the amount of more than €300,000.00 in instances where the demands of the case objectively called for a Registry response to ensure an effective and efficient legal representation and to grant additional resources within the set framework of the Court's legal aid system. Counsel's request does not fit in such category of cases. In the Registrar's view, Counsel has not discharged his onus to demonstrate why the additional resources requested should be granted (similarly situated counsel have previously executed their mandates at the preliminary stage of proceedings without making resort to a case-manager and legal assistant), even more so, given that his request requires a modification of the Court's legal aid system as approved by the ASP.

#### **IV. The Request for Review aims to expand the mandate of Counsel**

39. In the Registrar's view, a contextual as well as a logical reading of the Decision on the Request to Withdraw illustrates that the Chamber in appointing the Counsel did so as a provisional measure to ensure there is no gap in the legal representation in view of the challenges presented by Mr Gaddafi's ongoing *incommunicado* detention as they relate to the exercise of his right to freely choose counsel. However, the Chamber made the appointment of Counsel provisional "until Mr Gaddafi exercises his right to freely choose under article 67(1)(d) of the Statute, or until the definitive disposal of proceedings related to the Admissibility Challenge, at which point the question of Mr Gaddafi's legal representation will be revisited." These pronouncements unequivocally demonstrate that while the Chamber wanted



to preserve the right of the suspect to uninterrupted legal representation in these preliminary proceedings, it was nevertheless primarily concerned with the suspect's legal representation within the limited scope of the admissibility challenge. The fact that the Chamber reserved its right to revisit the "provisional" appointment at the "definitive disposal of proceedings related to the Admissibility Challenge" affirms this position. That is not to say that Counsel is or was prohibited from undertaking other necessary work for the suspect in the framework of the legal representation at this stage of the proceedings; only that such work is secondary to the principal purpose of the appointment by the Chamber, which was chiefly concerned with the admissibility challenge. In view of the above, Counsel in his Request for Review is in effect attempting to expand the limited scope of his provisional mandate beyond the boundaries set by the Chamber.

#### **V. The Request for Review aims to change the Court's legal aid system**

40. It is respectfully submitted that Counsel's Request for Review should not be seen merely through the prism of a "scope" of legal aid argument. When carefully considered in light of the applicable legal and policy framework in place, Counsel's Request for Review *de facto* challenges the legal aid system of the Court itself – a system instituted to ensure the equal treatment of persons whose costs are covered by the Court's legal assistance scheme, as well as consistency, uniformity, judiciousness and transparency in implementing that scheme – by attempting to extend legal aid entitlements beyond the boundaries clearly established by the legal aid scheme of the Court, as adopted by the ASP, and the legal requirements stipulated in Regulation 83 of the RoC.

41. To be sure, in the case at hand, Counsel is not merely asking the Chamber to exercise its judicial authority to reverse the scope of legal aid resources afforded to him by the Registrar. When properly understood, Counsel is in effect asking the Chamber to change the Court's legal aid system – a scheme approved by the ASP after extensive consultation with stakeholders, including counsel who intervene in proceedings before the Court and members of the List of Counsel, *inter alia* – to grant

resources for a case-manager and legal assistant before such resources are provided for in the Court's legal aid scheme (or justified by the facts or *charge de travail* at this preliminary stage of the proceedings). This should not be permitted.

42. While certainly the scope of legal aid resources granted by the Registrar can be appealable before the relevant Chamber pursuant to Regulation 83.4 of the RoC, the calling into question of a concrete aspect of the legal aid scheme itself is not permissible and cannot be done by way of judicial review. This notion is firmly established by relevant jurisprudence.<sup>30</sup>

43. There are strong policy and institutional reasons for this prohibition. As already stated, the Court's legal aid system falls in the first instance within the purview of the Registrar who is responsible for its design, implementation and management. Further, the Court's legal aid system is the by-product of extensive and comprehensive consultations with important stakeholders.<sup>31</sup> Chief amongst these are members of the List of Counsel, the legal professional at large, national and international bar associations, and non-governmental organizations. The legal aid system currently in place is therefore not simply a figment of the Registry's imagination, but the hard earned fruit of seasons of cultivation and fine-tuning on the strength of experience gained in practice since the Court's legal aid system was first conceived in 2004 and the feedback received by, *inter alia*, the system's beneficiaries – in this case, over ten years and numerous processes of revisions. In this process, the Registry's principal consideration is to ensure that the Court's legal aid system is responsive to the actual needs of its beneficiaries and in tune with the demands of the different stages of the Court's proceedings and practice before the ICC. At the conclusion of each process of policy formulation, review and report production, it is at the end the ASP which considers, scrutinizes and adopts the

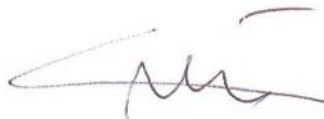
<sup>30</sup> See *Prosecutor v. Hadžihasanović et al.*, Trial Chamber II which noted that "the aim of the motion was to challenge the legal aid system itself rather than its application and that it is not for the Chamber, in the context of a particular case, to take decisions leading to an alteration of it which would affect all cases pending before the Tribunal". In this particular case, the motion was deemed to be inadmissible. See also *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-PT, "Urgent Defence Motion for ex parte Oral Hearing on Allocation of Resources to the Defence and Consequences Thereof for the Rights of the Accused to a Fair Trial", 10 April 2003.

<sup>31</sup> CC-ASP/12/3, 4 June 2013, at para. 4-8.

Court's legal aid system and any amendments to it. It is also in this established and structured process that concrete aspects and components of the Court's legal aid system can be reviewed, reassessed, and changed if so required.

44. It is respectfully submitted that while, in response to a judicial review application, the Chamber can reverse an administrative decision on the scope of legal aid resources granted in accordance with Regulation 83.4 of the RoC *and* the legal test for judicial review of an administrative decision of the Registrar,<sup>32</sup> when Counsel's request – on scope or otherwise – requires in effect an actual change to a concrete aspect of the Court's legal aid system itself – as is the case here – there is less room for judicial intervention. To grant Counsel's Request for Review would be in practical terms tantamount to changing a concrete aspect of the Court's legal aid system as adopted, setting a precedent that is in contradiction of the black letter of the law as it concerns the policy scheme governing the Court's legal aid system.

45. Based on the aforesaid, the Registrar requests the Honourable Judges of Pre-Trial Chamber I to reject the Request for Review in its entirety. The Registrar remains at the disposal of the Chamber for any further clarifications or observations if deemed necessary.



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For the Registrar  
Esteban Peralta Losilla  
Head of the Counsel Support Section

Dated this Tuesday, 18 June, 2013  
At The Hague, The Netherlands

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<sup>32</sup> See footnote 13, *supra*.