

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/11-01/11
Date: 11 December 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 OPCD application for leave the appeal and 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'"

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

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Defence**

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Philippe Sands

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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 application for leave the appeal¹ and the request for reconsideration² 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’”, both filed by the Office of Public Counsel for the defence (the “OPCD”) on 28 November 2012.

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.³

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”).⁴

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.⁵

4. On 6 June 2012, a delegation of four staff members of the Court, including two Registry representatives entrusted with the task of discussing

¹ ICC-01/11-01/11-234.

² ICC-01/11-01/11-235-Conf-Exp.

³ ICC-01/11-01/11-113.

⁴ ICC-01/11-01/11-129, para. 12 and operative part.

⁵ ICC-01/11-01/11-130-Red.

issues of legal representation, travelled to Libya and, the day after, met with Mr Gaddafi in Zintan. The visit, however, was interrupted before an 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.⁶

6. On 11 October 2012, Counsel for Libya requested the Chamber, *inter alia*, to 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.⁷

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.⁸

8. On 18 October 2012, the Chamber received the report of the Registrar,⁹ the observations of the Prosecutor¹⁰ and the response of the OPCD.¹¹

9. On 22 November 2012, the Chamber issued 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'", in which, *inter alia*, it rejected Libya's request to revoke the appointment of counsel from the OPCD as counsel for Mr Gaddafi (the "Decision").¹²

⁶ ICC-01/11-01/11-T-2-CONF-ENG and ICC-01/11-01/11-T-3-CONF-ENG, respectively.

⁷ ICC-01/11-01/11-222-Conf, para. 15.

⁸ ICC-01/11-01/11-222-Conf and annexes attached thereto.

⁹ ICC-01/11-01/11-226-Conf-Exp.

¹⁰ ICC-01/11-01/11-227-Conf-Exp.

¹¹ ICC-01/11-01/11-228-Conf-Exp.

¹² ICC-01/11-01/11-233-Conf.

10. On 28 November 2012, the OPCD filed a request for leave to appeal the Decision.¹³ On the same date, the OPCD also filed a request for reconsideration of the Decision.¹⁴

11. On 3 December 2012, the Prosecutor and Libya filed responses to the OPCD request for leave to appeal.¹⁵

II. Background and submissions of the parties

A. *The Decision*

12. In the Decision the Chamber rejected Libya's request to revoke the mandate of the OPCD given that "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",¹⁶ and the allegations presented by Libya against the OPCD did not warrant a filing of a complaint of misconduct by the Chamber.¹⁷ Nevertheless, the Chamber took note of the concerns expressed by Libya and the Prosecutor as regards the potentially adverse impact of continuing active representation of a particular suspect by the OPCD on the appearance of neutrality of the Court.¹⁸ In this context, the Chamber acknowledged 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".¹⁹

13. In the same Decision, the Chamber further recalled that the appointment of the OPCD as counsel for Mr Gaddafi was made by the Chamber only "*ad*

¹³ ICC-01/11-01/11-234.

¹⁴ ICC-01/11-01/11-235-Conf-Exp. A public redacted version thereof was contextually filed by the OPCD.

¹⁵ ICC-01/11-01/11-237, and ICC-01/11-01/11-238.

¹⁶ Decision, para. 29.

¹⁷ *Ibid.*, paras 30 to 32.

¹⁸ *Ibid.*, para. 33.

¹⁹ *Ibid.*, para. 35.

interim until regular counsel would otherwise be appointed in accordance with rule 21 of the Rules".²⁰ On this basis, and considering that the visit to Mr Gaddafi by Registry representatives was not successful,²¹ the Chamber stated that it appeared necessary to explore, in consultation with the Registrar, the possible options with a view to securing the appointment of regular counsel by Mr Gaddafi.²²

B. The OPCD requests

14. The OPCD requests both leave to appeal and reconsideration of the Decision.

The request for leave to appeal

15. In its request for leave to appeal the Decision, the OPCD identifies the following two issues on which leave to appeal is sought: (i) whether the Chamber erred in its finding that the appointment of the OPCD in admissibility proceedings to represent the defendant is intrinsically problematic as it jeopardises the appearance of the impartiality of the Court ("First Issue"); and (ii) whether the Chamber erred by failing to take into account the express wish of the defendant to be represented by the OPCD during this stage of the proceedings ("Second Issue").²³

16. The OPCD asserts that "whilst the disposition section of the decision appears to reject the request of the Libyan Government, it is clear [...] that the Chamber granted it in substance, insofar as the Chamber has indicated its intention to revoke the appointment of the OPCD in the admissibility proceedings".²⁴ Further, the OPCD submits that "[b]y finding that the OPCD's

²⁰ *Ibid.*, para. 36, with reference to the "Decision Appointing Counsel from the OPCD as Counsel for Saif Al-Islam Gaddafi", ICC-01/11-01/11-113.

²¹ *Ibid.*, para. 36.

²² Decision, para. 37.

²³ OPCD request for leave to appeal, para. 35.

²⁴ *Ibid.*, para. 6.

representation of Mr. Gaddafi is intrinsically problematic, the Pre-Trial Chamber has also called into question the status of the submissions of the Defence on behalf of Mr Gaddafi thus far".²⁵

17. With respect to the argument that the First Issue affects the fairness of the proceedings, the OPCD asserts that "[b]y revoking the mandate of the OPCD to represent Mr Gaddafi in the admissibility proceedings due to the impact on the appearance of the impartiality of the Court, the Chamber is effectively penalising the Defence for complying with their duty to vigorously defend the interests of their client in a fully independent manner".²⁶ Further, in the OPCD's submission, "[t]o the extent that the Decision could be interpreted to undermine the propriety of all submissions tendered thus far by Mr. Gaddafi's Defence, it also undermines Mr. Gaddafi's right to effective representation in these proceedings".²⁷

18. As regards the Second Issue, the OPCD avers that "the Chamber's failure to take into consideration the fact that the defendant verbally requested the continued appointment of the OPCD at this juncture of the proceedings constitutes a complete denial of the defendant's right to be represented by counsel of his choice, as enshrined in article 67(1)(d) of the Statute".²⁸ Accordingly, it is the OPCD's view that "[i]t was [...] completely arbitrary and unfair for the Chamber to disregard [Mr Gaddafi's preferences] in withdrawing the appointment of the OPCD".²⁹

19. With regard to the requirement that the purported issues significantly affect the expeditiousness of the proceedings, the OPCD argues that "[t]he replacement of Mr Gaddafi's Counsel at this juncture necessarily impacts on

²⁵ *Ibid.*, para. 7.

²⁶ *Ibid.*, para. 18.

²⁷ *Ibid.*, para. 20.

²⁸ *Ibid.*, para. 21.

²⁹ *Ibid.*, para. 23.

the expeditiousness of the proceedings”.³⁰ In particular, according to the OPCD “[s]ince the Decision has called into question the legitimacy and propriety of the OPCD’s representation thus far, either the replacement Counsel or the Government of Libya are likely to request that certain issues be re-litigated, which will delay the ability of the Chamber to resolve the admissibility challenge”.³¹

20. The same arguments are relied upon by the OPCD in order to demonstrate that an immediate decision of the Appeals Chamber in relation to the two issues would materially advance the proceedings. In particular, according to the OPCD, the Appeals Chamber would remove doubts about the validity and propriety of all the submissions rendered thus far on behalf of Mr Gaddafi³² as well as about the correctness of the Chamber’s approach to not take into account the wishes of Mr Gaddafi in deciding to withdraw the appointment of the OPCD in the admissibility proceedings.³³

The request for reconsideration

21. In a separate submission, the OPCD also requests the 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”.³⁴ In particular, the OPCD requests the 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]

³⁰ *Ibid.*, para. 27.

³¹ *Ibid.*

³² *Ibid.*, para. 32.

³³ *Ibid.*, para. 34.

³⁴ OPCD request for reconsideration, para. 7

22. The OPCD argues that “[b]y averring that the assignment of Counsel from the OPCD to represent the defendant in the current admissibility proceedings is ‘intrinsically problematic’, the Chamber effectively reconsidered its previous decision appointing Counsel from the OPCD”.³⁶ It submits that the reversal of the Chamber’s previous endorsement of the eligibility of Counsel from the OPCD to represent Mr Gaddafi without “clearly elucidat[ing] the legal and factual grounds for its reversal” is in itself a reason for reconsideration of the Decision.³⁷

23. In support of its request, the OPCD submits that the Chamber “incorrectly prioritized the ‘neutrality’ and ‘appearance of the impartiality of the Court’ over its positive duty to uphold the rights of the defendant”.³⁸ Specifically, the OPCD refers to the positive obligations of the Chamber to “preserve, and where necessary, advance the rights of the parties”, 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)”.³⁹

24. In particular, the OPCD argues that the Chamber “cit[ed] ‘impartiality concerns’ in order to revoke the mandate of the OPCD to represent Mr. Gaddafi in the admissibility proceedings”, thereby penalizing the rights

³⁵ *Ibid.*, para. 69.

³⁶ *Ibid.*, para. 9.

³⁷ *Ibid.*, para. 15.

³⁸ *Ibid.*, p. 6.

³⁹ *Ibid.*, paras 18 and 19.

of the Defence,⁴⁰ and failed to take into consideration the fact that Mr Gaddafi had indicated his wish to be represented by Counsel from the OPCD.⁴¹

25. Finally, the OPCD recalls that [REDACTED]
[REDACTED].⁴²

The OPCD now submits that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].⁴³ The OPCD

notes that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].⁴⁴

C. The Prosecutor's response to the request for leave to appeal

26. In her response, the Prosecutor requests the Chamber to reject the OPCD request for leave to appeal the Decision.

27. The Prosecutor's primary argument is that neither of the two issues raised by the OPCD arises from the Decision.⁴⁵ In the alternative, the Prosecutor submits that the two issues would not meet any of the other requirements under article 82(1)(d) of the Statute.⁴⁶

28. Notably, the Prosecutor submits that both issues are grounded on a misrepresentation of the Decision on the part of the OPCD. As regards the

⁴⁰ *Ibid.*, para. 47.

⁴¹ *Ibid.*, para. 48.

⁴² *Ibid.*, para. 64.

⁴³ *Ibid.*, para. 65.

⁴⁴ *Ibid.*, para 68.

⁴⁵ ICC-01/11-01/11-237, paras 3 and 8 to 10.

⁴⁶ *Ibid.*, paras 3 and 11.

First Issue, it is the view of the Prosecutor that the purported issue “is grounded on the erroneous premise that the Chamber terminated the mandate of the OPCD as counsel for the Mr Gaddafi in the [...] Decision”,⁴⁷ while the Chamber, “in line with [its] initial decision appointing OPCD”, only “indicated that it needs to explore the options to secure the appointment of regular counsel by Mr Gaddafi, in consultation with the Registry”.⁴⁸ In this sense, the Prosecutor submits that the First Issue “merely represents an abstract question or a hypothetical concern”,⁴⁹ which “[t]o the extent that the OPCD imagines what might occur in the future” is speculative in nature.⁵⁰

29. According to the Prosecutor, the OPCD’s argument that the Decision could be interpreted to question the propriety of prior submissions made by the OPCD is equally speculative and unfounded, as nothing in the Decision suggests anything to this effect.⁵¹

30. On this basis, the Prosecutor submits that the First Issue does not arise from the Decision, does not affect the fairness of the proceedings, does not affect the expeditious conduct of the proceedings, and its resolution would not materially advance the proceedings.

31. For similar reasons the Prosecutor submits that also the Second Issue rests on a fundamental mischaracterization of the Decision on the part of the OPCD. In particular, according to the Prosecutor, the Second Issue does not arise out of the Decision, given that “the Chamber explicitly considered the wish of Mr Gaddafi to be represented by the OPCD”, but found that “[this] wish was not necessarily dispositive”.⁵² Accordingly, in the Prosecutor’s

⁴⁷ *Ibid.*, para. 8.

⁴⁸ *Ibid.*, para. 22.

⁴⁹ *Ibid.*, para. 9.

⁵⁰ *Ibid.*, para. 14.

⁵¹ *Ibid.*, para. 15 and 22.

⁵² *Ibid.*, para. 10.

submission, since all the arguments of the OPCD are based on the flawed assumption that the Chamber did not consider Mr Gaddafi's wishes and considering, once again, that, in the Decision, "the OPCD has not been replaced nor has new counsel been appointed",⁵³ no requirement under article 82(1)(d) of the Statute is met with respect to the Second Issue.⁵⁴

D. Libya's response to the request for leave to appeal

32. Libya requests that the OPCD request for leave to appeal be rejected as the OPCD has not satisfied the cumulative requirements of article 82(1)(d) of the Statute.⁵⁵

33. In particular, according to Libya, OPCD's "[p]ure speculation as to what might happen in the future does not give rise to an appealable issue at the current juncture".⁵⁶ Notably, Libya submits that "[a]lthough the OPCD have asserted that the decision is 'unfair' and 'illogical', they have failed to adduce compelling arguments as to how the issues in question impact on the fairness or expeditiousness of the proceedings".⁵⁷

34. Furthermore, Libya avers that rather than advancing the proceedings, granting leave to appeal on the two purported issues would delay the proceedings before the Court.⁵⁸ Accordingly, in Libya's submission, "[s]ubjecting the present issue to appellate review would cause additional delays in concluding the admissibility proceedings and would therefore lead to an even longer period of time before Mr Gaddafi is brought to trial".⁵⁹

⁵³ *Ibid.*, para. 20.

⁵⁴ *Ibid.*, paras 10, 18 to 20, 27 to 29.

⁵⁵ ICC-01/11-01/11-238, para. 1.

⁵⁶ *Ibid.*, para. 13.

⁵⁷ *Ibid.*, para. 10.

⁵⁸ *Ibid.*, para. 16.

⁵⁹ *Ibid.*

III. Applicable law

35. The Chamber notes article 82(1)(d) of the Rome Statute (the “Statute”), rules 155 and 156 of the Rules of Procedure and Evidence (the “Rules”), and regulation 65 of the Regulations of the Court.

36. In particular, the Chamber recalls that article 82(1)(d) of the Statute sets out the following requirements to the granting of a request for leave to appeal:

- (a) the decision involves an issue that would significantly affect (i) the fair and expeditious conduct of the proceedings, or (ii) the outcome of the trial; and
- (b) in the opinion of the Pre-Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

37. With respect to the particular question of the meaning of the term “issue” in the context of the first limb of the test under article 82(1)(d) of the Statute, the Appeals Chamber has stated:

An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. [...] An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination.⁶⁰

IV. Analysis and conclusions of the Chamber

A. *Request for leave to appeal*

38. As noted above, the request for leave to appeal primarily rests, with respect to both purported issues, on its interpretation of the Decision, according to which: (i) the substance of the Decision indicates the Chamber’s intention to revoke the appointment of the OPCD; and (ii) the Chamber has

⁶⁰ Appeals Chamber, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168, para. 9.

called into question the status of submissions made by the OPCD thus far.⁶¹ On these very premises the OPCD avers that the identified issues arise out of the Decision, affect the fairness and expeditiousness of the proceedings and must immediately be decided by the Appeals Chamber in order to materially advance the proceedings.⁶²

39. In the view of the Chamber, the submissions of the OPCD in this respect are particularly crucial for the initial determination of whether the purported issues proposed for appeal arise out of the Decision, as required under article 82(1)(d) of the Statute.

40. In this respect, the Chamber notes that, contrary to the OPCD's submissions at several junctures of its request for leave to appeal,⁶³ the Decision does not terminate the mandate of OPCD as counsel for Mr Gaddafi. To the contrary, the Decision rejects Libya's request to revoke the appointment of the OPCD.⁶⁴ Beyond that, the Decision, in line with the Chamber's initial decision appointing the OPCD pending appointment of regular counsel by Mr Gaddafi, merely indicated that, at this stage, also taking into account the frustrated visit to Mr Gaddafi by Registry's representatives, the Chamber needed to explore the options to secure the appointment of regular counsel by Mr Gaddafi, in consultation with the Registrar.⁶⁵ All OPCD's arguments based on an interpretation of the Decision as terminating its mandate as counsel for Mr Gaddafi are thus unfounded.

41. Similarly, the submissions by the OPCD that the Decision questions the validity of its prior submissions are also without basis in the Decision. Plainly, nothing to this effect can be found in the Decision.

⁶¹ OPCD request for leave to appeal, paras 6 and 7.

⁶² See above paras 18 to 21.

⁶³ See e.g. OPCD request for leave to appeal, paras 18, 23, 27 and 33.

⁶⁴ Decision, p. 19.

⁶⁵ Decision, paras 36 and 37.

42. Therefore, since the OPCD misstates the actual ruling in the Decision, the purported issues cannot be deemed to arise out of the Decision. Accordingly, the OPCD fails to identify appealable issues under article 82(1)(d) of the Statute, and leave to appeal must be rejected.

B. Request for reconsideration

43. The Chamber observes that the OPCD seeks reconsideration of the Decision on the grounds that the Decision affects the rights of Mr Gaddafi to the extent that it is manifestly unsound and its consequences are manifestly unsatisfactory. In the view of the Chamber, the OPCD's arguments in this regard are once again based on a misconstruction of the Decision and on its unfounded interpretation that the Decision revoked the mandate of the OPCD as counsel for Mr Gaddafi.

44. The Chamber is of the view that, contrary to the OPCD's submission, no prejudice to the rights of Mr Gaddafi is caused by the Chamber's decision to reject Libya's request to terminate the appointment of the OPCD. Nor does any such prejudice ensue from the Chamber's intention to consider, in light of all the present circumstances, the matter of Mr Gaddafi's legal representation in consultation with the Registrar.

45. Furthermore, the OPCD's argument that, in the Decision, the Chamber ignored relevant facts (including the statements made by Mr Gaddafi or the difficulties faced by Mr Gaddafi in executing a formal power of attorney) cannot be upheld. In fact, the Chamber did not exclude any factor of potential relevance from the scope of those aspects that would be considered in the context of exploring, in consultation with the Registrar, the relevant options concerning Mr Gaddafi's legal representation. It was precisely the need to consider all facts and circumstances having an impact on Mr Gaddafi's right

to legal representation that prompted the Chamber's intention to explore the available options in this regard.

46. Finally, rather than constituting a reason for revising the Decision, the [REDACTED] [REDACTED], increases the need for an attentive consideration of the matter of Mr Gaddafi's legal representation, in the context of which, among other relevant factors, [REDACTED] should be taken into account.

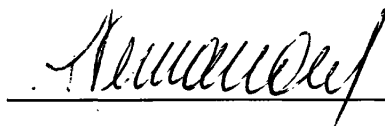
47. In light of the foregoing, the Chamber sees no need to determine whether it has an inherent right to reconsider its own decision, and the OPCD request for reconsideration shall be rejected.

FOR THESE REASONS, THE CHAMBER

REJECTS the request for leave to appeal;

REJECTS the request for reconsideration.

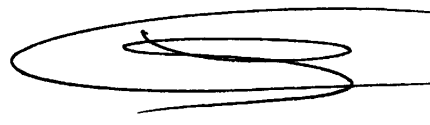
Done in both English and French, the English version being authoritative.



Judge Silvia Fernández de Gurmendi
Presiding Judge



Judge Hans-Peter Kaul



Judge Christine Van den Wyngaert

Dated this 11 December 2012

At The Hague, The Netherlands