

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **3 May 2012**

THE APPEALS CHAMBER

Before: Judge Sang-Hyun Song
Judge Akua Kuenyehia
Judge Erkki Kourula
Judge Anita Ušacka
Judge Sanji Mmasenono Monageng

SITUATION IN LIBYA

**IN THE CASE OF
*THE PROSECUTOR v. SAIF AL-ISLAM GADDAFI and ABDULLAH AL-
SENUSSI***

**Public
With Public Annexes A to I**

**Request to Disqualify the Prosecutor from Participating in the Case Against
Mr. Saif Al Islam Gaddafi**

Source: Defence

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

The Office of the Prosecutor

Mr. Luis Moreno-Ocampo, Prosecutor
Ms. Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Mr. Xavier-Jean Keïta, Principal Counsel
Ms. Melinda Taylor, Counsel

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia, Registrar

Deputy Registrar

Mr. Didier Daniel Pereira, Deputy
Registrar

Victims and Witnesses Unit

Counsel Support Section

Detention Section

**Victims Participation and Reparations
Section**

Other

1. Introduction

1. Libya is currently asserting their right to prosecute Mr. Saif Al Islam Gaddafi. As demonstrated by the death and subsequent corporeal display of the bodies of Muammar and Mutassim Gaddafi – there are extremely virulent reactions in Libya towards the Gaddafi family, which can manifest themselves in violent acts. The inflammation of such sentiments is directly contrary to the need to ensure independent and impartial judicial processes, and to ensure adequate security to a member of this family, who is detained under the authority of a Libyan militia.
2. The Prosecutor was recently present on Libyan soil. The ICC has not been able to conduct outreach activities in Libya and as such, the presence of an ICC official in Libya is obviously significantly influential as concerns the perception of Libyans concerning the status of proceedings before the ICC and the role of the Prosecutor.
3. Notwithstanding the fact that the Defence for Mr. Gaddafi had recently raised issues concerning the need to be sensitive to the volatilities of a post-conflict situation, the Prosecutor utilised the occasion to refer to the fact that the Libyan authorities have ‘great’ evidence against Mr. Saif Al Islam Gaddafi, a strong admissibility challenge, and that he personally committed crimes against persons.
4. The comments follow earlier statements from the Prosecutor, which appear to predict the success of the Libyan admissibility challenge or otherwise advance the positions of the National Transitional Council (NTC), or which contain categorical conclusions regarding the culpability and credibility of Mr. Gaddafi.
5. The Prosecutor has also consistently conducted joint press conferences with Libyan authorities, during which the Libyan authorities have clearly announced their intention to try Mr. Gaddafi in Libya and not to surrender him to The Hague. However, at no point since the arrest of Mr. Gaddafi on 19 November 2011, has the Prosecutor referred to the outstanding obligation of the Libyan authorities to bring Mr. Gaddafi before a judge or to surrender him to the ICC.
6. Unlike some national systems in which the Prosecutor might exercise a more partisan role, Article 54(1) of the Rome Statute enjoins the ICC Prosecutor to act as an independent and impartial Minister of Justice, who is dedicated to establishing the truth, and respecting the rights of all persons under the Statute, including the defendant.

7. Article 42(7) specifically tasks the Prosecutor with the obligation not to participate in any matter in which their impartiality might reasonably be doubted on any ground. Rule 34(1)(d) further specifies that the grounds for disqualification include the “expression of opinions, through the communications media, in writing or in public actions, that objectively, could affect the required impartiality of the person concerned”.
8. Article 42(8) invests the Defence with the right to request the disqualification of the Prosecutor on any grounds set out in Article 42.
9. In line with this article, the Defence for Mr. Saif Al Islam Gaddafi respectfully requests the Appeals Chamber to disqualify the Prosecutor from the current case due an objective appearance that the impartiality of the Prosecutor might reasonably be doubted.
10. In order to ensure that the integrity and appearance of fairness of the proceedings are not prejudiced pending the Appeals Chamber’s resolution of this application, the Defence further requests the Appeals Chamber to suspend the Prosecutor from all prosecutorial functions concerning the case in the interim.

2. Procedural History

11. After the issuance of an arrest warrant by the Pre-Trial Chamber against Mr. Saif Al Islam Gaddafi, the ICC Prosecutor was interviewed by Mr. Philippe Sands Q.C., who is now the senior counsel for the Libyan government in the proceedings before the ICC. According to the resultant article, the Prosecutor went through Prosecution evidence with Mr. Sands, such as video recordings of Mr. Saif Al Islam Gaddafi, and expressed several views concerning the criminal responsibility and credibility of Mr. Gaddafi.¹
12. Mr. Gaddafi was arrested on 19 November 2012.
13. On 22 November 2011, the Prosecutor conducted a mission to Libya. During this mission, the Prosecutor participated in a joint press conference with the Minister of Justice on 23 November 2011, during which Minister of Justice announced that “the Libyan authorities would conduct the trial in Libya but would coordinate with the

¹ P. Sands, ‘The Accomplice’, Vanity Fair (online version) 22 August 2011, at p. 4, <http://www.vanityfair.com/politics/features/2011/08/qaddafi-201108> (Annex A).

ICC”.² In a video of a press-conference in a Libya, the Prosecutor referred to Libya’s right to try Mr. Gaddafi in Libya, and stated that if they did so, the Court would not intervene.³ The Prosecutor also made several statements to reporters in Tripoli, which were interpreted as the Prosecutor supporting the right of Libya to try Mr. Gaddafi in Libya.⁴

14. On 25 November 2012, the Prosecutor filed submissions in which he noted inter alia, that the Libyan authorities had informed the Prosecution that they wished to try Mr. Gaddafi in Libya and had requested advice from the ICC.⁵ The Prosecutor had advised them inter alia, that the Statute provides for primacy of domestic jurisdictions, and as such, they could challenge the admissibility of the case.⁶ The Prosecutor stated that if Libya was successful, the ICC Prosecution would not monitor the subsequent domestic trial.⁷ Alternatively, the Libyan government could invoke Article 94 of the Statute and “the Libyan authorities might propose options to the Court in order to reach an agreement”.⁸
15. The Prosecutor further informed the Chamber that the NTC had transmitted a letter setting out their position directly to the ICC Prosecution, although it was addressed to the President of the Pre-Trial Chamber.⁹ The Prosecution translated this letter and transmitted it to the President of the Pre-Trial Chamber.
16. In this letter, the NTC informed the President of the Chamber that the Libyan judiciary had primacy to try Mr. Gaddafi and therefore the Court’s request for his arrest and surrender would be discussed with the Court and “the latter will be officially informed of the Council’s decision later.”¹⁰
17. In response to an order from the Chamber, on 23 January 2012, the NTC informed the Chamber that the NTC was not formally challenging the admissibility of the case at this point in time but was seeking to defer Mr. Gaddafi’s surrender under Article 94.¹¹

² ICC-01/11-01/11-31 at para. 12.

³ ICC-01/11-01/11-31, Annex F.

⁴ ‘Saif Al-Islam Could Be Tried in Libya’ Says ICC Prosecutor’, 22 November 2011, www.guardian.co.uk/world/2011/nov/22/saif-al-islam-gaddafi-trial-libya (Annex B). See also Annex D to ICC-01/11-01/11-31. It can be presumed by virtue of the fact that the Prosecutor relied upon it in its submissions to the Pre-Trial Chamber that the Prosecutor does not dispute the accuracy of its reporting.

⁵ ICC-01/11-01/11-3, at paras. 5 and 6.

⁶ At para. 7.

⁷ At para. 7.

⁸ At para. 9.

⁹ At para. 13.

¹⁰ ICC-01/11-01/11-34-Anx

¹¹ ICC-01/11-01/11-44-Anx1-Red.

18. In his response, the Prosecutor took “note that Saif Al-Islam is in custody in Zintan; that arrangements are underway for his transfer to the Libyan authorities in Tripoli and also that the Libyan authorities commit to discuss with the Court, the timing of its pending judicial processes against him.”¹²
19. On 7 March 2012, the Pre-Trial Chamber rejected Libya’s request to postpone Mr. Gaddafi’s surrender, and ordered Libya to make its decision concerning the surrender request within 7 days of the notification of the decision.¹³
20. On 22 March 2012, the Libyan authorities notified the Pre-Trial Chamber of their intention to challenge admissibility, and further requested the suspension of the surrender request pursuant to Article 95 of the Statute.¹⁴
21. On 4 April 2012, the Pre-Trial Chamber rejected the request for postponement on the grounds that Article 95 cannot be invoked in connection with an admissibility challenge which had not yet been filed.¹⁵
22. On the same day, the ICC Prosecutor gave interviews in which he stated *inter alia*, that “one year ago, Saif Gaddafi was threatening people”,¹⁶ and that in accordance with Libya’s primacy, if they challenged admissibility “probably they will get an approval”.¹⁷
23. On 17 April 2012, the Pre-Trial Chamber appointed Mr. Xavier-Jean Keita and Ms. Melinda Taylor as counsel for Mr. Gaddafi¹⁸ who averred to the Pre-Trial Chamber that the above press coverage had created an appearance of a lack of independence and impartiality,¹⁹ and further noted that through this filing, the Prosecutor could be deemed to be aware of the concerns of the Defence regarding the potential repercussions of such press statements.²⁰
24. On 18 April 2012, the Prosecutor again flew to Libya. A joint press conference was conducted with the Chairman of the NTC, Mustafa Jalil, during which the Chairman insisted that Libya would try Mr. Gaddafi.²¹

¹² ICC-01/11-01/11-50.

¹³ ICC-01/11-01/11-72.

¹⁴ ICC-01/11-01/11-82.

¹⁵ ICC-01/11-01/11-100 at para. 18.

¹⁶ ‘Hand over Gaddafi son, international criminal court tells Libya’, [Guardian](#) 5 April 2012 (Annex C).

¹⁷ J. Karadsheh ‘Hand Over Saif Gaddafi, Court Tells Libya’, [CNN](#) 5 April 2012 (Annex D).

¹⁸ ICC-01/11-01/11-113,

¹⁹ ICC-01/11-01/11-115, 17 April 2012.

²⁰ At para. 47.

²¹ H. Al Shalchi and M. Gumuchian ‘Libya insists on Gaddafi son trial as ICC visits’ [Reuters](#) 18 April 2012; A Wahab, ‘Moreno-Ocampo says ICC has not requested extradition of Senussi’ [Libya Herald](#) 18 April 2012 (Annex E).

25. The Prosecutor gave several interviews in which he commented on the strength of the Libyan challenge to admissibility,²² and also linked crimes to Mr. Gaddafi “some (where) he was involved in with his own hands”.²³ The Prosecutor informed journalists that the Libyan authorities had a strong case against Mr. Gaddafi, that he had been informed that Mr. Gaddafi had not been mistreated, that issues such as his location and well-being fell within the prerogative of national authorities,²⁴ and that he was travelling to Misrata to investigate allegations of crimes committed in this area. After this trip, the Prosecutor announced that he was initiating investigations concerning allegations of rape committed by Gaddafi officials.²⁵
26. On 25 April 2012, the Appeals Chamber dismissed the appeal filed by the Libyan authorities, and rejected the request for suspensive effect of the order to immediately surrender Mr. Gaddafi to the ICC.²⁶

3. Submissions

27. On the basis of the above press-statements, there is a reasonable basis for concluding that there is an objective perception that the ICC Prosecutor’s lacks the requisite impartiality to direct the investigations and prosecutions of this case, in a manner consistent with his obligations under the Statute.
28. This objective lack of impartiality is manifested by a repeated failure to respect the presumption of innocence and rights of the defendant under the Statute, and an objective appearance that the Prosecutor is affiliated with both the political cause and legal positions of the NTC government. This objective lack of impartiality clearly prejudices the right of the defendant to a fair and impartial trial, either before the ICC or Libyan courts, and could have implications concerning his personal security in Libya.
29. Although the Prosecutor is not bound by any Code of Conduct, Article 42 of the Statute stipulates that the “the Office of the Prosecutor shall act independently as a separate organ of the Court.[...] A member of the Office shall not seek or act on

²² Z Verjee, ‘Libya has ‘great evidence’ against Gadhafi’s son, ICC prosecutor says’ [CNN](#), 19 April 2012 (and video insert) (Annex F1 and F2) . See also Libya building up case against Seif: ICC envoy [AFP](#) 21 April 2012, (Annex G); and M. Gumuchian ‘Libya says building case against Gaddafi son -ICC prosecutor’, 21 April 2012, [Reuters](#) (Annex H).

²³ R. Al-Shaeibi, ‘ICC: Libya has evidence of killing by Gadhafi son’ [Associated Press](#) (Annex I)

²⁴ Annex H.

²⁵ Annex H.

²⁶ ICC-01/11-01/11-126

instructions from any external source”. Articles 42(5) and 42(7) further specify that neither the Prosecutor nor a Deputy Prosecutor shall “engage in any activity which is likely to interfere with his or her prosecutorial functions or to affect confidence in his or her independence” nor “participate in any matter in which their impartiality might reasonably be doubted on any ground”.

30. In sum, Article 42 imposes a strict requirement that the Prosecutor should adopt a consistent and impartial position to legal and factual issues, and should not be seen to change or vary his stance, depending on the wishes or views of particular States. As observed by Bergsmo and Harhoff, “[e]ven activity which is *likely to affect confidence* in the independence is prohibited. The perception of independence is recognized as being important”.²⁷
31. Prosecutorial independence from the executive is also an essential element of the right to a fair and impartial trial. Any perception of political interference could impact on the integrity and legitimacy of the prosecutorial decision making process. For this reason, the International Co-Investigating Judge (CIJ) resigned from his position at the Extraordinary Chambers for the Courts in Cambodia due to the fact that there was overt pressure by the Cambodian authorities on the CIJ not to initiate further cases, which could have impacted on the perception of his impartiality and the integrity of the proceedings.²⁸
32. With respect to the impartiality of the proceedings, the European Court of Human Rights has recalled that the presumption of innocence will be violated if “a statement of a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved so according to law”.²⁹
33. In terms of the standard applied by the ICC, the Presidency has concluded that an assessment of the appearance of bias should be determined by reference to a “consideration of whether the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias”.³⁰

²⁷ M. Bergsmo, F. Harhoff, ‘Article 42, ‘in O. Triffterer (ed.) Commentary on the Rome Statute of the International Criminal Court (Hart Publishing 2008) at p. 977.

²⁸ Press-Release by the International Co-Investigating Judge, 10 October 2011, [http://www.eccc.gov.kh/sites/default/files/media/correctedECCC-INT-CIJ%2010%20Oct%202011%20\(Eng\).pdf](http://www.eccc.gov.kh/sites/default/files/media/correctedECCC-INT-CIJ%2010%20Oct%202011%20(Eng).pdf).

²⁹ *Daktaras v. Lithuania*, Application no. 42095/98, 10 October 2000, para. 41. See also *Allenet de Ribemont v. France* judgment of 10 February 1995, Series A no. 308, p. 16, § 35.

³⁰ ICC-02/05-01/09-76-Anx2, 19 March 2010, at p. 5.

Objective appearance concerning the fact that the Prosecutor has failed to respect the presumption of innocence and the rights of the defendant.

34. As someone who is subject to an ICC arrest warrant, Mr. Gaddafi should, at the very least, be afforded the protections of the presumption of innocence, and Articles 55 and 59 of the Statute, which include the right not to be subject to arbitrary detention, the right to legal representation, and the right to be brought before a judge to challenge the legality of his detention.
35. Article 54(1)(c) obliges the Prosecution to “fully respect the rights of persons arising under this Statute”. This encompasses the rights of suspects. The Appeals Chamber has thus held that in seeking cooperation and entering into agreements with external entities, the Prosecutor should ensure that such cooperation and agreement is consistent with the rights of suspects.³¹ The ICTR Appeals Chamber has also emphasised that in line with the fact that the international prosecution of crimes should not be to the detriment of the defendant, the Prosecutor has a duty to take positive steps to ensure that the rights of a person, who is subject to an arrest warrant issued by the Tribunal, are respected.³²
36. These positive obligations are consistent with the fact that the Prosecution is an organ of the Court, whereas the Defence is not. The Prosecutor therefore has unique powers to obtain cooperation, which should be utilised for the benefit of an independent and impartial investigation. The Prosecutor enters into and issues pronouncements in relation to situation countries before any other entity of the Court. Rightly or wrongly, the Prosecutor’s pronouncements are often alluded to as the official position of the Court. Any statements or failure to take a position on issues therefore have a key impact on the views of bystanders concerning the responsibility of the defendant, the authority of the Court and the cooperation it can impel.
37. The fulfilment of the Prosecutor’s role as an independent and impartial Minister of Justice is thus essential to the principle of equality of arms. In this connection, the Appeals Chamber has endorsed the statement of the Preparatory Committee that “[g]iven the fact that the Prosecutor would have earlier access to evidence and other information, it was recommended that a mechanism be found that would neutralize

³¹ ICC-01/04-01/06-1486 at para. 42.

³² Appeals Judgment, Prosecutor v. Kajelijeli (ICTR-98-44A-A), 23 May 2005 at para. 220.

- any potential advantage to the Prosecutor over the defence”.³³ The resultant mechanism was the Prosecutor’s duty to search for and disclose exculpatory material.
38. This solution is vitiated if the Prosecutor demonstrates an apparent unwillingness to consider alternative case theories, or if the Prosecution demonstrates an apparent predisposition towards a party to the conflict, or a particular narrative concerning the conflict.
39. On various occasions throughout the proceedings, the Prosecutor has given high profile media interviews in which he has described Mr. Gaddafi, without any qualification, as “lying”, having committed a “crime against humanity”, being “involved in the recruitment of soldiers from outside”, “personally hiring people [...] financing the operations”, being “ready to crush the demonstration”, and “involved in the operation to kill the civilians on the street”,³⁴ ‘threatening people’,³⁵ and having personally committed crimes with his own hands through the execution of persons.³⁶
40. As found by the Appeals Chamber of the Special Court for Sierra Leone, the publication of predetermined views concerning the criminal responsibility of a defendant could lead a reasonable bystander to conclude that the official in question lacks the requisite appearance of impartiality.³⁷
41. The Vanity Fair interview is particularly telling. The Prosecutor appears to be unwilling or unable to contemplate the possibility of a counter-narrative to the Prosecution theory. The Prosecutor categorically refutes the possibility that Mr. Gaddafi was not involved in the planning of the events in February or that the protestors may have been confrontational, and point blank calls Mr. Gaddafi a liar.³⁸
42. This interview was given in August 2011 – only a couple of months after the Security Council referral. It would not have been feasible for the Prosecution to have conducted a comprehensive investigation at this point in time. Any reasonable bystander would understand from this interview that rather than exploring the possibility that there may be exculpatory lines of inquiry, the person who was

³³ United Nations General Assembly, “Draft Report of the Preparatory Committee”, 23 August 1996, A/AC.249/L.15, p. 14, cited in ICC-01/04-01/07-2288 at footnote 125.

³⁴ Annex A, p.4.

³⁵ Annex C.

³⁶ Annex I. As noted at para. 63 *infra*, the Prosecutor’s assertion on this point was based on NTC evidence, which he subsequently claimed not to have seen.

³⁷ Prosecutor v. Sesay, ‘Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber’, 13 May 2004, at para. 15.

³⁸ Annex A.

ultimately responsible for directing the investigations in this case was denying the possibility that such lines of inquiry could exist.

43. In many press statements, there is also no clear demarcation between the position of the ICC Prosecutor, and that of the Libyan authorities. For example, the Prosecutor has stated that “They will show they are able to prosecute Saif (al-Islam Gadhafi), who they believe is today the face of the old regime.” [...]The rebellion in Libya started as a fight for justice, so they want to show they can do justice in the Saif case”.³⁹ In so doing, the Prosecutor appears to endorse the narrative that firstly, the rebellion was a ‘fight for justice’, and secondly, that the present Libyan government is an extension of this rebellion, and ‘fight for justice’.
44. Subsequently, the Prosecutor observed that “it was critical for Libyans who fought against the injustices of the Gaddafi regime to now show they could “respect justice for a person like Saif.”⁴⁰ Again, the Prosecutor appears to identify the current Libyan government and judiciary with the rebels, and to endorse their cause by describing it as a fight against “the injustices of the Gaddafi regime”. The phrase ‘a person like Saif’, in this context, appears to situate the defendant within his general description of the ‘injustices of the Gaddafi regime’.
45. Issues concerning the merits of the protests and uprising in Libya have not yet been litigated or adjudicated before the ICC. Such categorical statements concerning the nature of the uprising and protests also conflicts with the Prosecutor’s duty to remain impartial and independent, in particular, as concerns any parties to a conflict, which is being litigated before the Court.
46. The appearance that the Prosecutor identifies with or endorses a particular regime is also problematic as the Prosecutor has sole responsibility under the Statute for investigating offences against the administration of justice. It is therefore imperative that the Prosecution is willing to take positive steps concerning problems with the security of defence witnesses, even if they are attributable to government authorities. The Prosecutor nonetheless refused to provide the Defence with any information concerning the steps it was taking to ensure that any information or assistance that it provided to the Libyan authorities did not contribute to any violations of the rights of the defendant or potential defence witnesses, particularly persons in detention.⁴¹

³⁹ Annex D to ICC-01/11-01/11-31.

⁴⁰ Annex H.

⁴¹ See ICC-01/11-01/11-81 and ICC-01/11-01/11-88-Red.

47. This refusal should also be construed in light of the Prosecutor's recent mission to Libya. The Prosecutor announced that the NTC Minister of Justice had brought him an alleged victim of rape, allegedly committed by a person who had subsequently been released from detention due to the lack of any legal basis for their detention.⁴²
48. Although there have been calls to investigate allegations of grave detention related violations allegedly committed by the *Thuwar* in Misrata,⁴³ the Prosecutor did not indicate that he would investigate such allegations, instead appearing to excuse the plight of the thousands of detained persons (some of whom are alleged to have been tortured) as being 'complicated', on the basis that these persons were potentially responsible for crimes.⁴⁴ Although the investigation had just commenced, the Prosecutor announced that he would focus on high level officials, who are outside of Libya (many whom, are potential Defence witnesses, seeking asylum from the Libyan government).⁴⁵
49. Public statements, which have the appearance of endorsing the actions of the government or implicitly ignoring or condoning their non-compliance with the order to surrender, may create a perception of impunity regarding violations of the Statute committed by governmental authorities, which therefore creates a situation of insecurity for both the defendant and potential Defence witnesses.
50. High profile, public statements concerning the criminal culpability of the defendant can also have a direct impact on the safety and security of the defendant. Mr. Gaddafi is currently detained by a militia in Zintan. As reported to the Pre-Trial Chamber, Mr. Gaddafi has asserted that he was attacked by persons from Misrata after his apprehension.⁴⁶ The issuance of public statements intimating that Mr. Gaddafi has blood on his hands is likely to fan the antipathy against him.⁴⁷ There have also been reports of numerous incidents, in which persons, wrongfully believed to be

⁴² Annex F2.

⁴³ 'Statement at the Human Rights Council on the International Commission of Inquiry on Libya, Human Rights Watch, 12 March 2012, <http://www.hrw.org/news/2012/03/12/statement-human-rights-council-international-commission-inquiry-libya>

Detention Abuses Staining a New Libya, Amnesty International Report, October 2011, p 6
<http://www.amnesty.org/sites/impact.amnesty.org/files/PUBLIC/mde190362011en.pdf>

⁴⁴ Annex F2.

⁴⁵ Annex H.

⁴⁶ ICC-01/11-01/11-70-Red2 at para. 27. See also, "Saif Gaddafi's fear of his fate exposed in recording", The Telegraph 20 November 2011, in which the journalist refers to the fact that a mob, firing shots into the air, was waiting for Mr. Gaddafi to disembark from the plane, and tried to slap him when he did so.

<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8902574/Saif-Gaddafis-fear-of-his-fate-exposed-in-recording.html>

⁴⁷ Annex I.

mercenaries or associated with the Gaddafi regime, have been attacked and killed, sometimes in detention.⁴⁸ In such a volatile environment, an apparent lack of impartiality can have just as dangerous consequences as an actual lack of impartiality.

51. Moreover, notwithstanding the Prosecutor's positive obligation to fully respect the rights of Mr. Gaddafi under the Statute, after the Libyan authorities were ordered to bring Mr. Gaddafi before a judge in accordance with Article 59 and to immediately surrender him to the ICC, the Prosecutor informed journalists that Mr. Gaddafi's 'well-being' and 'location' were a matter for national authorities.⁴⁹
52. The Prosecutor also juxtaposed the assertion that Mr. Gaddafi was threatening persons a year ago, with the fact that he has been arrested, and the Court "is discussing his destiny", and describes this as a 'good thing'.⁵⁰ In so doing, the Prosecutor appears to be implicitly endorsing the fact that Mr. Gaddafi is the subject of an unsatisfied order to surrender to the ICC, as a 'good thing'. The use of the word 'discussing' also undermines the legal authority of the Court's decision that Mr. Gaddafi should be immediately surrendered, and suggests that key decisions, which are necessary to safeguard the rights of the defendant, can be negotiated or discussed, rather than immediately implemented. This impression is consolidated by his following assertion to the journalist that "Libyans I'm sure they will accept it or appeal or debate it".⁵¹
53. Although the Prosecutor also states that the Libyans "will engage the court to have the court make the final decision", the key issue is the implementation of such a decision, which is undermined by reference to the possibility of 'debating' or 'discussing' decisions. All judicial decisions of the ICC must be implemented unless the decision has been reversed or the Appeals Chamber has granted suspensive effect. At the time when this interview was given, the Pre-Trial Chamber had not reversed the decision, and the Appeals Chamber had not granted suspensive effect. The only legal option was therefore to immediately implement the decision. To suggest otherwise creates the appearance that the Prosecutor is undermining the potency of judicial orders.⁵²
54. The Prosecutor has also repeatedly stated that if the case is referred back, the ICC would not monitor the fairness of the proceedings in Libya⁵³ which appears to be abrogating the responsibility of the Prosecution to ascertain whether, during the course

⁴⁸ Commission of Inquiry Report, A/HRC/19/68 2 March 2012 at paras. 56 and 57.

⁴⁹ Annex H.

⁵⁰ Annex C.

⁵¹ Annex C.

⁵² ICC-01/04-01/06-2582.

⁵³ ICC-01/11-01/11-31, Annex F.

of proceedings in Libya, new facts may have arisen, which negate the initial finding of inadmissibility. Given that the Defence does not have the right to invoke Article 19(10) of the Statute, any potential abrogation of this responsibility can be extremely deleterious to the rights of the defendant.

55. On the basis of the above statements, a reasonably informed observer would have a reasonable apprehension that the Prosecutor:
- a. has not and will not conduct his obligations under Article 54 in accordance with the standards of impartiality required for such a position
 - b. has a preconceived notion concerning Mr. Gaddafi's responsibility and the nature of the uprising in Libya,
 - c. will not actively take steps to investigate either exculpatory evidence or allegations that persons associated with or under the control of the Libyan government may be committing offences against the administration of justice against the defendant or defence witnesses; and
 - d. will not take into consideration the rights of the defendant or defence witnesses when exercising his powers under the Statute.

There are reasonable grounds to believe that there is an objective appearance that the Prosecutor is affiliated with the positions of the NTC government as concerns the admissibility of the case

56. The Prosecutor requested the Pre-Trial Chamber to issue an arrest warrant against Mr. Gaddafi on the grounds that it was necessary to bring him before the ICC. In this case, the issue of an ICC arrest warrant had a significant impact on the resolution of the conflict, in particular, whether it would be possible to reach a negotiated solution, and the ability of Mr. Gaddafi to seek asylum in another country.
57. At no point in time has the Prosecutor informed the Pre-Trial Chamber that the criteria under Article 58 are no longer met, including the criterion that the arrest of the person by the ICC is necessary. However, since the arrest of Mr. Gaddafi on 19 November 2011, the Prosecutor has not - through either public statements or court filings - requested the Libyan authorities to implement the ICC arrest warrant against Mr. Gaddafi or referred to the fact that they are under such an obligation.
58. On separate occasions, the Prosecutor has conducted joint press-conferences with NTC officials, during which the NTC officials gave clear indications that they

intended to try Mr. Gaddafi in Libya irrespective of the decisions of the ICC.⁵⁴ During the Prosecutor's intervention, it appears that the Prosecutor did not make any reference to the existence of an obligation to bring Mr. Gaddafi before a judge or to surrender him to the ICC, or to the potential consequences of non-compliance.

59. To the contrary, in some instances, the Prosecutor appears to have implicitly endorsed the position of the NTC explaining that "[t]hey are proud, they say to me that for them it's a matter of national pride to show that Libyans can do the case," [...] "They will show they are able to prosecute Saif (al-Islam Gadhafi) [...]."⁵⁵ This leads the publication to ascribe to the conclusion that the ICC Prosecutor supported Libya's position to try Mr. Gaddafi in Libya.⁵⁶ The Prosecutor also announced that "Libya has now established its government. They have the right to prosecute Saif and Senussi here. According to our role, the primacy is for national jurisdictions. If they conduct proceedings, the Court will not intervene".⁵⁷
60. The impact of such participation and collaboration in press conferences on the objective appearance of the Prosecutor is demonstrated by the fact that the Libyan officials have publicly stated their belief that the ICC Prosecutor has endorsed their stance vis-à-vis the ICC, and that his collaboration with them will assist them to achieve their objective before the ICC.
61. For example, the Libyan Coordinator for the ICC, Dr. Gehani, stated in Arabic news services that the "Prosecutor was totally in support of the Libyan judicial system and defends it and praises it. This trust stems from his visit to Tripoli on 23 November 2011, and what he was able to observe and witness in Libya".⁵⁸ Dr. Gehani also informed journalists that "he was optimistic Moreno-Ocampo's [subsequent] visit would help convince judges to allow Libya to try Saif al-Islam locally".⁵⁹ At another point, Dr. Gehani informed Reuters that:⁶⁰

"Ocampo's visit is part of a continued relationship between Libya and the International Criminal Court,"[...] "When the judges hear the appeal of the

⁵⁴ See paras. 13 and 23 *supra*.

⁵⁵ Annex D, ICC-01/11-01/11-31.

⁵⁶ "Moreno-Ocampo said Wednesday that Libya had the "right" to try him if it could do so." Annex D to ICC-01/11-01/11-31.

⁵⁷ ICC-01/11-01/11-31, Annex F.

⁵⁸ ICC-01/11-01/11-115 at para. 18.

⁵⁹ 'Moreno-Ocampo: Gaddafi son will face justice. Visiting Tripoli, prosecutor says Hague-based ICC will decide where Saif al-Islam will stand trial. *Al Jazeera* 18 April 2012,

<http://www.aljazeera.com/news/africa/2012/04/2012418153350244576.html>

⁶⁰ 'ICC prosecutor goes to Libya on Qaddafi son case' *Reuters* 18 April 2012, <http://arabnews.com/middleeast/article614244.ece>

Libyans to have Saif tried locally, they will also hear Ocampo's point of view.'"⁶¹

62. The media (which is comprised of informed bystanders), has regularly also reported on the basis of his interviews that the Prosecutor has agreed to have the trial in Libya,⁶¹ or that rather than advocating for the implementation of court decisions, the Prosecutor is seeking to adopt a more conciliatory approach which is sensitive to Libya's sovereign interests.⁶²
63. The statements of the Prosecutor have also created the impression that he is acting as an advocate for Libya's challenge to the admissibility of the Court. For example, he has informed journalists that if Libya filed a challenge, it would "probably get approval".⁶³ On a recent trip, the Prosecutor also described the strength of the evidence, which Libya is relying upon in connection with its admissibility challenge, as "great".⁶⁴ He has also asserted that they have a "strong case" as concerns their challenge to the admissibility of the case.⁶⁵
64. The Prosecutor subsequently clarified that due to confidentiality concerns, he had not actually seen the evidence of the Libyan authorities.⁶⁶ As such, it would not have been feasible for the Prosecutor to have reached an informed position based on an impartial appreciation of the evidence. This therefore creates the appearance that the Prosecutor's public endorsement concerning the Libyan admissibility challenge was predicated on the Prosecutor's personal preferences or allegiance to the Libyan government.
65. The particular positions advanced by the Prosecutor in the present case also stand in stark contrast to the positions advocated in relation to similar circumstances in previous cases. In this regard, in the Bemba case, the Prosecution advanced the position that the authorities of the Central African Republic should be considered to be unable to conduct a genuine investigation due to the fact that security considerations had prevented the investigating magistrate from being able to conduct interviews with witnesses in particular crime scenes.⁶⁷ Although the Libyan authorities have cited

⁶¹ Annex B.

⁶² 'Lawyers Demand Saif Al-Islam Be Handed to ICC', Libya Herald, 7 April 2012, <http://www.libyaherald.com/lawyers-demand-saif-al-islam-be-handed-to-icc/>

⁶³ Annex D.

⁶⁴ Annex F1.

⁶⁵ Annex G.

⁶⁶ Annex H.

⁶⁷ ICC-01/05-01/08-739, 29 March 2010, at paras. 62 and 64.

security concerns as a reason for the non-compliance with orders of the Chamber,⁶⁸ the ICC Prosecutor has made no reference to the impact of such in his filings in the case or in public statements.

66. As noted above, Article 54(1)(c) of the Statute also requires the Prosecutor to “fully respect the rights of all persons arising under this Statute”. This obligation extends to Defence witnesses and the defendant, and presupposes that the Prosecution will not discriminate in any way in his position concerning Prosecution witnesses as compared to Defence witnesses. This is particularly important given that at this early stage of the case, the Prosecutor will have a better idea concerning the identity and personal situation of potential exculpatory witnesses than the Defence will.
67. Furthermore, in *Ruto et al.*, the Prosecutor submitted that “holding the hearing in Kenya will further intimidate OTP witnesses, their families and potential witnesses [...] The Prosecution has a legal duty to protect its witnesses against all foreseeable risks.”⁶⁹ Due to the fact that Kenya was challenging admissibility, the Prosecutor also asserted that “its interests are divergent with the Court in this case since it also insists that the prosecution should not continue”, and as such, “is impossible to assume that the Government of Kenya will provide the essential cooperation and substantial protection to enable an effective continuation of the hearings in situ”.⁷⁰
68. In the Kenya situation, the Prosecution repeatedly emphasized that any cooperation provided to national authorities was subject to the overriding requirement that the country has adequate security structures in place to guarantee that that witnesses would not be subject to threats or intimidation.⁷¹ The Prosecutor also declared that:
- the Prosecution disagrees that the Court is obligated to assist the Government of Kenya in order to promote complementarity and the State’s effort to establish that the ICC prosecutions are inadmissible.”⁷²
69. The Prosecutor further postulated that no assistance should be provided to national authorities, who are taking efforts to derail the possibility of convening proceedings before the ICC.⁷³

⁶⁸ See for example, ICC-01/11-01/11-41-Anx2.

⁶⁹ ICC-01/09-01/11-127, at paras. 3 and 5.

⁷⁰ At paras. 9 and 10.

⁷¹ ICC-01/09-80, 6 October 2011 at paras.8-10.

⁷² ICC-01/09-80, at para. 24.

⁷³ ICC-01/09-80.

70. In contradistinction to the above positions, the Prosecutor announced on his first mission to Libya that the Prosecution would assist the Libyans to ‘do justice’.⁷⁴ The Prosecutor has made no mention of issues concerning the security and safety of witnesses, notwithstanding the fact that there have been credible reports of torture, arbitrary detention, and mistreatment of persons allegedly associated with the Gaddafi regime, or persons wrongly believed to be mercenaries.⁷⁵
71. By publicly qualifying the future Libyan challenge to admissibility as being ‘very strong’, and predicting that it was likely to succeed, the Prosecutor has also appeared to place his official imprimatur on their admissibility challenge. Such a stance is at odds with the prosecutorial stance adopted in the Kenya situation that it would be highly inappropriate to assist a State, which is not complying with its obligations under the Rome Statute.⁷⁶
72. The apparent adoption of such inconsistent prosecutorial strategies directly conflicts with the obligation of the Prosecutor to act as an independent and impartial minister of justice. The ICTY has therefore underscored that the adoption of different prosecution policies in relation to the same facts was a “matter of concern”, which could give rise to inferences concerning the credibility of the position advanced by the Prosecutor, and “serious internal policy concerns for the Prosecutor”.⁷⁷
73. The adoption of a position in the current case, which is so blatantly different from all previous cases, would also lead a reasonable observer to have a reasonable apprehension that there is an appearance that the Prosecutor is not applying legal and factual criteria to his assessment of the admissibility of this case in an independent and impartial manner.

An immediate suspension is required in order to mitigate the impact on the rights of the defence and the defendant

74. The right to a fair and impartial trial is absolute, such that “continuing to prosecute the defendants before a tribunal which was not independent and impartial infringes the

⁷⁴ Annex B.

⁷⁵ See for example, Commission of Inquiry Report, A/HRC/19/68 2 March 2012 at para 41.

⁷⁶ ICC-01/09-80.

⁷⁷ Prosecutor v. Limaj et al., Decision on Joint Defence Motion on Prosecution’s Late and Incomplete Disclosure, 7 June 2005, p. 25; Prosecutor v. Limaj et al., Trial Judgement, 30 November 2005 at para. 9.

right to a fair trial, even though criminal defendants could not show they had suffered any substantial injustice.”⁷⁸

75. Article 42(8) of the Statute also does not require the Defence to establish the existence of actual or potential prejudice. However the role of the Prosecutor in the forthcoming admissibility proceedings will have a crucial impact on the rights of the defendant in the case, and the implementation of key decisions, which are central to his rights. A judicial remedy is therefore required to ensure that any real or apparent lack of impartiality will not affect the right of the Defence to a fair and impartial trial.⁷⁹
76. In accordance with the terms of Security Council Resolution 1970, the ICC Prosecutor is invited to address the Security Council in relation to the implementation of this resolution. This is scheduled for 16 May 2012. The Presidency, Registry and Defence do not have any direct audience before the Security Council. As such, the defendant is completely dependent on the Prosecutor to raise issues concerning the implementation of the Chamber’s decision that Mr. Gaddafi be immediately brought before a judge and surrendered to the ICC.
77. The Prosecutor has thus far made no statements concerning the obligation of the Libyan authorities to surrender Mr. Gaddafi to the ICC. The Defence therefore has a very real concern that any failure on the part of the Prosecutor to comprehensively and impartially address this situation during the next report will influence the willingness of the Security Council to take steps to ensure the enforcement of Security Council Resolution 1970.
78. In terms of the pending admissibility proceedings, as noted above, there is an apparent expectation by Libyan authorities that rather than setting forth an independent and impartial assessment of the merits of the challenge, the participation of the Prosecutor will directly advance their case.
79. Consequently, an immediate suspension is required in order to ensure that the rights of the Defence are not further prejudiced in the interim, and to protect the appearance of the integrity of the present admissibility proceedings before the Court. The issuance of such a suspension *ex abundanti cautela* would be consistent with the practice adopted

⁷⁸ R. Clayton & H. Tomlinson, The Law Of Human Rights (Oxford University Press, 2009)p.748, referring to *Millar v. Dickson* [2002] 1 WLR 1615 (PC). Also see *González del Río v. Peru*, Communication no. 263/1987, UN Doc. CCPR/C/46/D/263/1987 (1992).

⁷⁹ Report of 31 March 1963, Pfunders (*Austria v Italy*), Yearbook VI (1963), p.740(784); report of 15 March 1961, Neilsen, Yearbook IV (1961), p490 (568), cited in P. Van Dijk et al., Theory and Practice of the European Convention on Human Rights (2006) (Intersentia Publishers, Belgium), 627

by the different Chambers in response to requests by the parties to disqualify judicial officers, due to a perceived lack of impartiality.⁸⁰

80. Such an approach would also be consistent with the mandatory interdiction under Article 42(7) that “Neither the Prosecutor nor the Deputy Prosecutor shall participate in any matter in which their impartiality might reasonably be doubted on any ground”.

Relief Sought

81. For the reasons set out above, the Defence respectfully requests the Honourable Appeals Chamber to:

- i. disqualify the Prosecutor from participating in the case against Mr. Saif Al Islam Gaddafi; and
- ii. pending the issuance of a determination on the present request, temporarily suspend the Prosecutor from conducting any prosecutorial activities related to the case against Mr. Saif Al Islam Gaddafi.



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

Dated this, 3rd Day of May 2012

At The Hague, The Netherlands

⁸⁰ Decision on the Prosecutor's Application to Separate the Senior Legal Adviser to the Pre-Trial Division from Rendering Legal Advice regarding the Case, 27 October 2006, ICC-01/04-01/06-623, para. 17. Prosecutor v. Katanga and Ngudjolo, oral decision, 14 July 2008, ICC-01/04-01/07-T-48-ENG pp. 1-2.