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Date: **21/02/2012**

PRE-TRIAL CHAMBER I

Before: Judge Sanji Mmasenono Monageng, Presiding Judge
Judge Sylvia Steiner
Judge Cuno Tarfusser

SITUATION IN LIBYA

**IN THE CASE OF
THE PROSECUTOR**

v. SAIF AL-ISLAM GADDAFI and ABDULLAH AL-SENUSSI

**Public Document
with Public Annex 1 and Confidential Annex 2**

**Application of Aisha Gaddafi for reclassification and the provision of a legally
authorised copy of the death certificate pertaining to her late father
Muammar Mohammed Abu Minyar Gaddafi**

Source: Aisha Gaddafi, represented by Nicholas Kaufman

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

Legal Representatives of the Victims

Legal Representatives of the Applicants

Mr. Nicholas Kaufman

Unrepresented Victims

Unrepresented

Applicants

(Participation/Reparation)

**The Office of Public Counsel for
Victims**

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

Mr. Xavier-Jean Keïta

Ms. Melinda A. Taylor

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section Other**

Aisha Gaddafi hereby requests that the learned Pre-Trial Chamber reclassify the facsimile document filed by the Registrar and purporting to be the death certificate of Muammar Mohammed Abu Minyar Gaddafi ("Muammar Gaddafi") as public and, further, requests that the Pre-Trial Chamber order the Libyan authorities to provide a legally authorised or notarised copy thereof:

Background

1. On 20 October 2011, Muammar Gaddafi was murdered near Sirte, Libya.
2. On 22 October 2011, a document said to be the death certificate of Muammar Gaddafi found its way, *inter alia*, into the hands of the Arab newspaper – *Al-Sharaq Al-Awsat*.¹ This document was widely distributed on the internet and a copy thereof is attached to this filing.² The document, as it would appear, emanates from the Civil Registration Office in Misrata and records the date of death as 20 October 2011. The section pertaining to the "cause of death" may loosely be translated as follows: "*medical details: gunfire which caused wounding to the left side of the head and to the middle of the chest, signs of operation on the left of the abdomen and on the right and also on the left leg. All the operations are old.*" The same death certificate was signed by a medical official called Dr. Majd Hassan.
3. On 10 November 2011, by way of confidential filing, the Registrar submitted her "*Transmission of Muammar Mohammed Abu Minyar Gaddafi's death certificate*" noting that she had received the said document from the Embassy of Libya in the Kingdom of the Netherlands by facsimile "*in the absence of a diplomatic pouch*".³ This facsimile was not a legally authorised document and was probably no more than a copy of the same photographed death certificate

¹ <http://asharq-e.com/news.asp?section=1&id=27039>.

² Annex 1. *c.f.*; also, <http://asharq-e.com/news.asp?section=1&id=27039> where the cause of death was translated as follows: "gun-shot wounds to the central chest region and left-side of the head".

³ ICC-01/11-01/11-22.

appended to this filing given that it also emanated from the Civil Registration Office in Misrata. Indeed as a facsimile, the document supplied by the Libyan Embassy has no more legal authority than the item which went "viral" in cyberspace within two days of Muammar Gaddafi's murder. The Registrar attached the facsimile of the death certificate she had received to her transmission report and filed it as confidential annex 2.

4. On 22 November 2011, the learned Pre-Trial Chamber rendered its public "*Decision to terminate the case against Muammar Mohammed Abu-Minyar Gaddafi*" whereby, *inter alia*, it acceded to the Registry's request that the death certificate should remain confidential until the Libyan authorities consent to making it public.⁴ To date, it is not known whether the Registrar has informed the Pre-Trial Chamber of the Libyan authorities' consent to publish the photocopied death certificate – despite its apparently global dissemination - nor whether a legally authorised or hard copy of the same document has been supplied. Moreover, the reasons for the Libyan authorities' insistence not to disclose the same document, if such even exist, remain confidential.
5. On 23 November 2011, the Registrar's transmission report was reclassified as public yet, pursuant to the Pre-Trial Chamber's decision of 22 November 2011, the legally unauthorised death certificate appended thereto remained classified as *confidential ex parte – Prosecution only*.
6. On 11 December 2011, herein undersigned Counsel ("Counsel") petitioned the Registry on behalf of Aisha Gaddafi and requested as follows: "*I would like to ask you to supply me with the [...] death certificate which I assume was classified as confidential out of respect for the family of the deceased. Such conditions of*

⁴ ICC-01/11-01/11-28.

confidentiality should not apply to Aisha Gaddafi who, as next of kin, is fully entitled to know the circumstances concerning her father's death".⁵

7. On the same day, the Registry declined to supply the death certificate and referred Counsel to the Libyan Embassy as follows: *"Please be informed that the contacts of the Embassy of Libya are accessible to the general public on the following website: <http://www.projectvisa.com/embassydetail.asp?seednum=4567>. Kindly note that, at the present stage, the Registry is not able to communicate to you the contacts used by the Registry for the transmission of official court requests".*
8. Immediately thereafter, Counsel petitioned the Libyan Embassy in the Netherlands for the death certificate. Notwithstanding the confirmed receipt of his facsimile message, Counsel has yet to receive a response to his request from the Libyan Embassy.
9. Other attempts made by Counsel to contact the "Libyan authorities" have met with no success. The Office of the Prosecutor astonishingly declined to provide Counsel with the contact details of the General Prosecutor of Libya⁶ and the Registrar inexplicably refrained from replying to a similar request. Given such a lack of cooperation and the potentially adverse effect it had on Saif al-Islam Gaddafi's right to be afforded legal representation, Counsel initiated a telephone conversation, on 26 December 2011, with another representative of the Libyan prosecution authorities – Mr. Abd al-Majid Sa'ad. After a brief introduction, and through no fault of Counsel, this conversation was abruptly terminated. This same official later refused to accept further communication from Counsel when an additional effort was made to contact him on 30 December 2011.⁷

⁵ Email to CSS copying the Registrar sent on 12 December 2011.

⁶ Letter from Mr. Phakiso Mochochoko (Head of JCCD) to Counsel dated 19 January 2011.

⁷ Confidential Annex 2: An affidavit filed confidentially because it contains Abd al-Majid Sa'ad's personal cellphone number and the details of Counsel's legal assistant.

10. On 27 December 2011, Aisha Gaddafi filed an application for victim status with the Victims Participation and Reparation Section (VPRS) of the Registry citing the severe psychological trauma that she has suffered and continues to suffer after witnessing, as did most of the television-viewing world, the savage torture and brutal murder of her late father Muammar Gaddafi. At the time of Aisha Gaddafi's application, Counsel drew VPRS's attention to the fact that no practice direction had been issued fixing a framework for victim participation in the Libyan situation. Counsel thus requested that Aisha Gaddafi's application be submitted to the Pre-Trial Chamber immediately - not least so that she could appeal to the Pre-Trial Chamber's understanding and sensitivity by petitioning for access to the death certificate.

11. It is not clear to Counsel whether VPRS communicated with the Pre-Trial Chamber *ex parte* informing it of Aisha Gaddafi's pending victim application thereby prompting the issuance of a victim's participation protocol. In any event, on 24 January 2012, Pre-Trial Chamber I issued its *Decision on Victim's Participation in Proceedings Related to the Situation in Libya*⁸ adopting the participation framework approved in the "*Decision on victims' participation in proceedings relating to the situation in the Democratic Republic of the Congo*".⁹

12. VPRS has since informed Counsel that it will not submit Aisha Gaddafi's application for victim participation to the Pre-Trial Chamber until 24 April 2012.¹⁰

Submission

13. Aisha Gaddafi is a victim applicant in the Libyan Situation and the form promulgated and tendered by VPRS is the only conduit by which she may submit her application to the Court. The present application form, as distinct from its predecessor, no longer permits a victim applicant to distinguish

⁸ ICC-01/11-18.

⁹ ICC-01/04-593.

¹⁰ Email from VPRS to Counsel dated 31 January 2012.

between a desire to participate in the "situation" or in a specific "case". In the circumstances, it is submitted that Aisha Gaddafi has standing to petition this learned Pre-Trial Chamber on various matters pursuant to the principles identified by Pre-Trial Chamber II in the Kenya situation where "*the Chamber is seized of a request emanating from victims of the situation who have filed an application for participation in the proceedings with the Registry*".¹¹

14. Aisha Gaddafi meets the requirements for victim status under Rule 85 of the Rules of Procedure and Evidence. She is a natural person who has suffered severe emotional trauma after witnessing the slaying of her father. The Prosecutor of the International Criminal Court himself has recognized that the murder of Muammar Gaddafi was a possible war crime.¹² The trauma suffered by Aisha Gaddafi thus constitutes harm which arose "as a result" of a crime falling within the jurisdiction of the Court.

15. Aisha Gaddafi's petition also satisfies the requirements for participation under Article 68(3) of the Rome Statute. The case against Muammar Gaddafi was terminated after confidential litigation dealing, *inter alia*, with the publication of the death certificate – albeit a facsimile. The final classification of the death certificate, however, is still a live judicial issue pending the result of "*an inquiry*"¹³ which the Registrar has made of the Libyan authorities. As will be clarified below, the right of families to know the fate of their relatives is a right enshrined in customary international law and is recognized in a number of international conventions.¹⁴ Aisha Gaddafi's intervention to request a notarised copy of her father's death certificate, or, at least, the copy submitted by the Registrar, is thus both "*appropriate*" and her "*personal interests are affected*". Aisha Gaddafi requires the said document in order to prove, for

¹¹ ICC-01/09-24 at paragraph 15.

¹² <http://af.reuters.com/article/topNews/idAFJJOE7BF00C20111216>: "'I think the way in which Mr Gaddafi was killed creates suspicions of ... war crimes," ICC prosecutor Luis Moreno-Ocampo told reporters".

¹³ ICC-01/11-01/11-28 at page 4.

¹⁴ ICRC: Customary IHL at Rule 117D: Practice relating to accounting for missing persons: http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule117_sectiond.

various privileged purposes, the legal fact of her father's death. Aisha Gaddafi also wishes to know, as is her right under customary international law, the exact cause and circumstances of her father's death given that conflicting¹⁵ accounts thereof have been promulgated by various individuals.

16. Pre-Trial Chamber II has recognized that there can arise various scenarios of judicial proceedings related to the situation stage where victims' personal interests may be affected and where judicial scrutiny is required. Pre-Trial Chamber II did not limit these scenarios to a closed category stipulating "*that there may be other instances where victims' participation may be deemed appropriate by the Chamber.*"¹⁶ Aisha Gaddafi's request for reclassification and the provision of a legally authorised copy of the death certificate submitted by the Libyan authorities through the Registry is just such a scenario.

17. Article 26 of the 1949 Geneva Convention IV provides that "[e]ach Party to the conflict shall facilitate enquiries made by members of families dispersed owing to the war, with the object of renewing contact with one another and of meeting, if possible. It shall encourage, in particular, the work of organizations engaged on this task provided they are acceptable to it and conform to its security regulations".

18. Article 32 of the 1977 Additional Protocol I to the Geneva Conventions of 1949 states that in ensuring the implementation of provisions relating to the missing and the dead, the parties bound by the Protocol "*shall be prompted mainly by the right of families to know the fate of their relatives*". More pertinently,

¹⁵ <http://www.ibtimes.com/articles/235529/20111021/gadaffi-dead-who-killed-gaddafi.htm>: "This would fit with medical examiner Abdel-Jalil Abdel-Aziz's conclusions after seeing the body. Abdel-Aziz determined that Gadhafi died from "two bullet wounds, to the head and chest," The Associated Press reported. "You can't imagine my happiness today. I can't describe my happiness," the doctor told the AP. "The tyranny is gone. Now the Libyan people can rest."

But, another medical examiner who looked at Gadhafi's body had a different idea about what happened, one which paints a much darker picture. According to doctor Ibrahim Tika, the two bullet wounds were the result of an execution that likely took place on the truck.

"Gaddafi was arrested while he was alive but he was killed later. There was a bullet and that was the primary reason for his death, it penetrated his gut," he told Al Arabiya television. "Then there was another bullet in the head that went in and out of his head."

¹⁶ ICC-01/09-24 at paragraph 12.

the German delegation to the Steering Committee for Human Rights (CDDH), when promoting what later became Article 32 of the 1977 Additional Protocol I, stated that the said provision was designed "*to mitigate the suffering of the families of those who disappeared in war by removing the uncertainty about their fate and to give them an opportunity to remember their dead in the place where their remains lay*". To this day, Aisha Gaddafi has no idea whatsoever where her late father is buried nor has she the opportunity to grieve at his graveside.

19. Principles 16(1) and 17(4) of the 1998 Guiding Principles on Internal Displacement provide that families of "*all internally displaced persons have the right to know the fate and whereabouts of missing relatives*".¹⁷

20. The aforementioned principles have also received recognition in international judicial precedent. In Kurt v. Turkey, the European Court of Human Rights found that depriving a mother of official information as to her son's disappearance in custody may constitute ill-treatment violating Article 3 of the European Convention on Human Rights (prohibition of inhumane or degrading treatment).¹⁸

21. In the Bámaca Velásquez case, the Inter-American Court of Human Rights has similarly pronounced as follows: "*The Court has evaluated the circumstances of this case, particularly the continued obstruction of [the victims wife's] efforts to learn the truth of the facts and, above all, the concealment of the corpse of [the victim] and the obstacles to the attempted exhumation procedures that various public authorities created, and also the official refusal to provide relevant information. Based on these circumstances, the Court considers that the suffering to which [the wife of the victim] was subjected clearly constitutes cruel, inhuman or degrading treatment, violating Article 5(1) and 5(2) of the [American Convention on Human Rights]*".¹⁹

¹⁷ UN Doc. E/CN.4/1998/53/Add.2, 11 February 1998.

¹⁸ Judgment, 25 May 1998.

¹⁹ Judgment, 25 November 2000.

Relief Sought

22. In the absence of any consent for publication or justification for confidentiality emanating from the Libyan authorities and in the absence of details as to the legal authenticity of the document sent to the Registrar, the Pre-Trial Chamber is respectfully requested to change the classification of the death certificate transmitted by the Registrar to a public document and to order the Libyan authorities to provide a legally authorized version thereof.
23. In the alternative, and out of respect for Aisha Gaddafi's fundamental rights under customary international law, the Pre-Trial Chamber is requested to disclose the document transmitted by the Registrar, exclusively and confidentially, to Aisha Gaddafi.



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Counsel for Aisha Gaddafi

Jerusalem, Israel
Tuesday, February 21, 2012