

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 02 March 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 Redacted Version Urgent Report Concerning the Visit to Libya

Source: The Office of Public Counsel for the Defence

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

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Ms. Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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Registrar

Ms. Silvana Arbia, Registrar

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Victims and Witnesses Unit

Counsel Support Section

Detention Section

**Victims Participation and Reparations
Section**

Other

1. Introduction

1. The Office of Public Counsel for the Defence (OPCD) hereby submits its Report concerning the results of its visit to Libya for the purpose of meeting with Mr. Saif Al-Islam Gaddafi.
2. The objective of the visit was completely frustrated. Based on the information that the OPCD received during this visit, the OPCD has grave concerns regarding whether it will be possible to uphold the rights of Mr. Gaddafi before the ICC in an effective manner, whilst he is being detained in Libya by the current authorities.

2. Procedural History

3. On 6 December 2011, the Pre-Trial Chamber requested the Libyan authorities to provide information concerning:¹
 - (i) whether Saif Al-Islam Gaddafi was arrested on account of the Court's warrant of arrest;
 - (ii) whether the information received by the Chamber as to Saif Al-Islam Gaddafi being held incommunicado is true;
 - (iii) when and where could the Registrar, or one of her representatives, meet Saif Al-Islam Gaddafi in order to seek his views on being assigned counsel from the Court for the purposes of proceedings before this Court;
 - (iv) how, when and where could an expert be mandated by the Court to examine Saif Al-Islam Gaddafi in order to assess his physical and mental state; and
 - (v) whether and when the Libyan authorities intend to surrender Saif Al-Islam Gaddafi to the Court.
4. The Pre-Trial Chamber also appointed the OPCD to "represent the interests of the Defence in all instances related to the proceedings against Saif Al-Islam Gaddafi in the present case until otherwise decided by this Chamber".²
5. After having received an extension of time to submit their observations, the Libyan authorities informed the Chamber *inter alia*, that the "NTC is willing to facilitate the

¹ 'Decision Requesting Libya to file Observations Regarding the Arrest of Saif Al-Islam Gaddafi' ICC-01/11-01/11-39-Conf-Exp at pp. 5-6.

² At p. 6.

Registrar or one of her representatives a visit to Saif Al-Islam Gaddafi at mutually convenient date and place to be agreed upon”.³

6. On 3 February 2012, the Pre-Trial Chamber decided that in light of the circumstances of the case, “a personal visit from the Registry and the OPCD is the best mechanism to ensure that Saif Al-Islam Gaddafi is well informed about the current stage of the proceedings before the Court and of the appointment of the OPCD to represent his interests until he decides, should he wish to be represented in the Court’s proceedings, to appoint counsel of his choosing”.⁴
7. To that end, the Pre-Trial Chamber ordered that the visit should be arranged “as soon as possible”, and that the representatives of the Registry and OPCD should report back to the Chamber, exempting privileged information, with a full account of the visit.⁵
8. On 20 February 2012, the Registry filed a report, in which they informed the Chamber that the Libyan authorities had indicated that it would not be possible to schedule a mission from 22 February 2012, but that the mission could be facilitated from 29 February 2012, and that the visit to Mr. Gaddafi would most likely occur on the 2 March 2012.
9. The Registry and OPCD delegation arrived in Tripoli on 29 February 2012. After having confirmed to the OPCD on multiple occasions on 29 February 2012 and 1 March 2012 that the visit to Zintan would definitely occur, the OPCD was informed for the first time at 11pm on 1 March 2012 that the visit would be cancelled. The full details will be provided below.
10. It is possible that the OPCD may receive additional information after the submission of this Report, in which case, the OPCD will submit an addendum.

3. Report

11. The OPCD was not advised or consulted by the Registry in connection with the specific schedule of the mission. It should also be noted that the ICC delegation was composed of two separate missions; the mission ordained by the Pre-Trial Chamber for the purpose of visiting Mr. Saif Al-Islam Gaddafi, and a separate mission

³ ICC-01/11-01/11-44-Conf-Ann1, 23 January 2012, p. 2.

⁴ ‘Decision on the Registry-OPCD Visit to Libya’, 2 February 2012, ICC-01/11-01/11-52-Conf-Exp, at p. 4.

⁵ Pp. 4-5.

conducted by the Registrar and her external relations advisor, at the invitation of the Libyan authorities.

12. In light of the fact that only one Arabic interpreter was travelling with the delegation, the OPCD attempted to coordinate with the Registrar concerning the scheduling of meetings with the Libyan authorities. The OPCD was informed that the OPCD would not be permitted to attend meetings organised by the Registry, and that the OPCD could utilise the interpreter when he was free from his commitments to the Registrar's meetings.
13. The OPCD has been informed that the Libyan authorities arranged a visit from the Registrar and her representatives to visit the intended prison facilities for Mr. Gaddafi. Although the OPCD was not, for the above reasons, permitted to participate in this meeting, the OPCD has included information that it has heard from the Registry, insofar as it is directly relevant to the rights of Mr. Gaddafi.

3.1 Meetings with Dr. Gehani and the Libyan Prosecutors concerning family visits, privileged communications, and the status of domestic proceedings

14. Upon arrival at approximately 4.30pm on 29 February 2012, the OPCD requested Dr. Gehani, the Libyan coordinator for the ICC, if it would be possible to meet with Libyan authorities, who were responsible for authorising and implementing family visits to Mr. Gaddafi, and facilitating privileged communications and visits between Mr. Gaddafi and his legal representatives. Dr. Gehani agreed to arrange this meeting, and at this point, informed the OPCD (verbatim) that as a lawyer, he accepts that Mr. Gaddafi has rights "even though he committed serious crimes".
15. At approximately 10.30pm, the OPCD met with [Redacted], and [Redacted], who are both Prosecutors assigned to the domestic proceedings against Mr. Gaddafi. Dr. Gehani was also present. The meeting was only 45 minutes due to the fact that the Prosecutors and interpreter had been busy with the Registrar during the day's meetings and the subsequent official dinner.
16. The meeting also did not occur under ideal conditions. The interpreter subsequently informed us that when the two Prosecutors would start to respond to our questions in Arabic to the interpreter, Dr. Gehani would interrupt them and say something contradictory in English to us. At one point, Dr. Gehani also directly informed the two Prosecutors in Arabic that he did not like the questions of the OPCD.

3.1.1. Family visits

17. The OPCD first inquired as to whether it would be possible for the Libyan authorities to facilitate visits or communications with family members and friends, who were not physically present in Libya. In particular, the OPCD inquired as to whether it would be possible to organise any telephone communications, either at the facility in Tripoli or Zintan, and if not, whether a written address could be provided, so that family members or friends could send correspondence to this address.
18. [Redacted] informed us that no requests had been submitted by any family members or friends. The Prosecutors denied that they had ever received any requests from Ms. Aisha Gaddafi or her counsel. Dr. Gehani informed the OPCD that Ms. Aisha Gaddafi would not be able to communicate with Mr. Gaddafi because she was accused as well and such communications would contaminate him.
19. In terms of the procedure for future family visits, the OPCD was informed that Mr. Gaddafi would have to write to the Prosecutor General to request such visits. Family members would also be required to contact him via the Prosecutor General.
20. The OPCD inquired as to whether it would be possible to receive specific contact details for this purpose, for example, an email address, given that the fax number for the Prosecutor General, which had previously been provided to the OPCD, did not function. Dr. Gehani promised that he would provide such details early the next day. The OPCD followed up on this matter with Dr. Gehani on the 1 March 2012, and was informed that the contact details would be provided later. The OPCD reiterated this request on the 2 March 2012. The OPCD was again informed that they would be provided at an unspecified, later stage.

3.1.2 Privileged communications

21. The OPCD then inquired as to the possibility and procedure for maintaining privileged communications between Mr. Gaddafi and the OPCD or his chosen counsel in the future in relation to the proceedings before the ICC.
22. The OPCD was informed that that it would not be possible to have such communications whilst Mr. Gaddafi is being detained in Zintan. After Mr. Gaddafi is transferred to Tripoli, then the OPCD or his chosen counsel would need to receive the

approval of the Prosecutor General to contact him or to transmit him documents. Documents would need to be transmitted via the Prosecutor-General, potentially through his email address. As noted above, Dr. Gehani has yet to provide the OPCD with these contact details. The OPCD was informed at this point that Mr. Gaddafi would be transferred to Tripoli in approximately two weeks.

23. Dr. Gehani also stated that he found it ludicrous to expect that the detainee should have a facility for receiving documents or storing them in his cell, and that he strongly contested the idea that such facilities would exist in any other country.

3.1.3. Status of Domestic Proceedings

24. The OPCD was informed that Mr. Gaddafi was under arrest by the Prosecutor General for financial crimes. In response to the OPCD's question concerning whether there was an arrest warrant, and whether this had been provided to Mr. Gaddafi, the OPCD was informed under Libyan procedural law, when a person has been arrested, it is presumed that legal action is taken as an automatic consequence. Mr. Gaddafi has apparently met with investigators, and allegedly refused counsel. The OPCD was informed that Mr. Gaddafi had signed a note in relation to such matters.
25. In response to the query of the OPCD as to whether Mr. Gaddafi had been brought before a judge, or competent authority to determine the legality of his detention, Dr. Gehani informed the OPCD that under Libyan law as under all civil law countries, there is no right to be brought before a judge or competent authority to determine the legality of detention.
26. The OPCD was also informed that Mr. Gaddafi has not been provided with any documents or decisions concerning the proceedings before the ICC, for example, the arrest warrant decision or the decision appointing the OPCD to represent his interests.

3.2 Meetings with Dr. Gehani concerning the status of the trip to Zintan

27. During the above meetings, Dr. Gehani repeatedly reassured the OPCD that the OPCD would be able to visit Mr. Gaddafi at Zintan on 2 March 2012.
28. On 1 March 2012, the Principal Counsel of the OPCD and a Registry Representative were at the same table as Dr. Gehani, who was receiving several phone calls (in Arabic). At approximately 10.15pm, Dr. Gehani informed the Principal Counsel that

he was waiting for another call, but that he had received bad news concerning the visit to Zintan, and he was ascertaining whether the visit could occur on Saturday rather than Friday.

29. At 11pm, Dr. Gehani received the last call. He informed the Principal Counsel that the visit to Zintan was definitely cancelled for the near future: it would not occur on Friday, Saturday, or the next week. The ICC delegation would need to return and organise another mission.
30. In terms of the reasons for the cancellation, Dr. Gehani informed the Principal Counsel that the NTC was still negotiating with the Zintan authorities; one faction was in favour of the NTC and one was not. The Zintan authorities had requested more than one month ago to be paid for detaining Mr. Gaddafi. The NTC accepted the request and the money was available.
31. Dr. Gehani noted that the scheduled day for the visit was a holiday (due to the fact that it was a Friday). Dr. Gehani averred that it was too complicated for the Zintan authorities to retain Mr. Gaddafi but the Tripoli prison facilities were not ready. At this point, Dr. Gehani informed the Principal Counsel that the Tripoli facilities would not be ready for at least another two months.
32. Dr. Gehani further stated that the Libyan authorities had been trying to solve the problem during the day. Both the Minister of Defence, who is from the same clan as the Zintan authorities, and the President of the NTC had attempted to intervene with no success.
33. Finally, Dr. Gehani suggested that the visit to Zintan could be organised to coincide with an ICC Prosecution mission, which is scheduled for 12 to 21 March 2012.
34. On the morning of the 2 March 2012 (at approximately 9am), Dr. Gehani informed the OPCD that it would be better if the OPCD and Registry representatives returned with an official invitation to visit Mr. Gaddafi at Zintan. The problem was that this time, only the Registrar had been officially invited by the Libyan authorities in connection with meetings, which were not related to the visit to Zintan. The OPCD noted that in their filings, the Libyan authorities had accepted to receive a visit from Registry representatives for the purpose of visiting Mr. Gaddafi and emphasised that it was very important for them to visit Mr. Gaddafi as soon as possible, but Dr. Gehani did not respond.
35. The Registrar subsequently discussed with Dr. Gehani the reasons for the cancellation and future prospects (in Italian). The Registrar appeared to inquire as to who could

change the situation. Dr. Gehani responded that the Minister of Defence could, since he was from the same clan, but he had failed. In response to the Registrar's question as to whether there will be change in circumstances, Dr. Gehani noted that there was no chance, and that he was not an optimist for visiting on Saturday as even the President of the NTC had failed.

36. The OPCD finally inquired at the end as to when he thought a new visit could take place. Dr. Gehani replied that he didn't know.

4. Observations

37. It is entirely unclear as to why the Libyan authorities cancelled the visit at such short notice, when they had been aware of the alleged financial dispute for at least a month. Dr. Gehani's reference to the absence of an official invitation and his proposal that the visit be scheduled to coincide with the ICC Prosecutor's mission further muddies the waters. From the OPCD's discussions with the ICC security representatives, it would appear that there are no security impediments concerning the visit to Zintan.
38. The OPCD has elaborated its concerns regarding the status of Mr. Gaddafi's detention and the implementation of his rights before the ICC in previous filings.⁶ Rather than allaying these concerns, the OPCD's mission to Libya has simply exacerbated them.
39. The implementation of Mr. Gaddafi's detention rights should be overseen by independent and impartial authorities, who are independent of the executive government;⁷ they should not be the subject of political or financial wrangling

⁶ For example, 'OPCD Observations on Libya's Submissions Regarding the Arrest of Saif Al-Islam', 2 February 2012, ICC-01/11-01/11-51-Conf; 'OPCD Response to the Request of the Libyan Authorities for an Extension of Time', 10 January 2012, ICC-01/11-01/11-43-Conf-Exp.

⁷ Article 9(3) of the International Covenant on Civil and Political Rights. See also N. S. Rodley, The treatment of prisoners under International Law (3rd ed. 2009) pp.462-463 :

In several cases the Committee has found violations of article 9(3) on the basis that it was not satisfied that public prosecutors, though nominally charged with quasi-judicial functions in this regard, actually had the "institutional objectivity and impartiality" required to meet the requirements of article 9(3) – ie 'an authority which is independent, objective and impartial in relation to the issues dealt with'. [citing *Kulomin v Hungary* (1996) UN Doc CCPR/C/50/D/521/1992, para 11.3. See also *Platonov v Russia* (2005) UNDoc CCPR/C/85/D/1218/2003, para 7.2] It cannot be stressed enough that for the protections provided for by article 9(3), as well as by article 9(4), to have any real effect, the judiciary must both as an institution and as individuals exhibit certain qualities. The Constitution or other fundamental laws must guarantee the formal independence and impartiality vis-à-vis detaining authorities, as well as the executive government more generally.

Principle 9 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, (A/RES/43/173, 9 December 1988) further provides that "The authorities which arrest a person,

between central and local authorities, nor should they be deferred for matters of convenience or legal strategy. The reality that Mr. Gaddafi's rights are contingent on the strategies of the executive government raises further concerns due to the fact that at least one member of this executive, Dr. Gehani, appears to possess predetermined views concerning the criminal responsibility of Mr. Gaddafi.

40. Irrespective as to whether Mr. Gaddafi is being detained in Zintan or Tripoli, there is not an effective mechanism for him to have privileged communications with either the OPCD or chosen counsel. In Zintan, there is no possibility to receive privileged communications, and in Tripoli, the Defence would need to seek the authorisation of the Prosecutor-General. Such a fundamental right of the Defence should not be contingent on the approval of the Prosecuting authorities.
41. Whilst Dr. Gehani accepted that the OPCD could physically give some ICC documents to Mr. Gaddafi during the planned 2 March 2012 visit, in the future, any such documents would need to be transmitted via the Prosecutor General. It would therefore be impossible to either notify Mr. Gaddafi or receive any information from him, which might be sensitive vis-à-vis the Libyan authorities.
42. It would be unrealistic to expect that Mr. Gaddafi's status will improve in the near future. Dr. Gehani finally informed the OPCD that the facilities in Tripoli will not be completed for another couple of months, and he could provide no date for the expected transfer.
43. The OPCD was also incidentally informed by the Registry representatives that the intended Tripoli detention facilities are designated for convicted persons, rather than persons being held in preventative detention.
44. Moreover, irrespective as to whether he is being held in Zintan or Tripoli, the Prosecuting authorities informed the OPCD that Mr. Gaddafi has no right to be brought before a judge or competent authority to discuss the conditions of his detention or determine its legality. This information appears to be in stark contradiction to the provisions of Libyan law,⁸ and the human rights obligations which

keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority." The Body of Principles further states that "The words "a judicial or other authority" mean a judicial or other authority under the law whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence."

⁸ According to the report submitted by the Libyan government to the UN Human Rights Committee, the right of anyone who is deprived of his liberty by arrest or detention to take proceeding before a court (article 9.3 of the ICCPR) is guaranteed by article 30 of the Promotion of Freedom Act, which stipulates that "everyone has the right to petition a court in accordance with the law. The court shall provide him with all the necessary

are expressly incorporated into Libyan law.⁹ OPCD would also like to draw the attention of the Pre-Trial Chamber to paragraph 787 of the OHCHR Commission of Inquiry's unedited Report on the situation in Libya.¹⁰

45. In light of the above considerations, the OPCD strongly submits that it will not be possible to guarantee the effective implementation of Mr. Gaddafi's rights before the ICC, whilst he is being detained in either Zintan or Tripoli, under the supervision of the current regime. In the absence of any information concerning his right to legal representation before the ICC and his right to silence, the progression of domestic proceedings, which could entail questioning regarding events related to the ICC arrest warrant or his involvement in government decision making, could also undermine Mr. Gaddafi's rights under article 55 of the Rome Statute.

safeguards, including legal counsel, and the applicant is entitled to avail himself, at his own expense, of the service of a lawyer of his own choosing". The Libyan government explicitly recognized that based on this provision, anyone who has suffered detriment by being deprived of his liberty by unlawful arrest or detention is entitled to apply to a court to consider the legality of his detention. Libyan Arab Jamahiriya third periodic report to the Human Rights Committee, CCPR/C/102/ADD.1, 15/10/1997, para. 161.

Another provision quoted by the Libyan Arab Jamahiriya in its periodical reports is principle 26 of the Great Green Document on Human Rights, which stipulates: "everyone has the right to apply to the courts in order to seek redress against any violation of the rights and freedoms accorded to him herein". According to Libya, the rights and freedoms set forth in the Great Green Document comprise most of the basic principle contained in the international human right treaties and instruments. In particular, article 2 of the Great Green Document on Human Rights stipulates that: "the members of Jamahiriyan society hold sacred the life of the individual and protect it. They prohibit his alienation. Imprisonment may be used only against an individual whose freedom threatens or undermines that of others" (Libyan Arab Jamahiriya, third periodic report to the Committee against Torture, CAT/C/44/ADD.3, 28 January 1999, para. 79; Libyan Arab Jamahiriya fourth periodic report to the Human Rights Committee, CCPR/C/LBY/4, 10 May 2007, para. 17).

Finally, article 33 of the Code of criminal procedure stipulates that: "every prisoner has the right to submit a written or oral complaint, at any time, to the prison warden and to request him to transmit it to the Department of the Public Prosecutions or the competent magistrate. The warden is legally bound to accept and promptly transmit such complaints after entering them in the register maintained for the purpose. Anyone who comes to know that a person is imprisoned unlawfully or in a place other than a legally designed prison must notify a member of the Department of Public Prosecutions or the competent magistrate, who, having been thus notified, must proceed forthwith to the place in which the person is being held, conduct an investigation, release the illegally confined person and draw up a report concerning the matter" (Libyan Arab Jamahiriya, third periodic report to the Committee against Torture, CAT/C/44/ADD.3, 28 January 1999, para. 69.)

⁹ See footnote 24, OPCD Observations on Libya's Submissions Regarding the Arrest of Saif Al-Islam', 2 February 2012, ICC-01/11-01/11-51-Conf.

¹⁰ Human Rights Council, Nineteenth session, Agenda item 4, Human rights situation that require the Council's attention, Advance Unedited Version, 2 March 2012, A/HRC/19/68, available at: <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session19/Pages/ListReports.aspx>.

5. Relief Requested

46. In light of the above considerations, the OPCD respectfully requests the Pre-Trial Chamber to issue an immediate determination concerning Mr. Gaddafi's legal status, and the Libyan authorities' request to postpone his transfer to the ICC.
47. Notwithstanding the fact that the current mission was not successful, the OPCD also maintains that it is necessary to continue to attempt to meet with Mr. Gaddafi in order to apprise him of his rights before the ICC and to ensure that his right to legal representation is fulfilled, pending the appointment of counsel of his choice.



Xavier-Jean Keïta, Principal Counsel of the OPCD

Dated this, 02nd Day of March 2012

At Tripoli, Libya