

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 30 March 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 Version of
Renewed Request for Privileged Visit**

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:

The Office of the Prosecutor

Counsel for the Defence

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**

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia, Registrar

Deputy Registrar

Mr. Didier Daniel Preira, Deputy
Registrar

Victims and Witnesses Unit

Counsel Support Section

Detention Section

Victims Participation and Reparations Section

Other

Request for privileged visit

1. The Office of Public Counsel for the Defence (OPCD) hereby renews its request for the Honourable Pre-Trial Chamber to order the Registry to make arrangements with the Libyan authorities for the OPCD to have an additional privileged visit with Mr. Gaddafi.¹ In addition to the reasons, which were set out in the previous request,² the OPCD would like to meet with Mr. Gaddafi for the purpose of seeking his more concrete views regarding the existence of a future admissibility challenge by the Libyan authorities.
2. During the previous visit, Mr. Gaddafi had been assured by Dr. Gehani that the Libyan authorities would not pursue him for any serious crimes.³ Mr. Gaddafi was also distracted by security and health issues,⁴ and in the absence of concrete developments before the ICC, it was not feasible during the limited time frame to provide concrete advice concerning every possible scenario that could arise in the future. The OPCD was therefore not in a position to effectively advise Mr. Gaddafi concerning the concrete ramifications of the initiation of domestic proceedings for the same conduct vis-à-vis his right to silence and his privilege against self-incrimination.
3. Whilst Mr. Gaddafi indicated that he would prefer to be detained under the custody of the ICC as opposed to being detained under the authority of the current regime in Libya,⁵ it is possible that he may have further preferences concerning the admissibility of the case. Although the defendant has an independent right to challenge admissibility, any decision of the Chamber as to whether Libya is either willing or able to investigate and prosecute Mr. Gaddafi will introduce a significant element of predetermination into any future admissibility challenge filed by the defendant.
4. In this regard, the present situation can be clearly distinguished from the Kony case. In that case, the Chamber merely confirmed that there was no basis for varying its prior decision on admissibility, and that the ICC had the exclusive competence to decide upon issues of admissibility. As found by the Appeals Chamber, the decision did not

¹ This request has been filed on a confidential *ex parte* (OPCD, Registry only) basis due to the fact that the OPCD cites from confidential *ex parte* filings, which have not yet been reclassified. If these filings are reclassified, then it could be possible to file a public version of the present filing. [Redacted].

² ICC-01/11-01/11-79-Conf-Exp.

³ ICC-01/11-01/11-70-Conf-Exp at paras 39 and 49.

⁴ ICC-01/11-01/11-79-Conf-Exp at para. 18.

⁵ ICC-01/11-01/11-70-Conf-Exp at paras. 23 and 24.

result in any additional factual or legal predeterminations, which could prejudice a future defence challenge.⁶

5. In contrast, in order to resolve the challenge of the Libyan authorities, the Chamber would need to assess the extent to which Libya is willing and able to genuinely investigate and prosecute the case. Unlike the defendants in the Kony et al. case, who are at large, Mr. Gaddafi is detained, which in itself, gives rise to a right to legal representation as a protection against arbitrary detention.⁷ Although the ICC arrest warrant has been served on him by the ICC Representative of the Registrar, he has been prevented from surrendering to the Court through decisions beyond his control.
6. Rule 117(2) further permits an arrest person to request the Pre-Trial Chamber to appoint counsel to assist with proceedings before the ICC. Mr. Gaddafi has indicated to the Chamber *via* the OPCD, that he does wish to have legal representation before the ICC.
7. Legal representation cannot be effective unless counsel have the ability to seek instructions and relevant information from the client, and to provide the client with advice. In light of the potential implications of a decision as to whether he could be tried in Libya for his personal security, it is imperative that the Chamber has at its disposal all relevant information concerning his views and concerns. Any information concerning whether he has been questioned, and afforded counsel, and how he has been treated since the Libyan authorities commenced their investigations for crimes falling under Article 7 of the Rome Statute is also directly relevant to the Chamber's determination on admissibility.
8. [Redacted].⁸ [Redacted].
9. [Redacted].⁹ [Redacted].

Relief Sought

10. The OPCD respectfully reiterates its request for the Pre-Trial Chamber to order the Registry to make arrangements with the Libyan authorities for the OPCD to have an additional privileged visit with Mr. Gaddafi so that the OPCD can seek instructions

⁶ Prosecutor v. Kony et al., Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19 (1) of the Statute" of 10 March 2009, 16 September 2009, ICC-02/04-01/05-408, at para. 86.

⁷ ICC-01/11-01/11-51-Conf at para. 28.

⁸ [Redacted].

⁹ [Redacted].

from Mr. Gaddafi regarding the putative admissibility challenge, and provide him timely advice concerning his right to silence and his privilege against self-incrimination, in the context of national investigations which directly overlap with the ICC proceedings.



Xavier-Jean Keïta, Principal Counsel of the OPCD

Dated this, 30th Day of March 2012

At The Hague, The Netherlands