

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 19 March 2012

PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernandez 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 Urgent Request for Reclassification

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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Other

1. Introduction

1. The right to a fair trial includes the right to be tried publicly. The public character of proceedings “protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of article 6(1), namely a fair trial.”¹ Trial Chamber II has also emphasised in the Katanga and Ngudjolo case that “justice cannot be administered in close session”.²
2. The right to a public trial may be curtailed in order to meet security exigencies or to protect victims and witnesses, but only insofar as the restriction comports with the requirements of necessity and proportionality.
3. On 6 December 2011, the Honourable Pre-Trial Chamber reclassified the letter of the National Transitional Council (NTC) seeking to postpone the proceedings as public, and requested observations from the Libyan authorities concerning the status of Mr. Saif Al-Islam Gaddafi, and the execution of the arrest warrant against him. Since that date, a large swathe of litigation has been conducted behind closed doors.
4. The Pre-Trial Chamber’s approach to the confidentiality of certain decisions and filings has been entirely appropriate, and consistent with the sensitive nature of some of the procedural developments. Nonetheless, in several instances, the justification for the confidential classification has expired. The public interest in ascertaining whether the NTC can lawfully maintain their detention of Mr. Gaddafi (in conditions which infringe his basic rights), rather than transferring him to the ICC, must therefore take precedence.
5. Moreover, as evidenced by their reaction to the arrest of Mr. Abdullah Al-Senussi, the Libyan authorities continue to assert that they have primacy vis-à-vis the ICC, notwithstanding the fact that they informed the ICC in their 23 January 2012 filing that they do not intend to challenge admissibility at this point in time. It is therefore imperative that the Chamber’s resolution of their request to postpone the surrender Mr. Gaddafi is rendered public, so that all national extradition proceedings concerning

¹ ECHR, *Werner v. Austria*, Judgement of November 24, 1997, para. 45.

² Oral decision, 8 October 2010 Transcript p. 63 [ICC-01/04-01/07-T-199-Red-ENG WT 08-10-2010]

Mr. Gaddafi and Mr. Al-Senussi can proceed on the basis of an accurate factual and legal record.

2. Procedural History

6. On 25 November 2011, the Prosecution informed the Pre-Trial Chamber in a public filing that it had met with the NTC to discuss the status of the execution of the arrest warrant against Mr. Saif Al-Islam Gaddafi, and that the NTC had indicated that they wished to initiate domestic proceedings against Mr. Gaddafi, and to that end, had discussed the possibility of invoking Article 94 or initiating admissibility proceedings.³ The Prosecution also referred to a letter addressed from the NTC to the Pre-Trial Chamber, in which the NTC informed the Chamber that they intended to postpone the execution of the arrest warrant against Mr. Gaddafi pending the Chamber's determination as to whether Libya could assert its primacy in the matter.⁴ Although the Prosecution delineated the main points of this letter in the public filing, the letter was attached as a confidential *ex parte* annex.
7. In light of the potential impact of such issues on the rights of the defendant and pending the appointment of legal representation for Mr. Gaddafi, the Office of Public Counsel for the Defence (OPCD) requested the Chamber to authorise the OPCD to present observations concerning the general interests of the defence in connection with any proceedings concerning admissibility or the status of Mr. Saif Al-Islam Gaddafi.⁵
8. The Pre-Trial Chamber subsequently issued both a confidential and a public redacted version of its 'Decision Requesting Libya to file Observations Regarding the Arrest of Saif Al-Islam Gaddafi',⁶ both of which note that the Prosecution had discussed the possibility of postponing the execution of the arrest warrant, pursuant to Article 94, and that a redacted individual had informed the Registry, *inter alia*, that Mr. Gaddafi was being held incommunicado. Both versions of the decision also contain the operative request from the Chamber: namely, for the Libyan authorities to transmit information on the following issues by 10 January 2012:

³ Prosecution's Submissions on the Prosecutor's recent trip to Libya, ICC-01/11-01/11-31

⁴ At para. 13.

⁵ 'OPCD Request for Authorisation to Present Observations in Proceedings Concerning Mr. Saif Gaddafi', ICC-01/11-01/11-33

⁶ Public Redacted Version of Decision Requesting Libya to file Observations Regarding the Arrest of Saif Al-Islam Gaddafi, 6 December 2011, ICC-01/11-01/11-39-Red; Decision Requesting Libya to file Observations Regarding the Arrest of Saif Al-Islam Gaddafi, 6 December 2011, ICC-01/11-01/11-39-Conf-Exp.

- (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 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.⁷

9. The Chamber 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”,⁸ and further ordered the Registry to reclassify the letter of the Libyan authorities as public.
10. On 9 January 2012, the NTC transmitted a request for an extension of the time limit, citing ‘security reasons’ in the area where the person was detained as justification for its inability to comply with the deadline. The request was filed on a confidential *ex parte* basis, notwithstanding the fact that main thrust of its content (i.e. the fact that more time was required due to security concerns) had been referred to by NTC officials in public statements, and in the public version of the Registry cover filing.⁹
11. In its response to the request for an extension of time, the OPCD submitted that the request lacked any valid justification, and further requested the Chamber to take immediate measures to ensure that Mr. Gaddafi’s rights under the Rome Statute were respected.¹⁰ The OPCD further requested the Chamber to reclassify both the NTC request and the OPCD response as public due to the fact that there was no confidential information contained in either.

⁷ At para. 11.

⁸ At p. 6.

⁹ ICC-01/11-01/11-41-Red.

¹⁰ 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

12. Due to a technical error in email transmission, the OPCD response was filed after the Pre-Trial Chamber issued its decision, which granted the request for an extension.¹¹ Although the decision granting the extension of time was public, the Chamber did not reclassify the NTC request.
13. On 23 January 2012, the Registry transmitted the NTC observations to the Chamber and parties on a confidential basis.¹² The NTC reiterated the position set out in its earlier letter concerning that fact that it was seeking to postpone the execution of the arrest warrant pursuant to Article 94. Apart from the name of the doctor treating Mr. Gaddafi and a reference to an alleged visit from [Redacted], the observations contained information which had already been revealed by the NTC in various press statements and media interviews.
14. The Prosecution filed their response of 2 February 2012 confidentially due to the fact that it was responding to a confidential filing, although it did not contain any information, which was itself confidential.¹³
15. On 3 February 2012, the Pre-Trial Chamber issued a confidential *ex parte* (OPCD, Prosecution and Registry only) decision, in which the Chamber ordered the Registry to make arrangements for representatives of the Registry and the OPCD to visit Mr. Gaddafi, and further requested the parties and the Registry to keep all details of the visit strictly confidential, until the Chamber otherwise ordered.¹⁴
16. On 2 March 2012, the OPCD filed an urgent report concerning the implementation of the visit.¹⁵ The report was filed confidentially due to the fact that the presence of the OPCD in Libya was confidential.
17. The subsequent OPCD addendum to the report contained information particular to the detention details of Mr. Gaddafi, and, consistent with Regulation 92 of the Regulations of the Court, was filed on a confidential *ex parte* (OPCD Registry only) basis in order to respect Mr. Gaddafi's right to privacy and dignity *inter alia*.¹⁶ Nonetheless, if the fact that the OPCD visited Mr. Gaddafi is made public, then sections of the addendum, which are not directly related to the meeting with Mr. Gaddafi himself, could be filed publicly.

¹¹ ICC-01/11-01/11-42.

¹² ICC-01/11-01/11-44-Conf-Anx1.

¹³ ICC-01/11-01/11-50-Conf-Exp.

¹⁴ Decision on the Registry-OPCD Visit to Libya, ICC-01/11-01/11-52-Conf-Exp.

¹⁵ 'Urgent Report Concerning the Visit to Libya', ICC-01/11-01/11-69-Conf-Exp.

¹⁶ 'Addendum to the Urgent Report Concerning the Visit to Libya', ICC-01/11-01/11-69-Conf-Exp.

18. On 7 March 2012, the Pre-Trial Chamber issued its ‘Decision on Libya’s Submissions Regarding the Arrest of Saif Al-Islam Gaddafi’, on a confidential basis.¹⁷ Apart from the Chamber’s reference to the fact that the Registry and the OPCD visited Mr. Gaddafi on 3 March 2012, the decision is comprised of a purely legal analysis as to whether Article 94 can be invoked to postpone the surrender of Mr. Gaddafi to the ICC.

3. Submissions

19. Regulation 23*bis* of the Regulations of the Court provides that “[w]here the basis for the classification no longer exists, whosoever instigated the classification, be it the Registrar or a participant, shall apply to the Chamber to reclassify the document. A Chamber may also re-classify a document upon request by any other participant or on its own motion”. Trial Chamber II has also held that in order to promote the publicity of the proceedings, best practices require that the Chamber undertakes an *a posteriori* review of confidential decisions, in order to identify whether the confidentiality of the decision can be lifted, or if a public redacted version can be issued.¹⁸
20. It is self-evident from the above procedural history that there has been a significant amount of judicial activity, which has not been exposed to the scrutiny of the general public. Whilst the right to publicity is ultimately subject to the countervailing requirement that the disclosure of sensitive information must not endanger the security of Mr. Gaddafi and court personnel, or impact on the efficacy of proceedings, it is questionable as to whether the continued confidential classification of filings concerning mainly legal and procedures issues, is either necessary or proportionate.
21. For example, several filings, such as the NTC observations of 9 January 2012 and 23 January 2012 respectively, lacked a clear basis for being filed on a confidential basis. Whilst the latter observations contained some sensitive information, such as the name of Mr. Gaddafi’s doctor, such details could have been redacted from the public version.
22. It was both necessary and proportionate to maintain the confidentiality of all filings concerning the visit of the Registry and the OPCD to Libya prior to the actual visit.

¹⁷ Decision on Libya’s Submissions Regarding the Arrest of Saif Al-Islam Gaddafi, ICC-01/11-01/11-72-Conf.

¹⁸ Prosecutor v. Katanga and Ngudjolo, Oral decision of 20 September 2010, T. 9-18 [ICC-01/04-01/07-T-189-ENG ET WT 20-09-2010]; See also Prosecutor v. Bemba, “Decision on Directions for the Conduct of the Proceedings”, 19 November 2010, ICC-01/05-01/08-1023, at paras. 20-25.

Nonetheless, since the Chamber had already presaged in its public decision of 6 December 2011 that representatives of the Registry would meet with Mr. Gaddafi in order to seek his views on the assignment of counsel, it is arguable that it is no longer necessary to maintain the confidentiality of all related filings after the visit has occurred.

23. As concerns the Chamber's ultimate decision as to whether Libya can postpone the surrender of Mr. Gaddafi, since the NTC's invocation of Article 94 is already a matter of public record, there does not appear to be any reason as to why this analysis, and the Chamber's ultimate adjudication of the issue, cannot be revealed publicly.
24. The particularities of the transfer should of course remain confidential. However, given that the Chamber issued the initial arrest warrants on a public basis, and subsequently reclassified the request of the Libyan authorities to postpone the arrest warrant pursuant to Article 94 as public, there is no logical basis for maintaining the confidentiality of the Chamber's adjudication of request.
25. The continued confidentiality of the outcome of the decision may also be detrimental to its effective execution. It is apparent from a very recent article, which postdates the Chamber's decision, that the Libyan authorities are still publicly asserting their intention for Mr. Gaddafi to be tried in Libya, notwithstanding the fact that they are obliged by the terms of the ICC arrest warrant to surrender him to the ICC.¹⁹
26. Given such an indication of the NTC's possible intransigence towards their obligation to surrender Mr. Gaddafi to the ICC, it is apparent that the successful execution of the arrest warrant may depend on the exertion of outside pressure from States and NGOs. This in turn, would depend on the public disclosure of the fact that Pre-Trial Chamber has ruled that the Libyan authorities have no legal basis for not surrendering Mr. Gaddafi to the custody of the ICC.
27. As noted above, the NTC has sought to apply the same approach to Mr. Abdullah Al-Senussi as it applied to Mr. Gaddafi; namely, they are asserting their legal right to detain and prosecute Mr. Senussi in connection with undisclosed allegations and in the absence of any domestic arrest warrant. The lack of any publicly available information concerning the status of Libya's request to defer the execution of the arrest warrant as concerns Mr. Gaddafi could create the impression for the authorities of Mauritania that

¹⁹ C. Stephen, 'The secrets of Saif Gaddafi's jail: chef, satellite TV and a basketball court for just one', *The Guardian* 18 March 2012, <http://www.guardian.co.uk/world/2012/mar/18/said-gaddafi-libya-international-criminal-court>.

Libya has the right to assert its primacy vis-à-vis the ICC, notwithstanding the clear terms of Security Council Resolution 1970, and the absence of any admissibility challenge.

4. Relief Requested

28. For the reasons set out above, the OPCD respectfully requests the Honourable Pre-Trial Chamber to:

- i) reclassify, on an urgent basis, the 'Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi' as public (or issue a public redacted version);
- ii) conduct an *a posteriori* review of related procedural decisions to determine which decisions can either be reclassified or issued as a public redacted version; and
- iii) subject to Article 68(1) of the Statute and Regulation 92 of the Regulations of the Court, order the parties and the Registry to review the classification of their filings (including those of the NTC) to determine whether public or public redacted versions can be filed.



Xavier-Jean Keïta, Principal Counsel of the OPCD

Dated this, 19th Day of March 2012

At The Hague, The Netherlands