

**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 Version of Urgent Request for Assistance in the Implementation
of a 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

1. Introduction

1. Mr. Saif Al-Islam Gaddafi has been detained for 121 days. During the entire period of this detention, he has only been able to meet a lawyer for approximately two hours. In light of Mr. Gaddafi's unfamiliarity with his lawyer, his preoccupation with his personal security, and the range of complex issues which needed to be canvassed, it is clear that this two hour visit did not, in itself, satisfy his right to effective representation.
2. It has also been 16 days since the representatives of the Office of Public Counsel for the Defence (OPCD) and the Registry visited Mr. Gaddafi. As set out in the OPCD report to the Chamber, the NTC authorities confirmed that it would not be possible for Mr. Gaddafi to receive visits from family and friends whilst he is being detained in Zintan. It is therefore reasonable to conclude that Mr. Gaddafi has not been able to see or speak to anyone apart from his guards, or prosecuting authorities for the last 16 days.
3. Although the Pre-Trial Chamber has ruled that Libya must comply with its obligation to surrender Mr. Gaddafi to the ICC, the Libyan authorities are not obliged to inform the Chamber as to the arrangements for the transfer until 14 days after the receipt of the Arabic translation of the decision. Since the Arabic translation has not yet been distributed, it would appear that Mr. Gaddafi will remain in incommunicado detention for some time to come.
4. Accordingly, pursuant to Article 57(3)(b) of the Statute, the OPCD respectfully requests the Chamber to order the Libyan authorities and the Registry to make such arrangements as are necessary to permit the OPCD to conduct an additional privileged visit with Mr. Gaddafi.

2. Procedural History

5. On 25 November 2011, the Prosecution informed the Pre-Trial Chamber in a public filing that it had met with National Transitional Council (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.¹

6. 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 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.²
7. The Pre-Trial Chamber subsequently issued 'Decision Requesting Libya to file Observations Regarding the Arrest of Saif Al-Islam Gaddafi',³ in which the Chamber requested the Libyan authorities to transmit information on the following issues:
 - (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.⁴
8. In the same decision, 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".⁵
9. On 23 January 2012, the NTC filed its observations, in which it informed the Chamber *inter alia*, that Mr. Gaddafi had refused to be assisted by any local or international lawyer, and that he had declared that he would not cooperate with any visitor from the

¹ Prosecution's Submissions on the Prosecutor's recent trip to Libya, ICC-01/11-01/11-31

² 'OPCD Request for Authorisation to Present Observations in Proceedings Concerning Mr. Saif Gaddafi', ICC-01/11-01/11-33.

³ 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.

⁴ At para. 11.

⁵ At p. 6.

ICC.⁶ The NTC nonetheless indicated that it was willing to facilitate a visit between Mr. Gaddafi and representatives of the Registry.

10. On 2 February 2012, the OPCD filed its response, in which the OPCD emphasised the importance of the right to legal representation as a bulwark against arbitrary arrest and detention,⁷ and further informed the Chamber that although the OPCD had informed the relevant NTC officials that it had been appointed to represent Mr. Gaddafi in connection with the proceedings before the ICC, the OPCD had been completely stymied in its efforts to communicate with or visit Mr. Gaddafi.⁸ The OPCD therefore requested the intervention of the Chamber in order to facilitate a privileged visit with Mr. Gaddafi.⁹
11. On 3 February 2012, the Pre-Trial Chamber issued its ‘Decision on the Registry-OPCD Visit to Libya’, in which the Chamber found that “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”.¹⁰ The Chamber therefore ordered the “Registry to make arrangements with the Libyan authorities for a visit, as detailed in the present decision, between Court personnel and Saif Al-Islam Gaddafi”.¹¹
12. The Registry and the OPCD conducted its visit to Libya from 29 February until 4 March 2012. During the course of this visit, the OPCD met with Prosecuting officials in order to determine the modalities for conducting future privileged communications with Mr. Gaddafi. As set out in the OPCD report, the OPCD was informed that all communications with Mr. Gaddafi would first be vetted by the Prosecutor-General.¹² In terms of the modalities for arranging visits, the ICC coordinator Dr. Gehani promised the OPCD that he would provide them with the details of the relevant contact persons. Despite repeated requests for this information, Dr. Gehani never provided it to the OPCD.¹³

⁶ ICC-01/11-01/11-44-Conf-Anx1.

⁷ At paras. 26-29.

⁸ At para. 17. See also confidential ex parte annex.

⁹ OPCD Observations on Libya's Submissions Regarding the Arrest of Saif Al-Islam, ICC-01/11-01/11-51-Conf

¹⁰ ICC-01/11-01/11-52-Conf-Exp, 3 February 2012 at p. 4.

¹¹ At p. 4.

¹² Urgent Report Concerning the Visit to Libya, ICC-01/11-01/11-69-Conf-Exp, 2 March 2012, at paras. 17-20.

¹³ ICC-01/11-01/11-69-Conf-Exp at para. 20. See also Addendum to the Urgent Report Concerning the Visit to Libya, ICC-01/11-01/11-70-Conf-Exp, 5 March 2012, at para. 48.

13. On 3 March 2012, the OPCD was able to meet with Mr. Gaddafi on a privileged basis. During this visit, Mr. Gaddafi clearly indicated that he had never objected to receiving visitors from the ICC, and that he wished to be represented in the proceedings before the ICC. In terms of his choice of counsel, due to his inability to make any external communications, Mr. Gaddafi requested the OPCD to assist him in this matter.¹⁴ [Redacted].¹⁵ [Redacted].¹⁶
14. Mr. Gaddafi also explicitly indicated that he consented to the OPCD representing him before the ICC, [Redacted].¹⁷
15. On 9 March 2012, the Pre-Trial Chamber issued its ‘Decision Regarding Medical Care for Saif Al-Islam Gaddafi’, in which the Chamber noted that both the OPCD and the Registry had indicated that there was a need for Mr. Gaddafi to receive medical and dental care.¹⁸ The Chamber therefore ordered the ‘Registry to immediately arrange with the Libyan authorities for one or more medical professionals to meet Saif Al-Islam Gaddafi in order to address the health concerns’.¹⁹

3. Submissions

16. The ability to communicate with, and receive instructions from Mr. Gaddafi on an ongoing basis are intrinsic elements of the right to effective legal representation, which is itself, necessary, to safeguard the effective implementation of Mr. Gaddafi’s rights under article 55 of the Statute.²⁰
17. Although Mr. Gaddafi has not yet appeared before the ICC, in light of the fact that Mr. Gaddafi has been detained for over four months, and has indicated his express wish to participate in the proceedings through a legal representative, the right to have regular meetings with counsel is also essential to facilitate Mr. Gaddafi’s right to be tried without undue delay.

¹⁴ Addendum to the Urgent Report Concerning the Visit to Libya, ICC-01/11-01/11-70-Conf-Exp, 5 March 2012 at paras. 40-41.

¹⁵ ICC-01/11-01/11-70-Conf-Exp-Anx1.

¹⁶ Information Related to the Legal Representation of Mr. Saif Al-Islam Gaddafi, ICC-01/11-01/11-73-Conf-Exp, 7 March 2012.

¹⁷ ICC-01/11-01/11-70-Conf-Exp-Anx1.

¹⁸ Decision Regarding Medical Care for Saif Al-Islam Gaddafi, ICC-01/11-01/11-75-Conf-Exp, at paras. 6 and 7.

¹⁹ At p. 5.

²⁰ OPCD Observations on Libya’s Submissions Regarding the Arrest of Saif Al-Islam, ICC-01/11-01/11-51-Conf, at paras. 26-29.

18. In this connection, although Mr. Gaddafi was primarily concerned with his security during the visit of 3 March 2012, he instructed the OPCD to undertake certain actions and inquiries concerning his case, and furthermore, explicitly requested the OPCD to visit him again on a privileged basis in order to update him on these matters, and provide further advice.²¹ [Redacted].
19. Although the OPCD has a legal entitlement to meet with, and communicate freely with Mr. Gaddafi, it has been unable to enforce the mechanical implementation of this right in the absence of an official order from the Chamber. In this regard, in terms of the OPCD's previous visit to Mr. Gaddafi, the fact that the OPCD was conducting the visit under the imprimatur of an explicit order from the Chamber was vital to its success, in particular, the ability of the OPCD to conduct the meeting in a privileged environment.
20. At the same time, there are significant logistical burdens in organising such a visit. These logistical burdens would be alleviated if the visit of the OPCD were to coincide with the other official visits from the Court. In this connection, the OPCD has recently communicated with the Registry in order to ensure that they have any relevant medical information, which was not contained in the report to the Chamber. The OPCD understands from these communications that the Registry is considering arranging for an ICC health professional to oversee the treatment to ensure that the Chamber's decision is implemented under appropriate conditions. The combination of a visit from the OPCD and a medical representative from the ICC would simplify the administrative arrangements and eliminate the need to utilise interpreters on different missions. At the same time, in light of the security concerns conveyed by Mr. Gaddafi to the OPCD,²² the OPCD anticipates that Mr. Gaddafi would wish to speak to his lawyer before undergoing any medical inspection or treatment implemented by the Libyan authorities, in order to assure himself of the legal basis and *bona fides* of such treatment.

4. Relief Requested

²¹ Addendum to the Urgent Report Concerning the Visit to Libya, ICC-01/11-01/11-70-Conf-Exp, 5 March 2012 at paras. 44 and 47. See also ICC-01/11-01/11-70-Conf-Exp-Anx2.

²² ICC-01/11-01/11-70-Conf-Exp, at paras. 23-32.

21. Pursuant to Article 57(3)(b) of the Statute, the OPCD respectfully requests the Honourable Pre-Trial Chamber to order the Registry to make immediate arrangements with the Libyan authorities for the OPCD to meet with Mr. Gaddafi, on a privileged basis, prior to Mr. Gaddafi's meeting with health professionals.



Xavier-Jean Keita, Principal Counsel of the OPCD

Dated this, 19th Day of March 2012

At The Hague, The Netherlands