

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 3 February 2012

PRE-TRIAL CHAMBER I

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

SITUATION IN THE LIBYAN ARAB JAMAHIRIYA

**IN THE CASE OF
*THE PROSECUTOR v. SAIF AL-ISLAM GADDAFI and ABDULLAH AL-
SENUSSI***

Public Document

With Annex A, Confidential Ex Parte Prosecution and OPCD only

**Public Redacted Version of "OPCD Observations on Libya's Submissions
Regarding the Arrest of Saif Al-Islam"
(ICC-01/11-01/11-51-Conf, 2 February 2012)**

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. Mr. Saif Al-Islam Gaddafi has been held in detention since 19 November 2011, a period of 76 days.

2. During this time, it would appear that
 - Mr. Gaddafi has not been visited by a lawyer and there is no indication that he has waived this right in writing, on an informed basis;
 - the Libyan authorities have refused to facilitate communications between Mr. Gaddafi and the Office of Public Counsel for the Defence;
 - the Libyan authorities have refused to execute the ICC arrest warrant, and there is no indication that Mr. Gaddafi has been arrested pursuant to a lawful domestic arrest warrant;
 - Mr. Gaddafi has not been brought before an appropriate judicial authority to determine the legality of his detention;
 - the location of Mr. Gaddafi's detention has not been disclosed to his relatives, and he has not been provided a means to communicate with family members who are not present in Libya, for example, *via* telephone; and
 - Mr. Gaddafi has been detained in isolation.

3. Mr. Gaddafi has therefore been deprived of the protections of article 55 of the Rome Statute, which apply to any person who is being investigated for conduct falling under the Rome Statute. The protection of the rights set out in article 55 are not contingent on the existence or enforcement of an ICC arrest warrant by domestic authorities.

4. In any case, contrary to the assertions of the Libyan authorities, article 94 of the Rome Statute does not provide a legal basis for suspending the execution of the ICC arrest warrant.

5. The Libyan authorities have not formally challenged the admissibility of the case, and as such, the *status quo ante* remains that the ICC has jurisdiction over the case. The

initial inability of the Libyan authorities to comply with the Pre-Trial Chamber's request for information concerning the legal status of Mr. Gaddafi due to 'security reasons', and the paucity of information concerning the current legal basis for Mr. Gaddafi's detention also speaks to a general lack of control and effectiveness as concerns the detention and domestic proceedings against Mr. Gaddafi. When viewed against the lack of due process afforded to Mr. Gaddafi, and the general backdrop of credible reports concerning allegations of torture and mistreatment of detainees, there is no basis for asserting that the ICC should defer the case to Libya.

6. The OPCD therefore respectfully requests the Pre-Trial Chamber to order the Libyan authorities to take measures to immediately implement Mr. Gaddafi's rights under the Rome Statute, within a strict time limit. Failure to do so should be reported to the Security Council.
7. Any decisions by the Pre-Trial Chamber concerning the present proceedings should be without prejudice to the ability of the defendant to exercise his right to challenge jurisdiction and admissibility or other aspects of the case, should he choose to do so.

2. Procedural History

8. On 23 November 2011, the National Transitional Council (NTC) confirmed by letter the arrest of Saif-Al Islam Gaddafi on 19 November 2011.¹ The NTC further informed the Pre-Trial Chamber that the Pre-Trial Chamber's surrender request would be considered and the Pre-Trial Chamber would be informed when a decision was reached.
9. On 6 December 2011, the Honourable Pre-Trial Chamber found that it required more information from the Libyan authorities concerning the status of Mr. Gaddafi, and the issues raised by the letter.² The Pre-Trial Chamber therefore ordered the Libyan authorities, on an urgent basis, to provide the Chamber with information concerning:

¹ ICC-01/11-01/11-34-Anx.

² Prosecutor v. Gaddafi et al, Public Redacted Version of Decision Requesting Libya to file Observations Regarding the Arrest of Saif Al-Islam Gaddafi, ICC-01/11-01/11-39-Red, 6 December 2011 at para. 9.

- (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.³

10. The Pre-Trial Chamber also found that it would be appropriate for the Prosecution and a counsel representing the interests of the Defence to file a response to the observations of the Libyan authorities.⁴ In the absence of any verification that Mr. Gaddafi had appointed a specific counsel to represent him before the ICC, the Pre-Trial Chamber appointed the OPCD to represent the interests of the Defence, pending the appointment of counsel to Mr. Gaddafi.⁵
11. The Pre-Trial Chamber granted the request of the NTC for additional time to respond, and set a new deadline of 23 January 2012.⁶
12. On 23 January 2012, the NTC filed their observations ('NTC Observations').⁷ The NTC informed the Pre-Trial Chamber that: [REDACTED]
13. The OPCD hereby files its observations in accordance with the Chamber's order that the Prosecution and the OPCD must file any response by 2 February 2012.⁸

³ At para. 11.

⁴ At para. 10.

⁵ At para. 10.

⁶ Decision on the request of Libya for extension of time limit to submit observations regarding the arrest of Saif Al-Islam Gaddafi, 10 January 2012, ICC-01/11-01/11-42.

⁷ Confidential annex to the "Report of the Registrar on Libya's observations regarding the arrest of Saif Al-Islam Gaddafi", 23 January 2012, ICC-01/11-01/11-44-Conf-Anx1

⁸ Order Requesting Observations Regarding the "Report of the Registrar on Libya's observations regarding the arrest of Saif Al-Islam Gaddafi", 24 January 2012, ICC-01/11-01/11-45. Pursuant to regulation 23*bis* of the Regulations of the Court, the OPCD has filed Annex A on an ex parte (OTP and OPCD only) basis for the reasons set out in the Annex.

3. The failure of the NTC to execute the arrest warrant does not exempt the Libyan authorities from the duty to respect the defendant's rights under the Statute

14. The NTC observations are notable not for what they have confirmed, but for what they have failed to confirm or provide evidence in relation to.
15. As concerns the legal basis for Mr. Gaddafi's detention, [REDACTED], they do not inform the Court as to whether he is being detained pursuant to a valid arrest warrant issued by Libyan authorities, nor do they provide any information or documentation concerning the legal status of domestic proceedings.⁹ There is no indication that he has been informed of the reasons for his arrest or that he has been brought before a judge to determine the legality of his detention. To the contrary, a report prepared by Human Rights Watch on the basis of a meeting between a Human Rights Watch representative and Mr. Gaddafi, indicated that he had not been brought before a judge.¹⁰ The NTC has not submitted any information which would displace that conclusion.
16. [REDACTED]. There is also no indication as whether he was informed of his right to counsel before the ICC, or that he is aware that the OPCD has been appointed to represent his interests on an interim basis until he is in a position to select his own counsel. A waiver of the right to counsel must be voluntary and unequivocal,¹¹ and the

⁹ According to Libyan law, Article 14 of Law No. 20 of 1991 on the Promotion of Freedom stipulates that: "No one can be deprived of his freedom, searched or questioned unless he has been charged with committing an act that is punishable by law, pursuant to an order issued by a competent court, and in accordance with the conditions and time limits specified by law". According to the same article: "Accused persons must be held in custody at a known location, which shall be disclosed to their relatives, for the shortest period of time required to conduct the investigation and secure evidence". Article 30 further states that "everyone has the right to petition a court in accordance with the law. The court shall provide him with all the necessary safeguards, including legal counsel, and the applicant is entitled to avail himself, at his own expense, of the services of a lawyer of his own choosing". Article 30 of the Libyan Code of Criminal Procedure also provides that all suspects, even those who have been accused of crimes against the Statute, can only be apprehended and detained pursuant to a warrant issued by a competent judicial authority. Detention is subject to strict time lines, which, depending on the nature of the crimes, can only be extended by a judge (Articles 122 and 123, and 175-177). As a general rule, during preventive detention, suspects have the right to be informed of the charges against them on their first appearance before the examining judge (Article 105) and not to be questioned without legal counsel unless the suspect has been caught in *flagrante delicto* or unless there is a fear that evidence will be lost (Article 106).

¹⁰ Human Rights Watch, 'Libya: Ensure Gaddafi Son's Access to Lawyer', 21 December 2011, <http://www.hrw.org/news/2011/12/21/libya-ensure-gaddafi-son-s-access-lawyer>.

¹¹ Prosecutor v. Bagosora, Decision on the Prosecutor's Motion for the Admission of Certain Materials Under Rule 89 (C), Case No. ICTR-98-41-T, 14 October 2004, para. 42 and Prosecutor v. Bagosora et al., Decision on

suspect must be informed of the charges against him.¹² The waiver must also be in writing, or video- or audio-recorded.¹³ These safeguards are of particular importance when the suspect is in a vulnerable position, for example, when kept incommunicado or in isolation.¹⁴

17. The OPCD has made concerted efforts to communicate with Mr. Gaddafi through the NTC in order to seek instructions and to advise him of his rights before the ICC. The Prosecutor-General refused to conduct communications with the OPCD by telephone or to confirm by facsimile whether it would be possible for the OPCD to visit Mr. Gaddafi.¹⁵ Similarly, the Libyan Co-ordinator with the ICC, [REDACTED], informed the OPCD that [REDACTED].¹⁶ It is also apparent that [REDACTED] failed to convey a letter to Mr. Gaddafi explaining the appointment of the OPCD and its mandate, so that Mr. Gaddafi could make an informed decision as to whether he wished to receive a visit from the OPCD.¹⁷

18. As concerns the issue as to whether Mr. Gaddafi has been held incommunicado and kept in isolation, on 19 January 2012, [REDACTED] informed the OPCD that it had not been possible to organise any family visits due to the fact that Mr. Gaddafi's family was not physically present in Libya. The OPCD was further informed that there are no telephone facilities that can be used by Mr. Gaddafi in his current detention facility in order to contact friends and family residing outside of Libya, who may fear reprisals or retaliation if they were to return to Libya. In the absence of information concerning the address of the detention facilities, it would also be impossible for

the Prosecutor's Motion for the Admission of Certain Materials Under Rule 89 (C), Case No. ICTR-98-41-T, 14 October 2004, para. 18.

¹² Prosecutor v. Karemera, Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ndirumpatse, Case No. ICTR-98-44-T, 2 November 2007, para. 30.

¹³ Rule 112(1)(b) of the Rules of Procedure requires that "A waiver of the right to be questioned in the presence of counsel shall be recorded in writing and, if possible, be audio- or video-recorded". See further, Prosecutor v. Kajelijeli, Judgement, Case No. ICTR-98-44A-A, 23 May 2005, paras. 235-236 and Prosecutor v. Kanyabashi et al., Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali Using Ntahobali's Statements to Prosecution Investigators in July 1997, Case No. ICTR-96-15-T, 15 May 2006, paras. 69, 71-72.

¹⁴ Prosecutor v. Kabiligi, Decision on the Prosecutor's Motion for the Admission of Certain Materials under Rule 89(C), Case No. ICTR-98-41-T, 14 October 2004, para. 16.

¹⁵ Telephone conference with [REDACTED], 19 January 2012. Minutes of this telephone call can be provided to the Chamber, upon request.

¹⁶ Telephone conference with [REDACTED], 19 January 2012. Minutes of this telephone call can be provided to the Chamber, upon request.

¹⁷ The OPCD transmitted to [REDACTED] the request, and correspondence addressed to Mr. Gaddafi, on 19 January 2012, but received no response from [REDACTED].

family members to send written communication to Mr. Gaddafi. Mr. Gaddafi therefore has no effective mechanism for communicating with family, friends, and prospective counsel, who do not reside in Libya. Although the Pre-Trial Chamber recently rejected two recent *amicus* requests, the *amicus* requests nonetheless appear to confirm that family members and friends have also not been informed of the location of his detention, or the legal basis for his detention, nor have the Libyan authorities cooperated with them in order to facilitate communications with Mr. Gaddafi.¹⁸

19. As noted by Mr. Abrahams, although Mr. Gaddafi has received some visits from international organizations, these visits have been organised independently of the wishes of Mr. Gaddafi:¹⁹

The big problem,” he said of his conditions of detention, “is the total isolation.” Various government officials and military commanders had come to visit, including the “so-called prime minister,” he said. But he was unable to contact anyone of his own choosing, including by telephone.

20. Mr. Gaddafi’s receipt of visits from officials does not satisfy the right to maintain effective communications with his friends and family, nor do these sporadic visits alleviate the problem of being detained for 76 days in isolation from other detainees.

21. The fact that Mr. Gaddafi is not being detained pursuant to the ICC arrest warrant does not, in itself, exempt the NTC from complying with its obligation under the Rome Statute to respect fundamental rights of Mr. Gaddafi: to hold otherwise would effectively reward the NTC’s non-compliance with the Court, and create a legal black hole as concerns the enforcement of Mr. Gaddafi’s rights.

22. Article 55(1) of the Statute is drafted in broad terms to refer to any person who is the subject of an investigation under the Rome Statute. In contrast to article 55(2), which is only triggered if the person is being questioned by the Prosecutor or national authorities pursuant to a request made under Part 9, article 55(1) contains no such limitation: it applies to both ICC officials and domestic authorities irrespective as to

¹⁸ Application on behalf of Aisha Gaddafi for leave to submit *amicus curiae* observations concerning her brother - Saif al-Islam Gaddafi’ 31 January 2012, ICC-01/11-01/11-47 at para. 7; Application on behalf of Mishana Hosseinioun for Leave to Submit *Amicus Curiae* Observations to the Chamber, ICC-01/11-01/11-46, 30 January 2012.

¹⁹ F. Abrahams, In His First Interview, Saif al-Islam Says He Has Not Been Given Access to a Lawyer, 30 December 2011, <http://www.hrw.org/news/2011/12/30/his-first-interview-saif-al-islam-says-he-has-not-been-given-access-lawyer>

whether the person has been arrested pursuant to an ICC arrest warrant or detained pursuant to a request from the Court.

23. Indeed, to read such a limitation into article 55(1) would be to render its protections inutile. Article 55(1)(d) stipulates that a person “[s]hall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute”. The drafters of the Rome Statute clearly intended this provision to encompass persons who had not been detained pursuant to a lawful ICC arrest warrant, since the absence of a properly executed ICC arrest warrant is the very situation which this article aims to address. This is confirmed by Christopher Hall, who observes that article 55(1) applies to both the situation where a suspect is being questioned by national authorities upon the request of the ICC Prosecutor, and the broader scenario in which suspects are questioned by national authorities in connection with domestic investigations concerning crimes falling under the Rome Statute.²⁰

24. [REDACTED]. The fact that Mr. Gaddafi may have been apprehended in the theatre of war does not exclude the application of article 55 of the Statute. The drafters of the Rome Statute were well aware of the possibility that due to the nature of the crimes falling within the purview of the ICC, it would be possible that suspects might be apprehended in the midst of an armed conflict. They nonetheless declined to incorporate any exceptions or possibilities to derogate from article 55 in the Statute.

25. This is consistent with the fact that the prohibition on arbitrary detention, and the prohibition against cruel and inhumane treatment are considered to be peremptory norms, which cannot be derogated from in times of emergency or during armed conflict.²¹ Indeed, Article 8(2)(c)(iv) of the the Rome Statute explicitly sanctions the failure to try prisoners of war in accordance with the requisite precepts of due process.²²

²⁰ C. Hall, ‘Article 55’, in O. Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court – Observer’s Notes, Article by Article* (Hart Publishers 2nd ed. 2008) at p. 1092.

²¹ General Comment No. 29 States Of Emergency (Article 4), 31 August 2001, at paras. 7 and 11.

²² Although the wording of article 8(2)(c)(iv) refers to the passing of sentences and carrying out of executions, footnote 59 to the Elements of the Crimes requires the ICC to consider whether “the cumulative effect of factors with respect to guarantees deprived the person or persons of a fair trial”. The legality of the arrest and detention of the suspect directly bear on the issue as to whether the “court that rendered judgement did not afford all other

26. The fact that Libya is not a State party to the Rome Statute does not exempt the NTC from respecting Mr. Gaddafi's rights under article 55. Security Council Resolution 1970 (2011) explicitly requires Libya to "cooperate fully with and provide any necessary assistance to the Court."²³ The provisions of article 55 are also reflective of customary international law, and do no more than mirror the provisions of international covenants which Libya has ratified, and incorporated into domestic law.²⁴

27. The protection against arbitrary detention, as enshrined in article 55(1)(d) and its human rights instrument equivalents, extends to *inter alia* a right to be informed of the legal basis and reasons for the arrest, the right to be brought before a judge to verify the legality of the detention, the right to counsel (which is an intrinsic element of the right to challenge the legality of detention), and the right to communicate with family members.²⁵ Human rights case law sets a maximum delay of four days as concerns both the time period within which the detainee must be brought before a judicial

judicial guarantees generally recognized as indispensable under international law" (Paragraph 4. Elements of the Crimes, Article 8(2)(c)(iv)). Article 6(2)(a) to Additional Protocol II stipulates in connection with non-international armed conflicts that "the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence". K. Dörman underscores that in order for the protection under article 8(2)(c)(iv) to be effective, the defendant must be in a position to exercise his rights at every stage of the procedure. He therefore argues that article 8(2)(c)(iv) encompasses an obligation, *inter alia*, to bring the defendant promptly before a judge and to allow the defendant to challenge the legality of his detention. K. Dörman Elements of War Crimes Under the Rome Statute of the International Criminal Court, Sources and Commentary (Cambridge University Press 2003) at p. 419-420.

²³ S/RES/1970 (2011) 26 February 2011.

²⁴ Libya is a party to *inter alia* the International Covenant on Civil and Political Rights (Ratified on 15 June 1970), and the African Charter on Human and Peoples' Rights (Ratified on 26 March 1978.). According to the report submitted by the Libyan government to the Human Rights Committee, every international instrument which is ratified by the People's Congress and published in the Official Gazette becomes binding and enforceable by the country's judiciary, in the same way as domestic legislation, with effect from the date of its publication in the Official Gazette. Consequently, the provisions of the ICCPR and African Charter must be applied by the country's judiciary, and any interested party has the right to invoke them before the Libyan judges at any level of the judiciary hierarchy (Libyan Arab Jamahiriya third periodic report to the Human Rights Committee, CCPR/C/102/ADD.1, 15/10/1997, paras. 31 and 32).

²⁵ Principles 10, 1, 12, 15, 16 and 17 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. Although article 55(1) does not explicitly set out a right to representation, a right to counsel is necessary in order to ensure that the detainee is able to enforce his rights under article 55(1) in a manner which is real and practical, and not illusory. For this reason, the European Human Rights Commission has concluded that article 6 paragraph 3 (c) of the Convention "gives the accused a more general right to assistance and support by a lawyer throughout the whole proceeding" because the Convention guarantees are meant to be "practical and effective". Such assistance necessarily includes "assistance to the accused regarding any complaints which he might wish to make in relation to his detention concerning its justification, length and conditions, and generally to assist the accused who by his detention is removed from his normal environment". *Can v. Austria*, Report of the Commission, 12 July 1984, paras. 54 and 55.

authority to determine the legality of his detention,²⁶ and the time within which the detainee must be able to communicate with counsel and family.²⁷ This can be contrasted to the 76 days during which Mr. Gaddafi has not been brought before a judge, informed of his right to legal representation before the ICC, or provided with an effective mechanism for communicating with his family.

28. The right to counsel, and the duty to notify family members of the location where the person is being detained are also intrinsically related to the protection against torture, and cruel and inhumane treatment set out in article 55(1)(b) of the Statute. There is increasing recognition that extended periods of detention in solitary confinement can constitute a serious violation of the detainee's rights.²⁸ The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has also emphasised that individuals suspected of having committed a crime are at a particularly high risk of being tortured during the very early stages of custody. For this reason, "procedural safeguards were developed in order to counter this risk, and their implementation is the linchpin efforts to eradicate torture into practice".²⁹ One such safeguard is the right to communicate with counsel and family members.³⁰ The Human Rights Committee has also found that holding detainees incommunicado for periods of 40 days and six weeks respectively had deprived them of the possibility of communicating with counsel of their own choosing, and therefore violated their right

²⁶ The Human Rights Committee (HRC) indicated that delays pending production before a judge should not exceed a few days. (*Freemantle v. Jamaica*, 625/1995). The HRC found violations of Article 9(3) in respect of periods of detention of four days (*Grant v. Jamaica*, 597/1994), seven days (*Stephens v. Jamaica*, 373/1989), and eight days (*Stephens v. Jamaica*, 373/1989). Similarly, the ECHR has understood the right to be brought promptly before a judge as not exceeding four days (*O'Hara v. the United Kingdom*, no. 37555/97, ECHR 2001-X, 16 October 2001). The General Recommendations of the United Nations Special Rapporteur on Torture also stipulate that the maximum period of detention without judicial warrant should be forty-eight hours - E/CN.4/2003/68, paragraph 26(g)).

²⁷ N. Rodley, *The Treatment of Prisoners under International law* (Oxford University Press 2009) p. 454.

²⁸ Concluding Observations of the HRC: Denmark. 31/10/2000, CCPR/CO/70/DNK, para. 12. Ramirez Sanchez v. France, European Court of Human Rights (ECtHR), Grand Chamber (GC), App. No. 59450/00, 4 July 2006, para. 121. HRC, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev. 1 at 30 (1994), para. 6. Cited in *Prosecutor v. Munyakazi*, Decision On The Prosecutor's Request For Referral Of Case To The Republic Of Rwanda 28 May 2008, ICTR-97-36-R11bis at footnotes 40 and 41.

²⁹ A/HRC/13/39/Add. 5 (5 February 2010), para 81.

³⁰ A/HRC/13/39/Add. 5 (5 February 2010), para. 82-83

to a fair trial under article 14(3)(b) of the International Covenant on Civil and Political Rights.³¹

29. In this connection, the term ‘incommunicado detention’ generally refers to a “person held with no contact with anyone apart from other detainees and officials in the place where he is detained”;³² the fact that Mr. Gaddafi has received visits from officials from international and local organizations therefore does not obviate the fact that the he has been detained in isolation and on an incommunicado basis for 76 days.

30. As noted above, Security Council Resolution 1970 (2011) explicitly requires Libya to “cooperate fully with and provide any necessary assistance to the Court”. For the reasons which will be elaborated below, Libya is subject to an extant obligation to execute the ICC arrest warrant against Mr. Gaddafi, which would in turn, trigger his right to be brought before a competent judicial authority under article 59, and to receive a copy of the arrest warrant, and relevant provisions of the Statute.³³ In order to ensure that there are no lacunae concerning the enforcement of Mr. Gaddafi’s rights pending the execution of this arrest warrant and his transfer to the ICC, the OPCD further requests the Honourable Pre-Trial Chamber to order the Libyan authorities to immediately comply with the provisions of article 55, in particular to:

- inform Mr. Gaddafi of the legal basis for his arrest and to bring him before a competent judicial authority so that he can challenge the legality of his detention;
- inform Mr. Gaddafi of his absolute privilege against self-incrimination and of his right to legal representation before the ICC, which includes the right to legal aid if he does not have the means to remunerate counsel;
- ensure that any meetings or communications between Mr. Gaddafi and his lawyers are privileged and not subject to any monitoring;

³¹ Case No. 1042/2001, Boimurodov v. Tajikistan, para. 7.3, Case No. 43/1979, Drescher Caldas v. Uruguay, para 13. See also Case No. 176/1984 Penarrieta v. Bolivia, para 16; Case No. 44/1979, Pietrarroia v. Uruguay, para 17.

³² N. Rodley, The Treatment of Prisoners under International law (Oxford University Press 2009) p. 461.

³³ Rule 117(1) of the Rules of Procedure and Evidence.

- subject to the imposition of appropriate security measures to ensure the safety of Mr. Gaddafi, amend his conditions of detention to ensure that he is not kept in isolation; and
- inform his immediate family members of the specific whereabouts of his detention, and implement measures to ensure that Mr. Gaddafi has an effective means to communicate with family members and friends (i.e. through written or telephone communications).

31. [REDACTED]. The OPCD fully endorses the principle that Mr. Gaddafi's rights can only be upheld fully by counsel of his choice, and for this reason, it is imperative that Mr. Gaddafi has the ability to be informed of his rights and to discuss his options concerning legal representation with a neutral representative of the Registry, as soon as possible. Nonetheless, it is equally important to ensure that the current violations of Mr. Gaddafi's rights are not exacerbated, and that he has effective access to legal advice pending the selection and appointment of his counsel of choice.³⁴ The OPCD respectfully requests the Pre-Trial Chamber to order the Libyan authorities to advise Mr. Gaddafi of the appointment of the OPCD and of his right to receive confidential legal counsel from the OPCD, and to facilitate any privileged communications or visits between the OPCD and Mr. Gaddafi, should Mr. Gaddafi choose to avail himself of this option.³⁵

32. The Pre-Trial Chamber has the power under article 87(7) of the Statute to report the non-compliance of the Libyan authorities to the Security Council. Pre-Trial Chamber I has previously exercised this power in connection with the failure of State parties to arrest President Al Bashir whilst present on their respective territories.³⁶ The duty to

³⁴ The ICTR has emphasised in the Barayagwiza and Rwamakuba cases the importance of assigning duty counsel to represent a detained person, pending the appointment of their counsel of choice, in order to limit the cumulative impact of prior arrest and detention related violations. *Prosecutor v. Rwamakuba et al.*, Decision on Appeal against Decision on Appropriate Remedy, Case No. ICTR-98-44C-A, 13 September 2007, 16; *Prosecutor v. Rwamakuba et al.*, Decision on the Defence Motion Concerning the Illegal Arrest and Illegal Detention of the Accused, Case No. ICTR-98-44-T, 12 December 2000, para. 38; *Prosecutor v. Barayagwiza*, Decision, Case No. ICTR-97-19, 3 November 1999, para. 101.

³⁵ This could be achieved by providing to Mr. Gaddafi a letter prepared by the OPCD, which explains its role before the ICC, so that Mr. Gaddafi can make an informed decision as to whether he wishes to communicate with the OPCD or receive a visit on a privileged basis. As detailed above, the OPCD previously transmitted this letter to the Libyan authorities, with a request that it be given to Mr. Gaddafi, but received no response.

³⁶ *Prosecutor v. Al Bashir*, 'Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir', ICC-02/05-01/09-139, 12 December 2011; *Décision rendue*

secure fundamental custodial and fair trial rights is of equal importance to the Court's mandate as the duty to arrest fugitives. It would therefore be appropriate for the Pre-Trial Chamber to invite the Libyan authorities to submit regular reports concerning the implementation of the above rights within a defined time period, with the caveat that non-compliance could trigger the application of article 87(7).

4. Article 94 of the Rome Statute does not provide a legal basis for suspending the execution of the ICC arrest warrant

33. Article 94 permits a State to postpone the immediate execution of a request if it would interfere with an ongoing investigation or prosecution of a case that is different from the case to which the request relates. As observed by Kress and Prost, "article 94 only pertains to requests for cooperation *other than* surrender with article 89 para. 4 being its counterpart as far as requests for surrender are concerned" (emphasis added).³⁷ Professor Schabas further concurs that the drafting history supports the conclusion that article 94 refers to other forms of cooperation under article 93, and not all forms of cooperation under Part 9.³⁸ The NTC can therefore not rely upon article 94 to justify their failure to execute the ICC arrest warrant against Mr. Gaddafi, and to transfer him to the custody of the ICC.

34. Article 94 can also only be invoked in connection with domestic proceedings, which are different from the case to which the request relates. The specific parameters of the ICC case against Mr. Gaddafi will not be crystallized until the Prosecutor files the document containing the charges. It is, nonetheless, apparent from the NTC's letter of 23 November 2011 that the underlying conduct investigated by the NTC overlaps with the temporal and geographic scope of the ICC proceedings.³⁹ The application of article 94 is, moreover, expressly restricted to situations in which the request would interfere with "an *ongoing* investigation or prosecution of a case [...]" (emphasis added). There is no indication or evidence that the current domestic investigation

en application de l'article 87-7 du Statut de Rome concernant le refus de la République du Tchad d'accéder aux demandes de coopération délivrées par la Cour concernant l'arrestation et la remise d'Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-140, 13 December 2011.

³⁷ C. Kress and K. Prost, 'Article 94' in Triffterer (ed.) Commentary on the Rome Statute of the International Criminal Court (Hart Publishers 2008) at p. 1589

³⁸ W. Schabas The International Criminal Court: A Commentary on the Rome Statute (Oxford University Press, 2010) p. 1027.

³⁹ ICC-01/11-01/11-34-Anx.

against Mr. Gaddafi had commenced at the time of his arrest. The findings of the Appeals Chamber that State parties wishing to challenge admissibility must adduce probative evidence concerning the existence of domestic investigations are equally applicable to article 94 requests for deferral.⁴⁰

35. The ICC also retains the discretion whether to agree to an article 94 application, and if so, for which time period. Mr. Gaddafi potentially faces the death penalty in connection with domestic proceedings. Deferring the transfer of Mr. Gaddafi until after the closure of domestic proceedings could thus potentially frustrate the possibility of convening proceedings before the ICC. As recently observed by Judge Kaul, the existence of an ICC arrest warrant and the prospect of such proceedings can create a shroud of “public stigmatisation and other negative consequences”, which Mr. Gaddafi would have to live under for the entire duration of domestic proceedings.⁴¹ The deferral of the execution of the ICC arrest warrant would therefore significantly jeopardise his right to an expeditious resolution of the ICC case, as required by article 67(1)(c) of the Statute.

36. In its letter of 23 November 2011, the NTC justified the non-transfer of Mr. Gaddafi on the basis that the “Libyan judiciary has primary jurisdiction to try Saif al - Islam Gaddafi and that the Libyan State is willing and able to try him in accordance with Libyan law”.⁴² The fact that the NTC has resiled from this admissibility based position and invoked article 94 solely in its stead could suggest that the NTC is seeking to exploit article 94 to circumvent firstly, the requirement under article 19(5) that a State must challenge admissibility at the earliest opportunity, and secondly, the findings of the Appeals Chamber in the Kenya cases that in order to assert primacy, a State must adduce specific and probative evidence pertaining to the existence of concrete steps in the investigative process.⁴³ By delaying the transfer of Mr. Gaddafi

⁴⁰ Prosecutor v. Ruto et al., Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, 30 August 2011, ICC-01/09-01/11-307.

⁴¹ Dissenting Opinion, Judge Kaul, Prosecutor v. Ruto et al., Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-01/11-373, at para. 56.

⁴² ICC-01/11-01/11-34-Anx.

⁴³ See Prosecutor v. Ruto et al., Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, 30 August 2011, ICC-01/09-01/11-307.

to the ICC, the Libyan authorities are thereby hoping to make the inadmissibility of the case a *fait accompli*. It is clear, however, from the clear wording and above-cited drafting history of article 94 that it was never intended to be invoked in such circumstances.

37. The interpretation of article 94 advanced by the NTC would also denude the procedures for adjudicating admissibility under articles 17 and 19 of any force or relevance. If a State could simply decide to suspend the execution of an arrest warrant due to the existence of any domestic proceedings, then there would be no need for them to challenge admissibility under article 19 at the earliest opportunity, or to prove a correlation between the person and conduct being investigated in order to assert primacy. In line with the maxim *generalibus specialia derogant* it must be presumed from the existence of specific provisions in article 17 and 19 concerning the circumstances in which a State can assert primacy, that the States expressly excluded the possibility that article 94 could be invoked as a general grounds for asserting primacy.

5. There is no other legal or factual basis for suspending the execution of the arrest warrant against Mr. Gaddafi and enforcing his rights under the Rome Statute

38. The ICC has the sole competence to determine the admissibility of the case.⁴⁴ [REDACTED].⁴⁵ There is therefore no basis for disturbing the *status quo ante* that the ICC has competence over the case, and that the Libyan authorities are therefore obliged to execute the arrest warrant and transfer Mr. Gaddafi to the ICC, in accordance with the terms of the arrest warrant and Security Council Resolution 1970.

39. Although the Pre-Trial Chamber may make a *proprio motu* determination as to the admissibility of the case, the Appeals Chamber has cautioned that the exercise of this power should be reserved for situations in which there are, for example, “uncontested facts that would render a case clearly inadmissible or an ostensible cause impelling the

⁴⁴ Prosecutor v. Kony et al., Decision on the admissibility of the case under article 19(1) of the Statute, 10 March 2009, ICC-02/04-01/05-377.

⁴⁵ At page 3.

exercise of *proprio motu* review”.⁴⁶ The Chamber should also take into consideration the impact of such a determination on the right of the defendant to challenge admissibility at a future point in time.⁴⁷

40. The NTC has failed to adduce probative evidence concerning the existence of investigations against Mr. Gaddafi, which is the *sine qua non* for an admissibility challenge. The factors delineated in section 3 of this Response, and the OPCD filing of 10 January 2012,⁴⁸ also clearly indicate that the Libyan authorities are either unwilling or unable to conduct proceedings against Mr. Gaddafi in a manner which is consistent with principles of due process recognised by international law, or with an intent to bring the person concerned to justice. As noted in the OPCD observations of 28 November 2011, the ICC Appeals Chamber has definitively ruled that “a fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped.”⁴⁹ Impunity against alleged perpetrators in Libya can only be eliminated by fair, independent, and impartial proceedings. Recent reports from NGOs and United Nations bodies also contain allegations of torture, and wide-spread mistreatment of detainees under the custody of the NTC, which indicates a substantial collapse or unavailability of the national judicial system to supervise the conduct of criminal investigations.⁵⁰ It is therefore evident that this is not a situation in which the Chamber is presented with uncontested facts, which would render the case clearly inadmissible.

41. The OPCD has not also received any instructions from Mr. Gaddafi concerning his position with respect to the admissibility of the case. The issuance of a decision on

⁴⁶ DRC situation, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", ICC-01/04-169, 13 July 2006 at para. 52.

⁴⁷ At para. 52.

⁴⁸ ICC-01/11-01/11-43-Conf-Exp.

⁴⁹ Prosecutor v. Lubanga, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772 at paras. 37, 44 and 45.

⁵⁰ See, e.g., Navi Pillay, "Statement to the Security Council by Navi Pillay, High Commissioner for Human Rights [Libya] 25 January 2012, New York", to be found at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11782&LangID=E>; Al-Jazeera, "Prisoners Being Tortured in Libya, UN Says", 26 January 2012, to be found at: <http://www.aljazeera.com/news/africa/2012/01/2012126601863986.html>; Reuters, "MSF Quits Prisons in Libya City over 'Torture'", 26 January 2012, to be found at: <http://www.reuters.com/article/2012/01/26/us-libya-torture-idUSTRE80P1KN20120126>; and BBC News Africa, "UN Concerns over Libya Militias and Secret Detention", 26 January 2012, to be found at: <http://www.bbc.co.uk/news/world-africa-16735217>.

admissibility at this point in time is unnecessary to dispose of the issues at hand, and could potentially prejudice the ability of Mr. Gaddafi to challenge both the factual and legal bases for the admissibility of the case at a later stage, should he choose to do so. In light of the limited mandate of the OPCD, any submissions presented by the OPCD herein should also be considered without prejudice to the ability of Mr. Gaddafi to contest both the legality of the ICC arrest warrant, and the jurisdiction of the Court, should he choose to do so.

6. Relief Sought

42. The OPCD respectfully requests the Honourable Pre-Trial Chamber to:

- i. order the Libyan authorities to immediately implement Mr. Gaddafi's rights under the Statute, including articles 55 and 59, and rule 117 of the Rules of Procedure and Evidence, as elaborated at paragraph 29;
- ii. order the Libyan authorities to submit reports verifying the implementation of these rights;
- iii. pending the appointment of counsel of Mr. Gaddafi's choice, order the NTC to inform Mr. Gaddafi of the appointment of the OPCD, and to facilitate any privileged visits or communications requested by Mr. Gaddafi;
- iv. find that Article 94 does not constitute a valid basis for deferring the execution of the ICC arrest warrant; and
- v. confirm that any decision on the NTC observations is without prejudice to the ability of the defendant to challenge any aspects of the case through his duly instructed counsel, should he choose to do so.



Xavier-Jean Keïta, Principal Counsel of the OPCD

Dated this, 3rd Day of February 2012

At The Hague, The Netherlands