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

Date: **05 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**

**Second Public Redacted Version of the “Addendum to the Urgent Report  
Concerning the Visit to Libya”  
(ICC-01/11-01/11-70-Conf-Exp)**

**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**

Mr. Luis Moreno-Ocampo, Prosecutor  
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)**

**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**

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**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. On 2 March 2012, the Office of Public Counsel for the Defence (OPCD) filed a report to the Pre-Trial Chamber, which explained that the Libyan authorities had cancelled the visit to Mr. Saif Al-Islam Gaddafi, which was scheduled for the 3 March 2012, and advised the Registry and the OPCD that the visit would have to take place at a later stage during another mission to Libya. At the same time, the OPCD informed the Pre-Trial Chamber that it would file an addendum to this report if any further information came to light prior to its departure from Libya.
2. After the filing of this report, the Libyan authorities performed a dramatic *volte-face* and informed the OPD and the Registry that the visit might occur. The visit to Mr. Gaddafi did in fact occur, albeit under different conditions than initially agreed to by the Libyan authorities.
3. The OPCD therefore files the present addendum in order to inform the Honourable Pre-Trial Chamber of the circumstances leading up to the visit, the non-privileged aspects of the visit itself, and the OPCD's observations concerning the status of Mr. Gaddafi.
4. The OPCD remains available to further elaborate on any of the above non-privileged matters, in a confidential *ex parte* Status Conference.
5. In accordance with regulation 23 *bis*, the OPCD has filed this report on a confidential *ex parte* basis due to the fact that it refers to issues concerning the personal status of Mr. Gaddafi (his private preoccupations, health, religious views *et cetera*), [Redacted].

## 2. Meetings concerning the arrangements for the visit

6. At 5.30pm on 2 March 2012, the ICC interpreter informed the Principal Counsel of the OPCD that the ICC Security had been notified that the Libyan authorities were now trying to make the visit to Mr. Gaddafi happen on Saturday, 3 March 2012. It was, however, just a rumour. At approximately 8pm, a Registry representative called the Principal Counsel to inform him that the visit would occur.
7. Dr. Gehani then confirmed to the Principal Counsel that the visit should occur, but it would only be one car because they now wanted the visit to be low profile, and did not

wish to have a security convoy. There would be a mini-bus with seven places (four for the ICC, two of which would be allocated to the OPCD, and two to the Registry). According to Dr. Gehani, the pre-condition of the Zintan brigade was that Dr. Gehani was required to accompany them, together with one security personnel from Libya.

8. In this configuration, there would be no ICC interpreter or ICC security. Dr. Gehani offered to interpret and asserted that the ICC delegation would not need an interpreter for the client. These were the conditions and the ICC should take it or leave it.
9. At about 10.45pm, the Registrar requested to meet with the OPCD. The Registrar informed the OPCD that they had been notified by the Libyan authorities that the ICC delegation would only be approved if it was composed of females. The Libyan authorities would allow the ICC interpreter and the ICC security officer, but they would only allow female representatives from Registry and OPCD. These were the final conditions, and if the ICC did not agree, the visit would not occur.
10. The OPCD noted that this would impede its working conditions and might impact on the efficacy of the interview, but in light of the fact that the OPCD's overarching objective was to meet with Mr. Gaddafi, the OPCD agreed to these conditions. The OPCD was therefore represented by Ms. Melinda Taylor, during the visit to Mr. Gaddafi.
11. On the morning of departure, the OPCD requested confirmation as to whether it could provide documentation to Mr. Gaddafi. Dr. Gehani informed the OPCD that any documentation would need to be approved by the Prosecuting authorities. The OPCD responded that such a measure would not be compatible with the privileged nature of the visit. Dr. Gehani finally replied that the OPCD could take them, and he would see what was possible when everyone arrived at Zintan.
12. The delegation left Tripoli at 10.15 am and arrived at Zintan at approximately 12.15pm.
13. Mr. Gaddafi is not detained in a detention facility. It is essentially a boarded up house guarded by militia with AK47s. He has been moved between different places.
14. Before the ICC met with Mr. Gaddafi, Dr. Gehani and local authorities spoke to Mr. Gaddafi for approximately 45 minutes.
15. The OPCD and the Registry first met with Mr. Gaddafi to give short presentations concerning their respective role. This meeting occurred in the presence of [Redacted], an authority from the Libyan prosecution, who insisted that the ICC interpreter translate everything into Arabic so that [Redacted] could follow the meetings.

16. In response to the question of the OPCD as to whether the OPCD would be permitted to meet with Mr. Gaddafi without anyone present, [Redacted] responded that it was up to the Prosecutor General, and that the OPCD could liaise with Dr. Gehani. The Registry then commenced its meeting with Mr. Gaddafi in the presence of [Redacted]. The OPCD was not present during this meeting.
17. Dr. Gehani initially confirmed to the OPCD in Zintan that it would be possible to meet with Mr. Gaddafi with no-one present. About 15 minutes after confirming this, Dr. Gehani requested to take a photograph of the representative of the OPCD meeting with Mr. Gaddafi. Dr. Gehani explained that this would help them in case the issue arose in Libyan proceedings as to whether Mr. Gaddafi had met with a lawyer.
18. The OPCD explained that the OPCD did not have the capacity to advise Mr. Gaddafi in relation to the Libyan proceedings; the OPCD was present solely in connection with the proceedings before the ICC. The OPCD's visit was therefore irrelevant to the question as to whether Mr. Gaddafi's rights had been respected in the Libyan proceedings. The photograph would also be incompatible with the confidential and low profile nature of the visit.
19. Dr. Gehani then requested the OPCD to agree to the photograph as a compromise – if the OPCD agreed to it, then he would permit the privileged visit to occur. The OPCD emphasised that it was essential that the visit take place in a privileged environment, but that it was ultimately for Mr. Gaddafi to consent to such a photograph. Dr. Gehani ultimately agreed to the privileged visit occurring under these terms.
20. During the meeting, Mr. Gaddafi indicated that he did not wish for such a photograph to be taken, and Dr. Gehani did not insist further at this point.
21. After the Registry finished its meeting, Dr. Gehani met with Mr. Gaddafi privately for approximately 30 minutes. The OPCD then met with Mr. Gaddafi from 2.35pm until 4.15pm. The meeting was attended by Mr. Gaddafi, Ms. Melinda Taylor (Counsel for the OPCD) and [Redacted] (ICC interpreter).
22. The OPCD hereby submits the following non-privileged aspects of the visit, which are relevant to the rights of Mr. Gaddafi before the ICC.

### **3. Report concerning the visit**

*Observations concerning Mr. Gaddafi's security, health, and detention conditions*

23. [Redacted].
24. [Redacted].
25. [Redacted].
26. [Redacted].
27. During the beginning of his detention, people from Misrata came and physically attacked him. The Commander of the Zintan brigade intervened to protect him.
28. Mr. Gaddafi is the only person being detained; the only people he can speak to are the guards. For the last twenty days, he has not seen any sunlight, he has not had any fresh air, and he has not seen any persons other than the guards. He is kept in a room with no windows and can only leave his room to go to the toilet.
29. There is no doctor or dentist he can see. Mr. Gaddafi has very bad tooth pain, and would very much like dental treatment.
30. Mr. Gaddafi received meals three times daily, but described it as the minimum level. Mr. Gaddafi used the same 'minimum' description as concerns his ability to have showers and clothes.
31. Mr. Gaddafi requested to see an Imam to discuss religious issues. The Imam, who was brought to him, told him that NATO was a gift from God, and the French and the English as well for supporting the Muslims against the Gaddafi regime. In light of this experience, Mr. Gaddafi did not wish to see the Imam again.
32. Mr. Gaddafi has not been informed of any procedure for complaints, and he does not have anyone he could complain to. He was informed by the Attorney General that his case was 'special' so that the normal rules couldn't be applied.

*Mr. Gaddafi's position concerning the International Criminal Court (ICC)*

33. [Redacted]. The details of ICC proceedings therefore appeared irrelevant to him, as his primary concern is his security in Libya. He would, however, prefer to be under the custody of the ICC in The Hague, rather than being detained in the current conditions, or transferred to Tripoli.
34. It is not correct that he informed the Libyan authorities that he did not wish to meet with any officials from the ICC.

*Legal representation*

35. Mr. Gaddafi met with the Attorney General and asked for a lawyer in connection with the Libyan proceedings. He was informed that it would be impossible for a lawyer to visit him in Zintan. Mr. Gaddafi does not think that he has signed anything waiving the right to have a lawyer, but in any case, he had been informed in definite terms at the beginning by the Attorney General that it would be impossible to implement in practice.
36. The persons guarding him have mobile phones but there did not appear to be any fixed telephone lines, from which he could call anyone to choose a lawyer. Although the visit did not take place in the particular room in which he is being detained, it is clear that he would not be able to keep privileged documents in a secure location.
37. When asked whether he would want someone, such as his family, to arrange for a Libyan lawyer for the domestic proceedings, he responded that he would.
38. Mr. Gaddafi has been interviewed by the Libyan authorities in connection with allegations concerning the fact that he allegedly did not have a licence for two camels, and issues concerning the cleaning of his fish farms.
39. Dr. Gehani informed Mr. Gaddafi during his meeting with him that Dr. Gehani is the 'architect' of the allegations against him. Dr. Gehani also notified him that their investigation into murder, rape et cetera had been terminated because they had no evidence against him.
40. In terms of his legal representation before the ICC, Mr. Gaddafi does want legal representation, but he was not in a position to select counsel himself. He does not know any lawyers, his family did not have any retained lawyers to his knowledge, and he does not have the ability to call lawyers to interview them or ascertain their availability.
41. Mr. Gaddafi requested the OPCD to either select counsel or help him in this matter. [Redacted]. Mr. Gaddafi is also willing for the OPCD to continue to represent him before the ICC, until a counsel is appointed. A signed declaration to the effect is attached to this report (in Arabic).<sup>1</sup>
42. [Redacted].
43. Mr. Gaddafi has no money or means to remunerate a lawyer.
44. Finally, Mr. Gaddafi requested to receive another visit from Ms. Taylor, and if possible, the same interpreter. The OPCD explained that once counsel is appointed, it would be for counsel to visit him, and not the OPCD, although the OPCD would

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<sup>1</sup> Annex 1. A draft translation has been provided by STIC.

continue to provide support to his counsel. Mr. Gaddafi nonetheless indicated that irrespective as to whether counsel was appointed or not, he would still want Ms. Taylor to visit him in order to report back on certain issues discussed during the visit. A signed statement to that effect is attached as annex 2.<sup>2</sup>

#### *Family visits*

45. The Attorney General also informed Mr. Gaddafi that it would not be possible for him to receive any family visits. It is not correct that his uncle visited him.
46. If he could receive visits, he would like to receive visits from his [Redacted].<sup>3</sup>

#### *Final comments*

47. At the end of the interview, the OPCD inquired as to whether Mr. Gaddafi would feel more secure being detained anywhere else in Libya, if he had to remain in Libya. Mr. Gaddafi reiterated his preference to be detained under the supervision of the Zintan brigade. The OPCD then specifically inquired as to what could be done to improve his current conditions. Mr. Gaddafi responded that he would like dental care, visits from the above-mentioned family members, fresh air, and another visit from Ms. Taylor.

### **4. Follow up discussions with Dr. Gehani**

48. On 4 March 2012, the OPCD met again with Dr. Gehani and requested the promised contact details of the Minister of Justice/Prosecutor-General for the purpose of arranging family visits and communications with his legal representative. Dr. Gehani responded that he did not have them yet, and requested the OPCD to email him after they had left. At this point, given that the OPCD requested these details from Dr. Gehani every day during the five day mission, the OPCD is not confident that Dr. Gehani will transmit them to the OPCD.
49. Dr. Gehani informed the OPCD that the penalty for the specific crimes, in relation to which Mr. Gaddafi had been questioned by the Libyan authorities (i.e. the absence of a

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<sup>2</sup> A draft translation has been provided by STIC.

<sup>3</sup> The OPCD has the spelling of his family members and the town in Arabic if this phonetic translation is incorrect.



licence for camels), was imprisonment. Dr. Gehani also spontaneously confirmed that the Libyan authorities were not investigating Mr. Gaddafi any more for murder, rape or international crimes, because they have no evidence on these matters and had not received any complaints.

50. Dr. Gehani emphasised that he had informed Mr. Gaddafi of this during his meeting with Mr. Gaddafi on 3 March 2012, and inquired as to whether Mr. Gaddafi had expressed his view to the OPCD as to whether he would prefer to be in Libya or before the ICC. Dr. Gehani believed that Mr. Gaddafi would prefer to be tried in Libya. The OPCD responded that such matters were privileged.
51. The OPCD is also concerned that Dr. Gehani may have provided Mr. Gaddafi with the information concerning the supposed termination of their investigation into other crimes immediately before Mr. Gaddafi's meeting with the Registry and the OPCD, in order to influence any preferences that Mr. Gaddafi expressed to the Registry and the OPCD.
52. Dr. Gehani also emphasised that Libya was not a party to the ICC, and was therefore not bound by any provisions of the Rome Statute. Although the Registry has now notified the arrest warrant to Mr. Gaddafi, it is clear that the Libyan authorities will not apply the provisions under the ICC Statute (such as article 59 or rule 117), unless expressly ordered to do so by the Chamber.

## **5. OPCD Observations**

53. The creation of international courts and tribunals represents a triumph for civilization, and the notion that right should prevail over might. International criminal law is therefore predicated on the fact that justice can only be achieved through a fair trial, which is divorced from the distorting effects of personal revenge. The brutal death of Muammar Gaddafi was a repudiation of everything that international criminal justice represents; it would be a travesty if the same were to occur to his son.
54. [Redacted].
55. [Redacted].
56. [Redacted].
57. In terms of the role of Dr. Gehani as focal point for cooperation with the ICC, in light of the fact that he has professed to be the 'architect' of the domestic prosecutions against Mr. Gaddafi, it would be inappropriate for any confidential issues pertaining to

the defence of Mr. Gaddafi to be relayed through him or for Dr. Gehani to be the ICC liaison on issues concerning Defence evidence or witnesses.

58. Mr. Gaddafi's ability to effectively participate in his defence, and to make informed decisions concerning his strategy is currently completely hampered by the fact that he is weighed down by these issues concerning his personal security, and the fact that the concept of remote proceedings in The Hague pails in significance to his more pressing need for fresh air, dental treatment, and visits. Mr. Gaddafi's ability to defend himself in an effective manner is therefore contingent on his environment, and the fulfilment of these basic rights, which are necessary to safeguard the protections enshrined in article 55 of the Statute.<sup>4</sup>

59. In line with the power of the Pre-Trial Chamber under article 57(3)(b) to make such orders as are necessary to assist the person in the preparation of his defence, the OPCD respectfully requests the Pre-Trial Chamber to order the Libyan authorities to:

- provide Mr. Gaddafi with immediate dental treatment;
- allow Mr. Gaddafi to receive family visits from his cousins from [Redacted];
- authorise another privileged visit for the OPCD, and his future legal representative; and
- modify his current detention regime so that he has fresh air.

60. Finally, the OPCD would like to express its sincere appreciation to the Chamber for having ordered the visit to Mr. Gaddafi, and to the Registry for having implemented

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<sup>4</sup> The OPCD refers to its observations concerning the right to family and legal visits in the 'OPCD Observations on Libya's Submissions Regarding the Arrest of Saif Al-Islam', ICC-01/11-01/11-51-Conf, 2 February 2012.

In terms of the right to fresh air, Article 21(1) of the Standard Minimum Rules for the Treatment of Prisoner provides that "Every prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits." (Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977). This is consistent with the fact that regulation 165(1) of the Regulations of the Registry ICC Regulations of the Registry stipulates that "Each detained person shall have the possibility to benefit daily, on a voluntary basis, from at least one hour of exercise in the open air."

With respect to the right to dental treatment, in *Kudla v. Poland*, the European Court of Human Rights (ECtHR) noted that article 3 of the European Convention imposes a duty to ensure that the detainee's "health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance". [Application No. 30210/96, 26 October 2000, para. 94]. In *Keenan v. the United Kingdom*, the ECtHR held that "lack of appropriate medical care may amount to treatment contrary to Article 3". [Application No. 27229/95, 3 April 2001, para. 111]. See also *Dybeku v. Albania* concerning the fact that "a lack of resources cannot in principle justify detention conditions which are so poor as to reach the threshold of severity for Article 3 to apply". [Application No. 41153/06, 18 December 2007, paras. 48-52].

the order, and made the necessary arrangements with the Libyan authorities under difficult circumstances.<sup>5</sup>

### **Relief Sought**

61. For the reasons set out above, the OPCD respectfully requests the Honourable Pre-Trial Chamber to take such measures, which are within its remit, to ensure the physical safety and security of Mr. Saif Al-Islam Gaddafi.
62. In particular, and without prejudice to any other measures which might achieve the above objective, the OPCD requests the Pre-Trial Chamber to:
- i. issue a decision concerning the Libyan authorities' request, pursuant to article 94 of the Statute, to defer the surrender of Mr. Gaddafi to the ICC, prior to Mr. Gaddafi's transfer to the prison in Tripoli;
  - ii. if the Chamber orders his transfer to the ICC, convene a confidential *ex parte* Status Conference for the purpose of discussing issues concerning Mr. Gaddafi's personal security during such a transfer;
  - iii. [Redacted];
  - iv. order the Libyan authorities to:
    - a. notify the ICC at least two weeks in advance of any planned transfer of Mr. Gaddafi to Tripoli;
    - b. authorise the OPCD to visit Mr. Gaddafi on a privileged basis (pursuant to the express wish of Mr. Gaddafi) prior to his transfer to the ICC or Tripoli, and to permit privileged visits/communications to be made from the counsel appointed to represent him before the ICC;
    - c. provide Mr. Gaddafi with immediate dental care, and medical care as necessary;
    - d. authorise the visit from his [Redacted]; and
    - e. modify his detention regime to permit his access to fresh air on a regular basis.

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<sup>5</sup> In particular, the OPCD would like to thank the Registry delegation – [Redacted].



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Xavier-Jean Keïta, Principal Counsel of the OPCD

Dated this, 5<sup>th</sup> Day of March 2012

At The Hague, The Netherlands