

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-01/11-01/11**
Date: **10 January 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

Confidential ex parte
Prosecution, OPCD and Registry only
OPCD Response to the Request of the Libyan Authorities for an Extension of
Time

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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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)**

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Counsel Support Section

Detention Section

**Victims Participation and Reparations
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Other

1. Introduction

1. Mr. Saif Gaddafi has been held in detention since 19 November 2011, a period of 53 days in total.
2. The fact that Mr. Gaddafi is currently kept in pre-trial detention imposes a heightened obligation on all actors in the proceedings to proceed with the necessary degree of diligence and expedition.¹
3. The Office of Public Counsel for the Defence respectfully submits that the request of the Libyan authorities to have an additional three weeks to submit their observations lacks any valid justification, and the requisite diligence and expedition, which could be expected from national authorities who have the willingness and capacity to conduct fair and impartial proceedings. Moreover, if there is any substance to the allegations that Mr. Gaddafi is being held incommunicado, then the requested three week delay would have the effect of further prolonging any putative violations of Mr. Gaddafi's rights.
4. If the Libyan authorities are either unable or unwilling to provide the Court with information by 10 January 2012, which is central to Mr. Gaddafi's status, then the Pre-Trial Chamber should draw adverse inferences concerning whether Mr. Gaddafi's rights have been violated, and whether the Libyan authorities have either the capacity or the willingness to conduct genuine proceedings, which comport with internationally recognised due process.
5. The Pre-Trial Chamber should also take positive measures to ensure the implementation of Mr. Saif Gaddafi's rights under the Rome Statute.

2. Procedural History

6. On 23 November 2011, the National Transitional Council (NTC) confirmed by letter the arrest of Saif-Al Islam Gaddafi on 19 November 2011.² The NTC further informed the Pre-Trial Chamber that the Pre-Trial Chamber's

¹ Tomasi v. France Judgement of 27 August 1992, Series A no. 241 p.35 para. 84.

² ICC-01/11-01/11-34-Anx.

surrender request would be considered and the Pre-Trial Chamber would be informed when a decision was reached.

7. 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.³ The Pre-Trial Chamber therefore ordered the Libyan authorities, on an urgent basis, to provide the Chamber with information concerning:

- (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. 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.⁵ In the absence of any verification that Mr. Saif 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. Saif Gaddafi.⁶

9. On 9 January 2012, that is one day before the expiration of the deadline, the NTC addressed a letter to the Pre-Trial Chamber in which they requested a further three week extension to respond to the questions of the Pre-Trial

³ 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.

⁴ At para. 11.

⁵ At para. 10.

⁶ At para. 10.

Chamber (the NTC Request).⁷ In support of this request, the NTC cited “security-related problems”.

10. The OPCD hereby requests the Honourable Pre-Trial Chamber to reject the request on the basis that the NTC has failed to demonstrate good cause for the requested extension of time.
11. Should the NTC failed to submit observations within the requested deadline, the OPCD respectfully requests the Pre-Trial Chamber to draw adverse inferences concerning the status of Mr. Gaddafi and the admissibility of the case. The OPCD further requests the Pre-Trial Chamber to order the Libyan authorities to take immediate measures to ensure that Mr. Gaddafi’s rights under the Rome Statute are fully respected.
12. The OPCD has filed its response on a confidential basis due to the fact that the Registry filed the NTC’s letter of 9 January 2012 confidentially. The OPCD notes, however, that there is no confidential information contained either in the NTC’s letter or the present response, and for that reason, respectfully requests the Pre-Trial Chamber pursuant to regulation 23*bis* (3) to reclassify both the letter and the present response as public.

3. The Libyan authorities have failed to demonstrate good cause for the requested extension of time

13. In its decision of 6 December 2011, the Pre-Trial Chamber underscored that it was seeking the requested information from the Libyan authorities on an ‘urgent basis’.
14. There is, however, no indication that the Libyan authorities have taken any steps to comply with the Pre-Trial Chamber’s request with the necessary degree of urgency. For example, the NTC Request does not explain why the NTC was not able to raise these security related issues before the Pre-Trial

⁷ ICC-01/11-01/11-41-Conf-Exp-Anx2. Although the letter is dated 7 January 2012, the Registry informed the Pre-Trial Chamber that the letter was only received on 9 January 2012.

Chamber in a more diligent manner, rather than filing the Request one day before the deadline.

15. The NTC Request also does not delineate how the security related issues prevent the NTC from being able to inform the Court as to the legal basis for Mr. Gaddafi's arrest or whether Mr. Gaddafi is being held incommunicado.
16. In terms of the Pre-Trial Chamber's questions as to whether the Libyan authorities could facilitate visits from Representatives of the Registrar and a Court appointed expert to Mr. Saif Gaddafi, in the absence of specific details concerning the security issues, there is insufficient information to make a proper assessment as to why it is not feasible to confirm the possibility of facilitating official visits from the ICC, when it was apparently feasible to host the visits of other high profile dignitaries, such as very recent visit of President Al Bashir.⁸ The Libyan authorities were also able to successfully host the official visit of the ICC Prosecutor and Deputy Prosecutor in November 2011, and furthermore, appeared to be in a position to facilitate a visit between the Prosecutor and Mr. Gaddafi.⁹
17. If the security related issues in question do indeed have an impact on the safety and security of persons visiting Mr. Saif Gaddafi, then this could also raise an issue as to whether the Libyan authorities are able to guarantee the security and safety of Mr. Gaddafi himself in custody. Similarly, if the security related issues impact on the question as to whether and when the Libyan authorities intend to surrender Mr. Gaddafi to the ICC, then this could also suggest that the Libyan authorities do not necessarily have the capacity to either ensure his proper detention, or to conduct independent and impartial proceedings, which are not influenced by political bartering or military outcomes.

⁸ C. Stephen, 'Saif Gaddafi sets Libya's new rulers a test of commitment to human rights', Guardian, 7 January 2012, <http://www.guardian.co.uk/world/2012/jan/07/saif-gaddafi-libya-human-rights>

⁹ Prosecution's Submissions on the Prosecutor's recent trip to Libya, ICC-01/11-01/11-31, 25 November 2011, at para. 3.

18. Finally, in the absence of any concrete information as to how these security related issues impact on the ability of the NTC to comply with the Pre-Trial Chamber's request, there is no basis for concluding that the Libyan authorities will be in a better position to comply with the Pre-Trial Chamber's request if the three week delay is granted.

4. The requested extension of time would be detrimental to the rights of Mr. Saif Gaddafi

19. In the Mbarushimana case, the Single Judge found that "[i]t is clear that the statutory framework of the Court explicitly provides for the appointment of Counsel to represent a suspect before their surrender to the Court".¹⁰

20. This is consistent with the conclusion of the European Commission on Human Rights 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".¹¹ 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".¹²

21. Article 55(1) of the Statute imposes an absolute obligation on both the ICC and national authorities to ensure that a defendant is "not subjected to any form of coercions, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment", and not "subjected to arbitrary arrest or detention" or "deprived of his or liberty exception on such grounds on such grounds and in accordance with such procedures as are established in this Statute".

¹⁰ Prosecutor v. Mbarushimana, Decision on the "Defence Request for the Review of the Scope of Legal Assistance", ICC-01/04-01/10-142, at para. 10.

¹¹ Para. 54.

¹² Para. 55.

22. 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.¹³
23. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has emphasised in this regard 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".¹⁴ One such safeguard is the right to communicate with counsel and family members: "all persons who are arrested are entitled to have their family members or other close persons promptly notified of the deprivation of liberty and their whereabouts. Delays of notification may be permissible when exceptional circumstances of a criminal investigation do require; however, the communication of detainees with their counsel or family, shall under no circumstances be denied for more than a matter of days. Furthermore, the authorities are obliged to inform about the reasons and any charges against the person held at the time of arrest".¹⁵
24. The Human Rights Committee has also found that holding detainees incommunicado for periods of 40 days and six weeks respectively had deprived them of possibility of communicating with counsel of their own choosing, and therefore violated their right to a fair trial under article 14(3)(b) of the International Covenant on Civil and Political Rights.¹⁶
25. Rule 117(2) of the ICC Rules of Procedure of Evidence entitles a person who has been arrested by national authorities to request the Pre-Trial Chamber to

¹³ *Can v. Austria*, Report of the Commission, 12 July 1984, paras. 54 and 55.

¹⁴ A/HRC/13/39/Add. 5 (5 February 2010), para 81.

¹⁵ A/HRC/13/39/Add. 5 (5 February 2010), para. 82-83

¹⁶ 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, *Pietraroia v. Uruguay*, para 17.

appoint counsel to assist with proceedings before the ICC. In order for such a right to be effective, the person would have to be informed by either national authorities or the ICC of the existence of such a right.

26. Article 59 sets out the right of an arrested person to be promptly brought before a judicial authority to ensure that the arrest warrant applies to the person in question, that the person has been arrested in accordance with proper process, and that the person's rights have been respected. As found by the Inter-American Court of Human Rights, this fundamental right of *habeas corpus* is non-derogable, and cannot be suspended even in times of emergency.¹⁷

27. At this point in time, there is no indication that the aforementioned rights of Mr. Gaddafi have been respected. The requested three week extension of time would therefore prolong the legal vacuum in which Mr. Gaddafi is being held. Indeed, if the Pre-Trial Chamber were to countenance the NTC's request, the Chamber would, in effect, be condoning the continuation of any violations of Mr. Gaddafi's rights. This would contravene the obligation of the Pre-Trial Chamber under rule 117(1) to ensure that the Mr. Saif Gaddafi has received a copy of the arrest warrant and relevant provisions of the Rome Statute (including articles 55 and 67(1)), and the Chamber's overarching duty to ensure the defendant's right to fair and impartial proceedings.

5. If the Libyan authorities fail to submit adequate information within the requested deadline, the Pre-Trial Chamber should draw adverse inferences

28. The particular information sought by the Pre-Trial Chamber is information, which is instrumental to the well-being and rights of Mr. Gaddafi. Any domestic authority, which has a *bona fide* intention to initiate genuine legal proceedings that accord with internationally recognised principles of due

¹⁷ Inter-American Court of Human Rights, Advisory Opinion on Habeas Corpus in Emergency Situations, 30 January 1987.

process, should at the very least, be aware of the legal basis for the arrest of such a high profile detainee in their custody, and be able to verify whether this detainee is being held incommunicado. As found by the European Court of Human Rights, the fact that the NTC authorities are apparently not in possession of information concerning his current detention status and the reasons for his detention "must be seen as incompatible with the very purpose of Article 5 of the Convention" (the right to liberty and security of the person).¹⁸

29. In order to be able to conduct effective proceedings, the Libyan authorities must also have the capacity to facilitate visits of medical experts and officials, such as Registry representatives, to Mr. Gaddafi. Otherwise, how can the Libyan authorities be expected to facilitate future visits between Mr. Gaddafi and his counsel or to ensure adequate security and protection to defence witnesses, who might not be from the region?

30. In the Ruto et al., case, the Appeals Chamber underscored that any State wishing to assert their primacy must adduce sufficiently specific and probative evidence within the time frame established by the Chamber, and that failure to do so will be fatal to any such challenge to admissibility.¹⁹

31. C. Hall has opined in connection with admissibility proceedings that where States have exclusive or virtually exclusive control of the information necessary to determine admissibility, then the burden should fall on the State to provide any necessary information or explanations.²⁰ The European Court of Human Rights has also found in the case of Orhan v. Turkey, that "[i]t is inherent in proceedings relating to cases of this nature, where an individual applicant accuses State agents of violating his rights under the Convention,

¹⁸ Kurt v. Turkey, Judgment 25 May 1998 at para. 125.

¹⁹ 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.

²⁰ C. Hall, 'Article 19' in O. Triffterer (ed.) Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article (Hart Publishing 2008) at pp. 645 and 652.

that in certain instances solely the respondent Government have access to information capable of corroborating or refuting these allegations. A failure on a Government's part to submit such information which is in their hands without a satisfactory explanation may not only give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations (...)"²¹.

32. In line with this jurisprudence and commentary, in the absence of any information that Mr. Saif Gaddafi has been arrested pursuant to a valid Libyan arrest warrant, which concerns proceedings that are entirely divorced from the subject matter of the ICC arrest warrant, the Pre-Trial Chamber is entitled to presume that Mr. Gaddafi has been arrested pursuant to the ICC arrest warrant, which triggers both his rights under the Rome Statute and the jurisdiction of the ICC.

33. The Pre-Trial Chamber is also entitled to conclude in connection with any future admissibility proceedings that unless the Libyan authorities have the capacity and willingness to comply with the Pre-Trial Chamber's request to submit information in a timely manner, then they may also lack the capacity or willingness to ensure Mr. Saif Gaddafi's custodial rights, and the genuine implementation of fair, impartial, and independent proceedings against Mr. Saif Gaddafi.

6. The Pre-Trial Chamber should take additional positive measures to ensure the implementation of Mr. Saif Gaddafi's rights under the Statute

34. As noted above, Rule 117 (1) imposes an explicit obligation on the Court to ensure that Mr. Saif Gaddafi has received a copy of the ICC arrest warrant and relevant provisions of the Statute. In line with the principle that "the international division of labour in prosecuting crimes must not be to the detriment of the apprehended person"²², the Pre-Trial Chamber should also

²¹ Application no. 25656/94) Final Judgment, 6 November 2002.

²² Appeals Judgment, Prosecutor v. Kajelijeli, ICTR-98-44A-A, 23 May 2005 at para. 220.

take such measures as are within its power to ensure Mr. Gaddafi's rights under Articles 55 and 67(1) of the Statute.

35. Even if the Libyan authorities were unable to facilitate the visits of ICC Registry representatives or experts due to 'security reasons', the International Committee of the Red Cross (ICRC) is well-versed in conducting visits to detainees in volatile regions, and would be appropriately placed to monitor the conditions of Mr. Saif Gaddafi and inform him of his rights in a neutral and impartial manner.
36. Inviting the ICRC to perform such a mission would be consistent with the role of the ICRC in monitoring the custodial conditions of ICC detainees, and ICC convicts, during the enforcement of their sentence in domestic prisons.²³
37. Finally, if the Libyan authorities refuse to permit the visit of either ICC officials or representatives of the ICRC, or fails to implement Mr. Gaddafi's rights under articles 55, 59 and 67(1) of the Statute, then 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.²⁴
38. The duty to 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 resort to article 87(7) in the current circumstances.

²³ Agreement between the International Criminal Court and the International Committee of the Red Cross on Visits to Persons deprived of Liberty Pursuant to the Jurisdiction of the International Criminal Court, 13 April 2006, ICC-PRES/02-01-06.

²⁴ 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 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.

7. Relief Sought

39. For the reasons set out above, the OPCD respectfully requests the Honourable Pre-Trial Chamber to reject the NTC request for an extension of time.

40. Should the NTC fail to respond to the Pre-Trial Chamber's request within the designated deadline, then the OPCD respectfully requests the Honourable Pre-Trial Chamber to:

- i. Draw adverse inferences against the Libyan authorities concerning their willingness and ability to genuinely investigate and prosecute the case of Mr. Saif Gaddafi;
- ii. Invite the ICRC to visit Mr. Saif Gaddafi to monitor the conditions of his detention and health, and to transmit information concerning the arrest warrant and his rights under the Rome Statute;
- iii. Order the NTC to immediately facilitate such a visit from the ICRC; and
- iv. In the event that the NTC fails to comply with any such requests of the Pre-Trial Chamber, report any non-compliance to the Security Council pursuant to article 87(7) of the Statute.



Xavier-Jean Keïta, Principal Counsel of the OPCD

Dated this, 10th Day of January 2012

At The Hague, The Netherlands