

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 27 April 2012

PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernández 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 Document

Decision on OPCD Requests

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor
Luis Moreno-Ocampo
Fatou Bensouda

Counsel for the Defence
Xavier-Jean Keïta
Melinda Taylor

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives
Philippe Sands
Payam Akhavan
Michelle Butler

Amicus Curiae

REGISTRY

Registrar
Silvana Arbia

Deputy Registrar
Didier Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Pre-Trial Chamber I (“Chamber”) of the International Criminal Court (“Court”) issues the following decision on requests submitted by the Office of Public Counsel for the defence (“OPCD”).

I. Procedural History

1. On 27 June 2011, the Chamber issued a warrant of arrest against, among others, Saif Al-Islam Gaddafi (“Mr Gaddafi”).¹ On 5 July 2011, the Registrar notified the Libyan authorities of a request for cooperation asking for their assistance in arresting Mr Gaddafi and surrendering him to the Court.²

2. On 6 December 2011, the Chamber, after consideration of regulation 77 of the Regulations of the Court (“Regulations”), authorised the OPCD to represent the interests of the Defence in all instances related to the proceedings against Mr Gaddafi in the present case until otherwise decided.³

3. On 2 February 2012, the OPCD filed the “OPCD Observations on Libya’s Submissions Regarding the Arrest of Saif Al-Islam”, requesting that the Chamber order the Libyan authorities to immediately implement Mr Gaddafi’s rights under articles 55 and 59 of the Rome Statute (“Statute”) and to submit reports verifying the implementation of these rights.⁴

4. A joint Registry-OPCD delegation visited Libya from 29 February 2012 to 4 March 2012, and a visit to Mr Gaddafi by part of this delegation occurred

¹ Warrant of Arrest for Saif Al-Islam Gaddafi, ICC-01/11-01/11-3.

² Request to the Libyan Arab Jamahiriya for the arrest and surrender of Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, 4 July 2011, ICC-01/11-01/11-5. *See also* ICC-01/11-01/11-25-Conf.

³ Decision Requesting Libya to file Observations Regarding the Arrest of Saif Al-Islam Gaddafi, 6 December 2011, ICC-01/11-01/11-39-Conf-Exp, paragraph 11 and public redacted version, ICC-01/11-01/11-39-Red, filed on 6 December 2011.

⁴ OPCD Observations on Libya's Submissions Regarding the Arrest of Saif Al-Islam, 2 February 2012, ICC-01/11-01/11-51-Conf, and public redacted version, ICC-01/11-01/11-51-Red, filed on 3 February 2012.

on 3 March 2012. The OPCD filed a report regarding this visit on 2 March 2012 (“2 March 2012 OPCD Report”)⁵ and an addendum to its report on 5 March 2012 (“5 March 2012 OPCD Report”),⁶ wherein a number of requests were made before the Chamber concerning the detention situation of Mr Gaddafi as well as the exercise of his defence.

5. On 4 April 2012 the Chamber decided that in giving effect to its obligation to arrest and surrender Mr Gaddafi to the Court, the Libyan authorities must “afford Mr Gaddafi the procedure described in article 59 of the Statute”,⁷ namely that he must be promptly brought before the competent judicial authority in Libya, which shall make a determination as to whether: (i) the warrant issued by the Court applies to that person before it; (ii) he has been arrested in accordance with the proper process; and (iii) his rights have been respected.⁸

6. On 17 April 2012, the Chamber formally appointed counsel from the OPCD as Mr Gaddafi’s counsel pursuant to regulation 76(2) of the Regulations (“Appointment Decision”).⁹

7. On 25 April 2012, the Government of Libya filed a response¹⁰ to the public redacted version of both the 2 March 2012 OPCD Report and the 5 March OPCD Report. In its response, the Government of Libya provided certain factual submissions with respect to the current conditions of detention of Mr Gaddafi.

⁵ Urgent Report Concerning the Visit to Libya, 2 March 2012, ICC-01/11-01/11-69-Conf-Exp. A public redacted version was filed on 4 April 2012 (ICC-01/11-01/11-69-Red).

⁶ Addendum to the Urgent Report Concerning the Visit to Libya, 5 March 2012, ICC-01/11-01/11-70-Conf-Exp. A public redacted version was filed on 4 April 2012 (ICC-01/11-01/11-70-Red).

⁷ ICC-01/11-01/11-100, para. 19.

⁸ Article 59(2) of the Statute.

⁹ Decision Appointing Counsel from the OPCD as Counsel for Saif Al-Islam Gaddafi, ICC-01/11-01/11-113.

¹⁰ ICC-01/11-01/11-128-Red and annexes attached thereto.

II. Applicable Law and Discussion

8. The Chamber has considered articles 57(3)(b) and (c), 59, 89 and 93(1)(l) of the Statute, rules 21 and 22 of the Rules of Procedure and Evidence ("Rules"), regulation 76 of the Regulations, Resolution 1970 adopted by the United Nations Security Council¹¹ and article 25 of the United Nations Charter.¹²

9. Having reviewed the relevant submissions of the OPCD and the Government of Libya, the Chamber is of the view that there are, at present, three distinct pending issues which must be contemplated in light of the Chamber's competences under article 57(3)(b) and (c) of the Statute: (i) the need to make possible privileged communication between the OPCD and Mr Gaddafi; (ii) the need to give full effect to Mr Gaddafi's right to appoint counsel of his choice; and (iii) concerns related to Mr Gaddafi's potential transfer to another detention centre.

10. The Chamber notes that article 57(3)(b) of the Statute states that the Chamber may "[u]pon the request of a person who has been arrested or has appeared pursuant to a summons under article 58 [...] seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence". Article 57(3)(c) of the Statute gives the Chamber the authority to provide for "the protection of persons who have been arrested or appeared in response to a summons".

11. The Chamber notes that the Libyan authorities assert that they have not arrested Mr Gaddafi pursuant to the arrest warrant issued by the Court and have refused to surrender him to the Court. The Chamber considers,

¹¹ UN Security Council, *Security Council resolution 1970 (2011)*, 26 February 2011, S/RES/1970 (2011).

¹² Charter of the United Nations, 26 June 1945, 1 United Nations Treaty Series XVI, last amended on 20 December 1971.

however, that its power to issue such orders or seek such cooperation as may be necessary to protect Mr Gaddafi or assist in the preparation of his defence pursuant to articles 57(3)(b) and (c) of the Statute cannot be made contingent on Libya's compliance with the request for arrest and surrender issued by the Court.

12. Accordingly, in relation to the OPCD request for authorisation of a privileged visit to Mr Gaddafi, the Chamber considers it appropriate, pursuant to article 57(3)(b) of the Statute, and in light of the Appointment Decision,¹³ to request the Libyan authorities to enable the OPCD to visit with Mr Gaddafi on a privileged basis. In this respect, the Chamber takes note of the submission, made by the Government of Libya in its response, to the effect that it will facilitate access to Mr Gaddafi by his lawyers.¹⁴ In addition, the Chamber finds it necessary that representatives of the Registry also visit Mr Gaddafi in order to discuss further with him the option to appoint counsel of his own choosing in accordance with rule 21 of the Rules.

13. The OPCD also requests that the Chamber order the Libyan authorities to notify the Court at least two weeks in advance of any planned transfer of Mr Gaddafi to Tripoli¹⁵ and that at least one visit to Mr Gaddafi take place prior to any planned transfer of Mr Gaddafi to Tripoli.¹⁶ In this respect, the Chamber notes that, in its response, the Government of Libya has confirmed its intention to transfer Mr Gaddafi to a specially constructed prison facility in Tripoli.¹⁷

14. The Chamber is of the view that having information on the whereabouts of Mr Gaddafi is necessary for effectively communicating with

¹³ Appointment Decision, page 4.

¹⁴ ICC-01/11-01/11-128-Red, para. 6.

¹⁵ 5 March 2012 OPCD Report, paragraph 62 (iv) (b)

¹⁶ 5 March 2012 OPCD Report, paragraph 62 (ii)

¹⁷ ICC-01/11-01/11-128-Red, para. 6.

him and assisting him in the preparation of his defence, within the meaning of article 57(3)(b) of the Statute. Therefore, the Chamber considers it appropriate to request the Libyan authorities to give reasonable advance notice to the Court of any transfer of Mr Gaddafi to another detention centre. The need of a prior visit by OPCD may be assessed by the Chamber in accordance with the prevailing circumstances at that time.

15. Finally, the OPCD also requests the Chamber, to hold an *ex parte* status conference prior to any transfer of Mr Gaddafi to the Court for the purpose of discussing issues concerning his personal security during such a transfer.¹⁸ The Chamber considers that this request is premature at this point in time.

FOR THESE REASONS, THE CHAMBER

- (i) **ORDERS** the Registrar to make the necessary arrangements for a visit to Mr Gaddafi by representatives of the Registry, for the purposes indicated in paragraph 12 of this decision, and by the appointed counsel from the OPCD;
- (ii) **REQUESTS** that the Libyan authorities provide reasonable advance notice to the Court of any transfer of Mr Gaddafi to another detention centre; and
- (iii) **REJECTS** the OPCD's request for an *ex parte* status conference.

¹⁸ 5 March 2012 OPCD Report, paragraph 62(ii).

Done in both English and French, the English version being authoritative.



Judge Silvia Fernández de Gurmendi
Presiding Judge



Judge Hans-Peter Kaul



Judge Christine Van den Wyngaert

Dated this Friday, 27 April 2012

At The Hague, The Netherlands