

# VICTOR'S JUSTICE: ICC Prosecutor Ocampo Misleads UN Security Council on Saif Al Islam Gaddafi's Detention

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*On Wednesday, May 16, Luis Moreno-Ocampo, the Chief Prosecutor of the International Criminal Court (ICC) made his 3rd report to the UN Security Council on the action of the ICC on the referral under UN Security Council Resolution 1970.(1) Much of Ocampo's report was about the actions of the ICC on issues related to the detention of Saif Al Islam Gaddafi.*

The report, however, failed to mention important aspects of the case. Instead it substituted the views of the National Transitional Council (NTC) of Libya in place of the actions and determinations of the ICC, giving the UN Security Council a false picture of the situation that exists regarding Saif Al Islam Gaddafi's detention.

According to the reports by the ICC Registry and the Office of the Public Counsel for the Defence (OPCD), Saif Al Islam Gaddafi has been held mostly incommunicado and denied access to a lawyer by his captors. In response to this situation, the ICC has assigned two Counselors from the OPCD to the case until Saif Al Islam Gaddafi is allowed to choose his own lawyer. In a motion to the Court, the OPCD criticized the Prosecutor's office for its bias against the defendant and asked the ICC to remove Ocampo from the case. The ICC judges have yet to rule on the OPCD motion.(2)

The Prosecutor's presentation to the Security Council and then to journalists at the UN at a press conference on the Libya situation demonstrated the problem.(3) The obligation of the Prosecutor is to present information confirmed by the ICC, not unconfirmed information from the Libyan officials of the NTC. Instead, in both his May 16 report to the Security Council and in the presentation at the press conference afterwards, the Prosecutor repeated the Libyan NTC's claims of "adequate conditions of detention", "access to ICC lawyers", "visits" from the ICRC, and "NGOs", and "family members" provided to Saif Al Islam Gaddafi. These claims are false according to reports by officials of the ICC who visited the Defendant and reported on the poor conditions he is being held in. Also he has been held in isolation and there has been a lack of access of anyone to him with the exception of one visit by the ICRC and one by Human Rights Watch.

Saif Al Islam Gaddafi is not even in the custody of the NTC. He is being held by a rebel group referred to as the Zintan militia. Based on a motion to the ICC judges by the OPCD, the ICC ordered that access to Saif Al Islam Gaddafi be made available to a delegation of officials from the ICC Registry and the OPCD. This visit, however, was allowed in only a very limited manner. On Saturday, March 3, a Counselor and translator from the OPCD met with Mr. Gaddafi from 2:35 pm to 4:15 pm, a one hour and forty minute meeting. Prior to that

meeting Saif Al Islam Gaddafi met with the ICC Registry official for one hour. That meeting was in the presence of a Libyan government official and Saif Al Islam Gaddafi appeared reluctant to talk openly in these circumstances. Only women were allowed to be part of the delegation and only two officials from each of the two offices of the ICC were allowed to be present at the visit.

The details of this meeting were reported in two separate reports to the ICC Court, one by the OPCD (4) and one by the Office of the Registry (5). The public version of both reports available at the ICC web site are heavily redacted.

These reports show that though Saif Al Islam Gaddafi requested legal representation, he is basically being denied the right to see a lawyer in private or even to see one at all except for the short one and a half hour visit in March from the OPCD. Though the ICC has appointed two officials from the OPCD to represent him, these lawyers have no access to him. They have filed a motion to visit him again, and ICC judges ruled they be allowed to visit. But the NTC has failed to make such a visit possible.

On May 18 the OPCD filed a motion explaining how the order of the judges “has been met with a combination of stony silence and prevarication.” The OPCD requests that the ICC officially “report the non-compliance of the Libyan authorities to the Security Council.”(6)

Also, the motion filed by the OPCD to disqualify the Prosecutor from participating in the case against Saif Al Islam Gaddafi describes a number of examples of bias by Prosecutor Ocampo against the defendant and in support of the NTC of Libya. The motion details how this is contrary to the obligation of the ICC Prosecutor to provide an independent and impartial presentation and assessment of the facts of the case. No decision has been made on this motion by the judges at the ICC. Instead, the NTC has been allowed to ignore a warrant to surrender Saif Al Islam Gaddafi to the ICC. Though the warrant was issued at the beginning of April and several appeals by the NTC were rejected by the ICC judges, the Prosecutor has not made an effort to have the warrant enforced.

The NTC has subsequently hired new lawyers to make its case for jurisdiction in this situation. At the beginning of May, they filed a new challenge to the ICC. The ICC is to receive observations from the parties to the case on this new challenge on June 4 and the Security Council has been invited to submit its views on the issues.

With Saif Al Islam Gaddafi denied the right to meet with his ICC appointed counsels and to have access to the information needed to consider the issues of his case, but another legal action is to be taken against his right to be a party in his own case. Given this situation the OPCD has filed a motion to stay the proceedings on the new filing of the NTC, along with its request that the “non-compliance of the NTC” be reported to the Security Council. In the motion, the OPCD describes the many attempts made by this ICC office to see Saif Al Islam Gaddafi so as to prepare to represent him on June 4. These attempts, the court document reports, only met with “obstructions.”

The OPCD says that, “There are only two conclusions which can be drawn from the Libyan authorities’ refusal to implement this request in a timely manner: either they are stonewalling because they are concerned about what Mr. Gaddafi might say to his counsel and the impact it might have on the admissibility proceedings, or, they simply do not have the capacity to implement the visit.” (7)

Along with the denial of Saif Al Islam Gaddafi's right to the process necessary to be represented by a lawyer, the OPCD points out that Law 37 passed by the NTC further demonstrates the impossibility of Saif Al Islam Gaddafi being able to get a fair trial in Libya. (8) The law makes it a criminal offense to speak in favor of Muammar Gaddafi or his sons. Thus there is no possibility for a court to consider that Saif Al Islam Gaddafi is innocent. This law threatens to make any lawyer who defends Saif Al Islam Gaddafi subject to criminal prosecution.

The actions of Prosecutor Ocampo described in the OPCD's motion to disqualify Ocampo in the case of Saif Al Islam Gaddafi, and the Prosecutor's reports to the UN Security Council demonstrate the failure of the ICC and the Security Council processes to provide even the appearance of a just process for the accused.

Luis Moreno Ocampo's nine year term as Chief Prosecutor ends on June 15, 2012. Meanwhile he continues in his position while a very important decision is to be made about the fate of the case of Saif Al Islam Gaddafi. The Court appointed lawyer has demonstrated the failure of Ocampo to fulfill the obligations of the ICC under Article 59 of the ICC rules. A defendant is to be presumed innocent until the court makes a decision otherwise. And a defendant is to be provided with legal counsel of his or her choosing, and the time and ability to meet in private with this counsel and to challenge the conditions of his or her detention. These conditions have been denied to Saif Al Islam Gaddafi by both the NTC and the ICC.

The UN Security Council which made the referral of Saif Al Islam Gaddafi to the ICC has failed to oversee the criminal prosecution it has set in motion. The Security Council seems unaware or unconcerned that the OPCD has presented motions to the ICC judges about the problems and that the ICC has failed to discipline the Prosecutor so as to protect the integrity of the Court's processes. Thus the action of the ICC, with the exception of the OPCD motions to the Court, have demonstrated the incapacity not only of the NTC, but more importantly of the ICC, to provide any semblance of an impartial and independent judicial process to a defendant referred to it by the UN Security Council.

It is, therefore, particularly ironic that some member nations of the UN have been campaigning to dispense with the veto in the process of referring an accused to the ICC. The Security Council and the ICC have already demonstrated an inability to provide any semblance of due process to an accused referred to it by the Security Council. Such a change in the Security Council processes would allow even more of the kind of abuse that Saif Al Islam Gaddafi has been subjected to as a result of the lack of any oversight by the UN Security Council of the cases they refer to the ICC.

#### Notes

1) < a

href="http://www.icc-cpi.int/NR/rdonlyres/D313B617-6A86-4D64-88AD-A89375C18FB9/0/UNSCreportLibyaMay2012Eng.pdf">

Third Report </a> of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970 (2011)

2) <a href="https://vivalibya.files.wordpress.com/2012/05/doc1407180.pdf">Request to Disqualify the Prosecutor </a>from Participating in the Case Against Saif Al Islam Gaddafi

3) < a

href="http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/icc0111/report s%20to%20the%20unsc/otpstatement160512">ICC Prosecutor Statement</a> to the United Nations Security Council on the situation in the Libyan Arab Jamahiriya, pursuant to UNSCR 1970 (2011), May 16, 2012.

See also Presentation by Ocampo to Security Council, S/PV.6772, May 16, 2012, <a href="http://www.un.org/ga/search/view\_doc.asp?symbol=S/PV.6772">Transcript of Meeting</a>.

Luis Moreno-Ocampo (ICC) on the situation in Libya - Press Conference 16 May 2012. UN webcast.

4) <a href="http://opiniojuris.org/wp-content/uploads/OPCD-Report.pdf">OPCD Report on Visit, March 5, 2012</a>,  
ICC-01/11-01/11-70-Red

5) <a href="http://opiniojuris.org/wp-content/uploads/RegistryReport.pdf">Registry Report on Visit, March 5, 2012</a>,  
ICC-01/11-01/11-71-Red

6) <a href="http://blogs.taz.de/netizenblog/files/2012/05/ICC-2012.05.18-PubRed-Defence-Rq-re-n on-compliance-by-LibyaENG.pdf">Motion filed by OPCD, May 18, 2012</a>,  
ICC-01/11/01/11-152-Red 18-05-02012, pp. 3, 19.

7) <a href="http://blogs.taz.de/netizenblog/files/2012/05/ICC-2012.05.18-PubRed-Defence-Rq-re-n on-compliance-by-LibyaENG.pdf">Motion filed by OPCD, May 18, 2012</a>,  
ICC-01/11/01/11-152-Red 18-05-02012, p. 4.

8) Law 37 <a href="http://blogs.taz.de/netizenblog/files/2012/05/ICC-AnnexA-2012.05.18-Def-Rq-re-non-c ompliance-by-Libya-AnxAENG-152.pdf">Annex A</a> of May 18 Motion by OPCD

Part of the law reads:

"In the circumstances similar to war in which the country finds itself, it is deemed inciteful advertising to glorify Mohammed...KADDAFI, his regime, his ideas and his children, to glorify them and show them as being good people or heroes or loyal to the country....The penalty shall be life imprisonment."

*A version of this article appears on my netizenblog. The url is <http://blogs.taz.de/netizenblog/2012/05/25/ocampo-un-security-council-saif-al-islam/>*

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