

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 12 June 2013

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

**Defence Request to invite Government of Libya to submit unequivocal and
binding undertakings concerning the national security proceedings against Mr.
Gaddafi**

Source: Defence for Mr. Saif Al-Islam Gaddafi

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Other

Introduction

1. The Government of Libya recently asserted that the Pre-Trial Chamber should reject a request for leave to reply submitted by the Defence for Mr. Saif Al-Islam Gaddafi due to the fact that acceptance of the reply would deprive the Libyan Government of the opportunity to submit crucial information concerning the national security proceedings against Mr. Gaddafi *et alia*.
2. Whilst the Government had the opportunity to submit this information at an earlier juncture, the Defence nonetheless agrees that in light of the importance of the topics in question, the Government of Libya *should* be accorded an opportunity to submit this information.
3. Accordingly, the appropriate remedy in such circumstances is not to reject the Defence request for leave to reply, but for the Chamber to provide the Government of Libya with an opportunity (within a limited time period) to tender unequivocal and binding undertakings, which reflect the information which the Government was purportedly hindered from relying upon in these proceedings.

Submissions

4. On 3 June 2013, the Defence filed its 'Leave to Reply to "Libyan Government's Response to the Saif Al-Islam Gaddafi "Addendum to the "Urgent Defence Request" of 21 January 2013, and Request for Finding of Non-Compliance"'.¹
5. On 7 June 2013, the Government of Libya filed its 'Response to "Public and Redacted Leave to reply to 'Libyan Government's Response to Saif Al-Islam Gaddafi 'Addendum to the Urgent Defence Request of 21 January 2013 and Request for Finding of Non-Compliance" (hereinafter: "Response")'.¹
6. In the Response, the Libyan Government requested the Pre-Trial Chamber to reject the Defence request for leave to reply on the ground that the matters

¹ICC-01/11-01/11-348.

raised therein were foreseeable, 'mere disagreements', or repetitious.² The Defence strongly contests that this is the case.

7. The Government also averred that it had been prejudiced due its procedural inability to bring to the attention of the Pre-Trial Chamber relevant matters, which allegedly refuted or undermined the Defence submissions.

8. In particular, the Government averred that it was prejudicial to include in the Request further Defence submissions concerning the application of People's Court procedures to the Zintan trial against Mr. Gaddafi *et alia*, as the

Government would wish to have the opportunity to respond to this allegation by clarifying the distinction under Libyan law between misdemeanours [such as offences pertaining to insulting the Libyan flag] (which are referred directly to trial courts) and felonies (which are referred to a trial court via the Accusation Chamber procedure).³

9. The clear implication of the Government's submission on this point appears to be that the Defence position concerning the application of People's Court to the Zintan trial is incorrect and unfounded because the case concerns misdemeanours and not felony accusations, and as such, it was not unconstitutional for the proceedings to bypass the Accusation Chamber.

10. The Defence notes that the Libyan Government could have included such submissions in its initial Response of 29 May 2013,⁴ in which the Government previously contended that the Defence position on this point was incorrect. The Defence nonetheless, agrees that submissions on the characterisation of the charges in the Zintan proceedings might be relevant to the Pre-Trial Chamber's determination of the Defence Addendum.

11. In particular, given the potential impact of the Zintan proceedings on the rights of Mr. Gaddafi before the ICC, it would be in the interests of justice for the Government of Libya to be accorded an opportunity to submit an unequivocal and binding undertaking that the trial court sitting in Zintan has

² Response at para. 7.

³ Response at para. 10.

⁴ ICC-01/11-01/11-343.

only been seized of misdemeanour charges against the seven defendants in question.⁵

12. Similarly, the Government of Libya has maintained that Defence submissions concerning the promulgation of legislation, which stipulates that the constitutionality of the Political Isolation Law cannot be challenged before Libyan courts, were “made in error”.⁶ If the position of the Defence on this specific point is indeed incorrect, then it would also be in the interests of justice for the Libyan Government to be granted an opportunity to provide an unequivocal and binding undertaking that as of the date of the Defence submissions, there were no legislative impediments nor political directives purporting to bar challenges to the constitutionality of the Political Isolation Law before Libyan courts.

13. The Defence attaches the caveat that although the submission of binding undertakings concerning the nature of the charges in the Zintan proceedings and the absence of legislation or political directives barring the right to challenge the Political Isolation Law might demonstrate that the Defence position on these issues is contradicted by the current Government positions advanced before the ICC, they would not establish that the Defence positions were “without evidential foundation”,⁷ or that the Defence had failed to substantiate its assertions in its previous filings.

14. With respect to the Zintan proceedings, the Head of the Libyan Human Rights Committee, who had attended the 2 May 2013 hearing, announced at the subsequent

⁵ Since the case of the seven defendants is joined, it follows that if even one of the defendants had been charged with a felony offence, the case should have first been remitted to an Accusation Chamber.

Article 156 of the Libyan Criminal Procedure Code (Linked crimes) provides as follows:

If the investigation included more than one crime under the jurisdiction of courts of the same degree, and [the crimes are] linked, they shall all be transmitted under one referral order to the competent court *ratione loci* based on either of the crimes. If the crimes were under the jurisdiction of courts of different degrees, they shall be referred to the court of higher degree.

Articles 135 and 136 (that Libya cited) address referral orders. Misdemeanours are referred to an auxiliary court (second degree) and felonies are referred to the Accusation Chamber (first degree). The Accusation Chamber is the court of higher degree.

⁶ Response at para. 9.

⁷ Response at para. 10.

press conference that Mr. Gaddafi was being charged with insulting the State's flag and conspiracy with foreign entities.⁸ The latter offence carries a mandatory prison sentence, which translates to a life sentence if the defendant is considered to be a public officer.⁹ According to Article 53 of the Criminal Code, any offence which is punishable by the death penalty, life sentence, or imprisonment, is characterised as a felony.

15. The Defence had appended the transcripts of this press conference to its Addendum, and had thus substantiated this aspect of its position concerning the unconstitutionality of bringing the case against all seven defendants straight before the Trial Chamber.

16. In terms of the ability of any domestic Defence team to challenge the constitutionality of the Political Isolation Law, apart from the evidence cited in the Defence Addendum on this issue,¹⁰ on the same day that the Government filed its Response, the NGO Lawyers for Justice in Libya again:

warned that the amendment to the Constitutional Declaration that denies any judicial review of the political isolation legislation, both further violates the rights of Libyan citizens and undermines the separation of powers between the legislature and the judiciary.¹¹

17. Moreover, if, for any reason, the Libyan Government is either unwilling or unable to provide either undertaking, then it would be appropriate for the Pre-Trial Chamber to draw inferences concerning both the credibility and

⁸ ICC-01/11-01/11-332-Anx3 at p. 3.

⁹ Article 167: *Conspiring with a Foreigner against the Military and Political Standing of the Country* Any person who conspires, in a time of peace, with a foreign state or one of its officials with the intent to harm the military, political or diplomatic standing of the Libyan Arab Jamahiriya shall be punishable by imprisonment. The same penalty shall apply to any person who wilfully destroys, hides or falsifies documents that may be presented as proof of the rights of the Libyan Arab Jamahiriya before the foreign state. Should the aforementioned crimes be committed in a time of war or should the perpetrator be a public officer or envoy on a general or any other mission he was assigned to carry out, the punishment shall be imprisonment for life.

¹⁰ ICC-01/11-01/11-332 at para. 70.

¹¹ N. Ash, 'Lawyers call for "restraint and transparency" in application of PIL' *Libya Herald* 7 June 2013, <http://www.libyaherald.com/2013/06/07/lawyers-call-for-restraint-and-transparency-in-application-of-pil/>

propriety of the Government's assertions that the Defence submissions were unfounded or unsubstantiated.

18. As concerns the Defence submissions, the Libyan Government alleges that "serious and personal allegations [are] contained in the Application".¹² There are no such *personal* allegations and it is wrong for the Libyan Government so to suggest. Indeed many of the examples given in the Response concern the conduct of the *Libyan authorities*. Misconduct by State authorities is obviously not the same thing as misconduct by that State's legal representatives. Moreover, the Libyan Government even appears to consider that highlighting the poor conditions of Mr Gaddafi's incommunicado detention for 18 months without access to a lawyer or a Judge is improper.¹³

19. Counsel for the Defence has a right, and indeed a duty, vigorously to champion its client's rights. Given that Counsel for the Libyan Government are acting in a case where Mr. Saif Gaddafi may receive the death penalty if convicted in Libya, there is a heightened requirement for due process and the utmost fairness to be shown to the Defendant.¹⁴ These proceedings will be subject to the most intense and rigorous scrutiny by the international legal community. It is not in the interests of justice for Counsel for the Defence to do

¹² Response at para. 11.

¹³ Response at fn. 18, complaining of the statement, "Mr Gaddafi's comment that he has 'no complaints' simply underscores the futility and hopelessness of his situation"

¹⁴ See *Huggins & Ors v. The State (Trinidad and Tobago)* [2008] UKPC 30 (09 June 2008) at para 27: "It was not in dispute in the argument presented to the Board that the function of prosecuting counsel is to act as a minister of justice, concerned with the fairness of the trial as well as presentation of his case, and that he should not act merely as an advocate striving to secure a result for a client. He should bear in mind in doing so the dignity, seriousness and justness of judicial proceedings: *Boucher v The Queen* (1954) 111 Can CC 263, 270, per Rand J. *The underlying reason is to ensure that the defendant is fairly tried, which constitutes an overriding requirement: Randall v The Queen* [2002] UKPC 19, [2002] 1 WLR 2237, 2241, para 10, per Lord Bingham of Cornhill (emphasis added)". See also *Little v. Jamaica*, Communication No. 283/1988, U.N. Doc. CCPR/C/43/D/283/1988 (1991) at para. 10 : "In capital punishment cases, the obligation of States parties to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant admits of no exception.". By ratifying the International Covenant on Civil and Political Rights, Libya also expressly accepted that it is prohibited from implementing the death penalty in proceedings which fail to respect the rights of the Defence in a scrupulous manner. See also Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007) <http://www1.umn.edu/humanrts/gencomm/hrcom32.html>. This imposes a corollary obligation on Counsel, mandated to advance Libya's interests in pursuing a capital case against Mr. Gaddafi, to abide by the strictest tenets of fairness.

anything other than advance his client's case zealously and fearlessly, and to be seen to be doing so.¹⁵

Relief Sought

20. The Defence for Mr. Saif Al Islam Gaddafi respectfully requests the Honourable Pre-Trial Chamber to invite the Government of Libya to submit, by Monday 17 June 2013, unequivocal and binding undertakings to the effect that:

- a. All seven defendants charged in the Zintan trial of Mr. Gaddafi *et alia* are only charged with misdemeanours, and not felonies; and
- b. As of the date of the Defence submissions, there are no legislative impediments or political directives, which purport to bar challenges to the constitutionality of the Political Isolation Law before Libyan courts.



John R.W.D. Jones QC, Counsel for Mr. Saif Al-Islam Gaddafi

Dated this, 12th Day of June 2013

At London, United Kingdom

¹⁵ According to the standards promulgated by the American Bar Association, Counsel representing defendants in capital cases are required to engage in zealous advocacy, free from political interference *See* ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 2003, Guidelines 2.1(c) at p. 2, and 5.1(B)(b) at p.6.

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