

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **23 July 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
with public annexes**

**Request for Finding of Non-Compliance and Referral to United Nations
Security Council**

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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1. On 31 May 2013, the Pre-Trial Chamber issued the “Decision on the admissibility of the case against Saif Al-Islam Gaddafi” (“Admissibility Decision”).¹ Having found the case against Mr. Gaddafi to be admissible, the Pre-Trial Chamber “recall[ed] Libya’s obligation to surrender [Mr. Gaddafi]”.² In the operative part of the decision, it “remind[ed] Libya of its obligation to surrender [Mr. Gaddafi] to the Court”.³
2. Whilst underscoring the Government of Libya’s obligation to immediately surrender Mr. Gaddafi to the Court, the Pre-Trial Chamber cited to its decision of 4 April 2012 in which the Chamber requested Libya to “proceed immediately with the surrender of Mr. Gaddafi to the Court”,⁴ and cautioned that:

“any failure on the part of the Government of Libya to comply with its obligation to enforce the warrant of arrest against Mr. Gaddafi may warrant that the Court make a finding to this effect”.⁵

3. On 18 July 2013, the Appeals Chamber rejected the Government of Libya’s request for suspensive effect and “recall[ed] that Libya is currently obliged to surrender Mr. Gaddafi to the Court” (“Suspensive Effect Decision”).⁶
4. Moreover, the Appeals Chamber found that this obligation was not subject to the appellate phase of proceedings, having found that “[t]he obligation arises from the request for surrender which was issued pursuant to the Pre-Trial Chamber’s decision on the warrant of arrest”.⁷ Consequently, there is no further reason for Libya to evade fulfilling this obligation on the apparent basis that the Admissibility Decision is still subject to appeal:

“the Appeals Chamber find that, in any event, article 95 of the Statute is not applicable to the appellate phase of proceedings. This is because

¹ ICC-01/11-01/11-344

² ICC-01/11-01/11-344, para. 219.

³ ICC-01/11-01/11-344, p. 91.

⁴ ICC-01/11-01/11-100, p. 9.

⁵ ICC-01/11-01/11-100, para. 19.

⁶ ICC-01/11-01/11-387 OA4, para. 27.

⁷ ICC-01/11-01/11-387 OA4, para. 27, footnote omitted.

this phase of the proceedings is regulated by article 82(3) of the Statute. In addition, in the view of the Appeals Chamber, once the Pre-Trial or Trial Chamber has ruled on an admissibility challenge, it is no longer “under consideration by the court”, as referred to in article 95 of the Statute. Rather, the decision on the admissibility challenge is being reviewed by the Appeals Chamber pursuant to article 82(1)(a) of the Statute”.⁸

5. This distinction between the surrender obligation and Libya’s appeal of the Admissibility Decision has been recognised by Mr. Ahmed Al-Gehani, the Libyan representative before the Court, who recently publicly announced that the Suspensive Effect Decision is not related to the appeal.⁹
6. The Government of Libya has been aware that a negative decision on its admissibility challenge would entail an immediate obligation to surrender Mr. Gaddafi to the Court as of June 2012 when the Pre-Trial Chamber provided:

“The arrest warrant remains valid in accordance with article 19(9) of the Statute, and accordingly Libya must ensure that all necessary measures are taken during the postponement in order to ensure the possibility of an immediate execution of the Surrender Request should the case be found admissible (emphasis added)”.¹⁰

7. The Government of Libya did not seek leave to appeal or for reconsideration against this finding, thereby accepting its obligation to comply with it and, in the event that it failed to do so, that it would be subject to a finding of non-compliance.
8. Given that Libya’s obligation to surrender Mr. Gaddafi to the Court was therefore triggered on 31 May 2013, Libya has failed to take any steps to notify the ICC as to either its decision to surrender Mr. Gaddafi and the steps it has taken to do so, or any difficulties it has faced in connection with implementing the decision. This is contrary to its obligation to “consult with the Court

⁸ ICC-01/11-01/11-387 OA4, para. 27.

⁹ See Annex A

¹⁰ ICC-01/11-01/11-163, para. 40.

without delay” in order to resolve any impediment or prevention in the execution of a request made under Part IX of the Statute.

9. Moreover, Libya actually continues to take positive steps to ensure that Mr. Gaddafi will not be transferred to the Court and to obscure any compliance on its behalf before the Court.
10. Immediately following the Suspensive Effect Decision, and in flagrant breach of its obligation to both surrender Mr. Gaddafi and to consult with the Court in this regard, the Libyan Minister of Justice publicly announced that concerted efforts were being made to transfer Mr. Gaddafi to Tripoli, and not to the Court, in order to launch a second admissibility challenge before the Court.¹¹
11. This follows on from prior statements made by the Libyan Prosecutor-General’s Office announcing that it will convene hearings against Mr. Gaddafi for crimes that appeared to be related to ICC crimes in the first half of August 2013.¹² It is noteworthy that Libya’s request for suspensive effect was premised on the allegation that the surrender of Mr. Gaddafi would “undermine domestic investigations”,¹³ when the reality is that Mr. Gaddafi faces imminent trial proceedings and subsequent conviction for crimes that attract the death penalty.
12. The announcements by Mr. Gehani, the Libyan Minister of Justice and the Libyan Prosecutor-General’s Office must further be considered in light of repeated statements from various Libyan authorities indicating their intention to prosecute Mr. Gaddafi on Libyan soil¹⁴ and in context of the fact that Libya’s original admissibility challenge was only brought in order to avoid a finding of non-compliance for Libya’s obligation to surrender Mr. Gaddafi,¹⁵

¹¹ See Annex B

¹² See Annex C and ICC-01/11-01/11-359.

¹³ ICC-01/11-01/11-370-Red2 OA4, para. 189.

¹⁴ See ICC-01/11-01/11-359, footnote 5.

¹⁵ ICC-01/11-01/11-T-3-CONF-ENG p. 44, lines 17-18.

following the issuance of an arrest warrant by the Court dating back to 27 June 2011.¹⁶

13. The Defence recalls the fact that UNSC Resolution 1970 orders Libya to “cooperate fully” with the Court,¹⁷ and on this basis “the Statute, and especially Part IX, is the legal framework within which Libya must comply with the Surrender Request”.¹⁸ By relying on Article 95 to postpone its obligation to surrender Mr. Gaddafi to the Court, it is apparent that Libya is aware of the application of the provisions of the Statute to it.
14. However, Libya cannot be allowed to unilaterally decide which provisions of the Statute it adheres to and to employ Part IX of the Statute as both a shield and a sword. In this regard, the Defence notes that pursuant to article 87(7) of the Statute “[w]here a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of the Statute [...] the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council (emphasis added)”.¹⁹
15. The Pre-Trial Chamber has previously exercised this discretion in referring States that have failed to cooperate with the Court in the arrest and surrender of a suspect to the Security Council¹⁹ and found that where a State Party has “prevent[ed] the institution from exercising its functions and powers under the Statute, the Court cannot but refer the matter to the Assembly of States Parties and the Security Council (emphasis added)”.²⁰
16. It is subsequently expected that where the Security Council has referred a situation to the Court, the “Council would respond by way of taking such measures which are considered appropriate, if there is an apparent failure on

¹⁶ ICC-01/11-01/11-3.

¹⁷ S/Res/1970 (2011),

¹⁸ ICC-01/11-01/11-72

¹⁹ ICC-02/05-01/09-139; ICC-02/05-01/09-151

²⁰ ICC-02/05-01/09-151, para. 23.

the part of the relevant State Party to the Statute to cooperate in fulfilling the Court's mandate entrusted to it by the Council".²¹

17. For the foregoing reasons, the Defence for Mr. Saif Al-Islam Gaddafi respectfully requests the Pre-Trial Chamber to:

- i. **FIND** that the Government of Libya has failed to cooperate with the Court by deliberately refusing to surrender Saif Al-Islam Gaddafi, thus preventing the Court from exercising its functions and powers under the Statute;
- ii. **FIND** that, pursuant to article 97, the Government of Libya has failed to consult with the Court without delay with regard to compliance with the Surrender Request;
- iii. **REFER**, in accordance with article 87(7) of the Statute and regulation 109(4) of the Regulations, its finding of non-compliance to the President of the Court for transmission to the Security Council, through the Secretary-General of the United Nations.



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

Dated this, 23rd July 2013

At London, United Kingdom

²¹ ICC-02/05-01/09-151, para. 22.