

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

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

Date: **20 August 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

**Request for Leave to Reply to the Government of Libya's "Response to the
Gaddafi Defence's '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:

The Office of the Prosecutor

Ms. Fatou Bensouda

Counsel for the Defence

Counsel for Saif Al-Islam Gaddafi:

Mr. John R.W.D Jones QC

Ms. Sarah Bafadhel

Counsel for Abdullah Al-Senussi:

Mr. Ben Emmerson QC

Mr. Rodney Dixon

Ms. Amal Alamuddin

Mr. Anthony Kelly

Professor William Schabas

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

Ms. Paolina Massidda

Ms. Sarah Pellet

Mr. Mohamed Abdou

The Office of Public Counsel for the Defence

States' Representatives

Professor Ahmed El-Ghani

Professor Phillipe Sands QC

Professor Payam Akhavan

Ms. Michelle Butler

Amicus Curiae

REGISTRY

Registrar

Mr. Herman von Hebel, Registrar

Deputy Registrar

Mr. Didier Daniel Preira, Deputy Registrar

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I. Introduction

1. Libya's Response to the Defence request for a finding of non-compliance ('the Response')¹ is replete with arguments which simply underscore the deliberate and flagrant nature of Libya's failure to surrender Mr. Gaddafi to the custody of the ICC.
2. In particular, Libya has:
 - a. Employed an inaccurate time frame for calculating the duration of its obligation to surrender Mr. Gaddafi to the ICC;
 - b. Confirmed that Libya intends to prosecute, convict and sentence Mr. Gaddafi in Libya (which is incompatible with its obligation to surrender him to the ICC);
 - c. Invoked Article 97 retrospectively on the basis of vague and contradictory references to the 'Zintan issue'; and
 - d. Attempted to bypass the authority of the Appeals Chamber by relitigating the issue of suspensive effect before the Pre-Trial Chamber.
3. The above issues strike at the heart as to whether the Chamber should issue a finding of non-compliance. It is also in the interests of justice that the record should not be tainted by Libya's selective quoting of decisions and ambiguous pleadings. Finally, given that Libya has asserted that its prior pleadings should be construed as 'consultations' for the purposes of Article 97, the principle of adversarial proceedings requires that the Defence should be accorded an opportunity to respond to such 'consultations'.
4. The Defence for Mr. Saif Al-Islam Gaddafi therefore respectfully submits that there is good cause for the Pre-Trial Chamber to grant the Defence leave to reply to the above issues.

¹ ICC-01/11-01/11-402.

II. Submissions

5. Libya has attempted to downplay the gravity of its non-compliance by asserting that its obligation to surrender Mr. Gaddafi has only existed since 18 July 2013.²
6. Mr. Saif Al-Islam Gaddafi was first apprehended by the Libyan authorities on 19 November 2011.
7. Although the Pre-Trial Chamber's decision of 1 June 2012 suspended Libya's obligation to surrender Mr. Gaddafi for the duration of the admissibility proceedings, Article 19(9) of the Statute clearly stipulates that an admissibility challenge does not impact on the legal validity of any pre-existing decision or order.
8. Since the admissibility challenge did not retrospectively invalidate either the arrest warrant or the Pre-Trial Chamber's decisions of 7 March 2012 and 4 April 2012 concerning Libya's obligation to surrender Mr. Gaddafi immediately to the ICC,³ the 1 June 2012 decision did not excuse Libya's prior non-compliance from 19 November 2011 until 1 June 2012.
9. Moreover, Libya's obligation to surrender Mr. Gaddafi to the ICC was only suspended for the duration of the admissibility proceedings before the Pre-Trial Chamber. The obligation to surrender Mr. Gaddafi was thus reinstated as soon as the Pre-Trial Chamber rejected the admissibility challenge on 31 May 2013.
10. Since Libya explicitly acknowledged that an appeal shall not of itself have suspensive effect unless and until the Appeals Chamber grants suspensive effect,⁴ it was aware that its obligation to surrender Mr. Gaddafi was reinstated on 31 May 2013 and not the date on which the Appeals Chamber rejected its request for suspensive effect.

² Response at para. 3.

³ ICC-01/11-01/11-72; ICC-01/11-01/11-100.

⁴ ICC-01/11-01/11-350 at para. 5.

11. If Libya had surrendered Mr. Gaddafi in a timely manner, as it was obliged to do so pursuant the terms of the ICC arrest warrant, Security Council Resolution 1970, and subsequent decisions of the Pre-Trial Chamber, the ICC proceedings against Mr. Gaddafi would have progressed significantly by this point.
12. Instead, Libya's consistent and contumacious failure to surrender Mr. Gaddafi has blocked the commencement of the pre-confirmation proceedings, and thereby violated Mr. Gaddafi's right to expeditious proceedings and prevented the ICC from exercising its core functions and powers under the Statute.
13. The Pre-Trial Chamber's decision to grant the suspension of Libya's obligation to surrender Mr. Gaddafi was also subject to the clear caveat that Libya was obliged to ensure that it was in a position to execute the surrender request, should the admissibility challenge be rejected.⁵
14. Rather than laying the groundwork for a potential surrender to the ICC, the Libyan authorities have, in the interim, stirred up public opinion against the ICC by consistently asserting that Mr. Gaddafi must be tried in Libya.⁶
15. In its Response, Libya has now sought to benefit from the fruits of its own actions by claiming that it is beholden to public opinion and must therefore continue the domestic proceedings against Mr. Gaddafi in Libya.⁷
16. In so doing, Libya has also acknowledged that its efforts to secure the transfer of Mr. Gaddafi are directed solely at ensuring his presence in a domestic courtroom in Tripoli, rather than surrendering him to the ICC.
17. In attempting to validate these actions, Libya has cited the Pre-Trial Chamber's findings out of context:⁸ the Pre-Trial Chamber's finding that "it

⁵ ICC-01/11-01/11-163 at para. 40. *See also* ICC-01/11-01/11-409 at para. 22.

⁶ ICC-01/11-01/11-359 at paras.4 and 5.

⁷ Response at para. 7.

⁸ Response at para. 6.

has no doubt that the central Government is deploying all of its efforts to obtain Mr. Gaddafi's transfer" concerned the Government's efforts to transfer Mr. Gaddafi to Tripoli, and not to the ICC.

18. No amount of circular language or rhetoric can disguise the fact that Libya has no intention of complying with the surrender order even if it were able to extract Mr. Gaddafi from Zintan. Libya has not only failed to confirm at any point in time that it would surrender Mr. Gaddafi to the ICC if it possessed the ability to do so, it has constantly argued that it should not have to do so, even though such matters are *res judicata*.
19. It is not correct – as Libya asserts at paragraph 7 – that a domestic State has the right to continue to exercise personal jurisdiction over a defendant once it has lost its admissibility challenge. Libya was granted ample opportunity to submit a substantiated challenge to the Court. It failed to do so. Libya's argument that it should be entitled to retain personal custody over Mr. Gaddafi for the duration of the appeal was unequivocally rejected by the Appeals Chamber.
20. Libya has not filed a second admissibility challenge and thus has no other option but immediately to surrender Mr. Gaddafi to the ICC. An intention to try, convict and sentence Mr. Gaddafi in Libya therefore does amount to an "intention to ignore international legal obligations".⁹
21. In terms of the potential application of Article 97, Libya's argument that it has apprised the Court concerning its difficulty in implementing the surrender order through prior submissions on the 'Zintan issue'¹⁰ begs the question as to what exactly the 'Zintan issue' is.
22. Libya has never clearly explained either in this filing or in previous filings why it has been unable to obtain the transfer of Mr. Gaddafi from Zintan. For their part, the Zintan authorities have indicated that their concerns

⁹ Cf Response at para. 7.

¹⁰ Response at para. 10.

relate specifically to conditions in Tripoli – such as the endemic insecurity there.¹¹ It therefore does not automatically follow from the fact that the Government has been unable to secure Mr. Gaddafi's transfer to Tripoli that it would not be possible to transfer him to the custody of the ICC.

23. In any case, Article 97 concerns practical difficulties faced by a State which has in principle, accepted to implement the ICC cooperation order in question. As noted above, Libya has never agreed to execute the surrender request. To the contrary, the practical difficulties cited in the Response concern the difficulties faced by Libya in advancing its domestic investigations,¹² not the difficulties faced in executing the surrender request. Article 97 has no applicability to a State which has never attempted to execute the ICC order in question. The fact that national authorities refuse to implement an ICC order also does not constitute the type of practical difficulty envisaged by Article 97.
24. Finally, by arguing that it would be disproportionate to report Libya to the Security Council whilst Libya's appeal against the admissibility decision is pending before the Appeals Chamber,¹³ Libya is attempting to relitigate the Appeals Chamber's refusal to grant suspensive effect.
25. A legal obligation without any enforcement mechanism or consequences for non-compliance is not a legal obligation. When the Appeals Chamber rejected the request for suspensive effect, the Chamber found that there was absolutely no legal or practical justification for Libya not to surrender Mr. Gaddafi to the ICC pending the issuance of the appeal. If the Pre-Trial Chamber were to refrain from imposing any legal consequences for Libya's failure to comply with this obligation, on the grounds solely that an appeal

¹¹ See for example, F. Aliriza, 'Is Libya too scared to put Saif Gaddafi on trial?' *The Independent* 16 August 2013, <http://www.independent.co.uk/news/world/africa/is-libya-too-scared-to-put-saif-gaddafi-on-trial-8771495.html>

¹² Response at para. 12.

¹³ Response at paras. 15-16.

is pending, the Pre-Trial Chamber would thereby undermine the Appeals Chamber's ruling and denude it of any legal import.

26. Similarly, by arguing that ICC cannot carry out a trial against Mr. Gaddafi until the Appeals Chamber has issued its ruling, Libya is completely ignoring both the ruling on suspensive effect, and the jurisprudence and practice of the ICC in other cases.

27. The filing of an admissibility challenge does not suspend the substantive proceedings before the ICC,¹⁴ as evidenced by the commencement and progression of the pre-confirmation proceedings in the Kenya cases. It is therefore entirely circular for Libya to argue that its failure to surrender Mr. Gaddafi to the Court has not disrupted the core functions of the Court because the 'carrying out of a trial' has not yet commenced: the only reason that the substantive proceedings against Mr. Gaddafi have not yet commenced is because Libya has failed to surrender him to the Court.

III. Relief Sought

For the reasons set out above, the Defence for Mr. Saif Al-Islam Gaddafi respectfully requests the Honourable Pre-Trial Chamber to grant leave to file a reply.



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

Dated this, 20th August 2013

At London, United Kingdom

¹⁴ ICC-01/09-01/11-62 at paras. 8-9.