



Original: English

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

Date: 8 May 2014

PRE-TRIAL CHAMBER I

Before: Judge Anita Silvia Fernández de Gurmendi, Single Judge

**SITUATION IN LIBYA
IN THE CASE OF**

***THE PROSECUTOR v.
SAIF AL-ISLAM GADDAFI and ABDULLAH AL-SENUSSI***

Public

Libyan Government's Response to the "Prosecution Request for an Order to Libya"

**Source: The Government of Libya, represented by:
Professor Ahmed El-Gehani
Professor Philippe Sands QC
Professor James Crawford SC
Professor Payam Akhavan
Mr. Wayne Jordash QC
Ms. Michelle Butler**

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

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**

State's Representatives

Professor Ahmed El-Ghani

Professor Philippe Sands QC

Professor James Crawford SC

Professor Payam Akhavan

Mr. Wayne Jordash QC

Ms. Michelle Butler

REGISTRY

Registrar

Mr. Herman von Hebel

Counsel Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

I. INTRODUCTION

1. The Libyan Government hereby files its Response to the “Prosecution Request for an Order to Libya”¹ (‘Request’) in which the Prosecution requests that the Chamber order the Libyan Government to inform it whether trial proceedings are being conducted against Mr. Gaddafi and Mr. Al-Senussi; to provide assurances that the outcome of domestic proceedings will not hinder implementation of the request to surrender Mr. Gaddafi and the “potential obligation” in respect of Mr. Al-Senussi; and to regularly update the Chamber in respect of Libya’s “ability and efforts” to surrender Mr. Gaddafi to the Court.²

II. SUBMISSIONS

2. The Libyan Government notes, at the outset, that the Request should be dismissed *in limine* for either or both of the following reasons:
 - a. First, the Prosecution does not indicate a basis under the ICC Statute for the order that it seeks, or for its Request in respect of such an order; and
 - b. Second, given that the issue of admissibility, in respect of both the case against Mr. Gaddafi and the case against Mr. Al-Senussi, is now before the Appeals Chamber, this request cannot be properly considered by the Pre-Trial Chamber at this stage of the proceedings.
3. It is further submitted that in previous filings, as well as in this Response, the Libyan Government has already provided all relevant information and assurances sought by the Prosecutor and accordingly, that the Request for such information and updates is unnecessary.
4. The Request is based on media reports (annexed to the Request). Contrary to the Prosecutor’s submissions, they do not demonstrate that “the trial of Mr. Gaddafi [and Mr. Al-Senussi] [...] is currently being conducted”.³ It is evident from even the media reports that the hearing was, in fact, entirely procedural. It is in substance similar to a pre-trial Status Conference at the ICC and is not an indication that the trial has commenced.

¹ ICC-01/11-01/11-539.

² Request, paras. 1, 8.

³ Request, para. 2.

5. The transcript of the proceedings is annexed to a recent filing by the Gaddafi Defence.⁴ It clearly demonstrates both the purely procedural nature of the proceeding and the concern of the Libyan court with safeguarding fair trial guarantees. The judge repeatedly asks accused persons: “[d]o you have a lawyer or shall the Court appoint one for you?” The judge goes on to emphasise that: “[y]ou have the possibility of appointing a lawyer, and if not, the Court can appoint a lawyer for you. *The other issues are not a matter of discussion at the moment*” (emphasis added). The judge also clarifies that “*without getting to the substance, we are now discussing the issue of legal representation*” (emphasis added). The transcript of the hearing leaves no doubt that the actual trial of Mr. Gaddafi and Mr. Al-Senussi is *not* being conducted at present. As the Government has clarified on several previous occasions, the trial cannot and will not commence until each defendant is appointed legal representation. This is even confirmed by the representative of the Prosecution, Mr Al-Sur, in the transcript of the press conference annexed by the Defence. In relation to Mr Gaddafi, he clarifies that “there shall be a lawyer present in criminal case and the Court may not initiate pleadings unless a lawyer is present”.⁵ There is thus no basis for the factual inferences in the Request which should be rejected outright.
6. The other arguments and requests specific to each of the two cases are equally unwarranted and without merit. With regard to Mr. Al-Senussi, the Prosecution argues that “Libya should be reminded that its domestic proceedings against Mr. Al-Senussi are subject to its obligations to cooperate with the Court” and that Libya “should refrain from any action that would frustrate the Court’s ability to exercise jurisdiction, should the admissibility decision in Mr. Al-Senussi’s case be reversed on appeal”.⁶ The Prosecution fails to provide any evidence whatsoever that Libya would somehow “frustrate the Court’s ability to exercise jurisdiction”. This suggestion is wholly speculative and completely unwarranted given Libya’s full engagement and good faith in these admissibility proceedings despite the challenges of a transitional situation.
7. The Request attempts to pre-empt a final decision. Unless and until there is an adverse finding against Libya by the Appeals Chamber, the Pre-Trial Chamber’s decision in respect of inadmissibility in the case against Mr. Al-Senussi stands. It would be manifestly in contradiction with the complementarity principle if Libya

⁴ ICC-01/11-01/11-537, Annex A, at pages 6-7.

⁵ ICC-01/11-01/11-537-Annex A, page 8.

⁶ Request, para, 4.

was precluded from making progress in national criminal proceedings merely because of a pending appeal against a decision of the Court. Indeed, such speculative challenges prejudice the legitimacy of genuine national efforts at bringing accused persons to justice and thus undermine the fundamental principles of the ICC Statute.

8. For greater certainty, Libya also notes that the trial itself will take many months as it must deal with the testimony of hundreds of witnesses as well as tens of thousands of pages of documentary evidence. After the trial is concluded, there will inevitably be an appeal – whatever the outcome – and this phase will also take a considerable period of time. There is accordingly no risk of a sentence of any kind being carried out in respect of Mr Al-Senussi in the immediate future. Accordingly, even if the trial had already commenced – which it has not – that would not cause any interference with a potential future obligation to surrender Mr Al-Senussi arising out of a possible future adverse finding by the Appeals Chamber.
9. Turning to the Prosecution’s arguments in respect of Mr. Gaddafi, the Prosecution also asserts that there is a contradiction between Libya’s submissions that: (i) the continued presence of Mr. Gaddafi in Zintan does not indicate an inability to obtain custody of him; and (ii) the submission that the Zintan Brigade is a government-sanctioned local authority notwithstanding that Mr Gaddafi has not been surrendered to the Court.⁷ The Prosecution assert that this “contradiction calls for clarification of the record”.⁸ Characterising the issue in this way, however, is not helpful to advancing the objective of these admissibility proceedings.
10. Libya emphasises its previous submissions that these circumstances do not demonstrate an inability to obtain the custody of Mr. Gaddafi nor failure or bad faith on the part of Libya.⁹ The presence of Mr. Gaddafi in Zintan indicates neither inability on behalf of the Libyan Government to obtain custody of him, nor that the Libyan Government does not have custody of him. As indicated by the Prosecution’s submissions, and as already explained to the Chamber, the Libyan Government is exercising its authority in Zintan in relation to the domestic proceedings alongside the Zintan Brigade, which is responsible for supervising Mr.

⁷ Request, paras. 6, 7.

⁸ Request, para 7.

⁹ ICC-01/11-01/11-402, para. 13.

Gaddafi's detention and is a Government-sanctioned local authority in that region.¹⁰

11. As the Libyan Government has already made clear, the progressive integration of the local authorities into new Libyan democratic institutions, and the negotiated transfer of Mr. Gaddafi from Zintan to Tripoli, is taking place in a transitional context where the consolidation of the State is necessarily a complex and gradual process. To disregard this reality and to demand an immediate solution would render complementarity an illusory principle. It demonstrates neither inability to obtain the custody of Mr. Gaddafi nor bad faith on the part of Libya.¹¹ The Court must consider that the practical difficulties encountered in the transfer of Mr. Gaddafi from Zintan to Tripoli have not impeded the Libyan Government's engagement with the Court and its utmost effort to comply with its international obligations in these proceedings.¹²
12. Finally, the Prosecution suggests that the very existence of the hearing is inconsistent with the Libyan Government's obligation to surrender Mr. Gaddafi to the Court, and the denial of suspensive effect.¹³ This is patently incorrect. It is contended, in particular, that the obligation to surrender Mr. Gaddafi entails an obligation to "abstain from any initiative, measure or action which could result in frustrating the Court's legitimate expectation that he will be surrendered to the Court and that it will be possible for the case against him to resume before the Court".¹⁴ For the reasons already set out, there is no basis for the assertion that this purely procedural pre-trial hearing has somehow frustrated any legitimate expectation on behalf of the Court. Rather, the record of the hearing should reassure the Court that the Libyan Government remains committed to a trial with adequate legal representation for the Defendants and that it remains committed to ensuring that the Libyan prosecution authorities make available to the Defendants and their legal representatives the full national investigative file. In relation to this latter point, the transcript of the hearing annexed by the Defence to their recent filing shows that the judge ordered that prior to the next hearing in the case "the Defence shall be allowed to photocopy the indictment and the Prosecution's investigation records".¹⁵ This is hardly the sign of a Government seeking to rush through national trials in order to circumvent an order of the ICC.

¹⁰ See, for example, Gaddafi Admissibility Appeal, para. 158; ICC-01/11-01/11-402, para. 13.

¹¹ ICC-01/11-01/11-402, para. 13.

¹² ICC-01/11-01/11-402, para. 12.

¹³ Request, paras. 2, 3.

¹⁴ Request, para. 5.

¹⁵ ICC-01/11-01/11-537-Annex A, page 8.

III. RELIEF REQUESTED

13. For the reasons set out above, the Libyan Government respectfully requests that the Pre-Trial Chamber reject the Request.

Respectfully submitted:

The image shows six handwritten signatures stacked vertically. From top to bottom, they correspond to the names listed in the caption below: Professor Ahmed El-Ghani, Professor Philippe Sands QC, Professor James Crawford SC, Professor Payam Akhavan, Mr. Wayne Jordash QC, and Ms. Michelle Butler.

Professor Ahmed El-Ghani
 Professor Philippe Sands QC
 Professor James Crawford SC
 Professor Payam Akhavan
 Mr. Wayne Jordash QC
 Ms. Michelle Butler

ICC Focal Point and Counsel on behalf of the Government of Libya

Dated this 8th day of May 2014
 At London, United Kingdom