



Original: English

No.: ICC-01/11-01/11
Date: 14 August 2013

PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernandez 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

Response to the Gaddafi Defence's "Request for Finding of Non-Compliance and Referral to United Nations Security Council"

Source: The Government of Libya, represented by:
Professor Ahmed El-Gehani
Professor Philippe Sands QC
Professor Payam Akhavan
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

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

**State's Representatives (in the case of Amicus Curiae
Saif Al-Islam Gaddafi)**

Professor Ahmed El-Ghani

Professor Philippe Sands QC

Professor Payam Akhavan

Ms. Michelle Butler

REGISTRY

Registrar

Mr. Herman von Hebel

Counsel Support Section

Deputy Registrar

Mr. Didier Daniel Preira

Victims and Witnesses Unit

Detention Section

I. INTRODUCTION

1. The Libyan Government hereby submits its Response to the “Request for Finding of Non-Compliance and Referral to United Nations Security Council”¹ (“Request”).
2. The Defence for Mr. Gaddafi requests the Pre-Trial Chamber to find that the Libyan Government “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” and to “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”. The Defence also argues 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”.²
3. Libya does not dispute that the Decision of 18 July 2013 reinstated the “obligation to surrender [Mr. Gaddafi] to the Court”,³ or that during the short period between that Decision and the present Defence request, such surrender has not been possible. Article 87(7) states that the Court *may* make a finding of failure to comply and refer the matter to the Security Council. In order to sustain its Request, the Gaddafi Defence would have to establish that Libya has not met its obligations under international law; *and* that it would be appropriate, in the circumstances, to make the referral sought. The nub of the issue is whether this discretion should be exercised – a point never made explicit in Mr. Gaddafi’s Request.
4. Libya submits that it should not. The Defence has failed to show either that the Government of Libya is “deliberately refusing” to surrender Mr. Gaddafi, acting

¹ ICC-01/11-01/11-388.

² At paragraph 17.

³ Gaddafi Admissibility Decision, p. 91.

in bad faith, or that it has failed to consult the Court “without delay” within the meaning of Article 97.

II. SUBMISSIONS

A. *Bad faith*

5. The central Defence argument that Libya is “deliberately refusing” to surrender Mr. Gaddafi is wholly without merit. The Gaddafi Defence repeatedly overstates its position, and presents facts in support of its assertions that do not, in reality, provide the support required. Mr. Gaddafi suggests, for example, that the Libyan Government “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”,⁴ and alleges Libyan efforts to “evade fulfilling” its obligations.⁵
6. Clearly, this asserts bad faith.⁶ Yet, despite countless submissions to this effect from the Gaddafi Defence, this remains unsupported by any of the Chamber’s decisions. Indeed, the Chamber has made clear that it “has no doubt that the central Government is deploying all efforts to obtain Mr. Gaddafi’s transfer”.⁷
7. The primary basis for the Gaddafi Defence’s allegations of bad faith, once again, is an announcement of an *intention* to try Mr. Gaddafi in Libya, which, Mr. Gaddafi asserts, entails or evinces a violation of international obligations. The absurdity of this is self-evident, and has been addressed in the Libyan Government’s submissions several times before: it amounts to arguing that any state which is carrying out a domestic investigation, or which challenges the admissibility of a case on the basis of an extant domestic investigation, is in violation of international law. Patently no state would pursue an investigation that it did not intend to progress to trial, if the investigation yielded sufficient

⁴ Request, para. 9.

⁵ Request, para. 4.

⁶ It is also relevant, in this regard, that Mr Gaddafi refers to the Libyan Government “deliberately refusing” to transfer Mr. Gaddafi to the ICC.

⁷ Gaddafi Admissibility Decision, para. 207.

evidence to do so. The Chamber's assessment cannot ignore the political reality in Libya: that the Libyan Government and public opinion are desirous of a domestic criminal process. This truism is far removed from an intention to ignore international legal obligations. The speculative nature of the Request continues with the assertions that a trial, a conviction, and a sentence, show that the Chamber should now refer the situation to the UN Security Council.⁸ All of this – it must be emphasised, before the investigation stage is even complete.

8. The Gaddafi Request depends upon an argument that the situation in respect of the transfer of Mr. Gaddafi out of Zintan evinces a Libyan effort at “preventing the Court from exercising its functions and powers under the Statute”.⁹ The Libyan Government has made no such effort.

B. Consultation

9. The Defence has failed to demonstrate that Libya has violated its obligations under Article 97 to consult with the Court with regard to “problems which may impede or prevent the execution of the request” for surrender. The Defence request was submitted on 23 July 2013, less than one week after the Decision of 18 July 2013. The requirement to consult with the Court “without delay” does not immediately transform “problems which may impede or prevent the execution of the request” into a breach of the Statute.
10. In any event, the argument that Libya has not consulted the Court when the “problems” contemplated by Article 97 have been litigated over several months is wholly without merit, not least in light of the Defence appeal submissions emphasizing that Libya has consistently referred, both in its written and oral pleadings, to the Zintan issue.

⁸ Request, para. 11.

⁹ Request, para. 17.

C. Temporary nature of barriers to transfer

11. Article 97 provides an indication of the kinds of barriers to fulfilling co-operation requirements, which are deemed legitimate. It refers to “[i]nsufficient information to execute the request”; and an inability to locate the person sought “despite best efforts”. They are essentially practical matters, which indicate that despite the state’s good faith efforts to fulfill the co-operation request, have prevented it from doing so.
12. Although the local authorities in Zintan are part of the Libyan state, negotiations pertaining to the transfer of Mr Gaddafi have caused delays in the Libyan investigation. This – as has repeatedly been noted – has raised obstacles to any action in respect of Mr. Gaddafi by the Libyan authorities. Such obstacles, however, are not permanent and do not indicate an inability to conduct a genuine trial. The fact that Libya is going through a difficult and slow period of transition causes certain practical barriers to smooth interactions between various organs of the state. Mere delay, or the fact that a domestic process may be less efficient than an international process, is not enough to amount to inability.¹⁰
13. It is clear, as Mr. Gaddafi noted in the Request, that the issue of admissibility – in particular ability to pursue a domestic criminal process – is distinct from that of whether there is a failure to comply with the co-operation provisions of the Rome Statute. Libya has submitted on appeal that “the central Libyan Government [is] exercising its authority in Zintan in relation to the domestic proceedings alongside the Zintan Brigade, which is responsible for supervising his detention.”¹¹ It has submitted further that 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

¹⁰ See John T. Holmes, 'Complementarity: National Courts versus the ICC', in Antonio Cassese, Paola Gaeta, John R.W.D. Jones (ed.). *The Rome Statute of the International Criminal Court: A Commentary*, Volume I (2002), 667 at 674.

¹¹ Appeal, para. 158.

gradual process.”¹² Libya has submitted that these circumstances do not constitute inability “to obtain the custody of Mr. Gaddafi”, at least at the investigative stage of proceedings. Equally, they do not constitute bad faith on the part of Libya in “deliberately refusing” to surrender Mr. Gaddafi as alleged by the Defence.

14. Whilst the surrender obligation is contingent upon the ability of Libya to conduct genuine criminal proceedings (and the admissibility of the case before the ICC more generally), the converse is not true.

D. Reporting now would be disproportionate

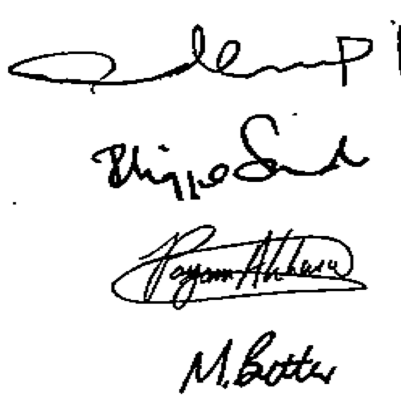
15. It is worth recalling the text of article 87(7) itself, which refers to failure to comply with a request to cooperate [...] “thereby preventing the Court from exercising its functions and powers”. In this regard, the Libyan Government submits that the imminence of the appeal is of immense relevance. Whilst the functions and powers of the Court are manifold, central among them is the carrying out of a trial. This, however, will not occur before the admissibility appeal is determined.
16. The Request, in effect, seeks final determination of the co-operation issue. However, it would be absurd if final determination of this matter were to arise before the issue of admissibility, upon which it depends. As such, it would be disproportionate to make a finding of non-compliance and report Libya to the Security Council when an appeal as regards the overarching issue of admissibility is pending – and imminent.

¹² Appeal, para. 157.

III. CONCLUSION

17. The non-surrender of Mr. Gaddafi at this time does not constitute a blatant disregard of a Court order or a refusal to engage in the court processes that may warrant a finding of non-compliance. Rather, the Government has sought to engage properly and in good faith with the court's processes and to actively cooperate with the court in challenging circumstances. To make a finding of non-compliance in the face of such engagement and co-operation would be to disregard the good faith efforts of a State and make a nonsense of the Court's complementarity jurisdiction.
18. Despite difficult circumstances, Libya has used its "best efforts" – as contemplated by Article 97 – to comply with the Court's requests and to comply with the admissibility procedures in good faith. It has been the subject of numerous baseless and alarmist accusations by the Defence, a seemingly endless stream of requests which needlessly repeat earlier submissions and perpetuate unreasonable expectations as to what a State in the throes of post-conflict institution-building can achieve in a relatively short time-frame. Despite this, Libya has nonetheless continued to cooperate with the ICC.
19. For the reasons outlined above, the Libyan Government respectfully requests that the Request be rejected.

Respectfully submitted:



The image shows four handwritten signatures stacked vertically. The first signature is a cursive 'A' followed by 'hmed El-Gehani'. The second is 'Philippe Sands'. The third is 'Payam Akhavan'. The fourth is 'M. Butler'.

Professor Ahmed El-Gehani
Professor Philippe Sands QC
Professor Payam Akhavan
Ms Michelle Butler
*Libyan ICC Coordinator and
Counsel on behalf of the Government of Libya
in the case of Saif Al-Islam Gaddafi*

Dated this 14th day of August 2013
At London, United Kingdom