

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **29 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
With Public Annexes A and B

Urgent Notification

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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Mr. Herman von Hebel, Registrar

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Victims and Witnesses Unit

Counsel Support Section

Detention Section

Victims Participation and Reparations Section

Other

Appeals Chamber

1. On 27 August 2013, the Prosecutor-General of Libya announced that together with Mr. Abdullah Al-Senussi and many others, Mr. Saif Al-Islam Gaddafi had recently been charged with crimes including “killing, looting, incitement of civil war as well as promotion and distribution of drugs, incitement of rape and kidnapping amongst others”.¹
2. The Prosecutor-General further stated that Mr. Gaddafi *et alia* would be brought before the Accusation Chamber in North Tripoli on 19 September 2013, which is the date which had previously been announced for the resumption of the national security proceedings involving the events in Zintan.
3. In a press-interview, the Libyan focal point for the ICC, Dr. Gehani confirmed this information.² In response to a question, “how can Libya benefit from stopping the transfer of Saif and Senussi to The Hague?”, Dr. Gehani responded that it would result in “one criminal group who will be tried together”.
4. In light of the vagueness of the statements, it is unclear whether the Libyan authorities have taken any concrete steps in the proceedings, or whether these announcements are simply a publicity ploy to exploit anti-Gaddafi feeling in order to distract the Libyan public from the fact that the Libyan State appears to be disintegrating, as evidenced by Prime-Minister Zeidan’s recent referral to the absence of a functioning State.³
5. In any case, Dr. Gehani confirmed that Libya was “stopping the transfer of Saif [...] to The Hague”. Moreover, since the date for the Court hearing has been set for a date which is before the Appeals

¹ Annex A.

² Annex B.

³ S. Zaptia, ‘Libya has many problems –Zeidan’ Libya Herald 26 August 2013, <http://www.libyaherald.com/2013/08/26/libya-has-many-problems-zeidan/>

Chamber would be in a position to issue its judgment on the appeal against the admissibility decision, it is clear that the Libyan authorities have absolutely no intention of complying with their obligation to surrender Mr. Gaddafi to the ICC irrespective of the outcome of the appeals proceedings.

6. The fact that both the Prosecutor-General and Dr. Gehani were aware that the Libyan authorities intended to try Mr. Gaddafi in Libya rather than surrender him to the ICC also suggests that the Libyan Government's submission in its 14 August 2013 filing that "Libya has used its "best efforts" - as contemplated by article 97 - to comply with the Court's requests"⁴ was disingenuous at best.
7. Similarly, although the Libyan Government invoked article 97 in order to refer to practical matters, which impeded " the state's good faith efforts to fulfil the cooperation request",⁵ the above statements of the Prosecutor-General and Dr. Gehani reveal that the Libyan Government had invoked article 97 improperly- any 'difficulties' faced by the Government in obtaining the transfer of Mr. Gaddafi related solely to their efforts to bring him to Court in Tripoli, and not as concerns his surrender to the ICC.
8. Even if Dr. Gehani had not been aware at the time of the above submissions that the Libyan authorities intended to disregard the surrender order and to put Mr. Gaddafi on trial in Libya, pursuant to article 24(3) of the Code of Professional Conduct, Dr. Gehani was under a duty to inform the Court as soon as he became he aware that his previous statements concerning the "best efforts" of the Libyan Government to comply with Court requests were no longer correct.

⁴ ICC-01/11-01/11-402 at para. 18.

⁵ ICC-01/11-01/11-402 at para. 11.

9. In consistently filing ambiguous and misleading information before the Pre-Trial Chamber, a reasonable observer would be entitled to conclude that the Libyan Government's tactic is one of 'running out the clock' by staving off a finding of non-compliance until such time as the Libyan authorities either have a possibility of submitting a second admissibility challenge, or have tried - and possibly executed - Mr. Gaddafi, which would render the admissibility proceedings moot.
10. The above media statements of the Prosecutor-General and Dr. Gehani must also be viewed against the backdrop that:
 - i. Since 1 June 2012, the Libyan Government has been under an obligation to take steps to ensure that it was in a position to *immediately* implement the surrender order of Mr. Gaddafi, in the event that its admissibility challenge was rejected;
 - ii. Libya is subject to a binding obligation to immediately surrender Mr. Gaddafi to the ICC; and
 - iii. The request of the Libyan Government to suspend the effects of the admissibility decision was rejected, and as such, there is absolutely no legal basis for the Libyan authorities to act in any manner which is contrary to their obligation to surrender Mr. Gaddafi *immediately* to the ICC.
11. There can be no doubt that the Libyan authorities have no intention to comply with the surrender request. Rather than employing their 'best efforts' to lay the groundwork for compliance with the surrender request, the statements of the Prosecutor-General and Dr. Gehani to the media will also have a completely counterproductive effect – by consolidating public opinion in favour of domestic trials.

12. In such circumstances, the discretionary power of the Pre-Trial Chamber to make a finding of non-compliance must be subordinated to the Pre-Trial Chamber's express *duty* to ensure that all reasonable measures have been taken to execute an ICC arrest warrant.⁶ The deferral of a finding of non-compliance simply gives Libya the green light to continue its flagrant disregard of ICC orders.
13. The Libyan Government has also been provided with several opportunities to address the Pre-Trial Chamber as concerns the fact that it has not surrendered Mr. Gaddafi to the ICC. Rather than engaging in good faith with the ICC, the Government has utilised these opportunities to provide contradictory and misleading information, which has hindered the ability of the Chamber to adjudicate upon the matter.
14. In such circumstances, it is neither necessary nor appropriate to accord the Government further opportunities to address its failure to surrender Mr. Gaddafi before issuing a decision on this matter. Further delays in the issuance of such a decision will only translate into further delays in the surrender of Mr. Gaddafi, which could be extremely prejudicial to his interests and rights.⁷

Relief Sought

15. For these reasons, the Defence for Mr. Saif Al-Islam Gaddafi respectfully requests the Honourable Pre-Trial Chamber to issue an immediate finding of non-compliance.

⁶ Rule 123(3) of the Rules of Procedure and Evidence.

⁷ See ICC-02/05-01/09-151 para. 18.



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

Dated this, 29th Day of August 2013

At London, United Kingdom