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

Date: 8 May 2014

PRE-TRIAL CHAMBER I

Before: Judge 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

Response to “Prosecution Request for an Order to Libya”

Source: Office of Public Counsel for Victims

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. PROCEDURAL HISTORY

1. On 1st May 2012, the Government of Libya filed an Application pursuant to article 19 of the Rome Statute, whereby it requested the Chamber to: (i) postpone the execution of the Surrender Request pursuant to article 95 of the Rome Statute and (ii) declare the case inadmissible and quash the Surrender Request.¹

2. On 4 May 2012, the Pre-Trial Chamber (the “Chamber”) issued the “Decision on the Conduct of the Proceedings Following the ‘Application on behalf of the Government of Libya pursuant to Article 19 of the Statute’” whereby it decided, *inter alia*, to appoint, for the purpose of the admissibility proceedings, the Principal Counsel of the Office of Public Counsel for Victims (the “OPCV” or the “Office”) as legal representative of victims who have communicated with the Court in relation to the case.²

3. On 31st May 2013, the Chamber issued the “Decision on the admissibility of the case against Saif Al-Islam Gaddafi”, in which it declared the case against Mr Gaddafi admissible and rejected Libya's admissibility challenge.³

4. On 7 June 2013, the Government of Libya filed the “Appeal against Pre-Trial Chamber I’s ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’”.⁴

¹ See the “Application on behalf of the Government of Libya pursuant to Article 19 of the Statute”, No. ICC-01/11-01/11-130-Red, 1 May 2012, paras. 107 and 108.

² See the “Decision on the Conduct of the Proceedings Following the ‘Application on behalf of the Government of Libya pursuant to Article 19 of the Statute’” (Pre-Trial Chamber I), No. ICC-01/11-01/11-134, 4 May 2012, para. 13.

³ See the “Decision on the admissibility of the case against Saif Al-Islam Gaddafi” (Pre-Trial Chamber I), No. ICC-01/11-01/11-344-Red, 31 May 2013 (the “Admissibility Decision”).

⁴ See the “Government of Libya’s Appeal against Pre-Trial Chamber I’s ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’”, No. ICC-01/11-01/11-350, 7 June 2013, para. 11.

5. On 1st May 2014, the Prosecution filed the “Request for an Order to Libya” (the “Request”), wherein it requested the Chamber “*to determine the status of Libya’s efforts to surrender Mr Gaddafi to the Court and to give assurances that its domestic proceedings will not impede its obligations to cooperate with the Court*”.⁵ In the Request, the Prosecution invited the Chamber to order the Libyan Government to “[u]pdate the Chamber on its ability and efforts, if any, to surrender Mr Gaddafi to the Court and to do so, on a regular basis until the Surrender Request is implemented” and to “[p]rovide assurances that the outcome of its domestic proceedings will not hinder the implementation of the Request to surrender Mr Gaddafi to the Court”.⁶

6. On the same day, the Legal Officer of the Chamber sent an email on behalf of the Single Judge requesting that “*any submission in response to the Prosecution Request for an Order to Libya (ICC-01/11-01/11-539) [should] be filed in the record of the case by Thursday, 8 May 2014*”.⁷

7. The Principal Counsel hereby respectfully submits her response to the Request on behalf of victims who have communicated with the Court in relation to the case.

II. LEGAL SUBMISSIONS

Victims’ interests

8. At the outset, the Principal Counsel notes that the matters raised in the Request relate to the implementation of Decision on Admissibility pursuant to article 19 of the Rome Statute.⁸ Indeed, the Request is predicated upon Libya’s

⁵ See the “Prosecution Request for an Order to Libya”, No. ICC-01/11-01/11-539, 1 May 2014, para. 1 (the “Request”).

⁶ *Idem*, para. 8.

⁷ Email communication from the Legal Officer of the Chamber on 1st May 2014 at 17:52.

⁸ See the Admissibility Decision, *supra* note 2.

failure to surrender the suspect to the custody of the Court, even after the Chamber has ruled that Mr Gaddafi should be tried before the ICC.⁹

9. The Principal Counsel submits that victims have a vital interest in the continuation of the proceedings against Mr Gaddafi before the ICC. They have an undeniable “right to truth” which can only be secured through transparent, expeditious and effective proceedings. As the Assembly of States Parties has recently emphasised, victims have a right “*to expeditious and effective access to justice, protection and support, adequate and prompt reparation for harm suffered, and access to relevant information concerning violations and redress mechanisms*”, all of which “*are essential components of justice*”.¹⁰ The refusal of Libyan authorities to surrender and/or the delay in the transfer of the suspect to the Court can only prejudice the interests of the victims in the proceedings.

The Request should be granted

10. The Principal Counsel supports the Request filed by the Prosecution. It is submitted that the Chamber should take appropriate measures to ensure the enforcement of its own judicial rulings, including the execution of the arrest warrant issued against the suspect. Moreover, the Request echoes similar concerns raised by the Defence in previous submissions regarding the reported commencement of a new domestic trial against Mr Gaddafi on 14 April 2014.¹¹ The press reports appended to the Request indicate that Mr Gaddafi will be tried for the “*murder, torture and bombardment of civilians during Libya’s eight-month civil war in*

⁹ See the Request, *supra* note 5.

¹⁰ See ASP, Resolution ICC-ASP/12/Res.5, 27 November 2013, p. 1.

¹¹ See, e.g., “Public Redacted version of “Request for Disclosure of Memorandum on Burden Sharing between the ICC Office of the Prosecutor and the Government of Libya”, No. ICC-01/11-01/11-533-Red, 28 March 2014, paras. 6 and 18.

2011".¹² The reports also suggest that the trial of Mr Gaddafi will be conducted via video-link, without the physical presence of the defendant.¹³

11. The trial of Mr Gaddafi is due to start in Libya nearly a year after the Chamber has rendered its Decision on the admissibility of the case, rejecting Libya's admissibility challenge.¹⁴ In its Decision, the Chamber concluded that the dismissal of the admissibility challenge entails an obligation upon Libya to surrender the suspect to the Court.¹⁵ The finding was subsequently confirmed by the Appeals Chamber. Indeed, in its Decision on Libya's request for suspensive effect, the Appeals Chamber made clear that "*Libya is currently obliged to surrender Mr Gaddafi to the Court*".¹⁶ Therefore, there can be no doubt as to the extent of Libya's obligation to surrender Mr Gaddafi to the Court.

12. The Principal Counsel recognises that the holding of domestic trials is not *per se* indicative of any failure to cooperate with the Court on the part of the Libyan Government. Libya's obligation to comply with the Admissibility Decision is without prejudice to its right to exercise jurisdiction over cases. In the same vein, the Appeals Chamber ruled that "*it has not been provided with information as to why Mr Gaddafi's transfer to the Court would prevent Libya from continuing with its investigations concerning him*".¹⁷ Thus, any legal proceedings in Libya against the suspect should not, in principle, constitute an impediment to his transfer to the Court.

13. Nonetheless, the Principal Counsel shares the Prosecution's concerns that the reported commencement of the trial may frustrate the Court's legitimate

¹² See the Request, *supra* note 5, Annex B.

¹³ *Idem*, Annex A.

¹⁴ See the Admissibility Decision, *supra* note 2, p. 91.

¹⁵ *Idem*.

¹⁶ See "Decision on the request for suspensive effect and related issues" (Appeals Chamber), No. ICC-01/11-01/11-387 OA 4, 18 July 2013, para. 27.

¹⁷ *Idem*, para. 26.

expectations that Mr Gaddafi will be surrendered to the ICC.¹⁸ This is particularly the case because despite the on-going judicial proceedings in Libya, it does not appear that the Government has taken any concrete step to implement the Admissibility Decision, nor has it raised any problem that may impede the surrender of Mr Gaddafi to the Court. On the contrary, the Libyan authorities have reportedly waived the requirement for the presence of the defendant during the trial to be conducted before the national jurisdiction.

14. This situation is aggravated by the lack of clarity in Libya's submissions as to the relationship between the central Government and the Zintan Brigade, which has a *de facto* control over Mr Gaddafi. In this respect, it is worth noting that the Chamber ruled in the Admissibility Decision that Libya was unable to obtain the defendant, as it had not *"been able to secure the transfer of Mr Gaddafi from his place of detention under the custody of the Zintan militia into State authority"*.¹⁹ The Chamber's conclusion is consistent with the Government's own submissions according to which *"[e]fforts to arrange Mr. Gaddafi's transfer to a detention facility in Tripoli"* were still ongoing.²⁰ However, the Government's most up-to-date submissions on the matter suggest that *"the Zintan Brigade is a Government-sanctioned local authority"* and that Libyan authorities are able to exercise authority over Mr Gaddafi alongside the Zintan Brigade.²¹

15. The Government's claims that it is in a position to obtain the suspect are directly relevant to the assessment of whether Libya has satisfied its obligations under the Rome Statute. Indeed, an obligation to surrender entails a duty upon the State to make all reasonable efforts to locate, arrest and secure the transfer of the

¹⁸ See the Request, *supra* note 5, para. 4.

¹⁹ See the Admissibility Decision, *supra* note 2, para. 206.

²⁰ See "Libyan Government's consolidated reply to the responses of the Prosecution, OPCD, and OPCV to its further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi", No. ICC-01/11-01/11-293-Red, 4 March 2013, para. 48.

²¹ See the "Document in Support of the Government of Libya's Appeal against the "Decision on the admissibility of the case against Saif Al-Islam Gaddafi", No. ICC-01/11-01/11-370-Red3 OA 4, paras. 157-161.

person concerned to the Court. Moreover, the Government has previously alluded to the existence of negotiations for “*the safe and orderly transfer of Mr. Gaddafi [...] to a specially constructed prison facility in Tripoli*”.²² No update has since been received on the outcome of these negotiations.

16. The Principal Counsel therefore concurs with the Prosecution that it is necessary, for the purpose of the present proceedings, to receive detailed submissions from Libya about how it will proceed to implement the Admissibility Decision. Further, the Principal Counsel welcomes the Prosecution’s proposal to require Libya to provide regular updates on its efforts in relation to the execution of the Surrender Request.

FOR THE FOREGOING REASONS the Principal Counsel of the OPCV, acting as Legal Representative of the victims for the purpose of Article 19 proceedings, respectfully requests the Pre-Trial Chamber to grant the Request.



Paolina Massidda
Principal Counsel

Dated this 8th day of May 2014

At The Hague, The Netherlands

²² See the “Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute”, *supra* note 1, para. 35.