

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **19 November 2014**

PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernández de Gurmendi, Presiding Judge
Judge Ekatarina Trendafilova
Judge Christine Van den Wyngaert

SITUATION IN LIBYA

**IN THE CASE OF
*THE PROSECUTOR v. SAIF AL-ISLAM GADDAFI***

Public

Defence request concerning Mr. Gaddafi's continued detention in Libya

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. James Stewart

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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and
Reparations Section**

Other

1. On 19 November 2011, Mr. Saif Al-Islam Gaddafi was captured and detained in Libya.
2. That was three years ago.
3. During these three years, he has remained in solitary detention in a secret location, and has had no ability to communicate with his Defence or family.
4. On 31 May 2013, the Pre-Trial Chamber ordered that he should be immediately surrendered to the custody of the ICC.¹ The Appeals Chamber later confirmed the finality of this order.²
5. In December 2013, the United Nations Working Group on Arbitrary Detention called on Libya to either surrender Mr. Gaddafi immediately to the ICC, or to release him.³
6. None of these orders were complied with.
7. The Defence has filed fifteen requests for a finding of non-compliance.
8. On 11 July 2014 (over a year after the first request for a finding of non-compliance was filed), the Single Judge found that Libya had not complied with its obligation to surrender Mr Gaddafi. The Single Judge further cautioned that the *“Chamber may decide at any time what further action is appropriate, including making a formal finding of non-cooperation and transmitting it to the Security Council”*.⁴

¹ ICC-01/11-01/11-344-Red.

² ICC-01/11-01/11-547-Red; ICC-01/11-01/11-387.

³ ICC-01/11-01/11-491-AnxA.

⁴ ICC-01/11-01/11-563, para. 13.

9. A further four months have elapsed. Libya has not submitted any concrete details to the ICC concerning the implementation of the surrender obligation. Nor has the Chamber taken any further action.
10. Mr. Gaddafi is presumed innocent, and should be entitled to enjoy the rights and liberties of an uncharged suspect. And yet, he has, for the last three years, suffered treatment which exceeds the permissible severity for even a convicted defendant. One month of incommunicado detention in isolation would have been excessive, but three years cannot be tolerated.
11. As recalled by the Working Group on Arbitrary Detention,

*“secret and/or incommunicado detention constitutes the most heinous violation of the norm protecting the right to liberty of human being under customary international law. The arbitrariness is inherent in these forms of deprivation of liberty as the individual is left outside the cloak of any legal protection.”*⁵
12. The *“international division of labour in prosecuting crimes must not be to the detriment of the apprehended person”*.⁶ Article 55(1)(d) of the Statute further provides that a suspect shall not be subjected to arbitrary detention.
13. In the present case, both the protracted admissibility proceedings and the non-execution of the ICC arrest warrant have consigned Mr. Gaddafi to an egregious form of legal limbo.

⁵ Working Group on Arbitrary Detention, Compilation of Deliberations: Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law, para. 60,

<http://www.ohchr.org/Documents/Issues/Detention/CompilationWGADDeliberation.pdf>

⁶ *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Appeals Judgment, (May 23, 2005), para. 220.

14. The ICC is the only Court which exercises lawful jurisdiction over Mr. Gaddafi. His continued detention in Libya has, however, rendered it impossible for him to appear before an ICC judge to challenge the legality of his detention, to receive privileged legal advice from his Defence, or to progress his case otherwise in any meaningful manner.
15. The current status quo is thus the equivalent of an adjournment *sine die*. Whereas such adjournments have been contemplated for released defendants, they are not permissible for detained defendants,⁷ particularly those who have not been charged.⁸
16. The rationale for the issuance of an ICC arrest warrant is to ensure the person's presence for trial: *"in the absence of the prospect of a trial, the accused cannot be held in custody or subjected to provisional release as purely preventative measures to deter him from committing further crimes"*.⁹
17. If Libya is unwilling to execute the ICC arrest warrant, and the Chamber itself has not taken steps to secure its compliance (i.e. through the formal referral of the matter to the Security Council), then the purpose of the ICC arrest warrant is vitiated. In the absence of steps to change the *status quo*, there is no prospect of a trial before the ICC.
18. To adopt the conclusion of the United Nations Working Group, if Mr. Gaddafi is not immediately surrendered to the ICC, then he must be immediately released: anything else constitutes impermissible arbitrary detention.

⁷ ICC-01/04-01/06-1418, para. 30.

⁸ See *Mr. Ali Saleh Kahlah Al-Marri v. United States of America*, Working Group on Arbitrary Detention, Opinion No. 43/2006, U.N. Doc. A/HRC/7/4/Add.1 at 29 (2007), paras. 28-38.

⁹ ICC-01/04-01/06-1418, para. 30.

19. Unlike suspects at large, Mr. Gaddafi has not sought to evade justice. He has nonetheless suffered all of the deprivations of a detained ICC suspect, without any of the legal protections or entitlements. Conversely, whereas the Court has referred several States to the Security Council in connection with their failure to arrest President Bashir during limited periods of time, Libya has enjoyed complete immunity thus far as concerns its prolonged non-compliance.

20. To maintain the ICC arrest warrant in these circumstances would serve no purpose other than to frustrate Libya's obligation to release Mr. Gaddafi in accordance with the terms of the decision of the Working Group, and as required by Article 55(1)(d). It would also be incompatible with the Chamber's "*distinct and independent obligation...to ensure that a person is not detained for an unreasonable period prior to trial under article 60(4) of the Statute*".¹⁰

21. Mr. Gaddafi has never been brought before a judge pursuant to Article 59, and as such, has had no means to invoke his right to request interim release pursuant to Article 59(3). In such circumstances, the fact that Mr. Gaddafi has not been brought before the Court should not be used as a basis for excluding his right to challenge the legality of the arrest warrant:¹¹ to hold otherwise would simply reinforce the arbitrary and illegal nature of his predicament.

22. For the above reasons, the Defence for Mr. Saif Al-Islam Gaddafi requests the Honourable Pre-Trial Chamber to either:

¹⁰ ICC-01/04-01/06-824, para. 98.

¹¹ "The Working Group on Arbitrary Detention has consistently maintained that the right to challenge the lawfulness of detention before court is a self-standing human right, the absence of which constitutes a human rights violation per se (A/HRC/19/57, para. 61)" cited in Report of the Working Group on Arbitrary Detention: compilation of national, regional and international laws, regulations and practices on the right to challenge the lawfulness of detention before court, 30 June 2014, para. 13

- (i) report Libya's non-compliance to the United Nations Security Council;
or
- (ii) convene a public hearing with the Defence and the Prosecution to hear submissions concerning the withdrawal of the ICC warrant of arrest against Mr. Gaddafi.

A handwritten signature in black ink, appearing to read 'John Jones', is centered on the page.

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

Dated this, 19th Day of November 2014

At the Hague, Netherlands