



Original: English

No.: ICC-01/11-01/11
Date: 04 December 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 Document

**Prosecution Response to
“Defence Request concerning Mr. Gaddafi’s continued detention in Libya”
of 19 November 2014, ICC-01/11-01/11-575**

Source: Office of the Prosecutor

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

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Introduction

1. The Office of the Prosecutor ("Prosecution") does not oppose the Defence request that Pre-Trial Chamber I ("Chamber") report to the United Nations Security Council Libya's non-compliance with its obligation to surrender Mr. Gaddafi to the Court.
2. The Prosecution opposes the alternative Defence request that a public hearing be convened to hear submissions concerning the withdrawal of the Court's warrant of arrest for Mr. Gaddafi. This alternative request is unnecessary.

Submissions

I. **Libya's failure to surrender Mr Gaddafi to the Court should be referred to the Security Council.**

3. The Prosecution recalls that in her 15 May 2014 Decision, the Single Judge found that Libya has "failed to discharge" its obligation to immediately surrender Mr. Gaddafi to the Court, with such obligation having been outstanding since 31 May 2013.¹ The Single Judge requested Libya to inform the Chamber by 28 May 2014 of the status of the implementation of this obligation, but Libya failed to do so. Libya instead sought an extension of time within which to provide such submissions, which the Single Judge denied in her 14 July 2014 Decision.² The Single Judge considered that "the extension requested is not appropriate, that consultations under regulation 109(3) of the Regulations may be deemed to have been concluded and 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."³

¹ ICC-01/11-01/11-545, para.3.

² ICC-01/11-01/11-563, para.13.

³ ICC-01/11-01/11-563, para.13.

4. The Single Judge nevertheless left it open to Libya to make submissions on the issue, stating that her decision was “without prejudice to the possibility for Libya to provide to the Chamber any additional information that it may consider relevant in relation to the implementation of the duty to surrender Mr. Gaddafi as well as to developments in the political and security situation in the country.”⁴ Despite being afforded such an exceptional opportunity, Libya has not made any submissions to the Chamber explaining why it has not surrendered Mr. Gaddafi to the Court. It has been almost five months since the Single Judge’s Decision, with there being no indication that Libya will either surrender Mr. Gaddafi, or that it will explain to the Court why it has not surrendered him.

5. The Prosecution recalls that in the *Omar Al Bashir* case, this Chamber has referred to the Security Council (and to the Assembly of States Parties as the non-compliant states were States Parties) several states who failed to arrest the Sudanese president on the occasions that he entered their territory.⁵ This Chamber noted that the states’ failure to cooperate with the Court with regard to the arrest and surrender of Omar Al Bashir prevented the Court from exercising its functions and powers under the Rome Statute (“Statute”).⁶ In the same manner, Libya’s failure to cooperate with the Court by surrendering Mr. Gaddafi has prevented the Court from proceeding with the case against him.

6. In light of the facts set out above, particularly the Single Judge’s determination that consultations required under Regulation 109(3) of the Regulations of the Court (“Regulations”) may be deemed to have been concluded, this Chamber should exercise its discretion to make a formal finding of non-cooperation on the part of Libya for its failure to surrender Mr. Gaddafi to the Court and refer this decision to the President of the Court for transmission to the United Nations Security Council

⁴ ICC-01/11-01/11-563, para.13.

⁵ ICC-02/05-01/09-140-tENG; ICC-02/05-01/09-139-Corr; ICC-02/05-01/07-57; see also the decisions of Pre-Trial Chamber II: ICC-02/05-01/09-195 and ICC-02/05-01/09-151.

⁶ ICC-02/05-01/09-140-tENG, para. 14; ICC-02/05-01/09-139-Corr, para. 47; ICC-02/05-01/07-57, p. 6; see also the decisions of Pre-Trial Chamber II: ICC-02/05-01/09-195, para. 34; and ICC-02/05-01/09-151, para. 23.

pursuant to Article 87(7) of the Statute and Regulation 109(4) of the Regulations. As this step has not yet been taken by the Chamber, it is premature for the Defence to conclude that there is no prospect of a trial before the Court.⁷

II. There is no legal basis for the withdrawal of the ICC arrest warrant for Mr. Gaddafi.

7. The Defence premises its argument for the withdrawal of the ICC arrest warrant for Mr. Gaddafi on the view that his present situation is akin to that of an adjournment *sine die*. In support of this argument, the Defence cites Trial Chamber I's 2 July 2008 Decision to release Thomas Lubanga Dyilo and the rationale for the detention of the accused.⁸ In the *Lubanga* case, the Trial Chamber adjourned the proceedings *sine die* due to the impossibility of trying the accused fairly following the non-disclosure of potentially exculpatory materials that were received from various source providers confidentially under Article 54(3)(e) of the Statute.⁹ The Trial Chamber considered that Thomas Lubanga's detention could no longer be justified in the absence of the prospect of trial.¹⁰

8. The present case could not be more different. Mr. Gaddafi has not yet been charged before the ICC, as proceedings in this case cannot commence until Libya surrenders him to the Court. This Chamber has held that there are only two options for pre-trial proceedings to unfold before this Court: pre-trial proceedings leading to the confirmation of charges *in absentia* pursuant to Article 61(2) of the Statute, and pre-trial proceedings in the presence of the suspect pursuant to Article 61(7) of the Statute.¹¹ There is no adjournment *sine die* to speak of, as there are currently no

⁷ ICC-01/11-01/11-575, para.17.

⁸ ICC-01/11-01/11-575, paras. 15-16.

⁹ ICC-01/04-01/06-1401, paras. 92-94.

¹⁰ ICC-01/04-01/06-1401, para. 93.

¹¹ ICC-01/11-01/11-440, para. 25.

proceedings concerning Mr. Gaddafi's guilt or innocence taking place before the Court.

9. Moreover, Mr. Gaddafi was not arrested and is not being detained in Libya pursuant to the ICC arrest warrant.¹² He is in fact the subject of domestic criminal proceedings, although the Libyan authorities have characterised the hearing which took place on 14 April 2014 as purely procedural in nature.¹³ Libya submitted evidence in support of its challenge to admissibility before the Court that the domestic proceedings against Mr. Gaddafi progressed from the investigation stage to the accusation stage of the criminal proceedings.¹⁴ As the ICC arrest warrant against Mr. Gaddafi is not the cause of his current detention, the withdrawal of the warrant will have no impact upon his detention.

10. As there is no material connection between the ICC arrest warrant for Mr. Gaddafi and his continued detention in Libya, there is no legal basis for this Chamber to consider the withdrawal of the arrest warrant. Given there is no connection, there is no reason for a hearing to be held in which submissions relating to such withdrawal can be made.

Conclusion

11. For the reasons stated above, the Prosecution requests that the Chamber:

- A. Grant the Defence request for this Chamber to make a finding of non-compliance on the part of Libya for its failure to surrender Mr. Gaddafi to the Court and to refer this decision to the President of the Court for transmission to the United Nations Security Council pursuant to Article 87(7) of the Statute and Regulation 109(4) of the Regulations; and

¹² ICC-01/11-01/11-130-Red, para. 26.

¹³ ICC-01/11-01/11-542, paras. 4-5, 12.

¹⁴ ICC-01/11-01/11-547-Red, para. 37; ICC-01/11-01/11-344-Red, para. 35.

- B. Deny the Defence request for a public hearing to be convened to hear submissions concerning the withdrawal of the ICC arrest warrant against Mr. Gaddafi.



Fatou Bensouda, Prosecutor

Dated this 4th day of December 2014

At The Hague, The Netherlands