

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **20 August 2015**

PRE-TRIAL CHAMBER I

**Before: Judge Joyce Aluoch, Presiding Judge
Judge Cuno Tarfusser
Judge Péter Kovács**

**SITUATION IN LIBYA
IN THE CASE OF**

***THE PROSECUTOR v.
SAIF AL-ISLAM GADDAFI and ABDULLAH AL-SENUSSI***

Public with Public Annexes A & B

Response to Prosecution's 'Request for an Order to Libya to Refrain from Executing Saif Al-Islam Gaddafi, Immediately Surrender Him to the Court, and Report His Death Sentence to the 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

Mr. James Stewart

Mr. Julian Nicholls

Counsel for the Defence

Counsel for Saif Al-Islam Gaddafi:

Mr. John R.W.D Jones QC

Ms. Sarah Bafadhel

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

Ms. Paolina Massidda

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

Professor Ahmed El-Gehani

Professor Philippe Sands QC

Professor Payam Akhavan

Ms. Michelle Butler

REGISTRY

Registrar

Mr. Herman von Hebel

Counsel Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

I. INTRODUCTION

1. On 9 December 2013, the Prosecutor filed a “Request for an Order to Libya to Refrain from Executing Saif Al-Islam Gaddafi, Immediately Surrender Him to the Court, and Report His Death Sentence to the United Nations Security Council”¹ (“Request”). The Libyan Government hereby submits its Response, in order to clarify misconceptions arising from the conclusion of Case 177 (2014) before the Court of Assize in Tripoli on 28 July 2015.
2. By way of summary, the Prosecutor’s request for an order that Libya refrain from executing Mr. Gaddafi is not necessary because the death sentence arises from a trial *in absentia*, which means that the judgment is not final: once Mr. Gaddafi is transferred from Zintan into the custody of the state, he will have an absolute right to a new trial, in person. Thus, the current sentence against him cannot and will not be carried out, even when he is transferred to the custody of the Libyan Government. Furthermore, even prior to his transfer, any judgment against him will be subject to appeal before the Supreme Court of Libya.
3. With regard to the Prosecutor’s Request for Libya to immediately surrender Mr. Gaddafi to the Court, there is a mistaken assumption that he is in fact in the custody of the Libyan Government and that there is thus a refusal to comply with the obligation to cooperate with the Court. As recognised by the Court, Mr. Gaddafi continues to be in custody in Zintan and is presently “unavailable” to the Libyan State.² Given the deterioration of the security situation in recent months, there are currently on-going negotiations to establish a unified Government which will in due course facilitate the resumption of Libya’s full cooperation with the Court.

¹ ICC-01/11-01/11-611.

² See, for example, Pre-Trial Chamber, “Decision on the admissibility of the case against Saif Al-Islam Gaddafi”, ICC-01/11-01/11-344, 31 May 2013, paras. 206, 215.

4. Accordingly, the continued custody of Mr. Gaddafi in Zintan precludes any possibility of either (a) a death sentence being carried out by the Libyan Government; or (b) surrender of Mr. Gaddafi to the Court by the Libyan Government.

II. SUBMISSIONS

A. *Non-enforceability of the death sentence following the trial in absentia of Mr. Gaddafi*

5. Article 358 of the Libyan Code of Criminal Procedure³ states, in relevant part, as follows:

If a person convicted in absentia appears or is arrested prior to the lapse of the penalty by prescription, the previously issued judgment shall be inevitably annulled either in respect of the penalty or the damages, and the case shall be retried before the court.

6. The Libyan Code of Criminal Procedure, therefore, affords Mr. Gaddafi (as a person convicted *in absentia*) an absolute right to a new trial when he is transferred from Zintan into the custody of the Libyan Government. That is to say, it absolutely prohibits the application of the death penalty following a trial *in absentia*. Such a sentence is thus not deemed to be a final judgment. This is true even if the Supreme Court were to uphold the findings of the Court of Assize on appeal. In the absence of a new trial, the death sentence will not and cannot be carried out against Mr. Gaddafi.
7. It is clear that because Mr. Gaddafi remains in custody in Zintan, and was not physically present in Tripoli before the Court of Assize, the proceedings are deemed to be a trial *in absentia* in relation to him. The fact that he participated in some proceedings by video-conference from Zintan does not affect his categorical entitlement under Article 358 of the Libyan Code of Criminal Procedure to a trial in-person before there would be any possibility of a sentence

³ See Annex A.

being carried out. There is no prospect of the Zintan authorities carrying out the death penalty in violation of Libyan law, and there is no example of them having done so in the past.

8. The Request to refrain from executing Mr. Gaddafi is, therefore, not necessary given that a sentence following a trial *in absentia* is not a final judgment and thus not enforceable under the Libyan Code of Criminal Procedure.
9. Although Case 177 (2014) does not result in a final judgment for Mr. Gaddafi, the Libyan Government and relevant institutions are nonetheless deeply concerned by false or misleading reports concerning the fairness of the trial proceedings. These reports contain a number of inaccuracies and misrepresentations, in respect of which the Libyan Government will request that the Court allow material evidence to be submitted, if appropriate, in due course.
10. Notwithstanding the difficult circumstances prevailing in Libya, great effort has been taken to afford the defendants a fair trial before an independent and impartial court (as indicated, for example, by efforts to ensure Mr. Gaddafi's participation by means of video-conference from Zintan, notwithstanding that he will have the right to a new trial upon his transfer to the custody of the Libyan Government in Tripoli). Furthermore, allegations of mistreatment against some defendants have been condemned strongly by the Prosecutor-General of Libya and are subject to on-going investigation.⁴

B. The Libyan Government's alleged non-compliance with its obligations to surrender Mr. Gaddafi to the Court

11. Since the Order of the Court to transfer Mr. Gaddafi, and the Appeals Chamber's decision in relation thereto on 25 April 2012, as well as the other

⁴ See, for example, <http://uk.reuters.com/article/2015/08/03/uk-libya-security-gaddafi-idUKKCN0Q81U720150803> ; <http://en.banglanews24.com/fullnews/bn/113829.html> ; <http://aninews.in/newsdetail4/story227782/-039-abuse-039-video-of-gaddafi-039-s-son-in-tripoli-jail-prompts-probe-by-libyan-authorities.html> ; http://www.maltatoday.com.mt/news/world/55811/watch_tripoli_prosecutor_hunting_saadi_gaddafis_torturers#.VdJRhYtsU_s ; <https://www.libyaherald.com/2015/08/04/public-prosecutor-to-investigate-alleged-saadi-qadddafi-torture-video/>

decisions to which the Prosecutor refers,⁵ the Libyan State has experienced a serious deterioration in security and a period of acute political instability. This has included attacks by extremist terrorist forces seeking to undermine the Libyan Government and post-revolution democratic process. In this context, bombing campaigns and other acts of terrorism have disrupted travel between Zintan and Tripoli, as well as effective communication and negotiations concerning transfer of the custody of Mr. Gaddafi to the Libyan Government.⁶

12. In addition to the actions of terrorist groups, there have been complications concerning the constitution of the Libyan Government. Following the second post-revolution parliamentary elections in June 2014, the Parliament was relocated to Tobruk in eastern Libya because of security concerns. For similar reasons, the internationally recognised Libyan Government is situated in Bayda, also in eastern Libya. The result of the elections, however, remains contested by members of the General National Congress, who have continued to operate both a legislature and a government based in Tripoli.

13. Despite the conflict between these authorities, there is a degree of co-operation among them, and Professor El-Gehani has a concurrent mandate from both governments, with the approval of both Parliaments, to represent Libya in these proceedings before the ICC.⁷ Furthermore, the Libyan prosecution authorities and the Libyan judiciary remain unified bodies headed in Tripoli, which, in accordance with the separation of powers principle, work independently from both of the two governments and legislatures. It is for this reason that the trial has proceeded in Tripoli despite the lack of a unified Libyan Government.

14. There is currently a delicate process of negotiation between, *inter alia*, the authorities in Tobruk and Bayda on the one hand, and the authorities in Tripoli on the other hand, as well as tribal leaders and other groups, with a view to

⁵ Request, para. 3; ICC-01/11-01/11-387, para. 27; ICC-01/11-01/11-545, paras.2-3; ICC-01/11-01/11-563, paras.9, 12-13; ICC- 01/11-01/11-577, paras.25-29, 34-35.

⁶ <http://www.bbc.co.uk/news/world-africa-28840655>

⁷ See Annex B.

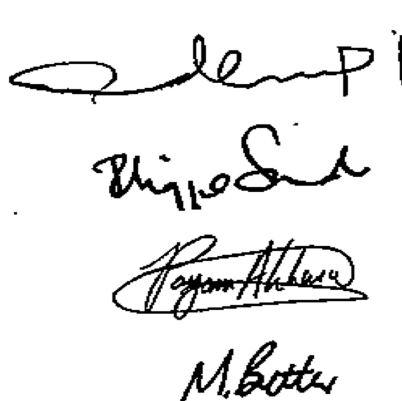
selecting a single Prime Minister with the mandate to create a single 'national unity government'.⁸

15. Until a unified Libyan Government can be established, there is no authority that can properly make and implement a decision in respect of the situation of Mr. Gaddafi, including negotiations for his transfer from Zintan to Tripoli. Moreover, any attempt by one party to the negotiations to do so would risk jeopardising the negotiation process. For these reasons, it is not possible at this stage to comply with the obligation to surrender Mr. Gaddafi or to otherwise cooperate with the Court in respect of a further admissibility challenge upon his transfer to Tripoli. Under the auspices of the United Nations however, there has been significant progress in negotiations held in Geneva during the week of 10th August 2015 that will continue in the very near future in Morocco, upon the invitation of His Majesty the King of Morocco.

III. CONCLUSION

16. For the reasons set out above, the Libyan Government respectfully requests that the Prosecutor's Request be rejected.

Respectfully submitted:



The image shows three handwritten signatures in black ink. The top signature is the most stylized, followed by a signature that appears to be 'Philippe Sands', and the bottom signature is 'M. Botte'.

Professor Ahmed El-Ghani
Professor Philippe Sands QC

⁸ See, for example, <http://www.unmultimedia.org/tv/unifeed/2015/08/42407/> .

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 20th day of August 2015

At London, United Kingdom