

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **27 March 2012**

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**

Confidential

OPCD Request for the Pre-Trial Chamber to Make a Finding of Non-Compliance

Source: The Office of Public Counsel for the Defence

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

The Office of the Prosecutor

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Ms. Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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**Victims Participation and Reparations
Section**

Other

1. Libya is subject to an extent obligation to surrender Mr. Gaddafi to the ICC. The mere fact that Libya presently contests this obligation does not itself postpone the obligation or exempt Libya from the consequences of non-compliance.
2. As emphasised by the Pre-Trial Chamber:

although Libya is not a State Party to the Statute, it is under an obligation to cooperate with the Court. This obligation stems directly from the Charter of the United Nations, more precisely article 25 and Chapter VII of that Charter, and UNSC Resolution 1970.25 UNSC Resolution 1970 orders Libya to "cooperate fully" with the Court, which means that the Statute, and especially its Part IX, is the legal framework within which Libya must comply with the Surrender Request. Libya's references to article 94 of the Statute also demonstrate that the Libyan authorities understand that they are required to work within the cooperation framework provided by the Statute. Libya has therefore a general obligation to comply with the Surrender Request in accordance with Part IX of the Statute and, more specifically, with its article 89(1).¹

3. The Libyan authorities were obliged to surrender Mr. Gaddafi as of the date of his arrest, on 18 November 2011, that is, almost **four and half months ago**. The fact that the Libyan authorities deliberately chose not to serve the arrest warrant on Mr. Gaddafi did not in any way exempt them from their obligation to surrender him to the ICC. One non-compliance cannot be used to excuse another, graver, non-compliance.
4. At no point in time have the Libyan authorities received any legal authorization from the ICC to delay or postpone Mr. Gaddafi's surrender. Nonetheless, through a combination of requests for extension of time, meritless requests for postponement, and mission delays, the Libyan authorities have managed to obtain de facto authorization to maintain Mr.

¹ At paras. 12 and 13.

Gaddafi in domestic conditions of detention, which significantly violate his rights.

5. Whilst each individual delay may have seen minimal, when viewed against the tapestry of delays, and the human rights yardstick that any delay of more than four days in bringing someone before a judge and giving them effective access to counsel and family is unacceptable,² it is clear that the Court should not countenance any further delays, no matter how minimal they seem in isolation. There must be a strict cut off point for when Mr. Gaddafi must be brought within the effective protection of the law.
6. The Libyan authorities were obliged to notify the Court by 23 March 2012 concerning their decision as to the Court's surrender request, and were further obliged to notify the Chamber by 30 March 2012 concerning the details for Mr. Gaddafi's surrender to The Hague.³ The Libyan authorities have not appealed the decision setting this deadline, nor have they requested an extension of time.
7. Although the Libyan authorities have requested to delay his surrender pursuant to Article 95 pending the resolution of their putative admissibility challenge,⁴ this request does not exempt them from compliance with either the 23 March 2012 or the 30 March 2012 deadline.
8. A request to postpone pursuant to Article 95 presupposes that State would still be willing in principle to surrender the person to the Court if either the request to postpone falls outside the scope of Article 95, or the admissibility challenge is rejected. The request to postpone therefore does not obviate the need for the Libyan authorities to indicate to the Court firstly, whether they will agree to surrender Mr. Gaddafi to the ICC, if the Court so orders, and

² ICC-01/11-01/11-51-Red at paras. 27 and 28.

³ Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi, ICC-01/11-01/11-72-Conf, 7 March 2012. The Arabic translation of the decision was notified to the Libyan authorities on 15 March 2012. ICC-01/11-01/11-83-Conf-Corr-Anx1

⁴ ICC-01/11-01/11-82-Conf

secondly, the modalities for such surrender. In terms of the latter, it is essential that such arrangements can be determined in advance so that if the Court ultimately rejects the postponement request, Mr. Gaddafi can be surrendered to the Court without further delays.

9. Nonetheless, the Libyan authorities' request to postpone does not indicate at any point that the Libyan authorities would be willing to surrender Mr. Gaddafi should their request be rejected.
10. Unless the Chamber explicitly amends or suspends a deadline for compliance, the parties and persons appearing before the Court must assume that they remain obliged to comply with it.⁵ This is particularly the case given that the request for postponement of Mr. Gaddafi's surrender pursuant to Article 95 is completely without merit. As will be elaborated in the OPCD's response on this issue, irrespective as to how Article 95 is interpreted, it cannot be invoked in connection with a hypothetical admissibility challenge; its scope is limited to the point at which the admissibility challenge is under consideration by the Court.
11. Although the Pre-Trial Chamber ordered the parties to file their response to the Article 95 request by 30 March 2012, the Chamber did not modify the outstanding deadline for the Libyan authorities to inform the Court as to their decision on the surrender of Mr. Gaddafi, and the deadline for informing the Registry concerning the modalities of the surrender.⁶
12. The Libyan authorities are therefore in non-compliance with the Chamber's order to inform the Court as to whether they will surrender Mr. Gaddafi to the ICC. In the absence of any indication that they will file further information

⁵ Prosecutor v. Lubanga, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU", ICC-01/04-01/06-2582, 8 October 2010, at para. 1.

⁶ ICC-01/11-01/11-85-Conf.

concerning the modalities of his surrender on 30 March 2012, it also appears likely that they will fail to comply with this deadline.

13. The Office of Public Counsel for the Defence therefore respectfully requests the Honourable Pre-Trial Chamber to:

- a. find that the Libyan authorities have failed to comply with the deadline of 23 March 2012 for informing the Court of their decision as to the surrender of Mr. Gaddafi to the ICC;
- b. order the Libyan authorities to immediately inform the ICC as to whether they will surrender Mr. Gaddafi to the ICC; and
- c. remind the Libyan authorities of their obligation to inform the Court by 30 March 2012 concerning the modalities of the surrender of Mr. Gaddafi to the ICC.

14. In the alternative, should the Chamber deem it necessary to receive the observations of the parties on the Article 95 postponement before making any decisions on this issue of non-compliance, the OPCD would be willing to file its observations at an earlier date (for example, by 28 March 2012), in order to minimize the unnecessary protraction of Mr. Gaddafi's detention in Libya.



Xavier-Jean Keïta, Principal Counsel of the OPCD

Dated this, 27th Day of March 2012

At The Hague, The Netherlands