

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **9 September 2013**

**THE APPEALS CHAMBER**

**Before:** Judge Anita Ušacka, Presiding Judge  
Judge Sang-Hyun Song  
Judge Sanji Mmasenono Monageng  
Judge Akua Kuenyehia  
Judge Erkki Kourula

**SITUATION IN LIBYA**

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

**PUBLIC**  
with public annexes A, B and C

**Request for an immediate finding of non-compliance and referral to United  
Nations Security Council**

**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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**REGISTRY**

**Registrar**

Mr. Herman von Hebel, Registrar

**Deputy Registrar**

Mr. Didier Daniel Preira, Deputy Registrar

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section**

**Other**

## **I. Introduction**

1. On 27 August 2013, the Libyan Prosecutor-General publically announced that Mr. Saif Al-Islam Gaddafi, amongst others, has been charged with “killing, looting, incitement of civil war as well as promotion and distribution of drugs, incitement of rape and kidnapping amongst others”<sup>1</sup>, and that following completion of investigations, the case will now be transferred to the Accusation Chamber to be heard in the presence of all accused in a North Tripoli Court on 19 September 2013.<sup>2</sup>
2. Efforts solely directed to transfer Mr. Gaddafi to Tripoli in order for his case to be heard before a Libyan domestic court are in direct violation of the Appeal Chamber’s definitive decision issued nearly two months ago, rejecting Libya’s request for suspensive effect and upholding Libya’s obligation to surrender Mr. Gaddafi to the Court.<sup>3</sup>
3. For the reasons cited below, the Defence requests the Honourable Appeals Chamber to issue an immediate finding of non-compliance against Libya and refer the matter to the United Nations Security Council.

## **II. Submissions**

4. On 27 August 2013 Mr. Abdel-Quader Radwan, the Libyan Prosecutor-General, announced that Mr. Saif Al-Islam Gaddafi, amongst others, had been charged with “killing, looting, incitement of civil war as well as promotion and distribution of drugs, incitement of rape and kidnapping amongst others”.<sup>4</sup> The Prosecutor-General confirmed that all accused would be tried together and transferred to Tripoli, for the case to be heard before the Accusation Chamber at a North Tripoli Court on 19 September 2013.<sup>5</sup>

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<sup>1</sup> Annex A, p.1

<sup>2</sup> Annex A, p.1

<sup>3</sup> ICC-01/11-01/11-387

<sup>4</sup> Annex A, p.1

<sup>5</sup> Annex A, p.1

5. On the same day Dr. Ahmed El-Gehani, the Libyan ICC Coordinator, was interviewed by a Libyan news programme in which Dr. El-Gehani opined that the Prosecutor-General's press statement both supported and proved that Libya is capable of trying Mr. Gaddafi, contrary to findings made by the Pre-Trial Chamber.<sup>6</sup> Relying on the Prosecutor-General's statement, Dr. El-Gehani further confirmed that Libya would benefit from stopping the transfer of Mr. Gaddafi to The Hague as Mr. Gaddafi belonged to one criminal group that would be tried together, all at once.<sup>7</sup>
6. On 3 September 2013, Dr. El-Gehani again appeared on Libyan news and repeated his position that the Libyan judiciary system was capable of trying Mr. Gaddafi and that despite "two years during litigation between Libya and the ICC, the door to challenge and the door to discussion remains open".<sup>8</sup> In response to a question concerning the strength of the ICC's demand for Libya to surrender Mr. Gaddafi, Dr. El-Gehani stated that it was "a domestic issue that we seek with urgency and the case will proceed in Libya, on Libyan soil by Libyan judges".<sup>9</sup>
7. These announcements are made nearly two months after the Appeals Chamber made its final determination on Libya's request for suspensive effect by definitively rejecting it and upholding Libya's current obligation to surrender Mr. Gaddafi to the Court.<sup>10</sup>
8. In its final determination, the Appeals Chamber linked Libya's appeal of the Pre-Trial Chamber's decision on admissibility with the request for suspensive effect before it and explicitly stated that the purpose of the substantive appeal was "not to permit Libya to conduct its domestic proceedings"<sup>11</sup> and that the

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<sup>6</sup> Annex B, p.2.

<sup>7</sup> Annex B, p.4.

<sup>8</sup> Annex C, p.4.

<sup>9</sup> Annex C, p.12.

<sup>10</sup> ICC-01/11-01/11-387 OA4

<sup>11</sup> ICC-01/11-01/11-387 OA4, para. 24.

transfer of Mr. Gaddafi to the Court would not prevent Libya from continuing its investigations concerning him.<sup>12</sup>

9. As a result Libya continues to be obliged immediately to surrender Mr. Gaddafi to the Court but whilst it has clearly sought to advance its investigations concerning Mr. Gaddafi, since 31 May 2013, it has failed to fulfill its obligation to the Court or “consult with the Court without delay” in order to resolve any impediment or prevention in the execution of a request made under Part IX of the Statute.
10. Libya has been aware of its immediate obligation to surrender as of 1 June 2012 when the Pre-Trial Chamber provided:

“The arrest warrant remains valid in accordance with article 19(9) of the Statute, and accordingly Libya must ensure that all necessary measures are taken during the postponement in order to ensure the possibility of an **immediate execution of the Surrender Request** should the case be found admissible (emphasis added)”.<sup>13</sup>

11. As a result any issues impeding the immediate surrender of Mr. Gaddafi, should have been notified to the Court “without delay” with the timeline running as of 31 May 2013, over three months ago.
12. Pursuant to article 87(7), the Appeals Chamber is also tasked with the discretionary power to make a finding of non-compliance in situations whereby it is prevented from exercising its functions and powers under the Statute. Libya has ignored the powers of the Appeals Chambers and its definitive determination that the obligation to immediately surrender Mr. Gaddafi to the Court continues.
13. By concentrating all efforts to continue with domestic prosecutions and scheduling hearings which require the presence of Mr. Gaddafi, Libya is conducting its domestic proceedings in a manner which is directly

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<sup>12</sup> ICC-01/11-01/11-387 OA4, para. 26.

<sup>13</sup> ICC-01/11-01/11-163, para. 40.

incompatible with the surrender obligation. This is an attempt by Libya to circumvent the finality of the Appeals Chamber's decision on suspensive effect and unilaterally determine when it ought to abide by orders rendered by the Court. In doing so, it challenges the functioning of the Court as "[n]o criminal court can operate on the basis that whenever it makes an order in a particular area, it is for the [participants] to elect whether or not to implement it, depending on his interpretation of his obligations".<sup>14</sup>

14. Libya's refusal to abide by the Appeals Chamber's decision is further emphasised by its attempts to re-litigate matters concerning suspensive effect before the Pre-Trial Chamber,<sup>15</sup> and its consistent public announcements that it will prevent the transfer of Mr. Gaddafi to the Court as the "door remains open" to further litigate its case before the ICC.
15. Dr. El-Ghani's statements are indicative of the fact that Libya intends to ignore the Appeals Chamber's decision upholding Libya's obligation to surrender Mr. Gaddafi, unless and until it succeeds in its appeal of the Pre-Trial Chamber's decision on admissibility and, if it loses, that it will continue to ignore the Appeals Chamber's ruling by instead launching a second admissibility challenge before the ICC.<sup>16</sup> In other words, Libya will only "cooperate" with the Court if the Court finds in its favour. This is an entirely disrespectful attitude to adopt towards the Court, and an impossible situation for the rule of law.
16. Even in the event of an unsuccessful second admissibility challenge by Libya, the Appeals Chamber can have no confidence at all that Libya will surrender Mr. Gaddafi to the Court, given Dr. El-Ghani's categorical statements that

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<sup>14</sup> ICC-01/04-01/06-2582 OA18, para. 48 (fn. omitted).

<sup>15</sup> ICC-01/11-01/11-402

<sup>16</sup> This is reminiscent of the delaying tactics employed by Libya to avoid its obligation to surrender Mr. Gaddafi following his arrest in November 2011 prior to any admissibility challenge brought on 1 May 2012. *See* ICC-01/11-01-34-Anx; ICC-01/11-01/11-41-Red; ICC-01/11-01/11-44-Anx1-Red; ICC-01/11-01/11-82; ICC-01/11-01/11-102; ICC-01/11-01/11-103 and ICC-01/11-01/11-127.

Mr. Gaddafi will be tried “on Libyan soil”.<sup>17</sup> These consistent and unequivocal remarks irresistibly give rise to the clear inference that Libya has entered into litigation before this Court not with any genuine intention to engage with the Court and to respect its ultimate rulings. In the meantime, Mr. Gaddafi remains detained *incommunicado* in an undisclosed location, with no access to a lawyer, his family or friends, and with no updates regarding the progress of the case against him before the ICC.

17. The above statements by Libyan officials may have been made simply to curry favour with the Libyan public; even if that were so (and it will be clear by 19 September whether that is so or not), they are clear announcements, made by public officials representing Libya including before this Court,<sup>18</sup> that suggest that the admissibility proceedings are a foregone conclusion and that Mr. Gaddafi will be tried on Libyan soil irrespective of the outcome of the appeal. This is in defiance of prior deprecations of statements, including in this case, made by participants that seek to suggest that the final authority for making judicial determination does not rest with the Judges and for commenting on matters that await resolution by the Court and thereby intruding on the Court’s role.<sup>19</sup>

18. Libya has resisted all opportunities to genuinely address the Court as to the true nature of its actions against Mr. Gaddafi and its commitment to deliver him to the Court. In formal submissions made by counsel on behalf of the Government of Libya, Libya has categorically stated that similar media

<sup>17</sup> In this regard, the Defence recalls Article 24(1) of the Code of Professional Conduct for counsel: “Counsel shall take all necessary steps to ensure that his or her actions or those of counsel’s assistants or staff are not prejudicial to the ongoing proceedings and do not bring the Court into disrepute”. Moreover, with respect to comments made by Dr. El-Ghani in relation to Counsel, specifically mentioning by name both present and former counsel for Mr. Gaddafi, the Defence recalls Article 27(1) of the Code, “In dealing with other counsel and their clients, counsel shall act fairly, in good faith and courteously” (*see* Annex C). Pursuant to Article 1 of the Code, it extends to counsel acting on behalf of the State. Dr. El-Ghani is listed as the first signatory of all filings submitted on behalf of Libya.

<sup>18</sup> As cited above, these announcements have been made by Dr. El-Ghani, the Libyan ICC Coordinator; Mr. Abdel-Quader Radwan, the Libyan Prosecutor-General *and* Mr. Salah Al-Marghani, the Libyan Justice Minister who has publically stated that Mr. Gaddafi would be among the 22 defendants scheduled to appear before a Tripoli Court on 19 September 2013, *see* <http://www.libyaherald.com/2013/09/07/september-date-confirmed-for-saif-and-senussi-pre-trial-hearing/>

<sup>19</sup> ICC-01/04-01/06-2433, para. 52; ICC-01/11-01/11-175 OA3, para. 33.

statements made on prior occasions, were only “announcements of an *intention* to try Mr. Gaddafi in Libya”.<sup>20</sup> In this instance, unlike previous rhetoric by the Libyan authorities, Mr. Gaddafi has now been charged with serious crimes and all efforts have been directed towards securing the transfer of Mr. Gaddafi to be prosecuted in Tripoli on 19 September 2013, rather than securing his surrender to the ICC.

### III. Relief sought

19. For the foregoing reasons, the Defence for Mr. Saif Al-Islam Gaddafi requests the Honourable Appeals Chamber to:

- a. **FIND** that the Government of Libya has deliberately taken steps that are directly incompatible with the surrender request thereby circumventing the Appeals Chamber’s final decision rejecting the request for suspensive effect;
- b. **FIND** that, pursuant to article 97, the Government of Libya has failed to consult with the Court without delay with regard to compliance with the Surrender Request;
- c. **FIND** that, pursuant to United Nations Security Council Resolution 1970 (2011), Libya has failed to “cooperate fully with and provide any necessary assistance to the Court”;<sup>21</sup>
- d. **REFER**, in accordance with article 87(7) of the Statute and regulation 109(4) of the Regulations, its finding of non-compliance to the President of the Court for transmission to the Security Council, through the Secretary-General of the United Nations; and
- e. **DEPRECATE** the objectionable public statements made by officials representing the Government of Libya.

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<sup>20</sup> ICC-01/11-01/11-402, para. 7.

<sup>21</sup> S/Res/1970 (2011)



20. In light of the imminence of the scheduled hearing on 19 September 2013, the Defence further requests that the Appeals Chambers order expedited responses to this request.

A handwritten signature in black ink, appearing to read 'John Jones', written in a cursive style.

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

Dated this, 9<sup>th</sup> Day of September 2013

At London, United Kingdom