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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***

Public

**With Confidential *Ex Parte* Annex A, Defence for Saif Al-Islam Gaddafi,
Defence for Abdullah Al-Senussi and Prosecution Only and
Confidential *Ex Parte* Annex B, Defence for Saif Al-Islam Gaddafi Only**

Defence Response to “Prosecution Request for an Order to 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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I. Introduction

1. The Defence for Mr. Saif Al-Islam Gaddafi hereby submits its response to the 'Prosecution Request for an Order to Libya'.¹
2. The maxim, *res ipsa loquitur*, fully applies to this case: the state of affairs speaks for itself.
3. Almost a year has elapsed since the Pre-Trial Chamber issued its decision on the admissibility of the case (the Admissibility Decision) on 31 May 2013. In so doing, the Pre-Trial Chamber confirmed that Libya's obligation to surrender Mr. Gaddafi immediately to the custody of the ICC was reactivated (the Surrender Order).²
4. Almost 10 months have elapsed since the Appeals Chamber confirmed, on 18 July 2013, that Libya was obliged to surrender Mr. Gaddafi to the custody of the ICC, notwithstanding the pendency of its appeal against the Admissibility Decision.³
5. Libya has not once, during this time, indicated that it is willing to surrender Mr. Gaddafi to the ICC.
6. Libya has also failed to invoke Article 97, in order to seek assistance with any matters that might have impeded its ability to execute the Surrender Order. It is, therefore, reasonable to infer that there are no matters impeding Libya's ability to comply with the Surrender Order, and that its non-compliance is explained solely by reference to its unwillingness to comply. Moreover, by reason of its failure to invoke Article 97 in a timely fashion, Libya should now be estopped from making any argument to the contrary.

¹ ICC-01/11-01/11-539 ("Prosecution Request")

² ICC-01/11-01/11-344-Red

³ ICC-01/11-01/11-387.

7. It is also indisputable that Libya's failure to implement the Surrender Order has prevented the ICC from "exercising its functions and powers under this Statute".⁴ The only reason that the confirmation proceedings against Mr. Gaddafi have not commenced is because Libya has not surrendered Mr. Gaddafi to the ICC.
8. Over the course of the last 12 months, the Defence for Mr. Gaddafi has submitted over thirteen filings in relation to Libya's non-compliance with the Surrender Order. Through these filings, the Chamber has been put on notice of:
 - i. Legal rulings that Mr. Gaddafi faces a situation of "extremely gravity and urgency, as a risk of irreparable harm", that Mr. Gaddafi's rights under Libyan law have been egregiously violated, and that Libya must either release him, or surrender him immediately to the ICC;⁵ and
 - ii. Evidence that persons associated with the case have been subjected to threats, reprisals, physical attacks, and taken hostage.⁶
9. The commencement of the domestic trial proceedings against Mr. Gaddafi is likely to exacerbate both the violations of Mr. Gaddafi's rights, and the risk to persons participating in proceedings connected to Mr. Gaddafi.

⁴ Article 87(7) of the Statute.

⁵ See for example, ICC-01/11-01/11-522-Red, paras. 13-24.

⁶ See ICC-01/11-01/11-367-Conf-Exp; ICC-01/11-01/11-452-Conf-Exp; ICC-01/11-01/11-464-Conf-Exp; ICC-01/11-01/11-469-Conf-Exp; ICC-01/11-01/11-501-Conf-Exp; ICC-01/11-01/11-504-Conf-Exp; ICC-01/11-01/11-514-Conf-Exp; ICC-01/11-01/11-518-Conf-Exp; ICC-01/11-01/11-522-Red; ICC-01/11-01/11-528-Conf-Exp; ICC-01/11-01/11-530-Conf-Exp; ICC-01/11-01/11-531; ICC-01/11-01/11-533-Red; ICC-01/11-01/11-537; ICC-01/11-01/11-538-Conf-Exp.

10. Ultimately, the fundamental and incontrovertible fact is that after almost 12 months, Mr. Gaddafi is still not in the custody of the ICC, and there is nothing in the judicial record which explains or justifies why he is not in the custody of the ICC. These facts speak for themselves, and require a timely judicial response.
11. If the ICC found that the conditions for issuing a finding of non-compliance and referring the matter to the Security Council were met where a State failed, over a period of at most, 48 hours to execute an ICC arrest warrant,⁷ then the same conclusion must be warranted in the present case, where Libya has failed, over a period of almost a year to do so. Justice, and indeed rationality, demand that like cases be treated alike.
12. The Defence for Mr. Saif Al-Islam Gaddafi therefore respectfully submits that the only appropriate “clarification on the record”⁸ that can be made in the circumstances of this case, is to ‘clarify’ that Libya has failed to comply with the Surrender Order, and that if it does not do so forthwith, the matter will be referred to the Security Council.

II. Submissions

13. A finding of non-compliance under Article 87(7) is warranted where:
 - a. A State has failed to comply with an ICC request for cooperation;
 - b. Its failure to do so is “contrary to the provisions of the Statute”; and
 - c. Its failure to do so has prevented the Court from exercising its powers and duties under the Statute.

⁷ ICC-02/05-01/09-195.

⁸ Prosecution Request, para. 7.

14. All three elements are met. It is also necessary to issue an immediate decision on non-compliance in order to ensure that the ICC's ability to exercise its powers and duties is not irreversibly compromised.

a) Libya has failed to execute the Surrender Order

15. Mr. Gaddafi has not been surrendered to the ICC.

16. During the last twelve months, the ICC focal point for Libya and representatives of the Libyan Government have issued multiple statements to the effect that Mr. Gaddafi would be tried in Libya.⁹

17. Mr. Gaddafi has now been put on trial in Libya.

18. The fact that the Libyan authorities have no intention of surrendering Mr. Gaddafi to the ICC is not only a matter of public record, but is further recently evidenced by the fact that Libya has adopted a law for the specific purpose of allowing it to try Mr. Gaddafi in Tripoli, whilst he remains detained in Zintan.

19. In this light, it becomes obvious that previous, oblique references by Libya to the difficulties between the Government and Zintan were a "red herring".¹⁰ The Government's negotiations with Zintan concerned Mr. Gaddafi's transfer to the Al Hadba detention center in Tripoli for the purpose of standing trial in Tripoli, and not for the purpose of surrendering him to the ICC. These negotiations appear to have resulted in the compromise whereby Zintan is able to maintain custody over Mr. Gaddafi, notwithstanding the fact that the Judges, prosecutors, and defence lawyers are present in a courtroom in Tripoli.

⁹ See for example ICC-01/11-01/11-358-AnxA; ICC-01/11-01/11-388-AnxA; ICC-01/11-01/11-388-AnxB; ICC-01/11-01/11-424-AnxA; ICC-01/11-01/11-424-AnxB; ICC-01/11-01/11-434-AnxA; ICC-01/11-01/11-434-AnxB; ICC-01/11-01/11-434-AnxC; ICC-01/11-01/11-467-Conf-Exp at para. 27.

¹⁰ See ICC-01/11-01/11-402, paras. 12-13.

20. There is no indication that the Government has ever requested the Zintan authorities to transfer Mr. Gaddafi to the ICC.
21. The Defence also concurs with the Prosecution that “Libya’s decision to prosecute Mr. Gaddafi is troubling in light of Libya’s acknowledgement that it is bound to surrender him to the Court and the Appeals Chamber denial of Libya’s request for the appeal of this Chamber’s Admissibility Decision to have suspensive effect”.¹¹
22. In such circumstances, a mere acknowledgement by Libya that it is bound to surrender Mr. Gaddafi to the Court does not fulfil its obligation to actually do so. The Court cannot infer willingness on the part of Libya to comply with and implement its obligations under the Rome Statute when it has taken no steps to comply.¹² Acknowledging a debt is not the same as repaying it.
23. From the moment that Mr. Gaddafi was arrested until the present day, Libya has never indicated in either filings or in statements that it would surrender Mr. Gaddafi to the ICC.
24. The only reasonable conclusion that the Chamber can draw in such circumstances is that Libya has not complied with the Surrender Order and that it will not do so, unless the ICC takes further measures to ensure its enforcement.

b) Libya’s failure to implement the Surrender Order is contrary to the provisions of the Statute

25. Although Article 97 of the Statute permits a State to enter into consultations with the Court in connection with the implementation of a Court order, the State must invoke Article 97 “without delay”, and the consultations must be

¹¹ Prosecution Request, para. 3.

¹² ICC-01/11-01/11-514-Conf-Exp-AnxA. See also ICC-01/11-01/11-504-Conf-Exp, paras. 90-96

directed towards eliminating the impediments to the execution of the Court order.

26. Although almost twelve months have elapsed, Libya has never invoked Article 97. As noted above, Libya's references to Tripoli's "problematic relationship" with Zintan do not bear any necessary relationship to Libya's actual willingness or ability to implement the Surrender Order.
27. There is also no indication that Libya ever sought the assistance of the Court to resolve any impediments to the implementation of the Surrender Order.
28. Had Libya's failure to implement the Surrender Order been attributable exclusively to Zintan's unwillingness to surrender Mr. Gaddafi to the ICC, then it follows that Libya would have welcomed, rather than opposed, an official finding of non-compliance, which would have strengthened the force of its domestic negotiations on this subject.
29. In any case, Article 97 does not permit a State to suspend unilaterally its obligation to implement an ICC order. In the absence of an explicit ICC ruling either reversing or suspending the Surrender Order, Libya was required to implement it.
30. Libya had a full and protracted opportunity to argue as to why it should be permitted to try Mr. Gaddafi in Libya. Libya's challenge was dismissed. Libya was then accorded multiple opportunities to justify why the Admissibility Decision (and related Surrender Order) should be suspended. Libya's multiple filings on suspensive effect¹³ were considered and rejected by the Appeals Chamber.
31. In so doing, the Appeals Chamber ruled expressly that "the purpose [of the appeal] is not to permit Libya to conduct its domestic criminal proceedings".¹⁴

¹³ ICC-01/11-01/11-416, ICC-01/11-01/11-371, ICC-01/11-01/11-370-Red3.

¹⁴ ICC-01/11-01/11-387, para. 24.

32. The Appeals Chamber has also underscored Libya's obligation to execute its duties and powers under the Rome Statute "in accordance with the principle of good faith".¹⁵
33. The principle of good faith, as set out in Article 26 of the Vienna Convention on the Law of Treaties, requires parties to execute their obligations in a manner which is consistent with the object and purposes of the treaty in question.¹⁶ As observed by Professor D'Amato, this obligation would be violated if a party were to construe its obligation in a literal or overly narrow manner, which results in that party gaining an unfair or unjust advantage.¹⁷
34. Libya's willingness to comply with the Surrender Order in good faith appears to be directly undermined by the statement of the representative of the Prosecutor-General that the Libyan authorities "consulted with legal experts and experts in human rights as well as our team before the International Criminal Court", and on the basis of such consultations, modified Libyan law in order to ensure that Mr. Gaddafi could be tried, by video-link in Zintan, in order to "strengthen the Libyan position before the International Criminal Court".¹⁸
35. The video-link mechanism is predicated on Mr. Gaddafi remaining in detention in Zintan. It therefore presupposes that Mr. Gaddafi will remain in Zintan, and by necessary implication, will not be surrendered to the ICC.

¹⁵ ICC-01/11-01/11-480, para. 18.

¹⁶ Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia) (1997 General List No 92), para. 142, <http://www.icj-cij.org/docket/files/92/7375.pdf>

¹⁷ A. D'Amato, "Good Faith", Encyclopaedia of Public International Law, (1992), 599-601, at 599, <http://anthonydamato.law.northwestern.edu/encyclopedia/good-faith.pdf>

¹⁸ Al-Ahrar Debate, "Siddique Sour: we consulted with legal experts and experts in human rights as well as our team before the International Criminal Court and concluded that this amendment strengthens the Libyan position before the International Criminal Court" [17:30 to 17:44]. ICC-01/11-01/11-533-Red, footnote 15.

36. Two conclusions can therefore be drawn from the spokesperson's statement. Firstly, it would appear that rather than improving its judicial system in order to meet the admissibility criteria, Libya has, to the contrary, eliminated key due process protections in order to prove that it is capable to bringing Mr. Gaddafi to trial, in the most superficial sense of the word.
37. Secondly, the Prosecutor-General's comments imply, certainly to a reasonable observer, that Libya's "team before the International Criminal Court" advised the Government on the adoption of measures directed at putting Mr. Gaddafi on trial in Libya, notwithstanding that this would be in violation of the Surrender Order.
38. Libya cannot be considered to be executing its obligations under the Rome Statute in "good faith" if it both fails to implement the Surrender Order, and exploits its continued custody of Mr. Gaddafi in order to "strengthen the Libyan position before the International Criminal Court".
39. In this regard, although Libya can, in principle, file a second admissibility challenge and invoke Article 95 in order to postpone the Surrender Order, it has not done so. Nor should Libya be permitted to prioritise a prospective second challenge (which would, for all practical purposes, also be predicated on Libya continuing to exercise custody Mr. Gaddafi even after losing its current appeal, and thus predicated on non-compliance going beyond an unfavourable Appeals Chamber's decision), over its immediate obligation to surrender Mr. Gaddafi.
40. As repeatedly found by the Pre-Trial Chamber, unless and until Libya files a concrete challenge to the admissibility of the case, Libya remains obliged to execute the Surrender Order.¹⁹ It also follows from this that unless and until Libya files a second challenge to the admissibility of the case, based on current

¹⁹ ICC-01/11-01/11-269, paras. 28-36, and , ICC-01/11-01/11-100.

facts; the Chamber must also hold Libya accountable as concerns any failure to implement the Surrender Order.

41. Remaining silent in the face of prolonged and repeated examples of non-compliance²⁰ would not promote constructive engagement, nor does it exemplify positive complementarity.
42. As concluded in a recent report on Libya, there has been a tendency to excuse and attribute the current failings of Libyan authorities and entities to Libya's legacy from the 'Gaddafi years'.²¹ However, Libya's current state of affairs is not uniquely attributable to its past. The international community's failure to hold the Libyan authorities and entities accountable for their actions and failures constitutes appeasement, which has rewarded and reinforced negative behaviour.²² The report further critiques the international community for disengaging from Libya prematurely, and allowing the discourse of "Libyan did it all by themselves" to take precedence over a genuine assessment as to whether Libya possessed the capacity to implement its domestic and international obligations, without international assistance or involvement.²³
43. Similarly, any inherited weaknesses in judicial institutions neither excuses nor justifies Libya's continued failure to implement the Surrender Order, or its protracted failure to secure Mr. Gaddafi's rights under Libyan law.
44. The judicial approach towards Libya must be consistent with the object and purposes of the Court: to eliminate impunity, promote accountability, and ensure effective justice. Given the current environment within Libya, within

²⁰ ICC-01/11-01/11-540-Conf-Exp.

²¹ K. Mezran, J. Pack, M. Eljarh, 'Libya's Faustian Bargains: Breaking the Appeasement Cycle', 5 May 2014, p. 1,

http://www.atlanticcouncil.org/images/publications/Libyas_Faustian_Bargains.

²² K. Mezran, J. Pack, M. Eljarh, 'Libya's Faustian Bargains: Breaking the Appeasement Cycle', 5 May 2014, p. 1, and 18,

http://www.atlanticcouncil.org/images/publications/Libyas_Faustian_Bargains.pdf

²³ P. 14.

which judges and prosecutors have been assassinated with impunity,²⁴ and persons protected by international immunities are taken hostage in order to extract bargains,²⁵ it is essential that the ICC does not appear to reward or condone non-compliance with legal obligations.²⁶

45. For this reason, the UNWGAD has found that the fact that Libya has undergone a significant political transition is not a valid basis to postpone ruling on Libya's compliance with legal obligations:

“human rights also apply in periods of transition. Previous opinions adopted by the Group have emphasized that not only do human rights apply in periods of transition but so do the international system of supervision and international law based on State responsibility”.²⁷

46. ICC Trial Chamber V(b) has also held that “[a]ny purported deficiency in domestic legal procedures (or interpretation thereof), cannot be raised as a shield to protect a State Party from its obligation to cooperate with the Court, or to undermine any application for non-compliance under Article 87(7) of the Statute that may result.”²⁸

47. It is thus clear that institutional weaknesses or the difficulties associated with transition do not exempt Libya from its obligation to enforce the Surrender

²⁴ Within the last 7 days, another judge was assassinated last week, and a member of the Prosecutor's office in Benghazi was kidnapped and held for ransom: N. Ibrahim, ‘\$5 million ransom demand for kidnapped lawyer’, *Libya Herald* 3 May 2014,

“<http://www.libyaherald.com/2014/05/03/5-million-ransom-demand-for-kidnapped-lawyer/#axzz311RKzOit>

‘Libya: Former judge killed, army officer injured in Benghazi’, 29 April 2014,

<http://www.panapress.com/Libya--Former-judge-killed,-army-officer-injured-in-Benghazi--12-908151-30-lang2-index.html>

²⁵ M. Eljarh, “Why Libya's Militants are Kidnapping Diplomats and Why We Can't Give In”, *Foreign Policy*, 2 May 2014

http://transitions.foreignpolicy.com/posts/2014/05/02/why_libya_s_militants_are_kidnapping_diplomats_and_why_we_can_t_give_in

²⁶ ICC-01/11-01/11-504-Conf-Exp; ICC-01/11-01/11-514-Conf-Exp; ICC-01/11-01/11-516-Conf-Exp; ICC-01/11-01/11-528-Conf-Exp and ICC-01/11-01/11-530-Conf-Exp.

²⁷ Opinion no. 60/2012, A/HRC/WGAD/2012/60, para. 12,

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/164/17/PDF/G1316417.pdf?OpenElement>

²⁸ ICC-01/09-02/11-908, para. 47.

Order, particularly in the absence of firstly, any official explanation as to why it has not enforced the Surrender Order, and secondly, a prompt request for assistance to eliminate any impediments to the execution of the Surrender Order.²⁹

c) Libya's failure to surrender Mr. Gaddafi to the ICC has prevented the Court from exercising its powers and duties under the Statute.

48. The ICC has found that where a State "has failed to cooperate with the Court with regard to the arrest and surrender of [a defendant], thus preventing the institution from exercising its functions and powers under the Statute, the Court cannot but refer the matter to the Assembly of States Parties and the SC."³⁰ It is undeniable that Libya's failure to execute the Surrender Order has prevented the Court from exercising its functions and powers under the Statute.

49. The Pre-Trial Chamber has interpreted the Statute to preclude the commencement of the confirmation proceedings until Mr. Gaddafi has appeared in person before the Court.³¹

50. Libya's failure to surrender Mr. Gaddafi to the ICC has therefore prevented the Court from commencing such proceedings, and severely prejudiced Mr. Gaddafi's right to be tried by the Court in an expeditious manner, and his right not to be detained for an unreasonable length of time during the pre-trial proceedings.

51. Libya's failure to implement the Surrender Order has thus impacted directly on Mr. Gaddafi's ability to exercise his rights under the Statute, and

²⁹ ICC-01/09-02/11-908, para. 48.

³⁰ ICC-02/05-01/09-195, para. 34.

³¹ ICC-01/11-01/11-440.

condemned him to remain detained in conditions which the UNWGAD has found to be “arbitrary and illegal”.³²

52. The continuation of the domestic trial against Mr. Gaddafi will, at a minimum, imperil:

- i. Mr. Gaddafi’s protection against *ne bis in idem*, as enshrined in Article 20(3) of the Statute;
- ii. his right to silence under the Rome Statute as concerns events which form the subject-matter of the ICC case against him;
- iii. the physical security and protection of actual and potential ICC witnesses (both Prosecution and Defence), whose names might be mentioned during the course of the domestic trial;³³ and
- iv. Mr. Gaddafi’s physical and mental integrity.

53. At the same time, Mr. Gaddafi has been placed in the impossible position of having to defend himself before a domestic Court, which has no legal competence to try him, whilst simultaneously, preserving his right to silence and safeguarding his potential Defence strategy before the ICC. In the absence of any ability to communicate on a privileged basis with his ICC Counsel, Mr. Gaddafi also has no means to seek legal advice as to how to preserve his rights and position before the ICC.

54. The Defence notes in this regard that in a 14 March 2014 submission, Libya attempted to minimise the risk of prejudice concerning Mr. Gaddafi’s non-surrender to the ICC by asserting that,

³² ICC-01/11-01/11-491

³³ ICC-01/11-01/11-201, paras. 31-38.

“three Libyan lawyers have been presented to the office of the Prosecutor General, and have been accepted as a team of defence counsel, representing both Mr. Al-Senussi and Mr. Gaddafi. They have, furthermore, received permission to visit both Mr. Al-Senussi and Mr. Gaddafi at the prisons where they are respectively detained.”³⁴

55. Apart from the fact that Mr. Gaddafi and Mr. Al-Senussi were both unrepresented for the first two trial hearings, and that there is no reason for thinking that the same lawyers can represent both men without a conflict of interest, it is self-evident that any Libyan lawyer appointed by the authorities would be unwilling or unable to protect Mr. Gaddafi’s rights before the ICC.
56. Libya also had over 18 months to appoint a lawyer to Mr. Gaddafi prior to the issuance of the Admissibility Decision. The appointment of a lawyer almost one year after the Admissibility Challenge was dismissed, five months after UNWGAD ordered Libya to either release Mr. Gaddafi or surrender him to to the ICC due to the egregious and incurable violations of his rights under Libyan law, is simply too late.
57. If Libya proves itself able to appoint a lawyer for him now, it raises the question as to why the authorities commenced key aspects of the trial proceedings in the absence of both Mr. Gaddafi and any legal representative. For example, the Accusation Chamber confirmed the charges without according Mr. Gaddafi any ability to make submissions in person or through a lawyer concerning the legality of investigative proceedings or the collection of evidence. Similarly, the Trial Chamber approved the use of video-link technology during the first hearing, during which Mr. Gaddafi was

³⁴ ICC-01/11-01/11-527, para. 13.

unrepresented, and for unexplained reasons, Mr. Gaddafi did not appear either in person or by video link.³⁵

58. The appointment of legal representation is also a superficial act, which does not secure effective representation in the absence of a genuine will to create an environment in which defendants can enjoy their rights in an effective manner, and without fear of retaliation.

59. In this regard, journalists reported that security officials prevented several lawyers from attending the first hearing.³⁶ Other lawyers did not attend the hearings due to security risks, and fears for their safety.³⁷

60. Even though Mr. Al-Senussi apparently signed a power of attorney for a lawyer prior to the first hearing, the authorities failed to recognise it in a timely manner.³⁸ The lawyer also subsequently withdrew due to “health reasons”.³⁹

61. The spokesperson for the Prosecutor-General has also confirmed that the Libyan authorities do not intend to implement any mechanism to enable

³⁵ C. Stephen, Chaos as Libya's war crimes 'trial of the century' fails to produce Gaddafi's sons', *The Guardian* 14 April 2014, <http://www.theguardian.com/world/2014/apr/14/libya-war-crimes-trial-gaddafi-sons-observers-barred>

³⁶ Rana Jawad@Rana_J01

Prison authorities also prevented some lawyers of defendants on trial from going in and some family members. #libya

https://twitter.com/Rana_J01/status/455646214667501568 (Rana Jawad is a journalist from BBC)

³⁷ Amnesty International, Questions and Answers, 26 April 2014, (Response to Question 5), <http://www.amnesty.org/en/library/asset/MDE19/003/2014/en/d3532c39-6150-48d0-84ef-69bf7840599a/mde190032014en.pdf>

“Hanan Salah @hananHRW · Apr 27

PT only handful of family members of defendants/ex officials case attended session today and some lawyers did not appear #Tripoli #Libya” <https://twitter.com/hananHRW/status/460400010937790464>

See also ICC-01/11-01/11-469-Conf-Exp, and ICC-01/11-01/11-501-Conf-Exp.

³⁸ ICC-01/11-01/11-537-AnxA. C. Stephen, Chaos as Libya's war crimes 'trial of the century' fails to produce Gaddafi's sons', *The Guardian* 14 April 2014,

<http://www.theguardian.com/world/2014/apr/14/libya-war-crimes-trial-gaddafi-sons-observers-barred>

³⁹ S. Zway, 'Qaddafi Son Appears on Screen at His Trial', *New York Times*, 27 April 2014, http://www.nytimes.com/2014/04/28/world/africa/qaddafi-son-appears-on-screen-at-his-trial.html?_r=0

See also ICC-01/11-01/11-538-Conf-Exp.

lawyers to speak to defendants, who are being tried by video-link, during the hearings.⁴⁰ Several lawyers complained during the first hearings that they had not been accorded an opportunity to obtain instructions from their clients in a confidential setting.⁴¹ During the most recent hearing, at least one lawyer appeared to have had no contact with his client, and to be uncertain as to whether his client was mentally or physically fit to stand trial, or deceased.⁴² This problem of counsel-client contact is likely to be exacerbated in light of Mr. Gaddafi's detention in Zintan.⁴³

62. The fact that Mr. Gaddafi has appeared – *via* video-link – before a Judge is also irrelevant in circumstances in which firstly, the narrow scope of the images transmitted by video-link prevent the Judges from being able to assess whether Mr. Gaddafi has the ability to address the Court freely, and secondly, there are reports that “the scarcely functioning criminal courts [...] generally skirted the pressing problem of abuses during the year by post-Qadhafi militias, in part because of militia intimidation of judges.”⁴⁴ Libyan Judges, in short, have to conduct trials while in mortal fear of militias' adverse reactions to their rulings.

63. In sum, the commencement of the trial against Mr. Gaddafi impels the question – if the ICC does not intervene now to issue a finding of non-compliance, then when?

64. The purpose of a finding of non-compliance is to ensure that the ICC is in a position to exercise its functions under the Statute. It would therefore be

⁴⁰ ICC-01/11-01/11-537-AnxA at p.12.

⁴¹ [Libya: Fair Trial Concerns for Ex-Officials](http://www.hrw.org/NEWS/2014/04/14/LIBYA-FAIR-TRIAL-CONCERNS-EX-OFFICIALS) Authorities Ignore ICC Ruling to Send Gaddafi's Son to The Hague', *HRW* 14 April 2014, <http://www.hrw.org/NEWS/2014/04/14/LIBYA-FAIR-TRIAL-CONCERNS-EX-OFFICIALS>

⁴² ICC-01/11-01/11-537-AnxA.

⁴³ Attached as Annex A. Due to the nature of the subject matter, this annex has been classified as confidential ex parte, Defence for Saif Al-Islam Gaddafi, Defence for Abdullah Al-Senussi and Prosecution Only.

⁴⁴ Libya, Country Report on Human Rights Practices, 2013, pp.1-2. <http://www.state.gov/documents/organization/220578.pdf>

counterproductive to defer issuing a finding until the point where the domestic proceedings may have permanently prejudiced Mr. Gaddafi's rights under the Statute, or triggered *ne bis in idem* complications.

65. In the absence of either a decision granting suspensive effect or a second admissibility challenge, there is no balancing exercise between State sovereignty and the rights of Mr. Gaddafi at this juncture; the Pre-Trial Chamber's exclusive concern should be to ensure that Mr. Gaddafi is able to exercise his rights under the Statute, and in so doing, take all reasonable steps to ensure Libya's compliance with any orders which are necessary to secure his rights.
66. Given the dismissal of the Admissibility Challenge, Mr. Gaddafi has a right to expect that the ICC will intervene to take all reasonable measures to ensure that he will be tried before the ICC. It is unfair to force him to participate in a domestic process, which Amnesty International has described as a "farce",⁴⁵ when he has a legitimate expectation that he can and should be tried before the ICC in connection with the same or similar allegations.
67. Time is of the essence where the defendant is detained, particular in circumstances such as those of Mr. Gaddafi.⁴⁶ It is therefore incumbent on the Single Judge to ensure that steps are taken to ensure that the case progresses before the ICC with the expedition required by the Rome Statute and ICC jurisprudence.⁴⁷
68. If the Single Judge were to remain silent or allow Libya to enmesh the ICC proceedings in further discussions or debates regarding compliance and

⁴⁵ Amnesty International, 'Libya: Trial of former al-Gaddafi officials by video link a farce', 14 April 2014, <http://www.amnesty.org/en/news/libya-trial-former-al-gaddafi-officials-video-link-farce-2014-04-14>

⁴⁶ ICC-01/11-01/11-491, para. 3.

⁴⁷ ICC-01/04-01/07-2259, para. 43, and footnote 89.

admissibility, it would cause unnecessary hardship for Mr. Gaddafi and his family by prolonging the prospect of him facing the death penalty.

69. Mr. Gaddafi is not merely a defendant, but a human being with the right to be treated with dignity and respect. His rights are not to be trifled with, nor his fate something to be toyed with. Mr. Gaddafi's only-to-be-imagined anguish at his continuing confinement and possible execution, and that of his family, is not to be dismissed lightly.⁴⁸ For anyone with a grain of human rights sensibility, his predicament should be deeply troubling.

70. The Defence respectfully endorses her supplication that the present situation cannot be allowed to continue.

71. The Security Council invoked its Chapter VII powers to refer the Libya situation to the ICC; the ICC Prosecution requested an arrest warrant against Mr. Gaddafi; the Pre-Trial Chamber then issued an arrest warrant against Mr. Gaddafi, and later rejected Libya's admissibility challenge. The case against Mr. Gaddafi is squarely and intentionally before the ICC.

72. Pre-Trial Chamber has observed in connection with the *Bashir* case that

the ICC relies mainly on the States' cooperation, without which it cannot fulfil its mandate. When the SC, acting under Chapter VII of the UN Charter, refers a situation to the Court as constituting a threat to international peace and security, it must be expected that the Council would respond by way of taking such measures which are considered appropriate, if there is an apparent failure on the part of States Parties to the Statute or Sudan to cooperate in fulfilling the Court's mandate as entrusted to them by the Council. Otherwise, if there is no follow up action on the part of the SC, any referral by the Council to the ICC under Chapter VII of the UN Charter would never achieve its ultimate goal, namely, to put an end to impunity. Accordingly, any such referral would become futile.⁴⁹

⁴⁸ See Annex B. Due to the nature of the subject matter, this annex has been classified as confidential ex parte, Defence for Saif Al-Islam Gaddafi Only.

⁴⁹ ICC-02/05-01/09-195, para. 33.

73. It is time, past time, for all efforts to be taken by the Court to ensure that Mr. Gaddafi is brought before the ICC forthwith.

III. Relief sought

74. The Defence for Mr. Saif Al-Islam Gaddafi respectfully supports the Prosecution Request and requests the Honourable Single Judge to:

- a. Issue a finding of non-compliance as concerns the execution of the Surrender Order; and
- b. Notify Libya that should Mr. Gaddafi not be surrendered to the ICC forthwith, the matter will be referred to the Security Council.



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

Dated this, 8th Day of May 2014

At London, United Kingdom