

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 7 March 2012

PRE-TRIAL CHAMBER I

**Before: Judge Sanji Mmasenono Monageng, Presiding Judge
Judge Sylvia Steiner
Judge Cuno Tarfusser**

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

Confidential

Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence**Legal Representatives of Victims****Legal Representatives of Applicants****Unrepresented Victims****Unrepresented Applicants for
Participation/Reparation****The Office of Public Counsel for
Victims****The Office of Public Counsel for the
Defence**

Mr Xavier-Jean Keïta, Principal Counsel
Ms Melinda Taylor, Counsel

States Representatives

Competent authorities of
Libya

Amicus Curiae**REGISTRY**

Registrar

Ms Silvana Arbia

Deputy Registrar

Mr Didier Preira

Victims and Witnesses Unit**Detention Section****Victims Participation and Reparations
Section****Others**

Pre-Trial Chamber I of the International Criminal Court (“Chamber” and “Court” respectively), hereby renders the following decision:

Procedural History

1. Resolution 1970 was adopted by the United Nations Security Council (“UNSC”) on 26 February 2011,¹ whereby the UNSC referred the situation in Libya since 15 February 2011 to the Prosecutor of the Court² and decided that the Libyan authorities “shall cooperate fully with and provide any necessary assistance to the Court”.³
2. On 27 June 2011, the “Decision on the ‘Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI” was issued by the Chamber (“Arrest Warrant Decision”),⁴ as well as a warrant of arrest against, among others, Saif Al-Islam Gaddafi (“Mr Gaddafi”).⁵ In the Arrest Warrant Decision, the Chamber decided that the Registry should prepare a request for cooperation asking for Libya’s assistance in arresting Mr Gaddafi, among others, and surrendering him to the Court.⁶ This task was completed by the Registry on 4 July 2011 (“Surrender Request”).⁷
3. A letter allegedly from the National Transitional Council (“NTC”) was transmitted to the Chamber on 23 November 2011, and the official English translation of this letter was formally put into the case record six days later.⁸ This letter confirmed the arrest of Mr Gaddafi on 19 November 2011 in Libya and, with reference to article 94 of the Statute,

¹ S/RES/1970 (2011).

² *Ibid.*, para. 4.

³ *Ibid.*, para. 5.

⁴ ICC-01/11-01/11-1.

⁵ ICC-01/11-01/11-3.

⁶ ICC-01/11-01/11-1, p. 42.

⁷ “Request to the Libyan Arab Jamahiriya for the arrest and surrender of Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI”, ICC-01/11-01/11-5.

⁸ Registry, “Implementation of the ‘Decision to Add Document to Case Record’ (ICC-01/11-01/11-29-Conf-Exp)”, 29 November 2011, ICC-01/11-01/11-34-Anx, public annex 1, p. 2.

stated that the Surrender Request would be discussed by the NTC and that the Court would be officially informed when a decision is made.⁹

4. On 6 December 2011, the Chamber issued the "Public Redacted Version of Decision Requesting Libya to file Observations Regarding the Arrest of Saif Al-Islam Gaddafi".¹⁰ In this decision, the Chamber: (1) authorised the Office of Public Counsel for the Defence ("OPCD") to represent the interests of the Defence in all instances related to the proceedings against Mr Gaddafi in the present case until otherwise decided¹¹ and (2) sought submissions from Libya on whether and when the Libyan authorities intended to surrender Mr Gaddafi to the Court.¹²

5. The Libyan authorities confidentially filed their responses to the Chamber's queries on 23 January 2012 ("Libya Submissions").¹³ The Chamber ordered that any response to the Libya submissions be filed by 2 February 2012.¹⁴ Both the Prosecution¹⁵ and OPCD¹⁶ filed observations by the indicated deadline ("Prosecution Observations" and "OPCD Observations", respectively).

6. On 3 February 2012, the Chamber issued the "Decision on the Registry-OPCD Visit to Libya",¹⁷ ordering the Registry to make arrangements with the NTC for a joint Registry-OPCD visit to Mr Gaddafi in Libya. The Registry-OPCD delegation visited Libya from 29

⁹ *Ibid.*

¹⁰ ICC-01/11-01/11-39-Red.

¹¹ *Ibid.*, p. 6.

¹² *Ibid.*, para. 11.

¹³ Registry, "Report of the Registrar on Libya's observations regarding the arrest of Saif Al-Islam Gaddafi", ICC-01/11-01/11-44, confidential annex 1. Libya's submissions were originally due on 10 January 2012, but the Chamber granted an extension of the deadline after Libya requested additional time. See "Decision on the request of Libya for extension of time limit to submit observations regarding the arrest of Saif Al-Islam Gaddafi", 10 January 2012, ICC-01/11-01/11-42.

¹⁴ "Order Requesting Observations Regarding the 'Report of the Registrar on Libya's observations regarding the arrest of Saif Al-Islam Gaddafi'", 24 January 2012, ICC-01/11-01/11-45.

¹⁵ "Prosecution Observations on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi", 2 February 2012, ICC-01/11-01/11-50-Conf-Exp.

¹⁶ "Public Redacted Version of 'OPCD Observations on Libya's Submissions Regarding the Arrest of Saif Al-Islam' (ICC-01/11-01/11-51-Conf, 2 February 2012)", 3 February 2012, ICC-01/11-01/11-51-Red.

¹⁷ ICC-01/11-01/11-52-Conf-Exp.

February 2012 to 4 March 2012, and a visit to Mr Gaddafi by part of this delegation occurred on 3 March 2012.¹⁸

Applicable Law and Discussion

7. The Chamber notes articles 13(b), 21(1)(b), 55, 57(3)(c), 58(4) and 5, 59, 89, 93 and 94(1) of the Rome Statute ("Statute"), rules 117, 183 and 184 of the Rules of Procedure and Evidence ("Rules"), article 25 and Chapter VII of the United Nations Charter¹⁹ and Resolution 1970 adopted by the UNSC.²⁰

A. Submissions

8. The Libyan authorities, *inter alia*: (i) note that Mr Gaddafi was not arrested on account of the Surrender Request, (ii) allege that Mr Gaddafi is currently being investigated for various crimes under national law, (iii) submit that they are considering whether to also institute national proceedings against Mr Gaddafi "in relation to the same conduct for which he is sought by the Court", (iv) submit that they are not contesting the admissibility of the case at the present time and (v) pursuant to article 94 of the Statute, seek postponement of Mr Gaddafi's surrender to the Court in order for the NTC to complete its investigation and prosecution ("Postponement Request").²¹

9. In the Prosecution Observations, the Prosecution submits that, because the admissibility of the case is not being challenged at this time, its investigation of Mr Gaddafi remains ongoing.²²

10. In the OPCD Observations, the OPCD seeks multiple forms of relief from the Chamber in response to Libya's Submissions, including a request for the Chamber to find that article

¹⁸ Registry, "Report of the Registry on the Visit to Libya", 6 March 2012, ICC-01/11-01/11-71-Conf-Exp; OPCD, "Addendum to the Urgent Report Concerning the Visit to Libya", 5 March 2012, ICC-01/11-01/11-70-Conf-Exp; OPCD, "Urgent Report Concerning the Visit to Libya", 2 March 2012, ICC-01/11-01/11-69-Conf-Exp.

¹⁹ Charter of the United Nations, 26 June 1945, 1 United Nations Treaty Series XVI, last amended on 20 December 1971.

²⁰ S/RES/1970 (2011).

²¹ Libya Submissions, pp. 2-3.

²² Prosecution Observations, para. 6.

94 of the Statute does not constitute a valid basis for deferring the execution of the Surrender Request.²³

11. The Registry and OPCD filed confidential *ex parte* reports regarding the visit to Libya from 29 February to 4 March 2012 and the visit to Mr Gaddafi on 3 March 2012.²⁴

B. Postponement Request

12. As a preliminary matter, the Chamber notes that, 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.²⁶ 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.

13. 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).²⁷ The question then becomes whether article 94(1) of the Statute, the provision on which Libya relies as the basis for its Postponement Request, allows for postponement of surrender.

²³ OPCD Observations, p. 18. All other requests regarding Saif Al-Islam Gaddafi that the OPCD has addressed to the Chamber will be dealt with in a separate decision.

²⁴ *Supra*, note 18.

²⁵ See *Prosecutor v. Ahmad Harun and Ali Kushayb*, Pre-Trial Chamber I, “Decision informing the United Nations Security Council about the lack of cooperation by the Republic of Sudan, Pre-Trial Chamber I”, 26 May 2010, ICC-02/05-01/07-57, p. 6 (Sudan’s obligation to cooperate with the Court found to stem directly from the United Nations Charter and a decision of the UNSC).

²⁶ See Statute, art. 1 (“[t]he jurisdiction and functioning of the Court shall be governed by the provisions of this Statute”); Pre-Trial Chamber I, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, 4 March 2009, ICC-02/05-01/09-3, para. 45 (partially reversed on other grounds).

²⁷ Article 89(1) of the Statute reads as follows: “The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender”.

14. The Chamber notes that article 94(1) of the Statute indicates that a requested State may postpone the execution of a cooperation request for a period of time agreed upon with the Court “[i]f the immediate execution of a request would interfere with an ongoing investigation or prosecution of a case different from that to which the request relates”. By contrast, article 89(4) of the Statute, which is part of the article discussing “Surrender of persons to the Court”, provides that: “[i]f the person sought is being proceeded against or is serving a sentence in the requested State for a crime different from that for which surrender to the Court is sought, the requested State, after making its decision to grant the request, shall consult with the Court”.

15. Upon comparing the text of the two provisions and with a view to giving independent content to each, the Chamber considers that the relationship between articles 94(1) and 89(4) of the Statute is as follows: (i) both articles relate to situations where a cooperation request creates interference with the requested State’s domestic legal process, (ii) article 89(4) of the Statute is a *lex specialis* provision that specifically relates to surrender requests and, without any mention of a possibility for postponement, requires the requested State to grant the request and then consult with the Court and (iii) article 94(1) allows for postponement of the request when such a situation arises, but only for requests *other* than requests for surrender. That article 94 only applies to cooperation requests other than surrender, such as those identified in article 93 of the Statute, is also supported by both the drafting history²⁸ and learned commentators²⁹ who have examined the issue.

²⁸ The text of draft article 90 [final article 93] of the Statute contained a sub-article 90(a) [final article 94] of the Statute, and the working group responsible for these provisions emphasized the link between the two provisions by commenting that article 90(a) “should be placed after article 90 (Other forms of cooperation) and before article 90 *bis* (Contents of request for other forms of assistance under article 90)”. Working Group on International Cooperation and Judicial Assistance, “Report of the Working Group on International Cooperation and Judicial Assistance”, 13 July 1998, A/CONF.183/C.1/WGIC/L.11/Add.2, p. 4.

²⁹ William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010), p. 1027; Claus Kreß and Kimberly Prost, “Article 94”, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (Beck et al., 2nd ed., 2008), p. 1589 (“article 94 only pertains to requests for forms of cooperation other than surrender”); Hans-Peter Kaul and Claus Kreß, “Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises”, 2 Yearbook of International Humanitarian Law 143 (1999), p. 166.

16. Given that the present cooperation request is a surrender request, the Chamber finds that Libya is not entitled to seek any relief pursuant to article 94(1) of the Statute. The Postponement Request must therefore be dismissed.

FOR THESE REASONS

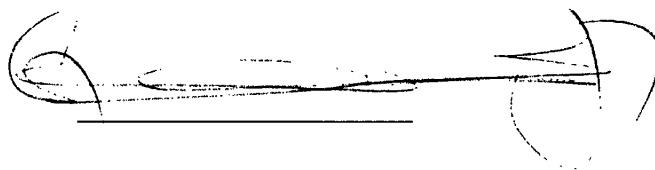
DISMISSES the Postponement Request;

REQUESTS that Libya make its decision to grant the Surrender Request and to inform the Chamber accordingly within seven days of notification of the Arabic translation of the present decision;

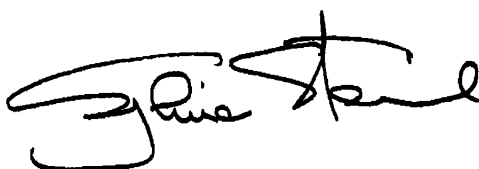
REQUESTS that Libya, pursuant to rule 184 of the Rules, arrange with the Registry for Saif Al-Islam Gaddafi's surrender to the Court; and

REQUESTS that the Registry inform the Chamber as to the arrangements regarding the surrender of Saif Al-Islam Gaddafi to the Court within fourteen days of notification to the Libyan authorities of the Arabic translation of the present decision.

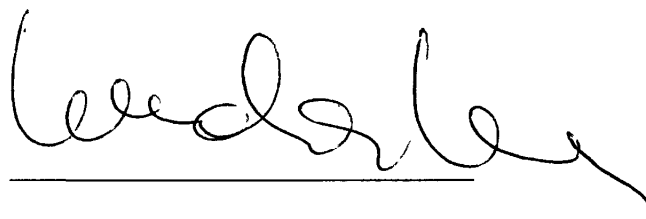
Done in both English and French, the English version being authoritative.



Judge Sanji Mmasenono Monageng
Presiding Judge



Judge Sylvia Steiner



Judge Cuno Tarfusser

Dated this Wednesday, 7 March 2012

At The Hague, The Netherlands