

THE LIBYA CASES AT THE ICC AND THE LIBYAN GOVERNMENT'S ADMISSIBILITY CHALLENGE

The International Criminal Court (ICC) has been investigating the Libya situation since March 3, 2011. The United Nations Security Council unanimously referred the case to the Court by Resolution 1970 on February 26, 2011. Under Article 13(b) of the Rome Statute, this referral gave the ICC jurisdiction to investigate alleged atrocity crimes in the case of Libya. Referrals under this article may be made concerning countries which are not party to the Court. The ICC issued arrest warrants for Muammar Gaddafi, his son Saif Al-Islam Gaddafi, and Gaddafi's intelligence chief, Abdullah Al-Senussi. All were charged with crimes against humanity. The case against Muammar Gaddafi was terminated on November 22, 2011 after his death was confirmed. Saif Al-Islam Gaddafi is currently being held by anti-Gaddafi forces in Zintan, and Al-Senussi was extradited from Mauritania to Libya on September 5, 2012.¹ The cases against Saif Al-Islam Gaddafi and Abdullah Al-Senussi are pending and Libya has made a challenge to the Court's jurisdiction.

Niger has offered to transfer another of Muammar Gaddafi's sons, Saadi Gaddafi, to the ICC. However, the Court has yet to issue an arrest warrant for Saadi Gaddafi or charge him with any atrocity crime.²

Background of the Conflict

In February 2011, protests broke out in various parts of Libya to end the 41-year totalitarian rule of President Muammar Gaddafi. In response, Gaddafi attempted to suppress the protestors with a violent crackdown, including allegedly ordering his security forces to conduct air raids on unarmed civilians in the streets on February 25. He also reportedly conscripted mercenaries from neighboring countries such as Chad, Sudan and Niger to attack unarmed civilians on the ground. His alleged actions and the resulting death toll in Libya led to a public outcry around the world and prompted the international community to quickly respond through several UN actions.

Although Resolution 1970 gives jurisdiction to the ICC over atrocity crimes in Libya, Libyan authorities have stated that they wish to hold perpetrators accountable in domestic courts. The government has argued that it has the ability to try Saif Al-Islam and Abdullah Al-Senussi. A Libyan official stated that: "We are sure that the evidence we have gathered is solid and it will shock and surprise the world. We believe we are capable of holding a fair trial."³ Members of the National Transitional Council (NTC), which governed Libya for almost one year, even claimed that a trial in The Hague would amount to a

¹ Human Rights Watch, *UN Security Council: press Libya on ICC cooperation, impunity*, November 6, 2012, <http://www.hrw.org/news/2012/11/06/un-security-council-press-libya-icc-cooperation-impunity>.

² George Grant, *Niger ready to hand Saadi Qaddafi to the International Criminal Court*, November 25, 2012, <http://www.libyaherald.com/2012/11/25/niger-ready-to-hand-saadi-qaddafi-to-the-international-criminal-court/>.

³ Nick Meo, *Libya: Saif Gaddafi to go on trial next month*, August 18, 2012, <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/9484459/Libya-Saif-Gaddafi-to-go-on-trial-next-month.html>.

“breach of sovereignty.”⁴ Libyan officials have stated that they have no intention of surrendering Saif Al-Islam Gaddafi to the ICC. The High National Elections Committee of Libya announced that Libyans would participate in electing the General National Congress which would replace Muammar Gaddafi’s previous autocratic political system⁵ with an elected national assembly.⁶ The government’s admissibility challenge claims that the elections “are premised on a strong commitment to the rule of law, respect for fundamental human rights, and the eradication of impunity for international crimes.”⁷

Security Issues and Justice

While the rule of Muammar Gaddafi may have ended and Libya has said that it is willing to hold perpetrators of atrocity crimes accountable, the country is still riddled with failures of security. Militia rule is still alive in some parts of Libya⁸ and people loyal to Muammar Gaddafi have been under threat of reprisals⁹. Security threats such as these culminated with the murder of United States Ambassador to Libya, John Christopher Stevens, in an attack on the U.S. consulate in Benghazi on September 5, 2012. Melinda Taylor, a member of the ICC’s Office of Public Defense Counsel and other ICC representatives were imprisoned in Zintan for 26 days after meeting with Saif Al-Islam Gaddafi.¹⁰ They were accused by the Libyan government of spying to help Saif Al-Islam Gaddafi. This action threw “the ICC case into months of disarray.”¹⁰ Saif Al-Islam Gaddafi has been held in detention for 8 months and his ICC appointed Defense Counsel summarized his treatment. Among other things, the summary states that Saif Al-Islam Gaddafi has been: “not brought before a judge”; “held in isolation in a facility...of which is secret and has not been disclosed to anyone including visiting officials”; and “denied access to appropriate dental treatment in a timely manner”¹¹. The anti-Gaddafi militia refuses to surrender Saif Al-Islam Gaddafi to government forces in Tripoli.¹² However, the militia and the government reached a compromise to hold Saif Al-Islam Gaddafi’s trial in Zintan.¹³

⁴ Thomas Darnstädt, *Who should bring Gadhafi’s son to justice?*, November 9, 2011, <http://www.spiegel.de/international/world/tripoli-vs-the-icc-who-should-bring-gadhafi-s-son-to-justice-a-796759.html>.

⁵ Aljazeera, *Explainer: how the Libyan election works*, July 3, 2012, <http://www.aljazeera.com/news/africa/2012/06/2012626182419350919.html>.

⁶ BBC News, *Libya’s NTC hands power to newly elected assembly*, August 9, 2012, <http://www.bbc.co.uk/news/world-africa-19183300>.

⁷ ICC Pre-Trial Chamber I, *Application on behalf of the government of Libya pursuant to Article 19 of the ICC Statute*, May 1, 2012, <http://www.icc-cpi.int/iccdocs/doc/doc1405819.pdf>.

⁸ Hadeel Al Shalchi and Marie-Louise Gumuchian, *Instability grips Libya a year after Gaddafi’s fall*, October 22, 2012, <http://www.reuters.com/article/2012/10/22/ozatp-libya-anniversary-idAFJOE89L01920121022>.

⁹ Voice of America, *HRW: Detained Gadhafi fighters beaten, executed*, October 17, 2012, <http://www.voanews.com/content/militias-accused-of-beating-executing-detained-gadhafi-fighters/1527953.html>.

¹⁰ Vivienne Walt, *Why Libya-and not the Hague-will try Gaddafi’s son*, October 10, 2012, <http://world.time.com/2012/10/10/why-libya-and-not-the-hague-will-try-gaddafis-son/>.

¹¹ ICC Pre-Trial Chamber I, *Defence Response to the “Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute,”* July 31, 2012, <http://icc-cpi.int/iccdocs/doc/doc1446165.pdf>.

¹² Richard Spencer, *Libya: conflict brewing over trial of Saif al-Islam Gaddafi*, November 20, 2011, <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8902994/Libyaconflict-brewing-over-trial-of-Saif-al-Islam-Gaddafi.html>.

¹³ Nick Meo, *Libya: Saif Gaddafi to go on trial next month*, August 18, 2012, <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/9484459/Libya-Saif-Gaddafi-to-go-on-trial-next-month.html>.

Challenging the Admissibility of the Saif Al-Islam Gaddafi Case

The ICC operates under a requirement of “complementarity.” According to this, the Court must defer cases to a state that claims jurisdiction unless it determines that the state is unwilling or unable to hold fair trials of the accused. Once a state challenges the admissibility of a case on the grounds of a claim of complementarity, the Pre-Trial Chamber of the ICC must determine whether or not the trial will take place at The Hague, or in a domestic court. In May 2012, Libya made such a challenge submitted by lawyers on behalf of the government: Philippe Sands, Payam Akhavan, and Michelle Butler. They claimed that the Court’s case was “inadmissible on the grounds that Libya’s national judicial system is actively investigating Mr. Gaddafi and Mr. Al-Senussi...” The challenge also states that, “To deny Libyan people this historic opportunity ... would be manifestly inconsistent with [the purpose of ICC principles] which accords primacy to national judicial systems.”¹⁴

Determining where Saif Al-Islam Gaddafi and Abdullah Al-Senussi will face trial is a challenge for the ICC’s mandate and also a test for the newly-formed Libyan government. Since the Court is considered a forum of last resort, some believe that the trial should be deferred to Libyan domestic courts. For example, they say that if the Court is serious about supporting complementarity, the Court should defer to Libya in order to give the newly forming democracy the ability to assert itself and right its own wrongs. Moreover, others argue that ICC involvement in the case is enabling the Libyan government to act, creating a “culture of justice” that could set a good precedent.¹⁵ The US government would welcome a domestic trial of the accused. Assistance to states in creating credible legal institutions to fight impunity, known as positive complementarity, is something the US believes the ICC should engage in.¹⁶ Whatever the decision, US officials have stated that any domestic initiatives against the accused should “fully comply with Libya’s international obligations.”¹⁷

However, due to unchecked militias and attacks on forces once loyal to Muammar Gaddafi, some argue that The Hague is the best place to ensure justice for the accused. An expert on Libya from Human Rights Watch stated that “the challenge today is the transformation from the rule of guns to the rule of law.”¹⁸ Human Rights Watch found that the government has failed to investigate the deaths of Muammar Gaddafi and his supporters, stating that “the killing of captured combatants is a war crime.”¹⁹ Since Libya is recently recovering from its bloody conflict, some question whether Libya can reject vengeance and seek justice instead.²⁰

¹⁴ ICC Pre-Trial Chamber I, *Application on behalf of the government of Libya pursuant to Article 19 of the ICC Statute*, May 1, 2012, <http://www.icc-cpi.int/iccdocs/doc/doc1405819.pdf>.

¹⁵ Eric Leonard, *Testing the ICC: the politics of complementarity*, June 1, 2012, <http://jurist.org/hotline/2012/06/eric-leonard-libya-ICC.php>.

¹⁶ US Department of State Legal Advisor Harold Hongju Koh, *International Criminal Justice 5.0*, November 8, 2012, <http://www.state.gov/s/l/releases/remarks/200957.htm>.

¹⁷ Eric Leonard, *Testing the ICC: the politics of complementarity*, June 1, 2012, <http://jurist.org/hotline/2012/06/eric-leonard-libya-ICC.php>.

¹⁸ Haifa Zaiter, *Libya faces uphill battle in disbanding militias*, October 16, 2012, <http://www.al-monitor.com/pulse/politics/2012/10/disbanding-libyas-armed-factions-easier-said-than-done.html>.

¹⁹ Human Rights Watch, *Libya: new proof of mass killings at Gaddafi death site*, October 17, 2012, <http://www.hrw.org/news/2012/10/16/libya-new-proof-mass-killings-gaddafi-death-site>.

²⁰ Thomas Darnstädt, *Who should bring Gadhafi’s son to justice?*, November 9, 2011, <http://www.spiegel.de/international/world/tripoli-vs-the-icc-who-should-bring-gadhafi-s-son-to-justice-a-796759.html>.

Libya's Capacity to Conduct Investigations and Trials

International assessment of Libya's ability to hold trials that meet ICC standards have been mixed. ICC Prosecutor Fatou Bensouda stated recently, "So far the cooperation that we are getting from Libya is a good one ... They are allowing our investigators to go into the field and all the necessary steps that they need to take to assist with our own investigations in Libya." However, only the Pre-Trial Chamber of the ICC can make a determination of Libya's ability to hold competent trials. Fatou Bensouda stated her hope that Libya will respect the decision of the Pre-Trial Chamber if it denies its admissibility challenge.²¹ Amnesty International conducted a fact finding mission in September and remains doubtful of Libya's willingness and ability to hold fair trials.²²

The UN Secretary-General issued a report on the UN Support Mission in Libya (UNSMIL) on August 30, 2012. The report discussed the progress of the Libyan judicial system and states that "almost all judges and prosecutors have reported back to duty." However, national court personnel have been under threat of attack by Gaddafi loyalists. UNSMIL is currently providing support to a Libyan committee that is mandated to "develop recommendations on restructuring the judiciary, its administration and legislative framework." Support is also being given to Libya's Office of the Prosecutor-General to create a "strategy for investigation and prosecution of past crimes." The first trial of a senior official in Muammar Gaddafi's government, Abu Zayd Dorda, took place on June 5, 2012, and the government is continuing its preparations for Saif Al-Islam Gaddafi's trial.²³

In May 2012, UNSMIL, in collaboration with South Africa, Switzerland and the Libyan National Consultative Group, invited experts on truth commissions to speak with domestic stakeholders to stress the need for reconciliation that may benefit the people of Libya. Also in May, the Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict released a report that highlighted the lack of government support services to victims of sexual violence and emphasized the importance of accountability and aid for survivors.²³

As stated above, the Libyan government wants to conduct Saif Al-Islam Gaddafi's trial in Libya and has issued an admissibility challenge to the ICC. It is currently building up its judicial systems and infrastructure and has requested help from the UN to do so. Ashour Saad Bin Khayal, Minister of Foreign Affairs and International Cooperation asked relevant UN organs to discuss ways for Libya to acquire "necessary technical assistance in capacity building and strengthening the governmental performance of the institutions of transitional justice..."²⁴ The UN Support Mission in Libya has reported progress in Libya's new judiciary system. Despite this, NGOs such as Amnesty International are doubtful of Libya's capacities to deliver a fair trial. Moreover, ICC defense counsel representing Saif Al-Islam Gaddafi's interests in ICC proceedings argue that "there is insufficient security and infrastructure to guarantee the

²¹ United Nations Radio, *Libya cooperates with ICC as it seeks to try Qadhafi*, November 8, 2012, <http://www.unmultimedia.org/radio/english/2012/11/libya-cooperates-with-icc-as-it-seeks-to-try-qadhafi/>.

²² Amnesty International, *Libya must seek justice not revenge in case of former al-Gaddafi intelligence chief*, October 18, 2012, <http://www.amnesty.org/en/for-media/press-releases/libya-must-seek-justice-not-revenge-case-former-al-gaddafi-intelligence-chi>.

²³ UN Security Council, *Report of the Secretary-General on the United Nations Support Mission in Libya*, August 30, 2012, <http://unsmil.unmissions.org/Portals/unsmil/Documents/SGReport30August2012.pdf>.

²⁴ ICC Pre-Trial Chamber I, *Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute*, Annex B, May 1, 2012, <http://icc-cpi.int/iccdocs/doc/doc1405815.pdf>.

independence of the judges, prosecution and the defense, and the protection of witnesses and victims.”²⁵

Implications

The Pre-Trial Chamber has now required Libya to present the evidence behind its claim of complementarity by January 23, 2012.²⁶ The Pre-Trial Chamber's upcoming decision on the admissibility of the Saif Al-Islam Gaddafi case is a very important one because not only will it determine how the case will proceed, but it can also set a precedent for future challenges to the admissibility of cases at the ICC. Should the ICC defer the case to Libya, there are several possible scenarios. The Libyan government may be perceived to have done a poor job at trial and not meet the standards set by the international community, or hold no trial at all. This scenario would look as if the ICC made a mistake. However, if Libya loses its admissibility challenge, it is highly unlikely that either Saif Al-Islam Gaddafi (or later Abdullah Al-Senussi) will be surrendered to the Court. If the Court is unable to get custody of the accused it would undercut the legitimacy the Court has worked to achieve thus far. In either scenario, the credibility of the Court could be undermined.

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²⁵ ICC Pre-Trial Chamber I, *Defence Response to the "Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute,"* July 31, 2012, <http://icc-cpi.int/iccdocs/doc/doc1446165.pdf>.

²⁶ ICC Pre-Trial Chamber I, *Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi,* December 7, 2012, <http://icc-cpi.int/iccdocs/doc/doc1522448.pdf>.