



International Bar Association

Address to the EU Council Working Group on Public International Law (COJUR) in Brussels by Clair Duffy, Senior Legal Advisor, IBA's International Criminal Court Programme, The Hague*

First ICC Agreement on Interim Release; Libya Obligation to Surrender Saif al-Islam Gaddafi to the ICC in The Hague

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EU Council Building, Brussels

Honourable delegates, on behalf of the International Bar Association (IBA), thank you once again for this opportunity to address you and to share views on ways to support and strengthen the work of the International Criminal Court (ICC).

By way of brief reminder, the IBA's Hague Office works to ensure that fair and efficient justice is delivered at the Court. We do this through legal and policy-focused monitoring of the Court, while also seeking to situate developments at the Court in the broader context of lessons learned from other international criminal justice pursuits. We also act as an interface between the Court and the global legal profession.

Today, I would like to briefly raise two issues, one of which is quite straight-forward, at least for now, and the other somewhat more complicated. I will turn firstly to the more straight-forward issue.

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First ICC agreement on interim release of detainees

A little earlier this year, Belgium and the ICC signed an agreement on the interim, or provisional, release of detainees onto Belgian territory, subject to a number of conditions. This was the first agreement of its kind between a State Party and the ICC, and facilitates the Court's ability to realise the rights of accused persons under the Rome Statute. The IBA very much welcomes this step by Belgium, and urges other European Union States to take steps to sign similar agreements with the Court. We also reiterate our previous calls for States to take steps to sign agreements on the relocation of persons released by the Court. Of course, on issues of cooperation, and wider ICC issues, the EU has always demonstrated leadership, for example, being the first regional organisation to sign an agreement on cooperation and assistance with the ICC.

We urge all EU Member States to continue to lead by example in both of these under-recognised areas – that is, agreements on interim release and for the relocation of acquitted persons. It's only through the recognition of this comprehensive network of cooperation agreements that all of the fundamental tenets of the Rome Statute system can be realised.

Now we turn to the more complicated issue: the Libya situation before the ICC.

Libya's obligation regarding surrender of Saif al-Islam Gaddafi

The essence of our intervention on Libya is, first, to take this opportunity to engage with those specific EU Member States who have current or permanent seats on the Security Council – France, Lithuania, Luxembourg, and the United Kingdom; and secondly, to engage more broadly with EU Member States and to urge your coordinated action.

On 21 May 2014 the Appeals Chamber of the ICC rendered its definitive ruling on the admissibility of the case against Saif al-Islam Gaddafi before the ICC, rejecting Libya's challenge. The outcome of this ruling is that Gaddafi's case is to proceed before the ICC in The Hague, and he is to be surrendered immediately by the Libyan authorities for this purpose. In relation to Gaddafi's surrender, however, there has been an outstanding ICC order for some ten months – since July 2013 – requiring the Libyan authorities to surrender him irrespective of the appeal proceedings. To date, Libya has not complied with this order. A number of requests by the Gaddafi defence for a finding of non-compliance on the part of Libya with this surrender order, as well as a number of others – and for the issue to be referred to the Security Council for further action – remain outstanding before the Court. Of course, this is a judicial matter pending judicial outcome, but for now I wish to highlight the political side of these discussions.

About one week prior to the 21 May judicial ruling, the Security Council convened to consider Prosecutor Bensouda's 7th report on developments concerning the Council's referral of the Libya situation to the ICC. The Prosecutor noted with great concern the non-surrender of Gaddafi to the court and called for his immediate surrender.

At this point, I would like to note our support for specific parts of the statements made by the four EU Member States on the Council, as follows:

France said that *'the Council has mobilised to assist Libya, and we must continue that mobilisation.'* France also noted that *'whatever the decision of the Court may be, Libya must comply'* and that Libya's compliance with its international obligations would be a further demonstration of its commitment to the rule of law: *'Libya has committed to respecting its obligations under the Security Council resolution referring the situation in Libya to the ICC, and it must do so.'*

Lithuania reminded Libya of its obligation to surrender Gaddafi.

Luxembourg said that the international community must continue to help Libya in this crucial phase of its transition. It also noted that any trial in Libya must not obstruct ICC proceedings, while reminding Libya of its obligation to surrender Gaddafi to the Court.

The **United Kingdom** said that it continued to support the right of Libya to hold national trials for crimes committed within its jurisdiction, but stressed the importance that any action taken be in line with the decisions of the ICC. *'The treatment and management of high profile detainees from the Gaddafi regime provides Libya with an opportunity to demonstrate to the international community that it is committed to ensuring fair trials, to meeting international standards and the protection of human rights, and to cooperating fully with the ICC.'* It also recalled Libya's obligation to surrender Gaddafi to the Court.

A few very notable comments were made by some Council members from outside of the EU.

Argentina, for example, noted that Libya's need for democratic legitimate legal institutions in the area of the rule of law clearly exceeds the competence of the ICC. It also said that the cooperation of the international community is essential if we are to achieve a secure Libya with reliable, sustainable institutions and respect for its citizens' human rights. *'The referrals that the Council makes – and the situation in Libya is one of them – include **an obligation to follow up responsibly on those referrals.** Argentina believes that the Council cannot merely take note of these reports, and that it is, therefore, essential that it put into practice the commitment [...] either through the Working Group on International Tribunals or a specific working group dedicated to the ICC.'*

Australia urged the Council to **take action in support of the Court** when necessary to help Libya achieve justice and lasting stability.

Chile underscored the essential role of the Security Council in the case of Libya. It also stressed that **the responsibility of the Council should not be understood as coming to an end simply with the referral of a situation to the Court. Chile also said that it supports the establishment of an effective follow-up by the Council.** It also called on the Libyan authorities to comply with their obligation to transfer Gaddafi to the ICC without further delay and to refrain from any domestic judicial action that might impede proceedings from resuming before the ICC.

As noted by **Russia**, the Secretary-General of the UN has recently expressed his serious concerns regarding the safety of judicial personnel, including attacks, death threats and other forms of intimidation against judges and prosecutors, including killings. In resolution 2144, the Council expressed its serious concern regarding the lack of an appropriate judicial process.

Considering the context of Libya's political situation, Russia said that it considered *'unclear the logic of the conclusion [by the ICC] that Libya is capable of conducting proceedings in the case of Abdullah Al-Senussi. That is especially so give that, as the Pre-Trial Chamber itself has noted, there is a lack of counsel in the case, serious security-related difficulties, a lack of witness protection programme, difficulties controlling penal facilities and other factors. We look forward to detailed clarification of future appeals rulings in those cases.'*

Rwanda called upon the international community to extend its **support in strengthening the Libyan judicial system by providing technical capacity.** It also encouraged the international community and the Libyan government to work together in ensuring that justice is rendered.

Concluding remarks concerning the Libya situation

Libya is under an unequivocal obligation to surrender Gaddafi to the ICC. This obligation has been outstanding for some ten months. The importance of Gaddafi's surrender to the ICC is about it being one component to Libya's transition – demonstrating its respect for the international legal order, and giving concrete substance to its promises of cooperation with the Court. But it has a wider importance for the future legitimacy of Security Council ICC referrals, and the credibility of the Court.

We urge EU Member States on the Security Council, as well as EU Member States generally, to continue to call for Gaddafi's surrender both privately and publicly.

The IBA is not blind to the complex and pressing security concerns facing Libya in its transition and, in many ways, the priority of some of these concerns. Yet we want to ensure that these concerns are

not used to mask Libya's international obligations, including towards the ICC. As the EU continues to support Libya in its transition, Gaddafi's surrender to the ICC should be considered as part of the package of broader legal and judicial reforms that are required to signal a commitment to a new Libya, with respect for the rule of law at the heart of its agenda.

I thank you EU delegates for your time, and for your continued leadership on ICC issues.

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