

## Does Libya have to Surrender Saif Al-Islam Gaddafi to The Hague?

By Amal Alamuddin, February 2012



Libyan leaders insist that Colonel Gaddafi's son, Saif Al-Islam, will be tried at home. The Justice Minister announced that Libya is "ready to prosecute him", and the Interior Minister adds that a trial could begin "within weeks, or months".<sup>1</sup>

And yet, the International Criminal Court (ICC) has issued a request for his surrender to The Hague to stand trial on charges of crimes against humanity for the killing and persecution of demonstrators during Libya's 2011 revolution.<sup>2</sup>

Although Libya can challenge the admissibility of an ICC case on the grounds of "complementarity" – the principle that gives national courts priority to try a suspect if they are willing and able to do so – it has not yet done so. Rights groups say that there is no functioning judiciary in Libya to hold a fair trial. It is unclear how advanced any investigation is or what the charges would be in Libya. And to complicate matters, Saif Al-Islam is being held not by the authorities, but by a militia force in Zintan with tenuous links to the National Transitional Council that is ruling the country.

Nobody knows how this will play out: a Libyan (or hybrid) trial under Libyan law?

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<sup>1</sup> See Guardian [article](#).

<sup>2</sup> According to the ICC Prosecution, Saif Al-Islam was involved in implementing a State policy of widespread and systematic attacks against a civilian population, in particular those considered demonstrators and alleged dissidents.

An international trial in The Hague? Both? Or perhaps a trial by ICC judges sitting in Libya? All are legally possible, and ultimately for the ICC Judges to decide since they are currently seized of the case.<sup>3</sup>

But, as Saif Al-Islam completes nearly fourth months in detention, without access to either a lawyer or a judge,<sup>4</sup> there is a more immediate question: can Libya hold him any longer while these questions are worked out? The Libyan authorities say: "in one word, we won't hand him over".<sup>5</sup> But the ICC judges may well disagree. After Libya sent a letter to the Court stating its decision to hold Saif Al-Islam in Libya for trial, the judges of Pre-Trial Chamber I ordered 'observations' to be filed by Libya, the prosecution, and the ICC's defence office (representing the suspect's interests at this stage), and these have now been received. The Court therefore seems poised to issue an order on this issue soon.<sup>6</sup>

### Libya's Obligation to Cooperate

The ICC issued an arrest warrant for Saif Al-Islam on 27 June and sent a request to Libya for his arrest and surrender to the Court in early July. He was arrested by rebel forces in November 2011, and remains in custody, but so far he has not been transferred to the ICC.

Libya is not party to the treaty that created the ICC, the Rome Statute. But it is a member of the United Nations, and under Security Council resolution 1970 – the resolution that referred the situation in Libya to the ICC – it has an obligation to "cooperate fully with and provide any

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<sup>3</sup> ICC St., arts. 17 and 19.

<sup>4</sup> See [HRW Press Release](#).

<sup>5</sup> See ICC, OTP Filing, ICC-01/11-01/11-31 25-11-2011 1/7 CB PT, 15.11.11.

<sup>6</sup> Order Requesting Observations Regarding the "Report of the Registrar on Libya's observations regarding the arrest of Saif Al-Islam Gaddafi", ICC-01/11-01/11-45 24-01-2012 1/4 FB PT, 24.01.12.

necessary assistance to the Court”.<sup>7</sup> The presumption is that Libya is required to act in accordance with the provisions of the Rome Statute unless the resolution says otherwise.

### **ICC Surrender Requests: Refusal versus Delay**

The Rome Statute requires that states “comply with requests for arrest and surrender” as soon as possible.<sup>8</sup>

There are no explicit exceptions to this duty. While a *suspect* can challenge the issuance of an ICC warrant on certain narrow grounds,<sup>9</sup> there is no provision in the Rome Statute (or indeed resolution 1970) that allows a *state* to challenge or refuse to comply with its obligation to surrender the suspect to The Hague.

The drafting history of the Rome Statute suggests that this omission was intentional. Under earlier drafts, a state could “file a written application with the Court” to “set aside or withdraw the request [for arrest and surrender] on specified grounds” -- including on admissibility grounds -- and to “delay complying with the request” while these matters were pending.<sup>10</sup> But these provisions did not end up in the final text of the Rome Statute. Instead, under Article 59(4), a state *cannot* inquire into or challenge the basis for the issuance of a warrant. Traditional grounds for refusing extradition between states – such as non-surrender for nationals, for political offences, or in the absence of dual criminality – were discussed by the states that negotiated the Statute, but it was decided that they should not apply. Only two narrow grounds for refusal-to-surrender may arise: where a state’s existing treaties require

extradition to other states (article 90) or where there are treaty-obligations relevant to immunities (article 98). Neither of these exceptions applies here, so there is no clear basis for Libya to *refuse* to honour the ICC’s surrender-request.

The Statute’s drafters did allow for a state to *postpone* the obligation to surrender the suspect under certain circumstances<sup>11</sup> or to “consult” the Court if it had difficulties.<sup>12</sup> But ultimately any dispute “shall be settled by the decision of the Court”.<sup>13</sup>

### **A trial in Libya first? Postponing Surrender if Libya is investigating “different conduct”**

If the investigation in Libya relates to different conduct than that covered by the ICC warrant, the authorities can consult with the Court about postponing compliance with the surrender-request.

According to Libya’s authorities, the scope of their investigation is indeed broader than the ICC’s. The ICC case concerns violence meted out to protesters and other alleged dissidents since the start of the revolution in February 2011. The Libyan authorities claim that their investigations cover two tracks: “the crimes [Saif Al-Islam] committed, *including those* committed since 15 February 2011”<sup>14</sup> as well as “five cases of embezzlement”.<sup>15</sup>

Under Article 94 of the Rome Statute, if “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, the requested State *may postpone* the execution of the request *for a period of time agreed upon with the*

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<sup>7</sup> S/RES/1970 (26 February 2011).

<sup>8</sup> ICC St., Arts 89(1) and 59(7).

<sup>9</sup> ICC St., Art. 59(2); Rule 117.

<sup>10</sup> [http://untreaty.un.org/cod/icc/rome/proceedings/E/Rome%20Proceedings\\_v3\\_e.pdf](http://untreaty.un.org/cod/icc/rome/proceedings/E/Rome%20Proceedings_v3_e.pdf), p. 327.

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<sup>11</sup> ICC St., Arts 89-98.

<sup>12</sup> ICC St., Art.97.

<sup>13</sup> ICC St., Art. 119.

<sup>14</sup> NTC Letter to ICC, 23.11.11.

<sup>15</sup> Prosecution’s Submissions on the Prosecutor’s recent trip to Libya, ICC-01/11-01/11-31 25-11-2011 1/7 CB PT, 25.11.11, para. 14.

*Court*. However, the postponement shall be *no longer than is necessary to complete the relevant investigation or prosecution* in the requested State”.

This means that, if the Court agrees, a sequencing could take place that would allow a Libyan trial - for conduct that is not being pursued by the ICC - to happen first.<sup>16</sup>

This seems to be what the Libyan authorities are hoping for, and what the Prosecutor is supporting.<sup>17</sup> In a letter to the Court, the Libyan authorities announced that “in accordance with Article 94 of the Rome Statute, the issue of the Court’s request for the arrest and surrender of Mr Saif al-Islam Gaddafi will be discussed with the Court. *The latter will be officially informed of the [National Transitional] Council’s decision later*”. Article 94 also appears to have been mentioned in the confidential observations filed by Libya at the Court’s request in January 2012.<sup>18</sup> But whether this will be “agreed upon” by the Court is not yet known.

A key question is whether such a *Libya-first* approach would include any sentence handed down by a Libyan court: if this turned out to be the death penalty or a life sentence, Saif Al-Islam would never face an ICC trial. This possibility has not been lost on the Libyan authorities, whose representative stated in November (in a manner that raises concerns about the presumption of innocence), that Saif Al-Islam “will receive the most severe penalty [in Libya]” and then “there will be no need for another trial [at the ICC]”.<sup>19</sup>

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<sup>16</sup> Ibid., paras. 8-10. Cf. ICC press release issued on 23 November, Press release, 23.11.11, ICC-CPI-20111123-PR746.

<sup>17</sup> Prosecutor’s second report to the Security Council on Libya, 02.11.2011, para. 41.

<sup>18</sup> Based on the partially redacted reply by the OPCD, available on the Court’s website.

<sup>19</sup> Statement by Dr. Salwa Fawzi El-Deghali, in charge of Legal Affairs and Women for the NTC, Press conference with Luis Moreno-Ocampo, 23.11.11 (video).

However, the Court may well decide that Article 94 does not apply at all. It could interpret Article 94 as applying only to *requests for general cooperation*, as the article does not mention arrest or surrender. The structure of Part 9 of the Rome Statute – on cooperation – distinguishes in several places between requests for arrest/surrender versus requests for “other forms of cooperation” such as the collection of evidence or interviewing of witnesses. Article 94 (and articles 93, 96 and 99) have been considered to relate to these other forms of cooperation and they cross-reference each other on this basis.

Article 89(4) is an alternative justification for delayed surrender where an investigation into different conduct is involved. The title of this article makes clear that it applies to “surrender of persons to the court” and the ICC’s surrender request specifically states that Libya should comply with it.<sup>20</sup> It provides that if “the person sought is being *proceeded against*” for a crime different from that for which surrender to the Court is sought, the requested state should consult with the Court. The Court may find that this article applies instead of article 94, because it clearly applies to requests-for-surrender. But if it did apply, this would not automatically lead to the right to postpone execution of the surrender-request: it merely provides that “*after making its decision to grant the request*”, the State shall *consult* with the Court”, leaving little room for manoeuvre.

Ultimately, articles 94 and 89(4) present the same obstacles for Libya: concrete investigative steps need to be taken (to satisfy the requirement of “ongoing investigation” or “being proceeded against”). It is the Court that has the final say (the Court must “agree”, or “be

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<sup>20</sup> In its request, the Court “REQUESTS Libya to comply with the procedures provided for in articles 59, 89(2) and 89(4) of the Statute and rule 117 of the Rules”.

consulted” following a decision to grant the request). And even if postponement is granted, this may be for a shorter period than the Libyan authorities might hope.

### **A trial in Libya Only? Postponing Surrender if Libya is investigating the ‘same conduct’**

If the Libyan authorities are investigating Saif Al-Islam for “substantially the same conduct” as the ICC, as they claim to be, they can file an admissibility challenge arguing that they are willing and able to try him themselves. If they succeed, this is a full bar to the ICC exercising jurisdiction over the case. This is not a ground for challenging the surrender-request *per se*: it is an argument that the entire case is inadmissible. But it may provide a basis for postponing surrender while the matter is resolved.<sup>21</sup>

Although Article 19(9) provides that “[t]he making of [an admissibility] challenge shall not affect the validity of ... [a] warrant issued by the Court prior to the making of the challenge”, Article 95 would arguably allow Libya to hold Saif Al-Islam while this challenge was being resolved. It provides that “[w]here there is an admissibility challenge under consideration by the Court pursuant to article 18 or 19, the requested State may postpone the execution of a request under this Part pending a determination by the Court, unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence...”.

The threshold for challenging admissibility is high. The State must do it “as soon as possible once it is in a position to actually assert a conflict of jurisdictions”.<sup>22</sup> Its investigation or prosecution must target the same “case” as the ICC, which has been defined to mean the same person and

“substantially the same conduct”.<sup>23</sup> A national investigation must be underway, which means “the taking of steps [such as] interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses” to ascertain the suspect’s criminal responsibility.<sup>24</sup> And the ICC must be convinced that these steps are genuine.

Some commentators suggest that, even if Libya were genuinely pursuing Saif al-Islam for the same conduct, and filed a valid admissibility challenge on this basis, Article 95 would not in fact provide a basis for Libya to postpone compliance with the request for surrender, for three reasons. First, an admissibility challenge had not been filed at the time of the surrender-request, whereas Article 95 permits postponement of a request only while an admissibility challenge is “under consideration”.<sup>25</sup> Second, they argue that “a request under this Part” should be understood to mean a request for evidence under Part 9 of the Rome Statute – *not* a request for arrest and surrender, which is principally (though not exclusively) dealt with in Part 5.<sup>26</sup> Third, they argue that Article 95 cannot possibly allow for postponement of surrender-requests anytime admissibility is challenged, because that would make article 89(2) – a specific provision that allows for the suspension of a surrender-obligation where there is a double-jeopardy challenge made in a national court – redundant.<sup>27</sup>

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<sup>23</sup> Ibid., para 39-40.

<sup>24</sup> Ibid.

<sup>25</sup> B. Swart, Arrest and Surrender, in Cassese et al, The Rome Statute of the International Criminal Court, p. 1694.

<sup>26</sup> See eg [www.ejiltalk.org](http://www.ejiltalk.org) These commentators point to the fact that the second part of the article refers to “such evidence” which suggests the request in question is limited to evidence and not arrest or surrender.

<sup>27</sup> See eg [www.opiniojuris.org](http://www.opiniojuris.org).

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<sup>21</sup> See also ICC St., Art. 19(8).

<sup>22</sup> Kenya Admissibility Decision, Appeals Chamber, para 45.

There is, however, no authoritative interpretation of Article 95<sup>28</sup> to date and there is a good chance that the Court would adopt a plain-meaning approach to article 95(1), allowing Libya to suspend execution of the request to surrender Saif Al-Islam to the Court while any admissibility challenge is being resolved. The postponement would only be pending the decision, though, so if and when the case was deemed admissible at the ICC, the obligation to surrender the suspect would resume.

Here again, various obstacles emerge if Libya plans to invoke this article as a basis for postponement. Libya would have to file an admissibility challenge, which it has not done to date; it would have to show that it is carrying out genuine (and possibly fair)<sup>29</sup> investigations; and that those investigations relate to the same conduct as that which underlies the ICC charges. The success of any such application would then depend on the view of the Court.

## Conclusion

Libya is under an obligation to enforce ICC warrants issued pursuant to the Court's mandate under Security Council resolution 1970. If it does not comply with ICC requests, the Prosecutor and the Judges can report this to the Security Council. The Pre-Trial Chamber has not shied away from doing so when States have refused to arrest Sudan's President Bashir, but so far there has been no Council action.<sup>30</sup> But does Libya breach its international obligations by

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<sup>28</sup> The drafting history does not specifically address whether this language was intended to cover requests-for-arrest and surrender or not. .

<sup>29</sup> Public Redacted Version of "OPCD Observations on Libya's Submissions Regarding the Arrest of Saif Al-Islam", ICC-01/11-01/11-51-Red 03-02-2012 1/18 FB PT (OPCD Observations), 3 February 2012.

<sup>30</sup> ICC Statute, Art. 87(7); Prosecutor v. Al Bashir, ICC-02/05-01/09-139, ICC-02/05-01/09-140, 12-13 December 2011. The Security Council can also suspend ICC proceedings under Article 16, but this controversial power has never been used in relation to a "situation" before the Court.

not surrendering Saif Al-Islam to the Court?

There are two ways Libya could legally avoid surrendering Saif Al-Islam to The Hague: first, it can reach an agreement with the Court under articles 94 and/or 89(4) of the Rome Statute that it will try him for conduct that is *different to* that described in the ICC arrest warrant, and that the ICC can try him after that. This might mean that Saif would face two trials, or – if the ICC allowed him to serve any sentence he received in Libya as part of the sequencing process – he may never go The Hague.

The second possibility is that Libya files an admissibility challenge, and – relying on Article 95 – is allowed to postpone surrender pending the decision in admissibility. If Libya wins on admissibility, this extinguishes the ICC case; if it loses, the surrender obligation returns.

Libya has not filed an admissibility challenge, perhaps because of the difficulties in succeeding in such a challenge at this juncture. So it is articles 94 and 89(4) that the Court is likely to address in any upcoming decision. These articles each contain certain limitations, as discussed above, but may allow for a sequencing of a nature that Libya desires.

Given the apparent violations of Saif Al-Islam's rights as a suspect (including the right to counsel and to be brought before a Judge),<sup>31</sup> uncertainty about the capacity of Libya's judiciary, reports of torture of pro-Gaddafi detainees in prisons, and an apparent paucity of evidence regarding investigations carried out to date, it must be unlikely that the Court will permit Libya to keep holding Saif in these conditions and

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<sup>31</sup> The Surrender Request asks Libya to respect these rights (in Article 59 of the Statute). Rule 117 of the Court's Rules also provides that "the Court shall ensure that the person receives a copy of the arrest warrant issued by the Pre-Trial Chamber ... in a language that the person fully understands and speaks".

“go first” on prosecuting him. The Court will be loathe to set a precedent that makes it too easy for states to put suspects beyond its reach, particularly where human rights guarantees are lacking.

As the defence office has put it: “The NTC has failed to adduce probative evidence concerning the existence of investigations against Mr. Gaddafi...[and the evidence] indicate[s] that the Libyan authorities are either unwilling or unable to conduct proceedings against Mr. Gaddafi in a manner which is consistent with principles of due process recognised by international law...”<sup>32</sup>

The Rome Statute does not set out the factors to be applied by the Court deciding on postponement, but Articles 55 and 59 of the Rome Statute require that due process guarantees for suspects be observed, and Article 21(3) reminds us that the ICC must apply and interpret law in a manner “consistent with internationally recognized human rights”. The Court’s analysis should therefore (as it should in an admissibility challenge) cover not only whether genuine investigations are underway but also the question of whether the suspect will be treated *fairly*. On both counts, the Libyan position currently looks weak.

It has been said that this case is a big test for the new Libya, which is attempting to draw a line under the old Gaddafi regime and show that it is a modern state embracing the rule of law and human rights. If the ICC demands Saif Al-Islam’s surrender, and Libya resists, the case may also become a test for the Security Council -- will there be any consequences? And it is a test for the Court, which is expected to issue an order in the weeks to come. One solution that could be discussed in the meantime is to have an ICC court (with judges who will apply international standards of fair trial) sitting *in* Libya (where the conflict occurred). The Court can sit abroad under Article 3(3) of its

Statute “whenever it considers it desirable”. Although this solution raises security and other concerns, it would ensure the safeguarding of international fair-trial rights while keeping justice at home.

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<sup>32</sup> OPCD Observations, 3 February 2012.