

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 18 May 2012

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 Public Annexes A-H**

Public Redacted Version of the "Defence Request"

Source: Defence

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Ms. Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

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

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

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States' Representatives

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REGISTRY

Registrar

Ms. Silvana Arbia, Registrar

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Victims and Witnesses Unit

Counsel Support Section

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. Mr. Saif Al Islam Gaddafi wishes to face justice. He wants the truth to be ascertained in a fair, impartial, independent, and transparent trial. Mr. Gaddafi has full confidence in the ability of the ICC judges to render justice, and none whatsoever, in the current Libyan regime.
2. The failure of the Libyan authorities to implement the right of the Defence to visit Mr. Gaddafi simply reinforces the legitimacy of his conclusion.
3. The right to an independent Defence is the cornerstone of a fair and impartial trial. This right cannot be derogated from in proceedings, in which the defendant faces the death penalty.
4. The implementation of this right should not depend on whether the government approves of the content of the submissions of the Defence or the colour of the Defence Counsel's skin, his nationality, or dress.
5. It should also not be subordinated to strategic considerations concerning the government's own litigation before the ICC or the travel schedule of government authorities.
6. The Defence for Mr. Saif Al Islam Gaddafi has attempted, to no avail, to meet with Mr. Gaddafi for the purpose of advising him of his rights and the status of legal proceedings, seeking instructions concerning the admissibility of the proceedings, and, at his specific request, discussing his options for legal representation in connection with domestic proceedings.
7. Multiple Defence requests have been met with continued obfuscation and prevarication.
8. On 27 April 2012, the Pre-Trial Chamber requested the Libyan authorities to implement a privileged visit from the Defence to Mr. Gaddafi. This order has also been met with a combination of stony silence and prevarication.

9. As emphasized by the Security Council members during the Libya briefing on 16 May 2012, Security Council Resolution 1970 imposes a mandatory obligation on Libya to cooperate with all orders of the Court.¹ The Court is not comprised solely of the Prosecution. Compliance with the Court means compliance with judges' orders, in particular, orders which are central to the rights of the Defence.
10. It is clear at this point that the Defence will not be in a position to meet with Mr. Gaddafi prior to the deadline for filing Defence observations on admissibility.
11. This will deprive the Defence of the ability to verify any of the assertions of the Libyan authorities concerning the implementation of Mr. Gaddafi's rights in detention.
12. There are only two conclusions which can be drawn from the Libyan authorities' refusal to implement this request in a timely manner: either they are stonewalling because they are concerned about what Mr. Gaddafi might say to his counsel and the impact it might have on the admissibility proceedings, or, they simply do not have the capacity to implement the visit.
13. Either conclusion undermines their assertion that they are either willing or able to conduct proceedings against Mr. Gaddafi.
14. At the same time as the Defence has been completely denied the opportunity of meeting with their client, the Libyan authorities are now attempting to assert that Mr. Gaddafi wishes to be tried in Libya, and that he is obstructing their efforts to ensure his right to legal representation.
15. The Defence would like to very clearly state that the only lawyer who has obtained instructions from Mr. Gaddafi in a privileged setting is Ms. Taylor. As such, only the Defence has the authority to speak to Mr. Gaddafi's preferences.

¹ ICC Prosecutor's Briefing to the Security Council on Libya and State Responses, 16 May 2012, <http://www.unmultimedia.org/tv/webcast/2012/05/security-council-meeting-the-situation-in-libya-english-6.html> Remarks by Ambassador Susan E. Rice, Permanent Representative of the United States to the United Nations, 16 May 2012, <http://usun.state.gov/briefing/statements/190099.htm>

16. The fact that the Libyan authorities are seeking to controvert his clear preference on the basis of information allegedly gleaned from a meeting conducted without the knowledge, approval or consent of his counsel simply underscores a lack of understanding and respect for Defence rights.
17. Indeed, to claim that someone, who had been kept in incommunicado detention for 107 days without access to any legal advice, could freely consent to face the death penalty is astounding.
18. It is also sadly reminiscent of NTC allegations that the former regime forced detained persons to attest in videos that they were being well-treated. The continuation of such practices would belie the promise of the current government to create a new Libya, founded on principles of due process and human rights.
19. The Defence has thus far refrained from fully pursuing these issues because of its concern that any public statements or filings could trigger the application of NTC law 37, which potentially imposes a life sentence on anyone who speaks in favour of Mr. Saif Al Islam Gaddafi, or who makes statements, which the government considers to be harmful to their regime.²
20. The instigation of any such proceedings against the Defence, would in turn, have prevented the Defence from being able to see Mr. Gaddafi.
21. It is now clear that the Libyan authorities will not freely permit the Defence to see Mr. Gaddafi. The Defence cannot face the prospect of Mr. Gaddafi being forced to the gallows in silence.
22. The Defence therefore respectfully requests the Honourable Pre-Trial Chamber to:
- i. report the non-compliance of the Libyan authorities to the Security Council;
 - ii. stay the Chamber's consideration of the admissibility proceedings due to Libya's non-compliance with the implementation of fundamental rights of the Defence; and

² NTC Law 37 is attached as Annex A.

- iii. draw adverse inferences concerning the implementation of Mr. Gaddafi's rights in detention and the willingness and ability of the Libyan authorities to genuinely investigate the case in accordance with internationally recognized standards of due process.

Procedural History

23. On 6 December 2011, the Pre-Trial Chamber appointed the Office of Public Counsel for the Defence (OPCD) to represent the interests of Mr. Saif Al Islam Gaddafi in the proceedings before the ICC, until such time that he designates his own counsel.³
24. On 23 February 2012, the Pre-Trial Chamber ordered the Registry and the OPCD to visit Mr. Gaddafi in order to advise him of the appointment of the OPCD, and the status of the legal proceedings before the ICC.⁴ The Chamber also specifically requested the OPCD and the Registry to "to report back to the Chamber, to the extent possible and exempting privileged information, with a full account of the visit".
25. After delays and political wrangling, which is recounted in the OPCD report of 2 March 2012, the OPCD was finally permitted to visit Mr. Gaddafi on 3 March 2012.
26. Before the OPCD was able to commence its privileged visit with Mr. Gaddafi, the Libyan focal point for the ICC met with Mr. Gaddafi alone in an upstairs room without the knowledge, or consent of the OPCD.
27. During the course of the OPCD's meeting with Mr. Gaddafi, Mr. Gaddafi clearly indicated the following:
- a. he does not believe that he can have a fair, impartial, and independent trial in Libya;
 - b. he wishes to face justice and assert his innocence, and that he considers that the ICC represents the best prospect for him to be able to do so under fair, impartial and independent conditions;

³ Public Redacted Version of Decision Requesting Libya to file Observations Regarding the Arrest of Saif Al-Islam Gaddafi, ICC-01/11-01/11-39-Red.

⁴ Decision on the Registry-OPCD Visit to Libya, ICC-01/11-01/11-52.

- c. that he wished to actively participate in both international and domestic proceedings, through counsel of his choice;
- d. his right to freely choose any such counsel was impeded by his inability to communicate with the outside world, and as such he wished for the OPCD to assist him in the selection of counsel, and to represent him in the interim;
- e. he wished for his family to select a lawyer to represent him in the proceedings in Libya, and for the OPCD to facilitate this (as was the case with his legal representation before the ICC); and
- f. he wished for Ms. Taylor to visit him again for the purpose of providing him legal advice.

28. At the same time, at the beginning of the meeting, Mr. Gaddafi explained that prior to meeting with the OPCD, his ability to formulate a clear position concerning the forum for the trial had been impeded by the fact that Dr. Gehani had informed him that the Libyan prosecuting authorities had decided not to pursue any serious allegations against him, such as murder or rape, due to lack of evidence.

29. This information was consistent with the fact that he had only been questioned in connection with issues concerning the licensing of camels and his fish farms.

30. Mr. Gaddafi raised this issue because he genuinely desired to have legal advice as to whether it was credible that the Libyan authorities would refrain from prosecuting him for these more serious crimes, and the impact that this would have on his rights both domestically and before the ICC.

31. In light of the fact that Dr. Gehani spontaneously confirmed the same information to the OPCD - namely that it was better for Mr. Gaddafi to be tried in Libya because they had terminated the proceedings for serious crimes due to lack of evidence - the OPCD had no reason to doubt the veracity of the information provided by Mr. Gaddafi.

32. It should also be noted that at this point in time, the Libyan authorities had requested to postpone the surrender of Mr. Gaddafi under Article 94 of the Statute, and as such, had a vested interest in demonstrating that there was no overlap between the domestic proceedings and the ICC charges.

33. Since the OPCD was not present during the meeting between Mr. Gaddafi and Dr. Gehani, it cannot verify whether Mr. Gaddafi expressed a certain view concerning the location of the trial. Any preference expressed by Mr. Gaddafi should, however, be treated with the caveat that at the time Mr. Gaddafi expressed the view, he had not received any legal advice since the date of his arrest three and a half months prior, and he had been assured by Dr. Gehani that the Libyan authorities had terminated the domestic proceedings for serious allegations.
34. In putting this information before the Chamber, the OPCD was well aware of its obligations under the Code of Professional Conduct for Counsel.
35. On 7 March 2012, the Pre-Trial Chamber rejected the request of the Libyan authorities to postpone the surrender of Mr. Gaddafi pursuant to Article 94 of the Statute.⁵ The Libyan authorities were ordered to make a formal decision to surrender Mr. Gaddafi within seven days of the notification of the decision, and to inform the Registrar of the modalities of surrender within 14 days.
36. In order to ensure that Mr. Gaddafi's rights were preserved pending his surrender to the ICC, on 12 March 2012, the OPCD requested the Pre-Trial Chamber to order the Registry to facilitate the implementation of a privileged visit between the OPCD and Mr. Gaddafi
37. On 22 March 2012, the Libyan authorities informed the Pre-Trial Chamber that they intended to challenge the admissibility of the case, and that they wished to therefore invoke Article 95 of the Statute in order to postpone the surrender of Mr. Gaddafi to the ICC.⁶
38. On 30 March 2012, the OPCD filed a renewed request for a privileged visit, and explicitly noted that firstly, Mr. Gaddafi had clearly indicated that he preferred to be transferred to the custody of the ICC, secondly, that the ability of the OPCD to

⁵ Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi, ICC-01/11-01/11-72.

⁶ Notification and Request by the Government of Libya in response to "Decision on Libya's Submission Regarding the Arrest of Saif Al-Islam Gaddafi" ICC-01/11-01/11-82

provide concrete advice to Mr. Gaddafi concerning possible admissibility proceedings during the brief 3 March 2012 visit had been impeded by the fact that Mr. Gaddafi had been assured by Dr. Gehani that he would not be pursued for serious crimes., and thirdly, that:

Any information concerning whether he has been questioned, and afforded counsel, and how he has been treated since the Libyan authorities commenced their investigations for crimes falling under Article 7 of the Rome Statute is also directly relevant to the Chamber's determination on admissibility.⁷

39. On 4 April 2012, the Pre-Trial Chamber rejected the second request of the Libyan authorities to postpone the surrender of Mr. Gaddafi, and ordered them to immediately surrender Mr. Gaddafi to the ICC.⁸ The Pre-Trial Chamber cautioned the Libyan authorities that any failure to comply with the order could warrant the Chamber making a finding of non-compliance.⁹
40. In light of the fact that approximately six weeks had elapsed since Mr. Gaddafi's last meeting with a lawyer, and in order to ensure that Mr. Gaddafi's rights were not further prejudiced due to the failure of the Libyan authorities to comply with their obligation to surrender Mr. Gaddafi to the ICC, the OPCD contacted Dr. Gehani on 12 April 2012 in order to determine whether it would be possible to visit Mr. Gaddafi.
41. Although Dr. Gehani was at first, polite with the OPCD, when it was indicated that the Principal Counsel was also participating in the telephone conversation, Dr. Gehani indicated that he would sue the Principal Counsel and that he intended to respond to the 'lies' in the OPCD report.
42. In order to defuse the situation, the conversation was continued without the participation of the Principal Counsel. Dr. Gehani indicated that the next day was a holiday (as a Friday), and that the Prosecutor-General, who is responsible for

⁷ Public Redacted Version of Renewed Request for Privileged Visit ICC-01/11-01/11-90-Red at para. 7.

⁸ Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi ICC-01/11-01/11-100 at para. 5.

⁹ At para. 19.

approving such visits, would be outside of Tripoli on a boat for the first three days in the subsequent week.

43. On 16 April 2012, the OPCD wrote to Dr. Gehani to confirm the contents of this communication, and to reiterate the fact that the OPCD wished to visit Mr. Gaddafi as a matter of urgency in order to advise him of the developments before the ICC.¹⁰ The OPCD also requested information concerning the details of the domestic charges against Mr. Gaddafi so that it could provide legal advice to Mr. Gaddafi on this matter.
44. The OPCD subsequently telephoned Dr. Gehani to confirm receipt of the email, and to inquire in relation to the requisite qualifications for lawyers to represent Mr. Gaddafi in connection with the domestic proceedings.
45. Dr. Gehani confirmed that he could not authorize the visit in the absence of the Prosecutor-General, and suggested that the Defence contact him later in the week upon the return of the Prosecutor-General. Dr. Gehani also indicated that Mr. Gaddafi could be represented by any lawyer of his choice in Libyan proceedings, including international counsel; all he had to do was designate a lawyer.
46. On 17 April 2012, the Pre-Trial Chamber appointed counsel from the OPCD to represent Mr. Gaddafi until such time as he is in a position to freely select his counsel.¹¹ In particular, the Chamber found the declaration signed by Mr. Gaddafi “to be sufficient evidence that Mr Gaddafi would like for the OPCD to fully represent him until such time as regular counsel is appointed.”¹²
47. At the same time, the Defence also became aware of press-reports that the Prosecutor-General was in fact in Tripoli for the purpose of receiving the visit of the ICC Prosecutor.¹³

¹⁰ This email is attached as Annex B.

¹¹ Decision Appointing Counsel from the OPCD as Counsel for Saif Al-Islam Gaddafi ICC-01/11-01/11-113.

¹² At para. 5.

¹³ H. Al Shalchi, M. Gumuchian, Libya insists on Gaddafi son trial as ICC visits 18 April 2012 [Reuters](http://www.reuters.com/article/2012/04/18/us-libya-icc-idUSBRE83H1FM20120418)
<http://www.reuters.com/article/2012/04/18/us-libya-icc-idUSBRE83H1FM20120418>

48. The Defence therefore contacted Dr. Gehani by telephone on the morning of 19 April 2012 to inquire in relation to the status of the request. Dr. Gehani again referred to the report of the OPCD, expressed his intention to respond to it, and indicated that he would decide on our request after he had filed his response. When the Defence asked Dr. Gehani to confirm whether their right to visit Mr. Gaddafi was contingent on his response to the report, Dr. Gehani clarified that it was not, and that he would endeavor to contact the Prosecutor-General.
49. At this point, Dr. Gehani also informed the Defence that any lawyer representing Mr. Gaddafi in connection with domestic proceedings would need to speak Arabic, as it would not be possible to employ an interpreter due to inaccuracies in interpretation.
50. The Defence contacted Dr. Gehani again by telephone on the evening of 19 April 2012. Dr. Gehani responded that he had been unable to contact the Prosecutor-General, that the next day was a holiday, and that he would try to do so over the course of the weekend.
51. On 24 April 2012, the Defence emailed Dr. Gehani to inquire as to whether he had been successful in contacting the Prosecutor-General, and to underscore the urgency of the request to visit Mr. Gaddafi, and its importance vis-à-vis his right to effective representation.¹⁴ The Defence also reiterated its request for information concerning the details of the domestic charges against Mr. Gaddafi.
52. The Defence subsequently telephoned Dr. Gehani to confirm his receipt of the email. During this conversation, Dr. Gehani informed the Defence that he was extremely busy preparing the Libyan challenge to admissibility, and that as such, he did not have time to facilitate the visit prior to 30 April 2012. Dr. Gehani indicated that it was necessary for him to be present during the visit in order to facilitate it.
53. When the Defence sought clarification as to whether, in light of the urgency of the visit, it would be possible for them to travel to Zintan without Dr. Gehani, the phone cut out. The Defence then called Dr. Gehani back, and Dr. Gehani suggested that the Defence contact the Prosecutor-General to organize a visit after the 30 April 2012.

¹⁴ This email is attached as Annex C.

When the Defence requested the contact details of the Prosecutor-General, the phone once more cut out.

54. The Defence subsequently wrote to Dr. Gehani to confirm the contents of the conversation, and to request the contact details of the Prosecutor-General (the fax number, which had been provided to the Defence in January 2012 did not work).¹⁵
55. Dr. Gehani responded by sending the Defence a mobile number for the Prosecutor-General.¹⁶
56. In a separate email sent on the same day, the Defence also requested further information concerning the requisite qualifications for appointing counsel in domestic proceedings, in particular whether there were any requirements other than the fact that the counsel must speak Arabic, and whether Mr. Gaddafi would be entitled to receive legal aid.¹⁷ Dr. Gehani has not responded to this email.
57. On 25 April 2012, with the assistance of an Arabic interpreter, the Defence made multiple attempts, without success, to contact the Prosecutor-General. The minutes of these attempts is attached.¹⁸
58. The Defence subsequently emailed Dr. Gehani to inform him of the difficulties faced by the Defence in contacting the Prosecutor-General. The Defence therefore inquired as to whether it would be possible to obtain an email address for the Prosecutor-General, or whether a specific time could be designated for contacting him.¹⁹ Dr. Gehani did not respond to this email.
59. On 25 April 2012, the Libyan authorities filed a ‘response’ to the reports submitted by the OPCD to the Pre-Trial Chamber.²⁰ The Libyan authorities described the reports of the OPCD as ‘patently false’, and ‘manifestly absurd’, a ‘campaign of smear and

¹⁵ This email is attached as Annex D.

¹⁶ This email is attached as Annex E.

¹⁷ This email is attached as Annex F.

¹⁸ Annex G.

¹⁹ Annex H.

²⁰ The redacted version was filed on 26 April 2012. Redacted Response on behalf of the Government of Libya to the public and redacted (1) Urgent Report concerning the visit to Libya; and (2) Addendum to the Urgent Report concerning the visit to Libya, ICC-01/11-01/11-128-Red

innuendo', which had 'prejudiced the Libyan government', and which violated article 24 of the Code of Conduct for Counsel.

60. The Libyan authorities also averred that "following the 17 April 2012 appointment of the OPCD as counsel for Mr Gaddafi before the ICC, [...] it will facilitate access to Mr Gaddafi by any other lawyer in the event that he communicates a preference for a different lawyer to the OPCD."²¹

61. Dr. Gehani also appended a confidential attestation, in which he asserted, inter alia, that when he met Mr. Gaddafi alone on 3 April 2012 (without the knowledge, permission or present of Mr. Gaddafi's lawyer), Mr. Gaddafi had [Redacted].²²

62. In relation to the fact that the OPCD delegation to Mr. Gaddafi had been restricted to Ms. Taylor, Dr. Gehani noted that [Redacted].²³

63. Dr. Gehani further stated that he intended to [Redacted].²⁴

64. On 27 April 2012, the Pre-Trial Chamber noted that:

the Libyan authorities assert that they have not arrested Mr Gaddafi pursuant to the arrest warrant issued by the Court and have refused to surrender him to the Court. The Chamber considers however, that its power to issue such orders or seek such cooperation as may be necessary to protect Mr Gaddafi or assist in the preparation of his defence pursuant to articles 57(3) (b) and (c) of the Statute cannot be made contingent on Libya's compliance with the request for arrest and surrender issued by the Court.

Accordingly, in relation to the OPCD request for authorisation of a privileged visit to Mr Gaddafi, the Chamber considers it appropriate, pursuant to article 57(3)(b) of the Statute, and in light of the Appointment Decision, to request the Libyan authorities to enable the OPCD to visit with Mr Gaddafi on a

²¹ At para. 6.

²² At para. 30.

²³ Annex A, para. 12.

²⁴ At para. 27.

privileged basis. In this respect, the Chamber takes note of the submission, made by the Government of Libya in its response, to the effect that it will facilitate access to Mr Gaddafi by his lawyers.²⁵

65. On 1 May 2012, the Libyan authorities filed their challenge to the admissibility of the case.²⁶

66. The Libyan authorities attached a statement from the Prime Minister of the NTC (made in the presence of the ICC Prosecutor), in which the Prime-Minister accused the OPCD of making baseless and ridiculous allegations of mistreatment, and noted that it would be “most unfortunate if the actions of any individual associated with that body, in stirring up the media, prevented Libya from obtaining the highest standards of fairness and professional integrity being applied to proceedings in The Hague”.²⁷

67. The Defence has been informed by the Registry that they contacted Dr. Gehani during the week of 1 May to 4 May 2012 to discuss the implementation of the visit to Mr. Gaddafi, but Dr. Gehani informed them that he was in Rome.

68. The Defence was also informed that the Registry sent a follow up email on 10 May 2012 underscoring the urgency of the request, but that no response was received.

69. In response to a further follow up email sent on 16 May 2012, Dr. Gehani responded that he would be in New York until the 25 May 2012, and would address the issue upon his return.

70. On the same day, the Libyan authorities filed a request to file a reply in relation to their request to postpone Mr. Gaddafi’s surrender, in which the Libyan authorities stated that:

the Libyan Government has expended and continues to expend considerable efforts in negotiating with the local authorities in Zintan to arrange for a visit by the Registrar and the OPCD in compliance with the Pre-Trial Chamber’s

²⁵ Decision on OPCD Requests, ICC-01/11-01/11-129, at paras 11-12.

²⁶ Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11-130

²⁷ ICC-01/11-01/11-130-AnxA at p. 3.

order to do so. Unfortunately, these efforts have not been assisted by the Zintani authorities mistrust of the OPCD, having regard to the previous false and unverified allegations regarding Mr Saif Al-Islam's treatment and conditions. It is hoped that the situation will be resolved in the coming week and that the said visit can take place imminently after that.²⁸

71. In light of the fact that the Defence response to the admissibility challenge is due on 4 June 2012, and the time required to conduct security checks for such a visit, there does not appear to be a reasonable prospect for the Defence to be able to visit Mr. Gaddafi prior to this date.

72. The Defence has filed a confidential and public redacted version of the present Request due to citations from Confidential Annex A to the response of the Libyan authorities to the OPCD reports. There is nothing confidential in these citations, and it would be in the interests of the defendant's right to fair and public proceedings for these citations to be made public. The Defence therefore requests the authorisation of the Pre-Trial Chamber to file a public, un-redacted version of the present request.

Submissions

73. One of the most egregious consequences of incommunicado detention is that it prevents the Defendant from being able to voice his concerns and wishes in a transparent manner- to exist as a legal person.

74. The Libyan authorities have exploited the imposed silence of Mr. Gaddafi to make various unsubstantiated claims regarding his preferences for the proceedings. The position of the Libyan authorities has swung from asserting that Mr. Gaddafi wished to represent himself 'like Milosevic' (a specter which the Defence presumes was designed to paint Mr. Gaddafi in the same obstructive light as was cast over Mr. Milosevic),²⁹ to claiming that [Redacted], to asserting that he had indicated that he did not wish to have any legal representation.³⁰

²⁸ Libyan Government Application for leave to reply and reply to OPCD Response to the request to postpone the surrender of Mr Saif Al-Islam Gaddafi pursuant to article 95 of the Statute ICC-01/11-01/11-149 at para. 33.

²⁹ Saif al-Islam Gaddafi 'determined to defend himself – like Milosevic', 12 April 2012, <http://rt.com/news/saif-gaddafi-court-defense-852/>

75. At no point have the Libyan authorities ever submitted any signed declarations from Mr. Gaddafi in support of such claims.
76. It is also not possible to select a qualified lawyer in a vacuum: it is self-evident that Mr. Gaddafi will not be able to choose a lawyer, whom he can trust to represent his interests in the domestic proceedings in an effective and independent manner, without external advice from his friends, family or the Defence.
77. Rather than implementing the orders of the Chamber and thus facilitating Mr. Gaddafi's right to legal representation before the ICC and Libyan courts, the Libyan focal point for the ICC is in New York, possibly to lobby the Security Council to support the Libyan admissibility challenge and to avoid the consequences of non-compliance with such orders.
78. By failing to implement the Defence meeting with Mr. Gaddafi, the Libyan authorities have prevented the Defence from obtaining any verification of several issues, which are central to the Libyan challenge to admissibility. This, in turn, has destroyed the adversarial nature of the admissibility proceedings, and prevented the Defence from being able to bring highly relevant information to the attention of the Pre-Trial Chamber.
79. Both the Inter-American Court of Human Rights and the European Court of Human Rights have also found in circumstances, in which the State has prevented the applicants from accessing information or evidence within the control of the State, that it would appropriate to draw adverse inferences against the State.³¹ C. Hall has also opined that it would appropriate to incorporate such an approach in admissibility proceedings before the ICC.³² This would also be consistent with the jurisprudence of

See also H. Al Shalchi, *Fighters want to try Gaddafi son: Libyan lawyer* 11 April 2012 [Reuters](http://www.reuters.com/article/2012/04/11/us-libya-icc-idUSBRE83A1BL20120411)
<http://www.reuters.com/article/2012/04/11/us-libya-icc-idUSBRE83A1BL20120411>

³⁰ Statement of the Libyan Ambassador to the United Nations to the Security Council, 16 May 2012, <http://www.unmultimedia.org/tv/webcast/2012/05/security-council-meeting-the-situation-in-libya-english-6.html>

³¹ *Orhan v. Turkey*, Application no. 25656/94) Final Judgment, 6 November 2002; *Neira Alegria et al. Case, I.-A. Court H.R., Series C: Decisions and Judgments, No. 20, 1995, p. 29*; Article 39 of the Rules of Procedure and Evidence of the Inter-American Commission on Human Rights.

³² C. Hall, 'Article 19' in O. Triffterer (ed.) Commentary on the Rome Statute of the International Criminal Court (Hart Publishing 2008) at pp. 645 and 652.

the ICC to the effect that the Chamber may accept admissions of fact in order to compensate for the consequences of non-disclosure to the Defence.³³

80. At the same time that the Libyan authorities have failed to implement a visit between Mr. Gaddafi and the Defence, the Libyan authorities have sought to delegitimize and intimidate the positions of the Defence by publicly haranguing the OPCD, accusing it on multiple occasions of misconduct, lies and unprofessionalism, threatening to bring a claim against the Principal Counsel of the OPCD, and refusing to correspond or answer inquiries.
81. The promulgation of law no. 37 on 3 May 2012 by the National Transitional Council on has also had a chilling effect on the independence of the Defence. Article 1 of Law 37 declares that firstly, Libya is in a state similar to armed conflict, and secondly, that anyone who praises Saif Al Islam Gaddafi, suggests that he is a reformer, makes false allegations or press releases during this state of conflict, can be criminally sanctioned, potentially for life if the statements or press releases cause harm to the country.³⁴
82. As set out in the procedural history, the Libyan authorities have made very clear that they consider that the submissions of the Defence have prejudiced the position of the Libyan government. It could also be inferred from the multitude of times that Dr. Gehani mentioned the OPCD report during communications concerning the Defence request to visit Mr. Gaddafi that his willingness (or lack thereof) to facilitate the visit is related to the submissions of the Defence to the ICC.
83. How can it be possible to conduct a fair and impartial trial in Libya if the threat of criminal sanctions hang, like the sword of Damocles, over the heads of the Defence, and prosecuting authorities have the discretion to regulate Defence visits to the defendant, depending on whether they agree with or dispute Defence positions adopted in the proceedings?

³³ Prosecutor v. Lubanga, Decision on the prosecution and defence applications for leave to appeal the Trial Chamber's "Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters", 16 December 2008, ICC-01/04-01/06-1557 at para. 41.

³⁴ Annex A.

84. It is also clear that there cannot be a fair and impartial trial if the Defence is muzzled by the prospect of criminal sanctions.
85. If the failure of the Libyan authorities to implement the Defence visit to Mr. Gaddafi is attributable to security reasons or their lack of authority over the detaining authorities, then it is clear that this would also militate in favour of the admissibility of the case before the ICC.
86. The Defence contacted Dr. Gehani on 12 April 2012 in order to visit Mr. Gaddafi on an urgent basis. Five weeks later, there still does not appear to be any reasonable prospect of this visit occurring.
87. One brief two hour visit over the course of 6 months of detention does not in any way satisfy Mr. Gaddafi's right to legal representation.
88. As confirmed by the Grand Chamber of the European Court of Human Rights in the Öcalan case, denying the detained defendant access to lawyers for over 8 days – even if related to security reasons – constitutes a violation of the defendant's right to a fair trial.³⁵ The following findings are particularly relevant:

It finds that the special circumstances of the case did not justify restricting the applicant to a rhythm of two one-hour meetings per week with his lawyers in order to prepare for a trial of that magnitude.

... With respect to the Government's argument that visits took place in accordance with the frequency and departure times of the ferries between the island of İmralı and the coast, the Court considers that, while the Government's decision to hold the applicant in an island prison far from the coast is understandable in view of the exceptional security considerations in the case, restricting visits to two one-hour visits a week is less easily justified. It notes that the Government have not explained why the authorities did not permit the lawyers to visit their client more often or why they failed to provide more

³⁵ Case of Öcalan v. Turkey, Judgment of 12 May 2005, Application no. 46221/99, at para. 131.

adequate means of transport, thereby increasing the length of each individual visit [...]

... As to the Government's argument that the applicant's lawyers organised press conferences after each visit and acted as spokespersons for the PKK, the Court holds that any such conduct on their part could not justify the restrictions in issue, since restrictions cannot be placed on the rights of the defence for reasons that are not directly related to the trial.³⁶

89. The Human Rights Committee has further emphasised that the right of the defendant to a fair trial, of which the right to legal representation is the *sine qua non*, is non derogable in proceedings in which the defendant faces the death penalty.³⁷ The Rome Statute also contains no derogation from the right to effective legal representation. As confirmed by the Pre-Trial Chamber, the implementation of Mr. Gaddafi's rights should not be contingent "cannot be made contingent on Libya's compliance with the request for arrest and surrender issued by the Court."³⁸

90. Neither prevailing security conditions in Libya nor the fact that the Libyan government considers that it is in a state similar to war are germane to the duty of the Libyan authorities to implement this right. If the Libyan authorities do not have the power or security to implement the fair trial rights of Mr. Gaddafi in a manner which is consistent with his right to expeditious proceedings, then they should cede the right to prosecute Mr. Gaddafi to a Court, which can – the ICC.

Relief Sought

91. For the reasons set out above, the Defence for Mr. Saif Al Islam Gaddafi respectfully requests the Honourable Pre-Trial Chamber to:

I. report the non-compliance of the Libyan authorities to the Security Council;

³⁶ At para. 135.

³⁷ Human Rights Committee, General Comment 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), at para. 15.

³⁸ ICC-01/11-01/11-129, at para 11

- II. stay the Chamber's consideration of the admissibility proceedings due to Libya's non-compliance with the implementation of fundamental rights of the Defence; and
- III. draw adverse inferences concerning the implementation of Mr. Gaddafi's rights in detention and the willingness and ability of the Libyan authorities to genuinely investigate the case in accordance with internationally recognized standards of due process.



Xavier-Jean Keïta, Counsel for Mr. Saif Al Islam Gaddafi

Dated this, 18th Day of May 2012
At The Hague, The Netherlands