

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **21 January 2013**

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 and B

Urgent Defence Request

Source: Defence of Mr. Saif Al Islam Gaddafi

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

The Office of the Prosecutor

Ms. Fatou Bensouda

Counsel for the Defence

Counsel for Saif Al-Islam Gaddafi:

Mr. Xavier-Jean Keïta

Ms. Melinda Taylor

Counsel for Abdullah Al-Senussi:

Mr. Ben Emmerson QC

Mr. Rodney Dixon

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms. Paolina Massidda

Ms. Sarah Pellet

Mr. Mohamed Abdou

**The Office of Public Counsel for the
Defence**

States' Representatives

Mr. Phillipe Sands QC

Mr. Payam Akhavan

Ms. Michelle Butler

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia, Registrar

Deputy Registrar

Mr. Didier Daniel Preira, Deputy
Registrar

Victims and Witnesses Unit

Counsel Support Section

Detention Section

**Victims Participation and
Reparations Section**

Other

1. Introduction

1. On 18 January 2013, in complete contravention of the Government of Libya's written assurances to the Court, the Libyan authorities put Mr. Saif Al Islam Gaddafi on trial.
2. The Pre-Trial Chamber authorised the Government to defer the surrender of Mr. Gaddafi to the ICC for the sole purpose of conducting investigations into the same conduct as the ICC case, whilst the admissibility challenge is under consideration by the ICC.
3. The Libyan authorities have, nonetheless, exploited their control over Mr. Gaddafi, and the further time accorded by the Chamber to formulate additional admissibility submissions, in order to launch a completely unrelated, and abusive prosecution.
4. Mr. Gaddafi is essentially being tried for attempting to communicate with the ICC *via* his Counsel in relation to the fact that his rights had been violated. Prosecuting a defendant for trying to defend himself epitomises the very definition of a Kafkaesque show trial.
5. It is also apparent that the allegations are predicated on privileged Defence materials, which were illegally seized from the Defence and the defendant, and information garnered from a privileged meeting, which was illegally and deceptively monitored.
6. The mere existence of such a trial therefore exhibits the Government of Libya's complete disregard for its obligations under the Rome Statute, and the vacuity of its promises to the Court, such as its explicit promise to permit the Defence to meet with Mr. Gaddafi on a privileged basis, and its assurance that no criminal sanctions would be imposed against the Defence for actions falling within the remit of defending Mr. Gaddafi.
7. The Libyan authorities also capitalised on this hearing in order to repeat their ridiculous and baseless accusations against the ICC delegation, and to announce their intention to convoke a trial hearing against the ICC delegation in May.
8. This is sabre-rattling – pure and simple. Libyan officials have publicly acknowledged that the ICC delegation cannot be lawfully prosecuted in domestic courts because of their privileges and immunities, which have not been waived.

9. It would appear that the Libyan authorities have resorted to making veiled threats against the Court and attempting – once again - to discredit the Defence in order to distract from the paucity of their admissibility submissions as concerns Mr. Gaddafi, and the complete absence of any legal or factual justification for their failure thus far to surrender Mr. Al-Senussi to the ICC.
10. Such strong-arm tactics have absolutely no place in a court of law, or in any country, which claims to respect the rule of law.
11. The only effective remedy in such circumstances is to issue an immediate decision on the admissibility of the case, and to order the Government of Libya to immediately surrender Mr. Gaddafi to the custody of the ICC.

2. Procedural History

12. On 23 November 2011, the National Transitional Council confirmed by letter that Mr. Saif Al Islam Gaddafi has been arrested on 19 November 2011.¹
13. In response to an order from the Pre-Trial Chamber, on 23 January 2012, the Government of Libya notified the Chamber, *inter alia*, that it was not formally challenging the admissibility of the case at that point in time but was seeking to defer Mr. Gaddafi's surrender under Article 94 of the Statute in order to obtain more time to complete its domestic investigations.²
14. On 7 March 2012, the Pre-Trial Chamber issued its 'Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi', in which the Chamber found that Article 94 could not be invoked to postpone the surrender of Mr. Gaddafi in order to allow the domestic authorities to investigate Mr. Gaddafi for other crimes.³
15. The Government of Libya did not appeal this decision.
16. On 22 March 2012, the Government of Libya informed the Pre-Trial Chamber that it intended to challenge the admissibility of the case, and that it wished to therefore invoke Article 95 of the Statute in order to postpone the surrender of Mr. Gaddafi to the ICC.⁴

¹ ICC-01/11-01/11-34-Anx.

² ICC-01/11-01/11-44-Conf-Anx1

³ ICC-01/11-01/11-72-Conf.

⁴ ICC-01/11-01/11-82.

17. On 4 April 2012, the Pre-Trial Chamber rejected the second request of the Libyan Government to postpone the surrender of Mr. Gaddafi on the basis that there was no admissibility challenge under consideration by the Court, as required by Article 95. The Chamber therefore ordered the Government to immediately surrender Mr. Gaddafi to the ICC,⁵ and cautioned the Government that any failure to comply with the order could warrant the Chamber making a finding of non-compliance.⁶
18. On 27 April 2012, the Pre-Trial Chamber took note of previous submissions by the Government of Libya that it was willing to facilitate access to Mr. Gaddafi by his lawyers, and ordered the Government of Libya to enable the OPCD to visit Mr. Gaddafi on a privileged basis.⁷
19. On 1 May 2012, the Libyan authorities filed their challenge to the admissibility of the case, and simultaneously invoked Article 95 in order to postpone the surrender of Mr. Gaddafi to the ICC.⁸
20. In response to concerns expressed by the Defence concerning the lack of any progress in relation to the implementation of the visit to Mr. Gaddafi, and the possible application of NTC law 37 – which imposed criminal sanctions on anyone who assists or praises Mr. Saif Al Islam Gaddafi or harmed the State through their statements - the Government of Libya expressly confirmed to the Pre-Trial Chamber that:
- a. the Libyan authorities would grant the Defence “ full access” to Mr. Gaddafi, in accordance with the applicable standards;⁹
 - b. the Government of Libya “ will do all it can to grant access by the ICC OPCD and Registry to Mr. Gaddafi, consistent with international law. The Government of Libya makes this undertaking without hesitation or caveat”;¹⁰
 - c. the visit would be privileged, and that security measures would be taken to ensure that members of the delegation would not be put at any personal risk;¹¹
- and

⁵ ICC-01/11-01/11-100 at para. 5.

⁶ At para. 19.

⁷ ICC-01/11-01/11-129 at paras 11-12.

⁸ ICC 01/11-01/11-130.

⁹ ICC-01/11-01/11-160 at para. 3.

¹⁰ At para. 5.

¹¹ At para. 26.

- d. “any statements made by the OPCD which are made within their proper remit of defending Mr Gaddafi in criminal proceedings would not and cannot constitute a violation of Law No. 37”.¹²
21. In an earlier statement to the Court, the Libyan focal point for the ICC, Dr. Gehani, had confirmed that under Libyan law, Defence counsel have the right to exchange documents with their client on a privileged basis.¹³ Article 80 of the Libyan Code of Criminal Procedure further prohibits the confiscation or seizure of documents, which are communicated between counsel and client.
22. On 7 June 2012, during the visit to Mr. Gaddafi, the ICC delegation was arrested and detained for 26 days. Without the knowledge of the ICC delegation, the ‘privileged’ visit was surreptitiously recorded, and monitored by a guard, who claimed to be illiterate and ignorant of any language other than Arabic, but was, in reality, fully conversant in English, and French.
23. In violation of Article 80 of the Libyan Code of Criminal Procedure, and without first seeking an order of the ICC,¹⁴ the Libyan authorities seized various privileged Defence documents from the Defence Counsel and the defendant, and interrogated the guards monitoring the visit, Mr. Gaddafi, and the ICC delegation on issues, which should have been protected by legal professional privilege.¹⁵
24. Mr. Gaddafi was immediately interrogated without the presence of a lawyer, and before he would have had any opportunity to request and designate a lawyer. The Libyan authorities initially attempted to interrogate the ICC delegation without the presence of a lawyer. Although lawyers were subsequently appointed to the delegation, the delegation was not permitted to meet with these lawyers prior to interrogation sessions, nor was the delegation permitted to have any private communications with these lawyers.¹⁶
25. After over two weeks in detention, it was conveyed to the ICC that unless the delegation submitted to such questioning, they would not be released.¹⁷ The delegation was not informed of the purpose of the questioning. At no point in time

¹² At para. 29.

¹³ ICC-01/11-01/11-146, Annex A, para 25.

¹⁴ ICC-01/11-01/11-190-Corr-Red at paras. 272- 273.

¹⁵ ICC-01/11-01/11-190-Corr-Red at paras. 263 and 265.

¹⁶ ICC-01/11-01/11-190-Corr-Red at para. 239.

¹⁷ ICC-01/11-01/11-190-Corr-Red at para 239; ICC-01/11-01/11-190-Conf-Corr at footnote 227.

did they ever receive any oral explanation or written documentation concerning the legal basis for their detention, or the seizure of Defence documents.¹⁸

26. After their release, the Libyan focal point for the ICC announced that the Libyan authorities had deliberately decided not to bring the delegation before a judge because it was likely that a judge would have ordered their release due to their privileges and immunities.¹⁹
27. The Defence filed its response to the admissibility challenge on 24 July 2012. The Government of Libya subsequently sought, and was granted several extensions of time due to an array of factors, which apparently hindered its ability to formulate a reply.
28. During admissibility hearings scheduled on 9 and 10 October 2012, the Government announced that Mr. Gaddafi's trial was scheduled to commence in February 2013.²⁰ The Government, nonetheless, asserted once again that it required more time to submit information and evidence in connection with the admissibility proceedings. Counsel for Libya also expressly conceded that the Government had filed its admissibility challenge on 1 May in order to avoid its obligation to surrender Mr. Gaddafi to the ICC.²¹
29. On 7 December 2012, the Pre-Trial Chamber requested the Government of Libya to submit further information and evidence on certain issues concerning the admissibility of the case by 23 January 2013, and granted the Prosecution, OPCV, and OPCD a right to file a response to such submissions by 11 February 2012.²²
30. On 7 January 2013, the Defence for Mr. Gaddafi notified the Pre-Trial Chamber of reports in the Libyan media, that the official spokesperson of the Prosecutor-General had announced on 1 January 2013 that there would be a trial against Mr. Gaddafi in a month's time in Zintan.²³ The Minister of Justice had also confirmed that the trial of Mr. Gaddafi was scheduled to commence in the next month.
31. On 10 January 2013, the Pre-Trial Chamber ordered the Government of Libya to "provide observations on the OPCD Notification, including by confirming or not the accuracy of the information contained in the newspaper articles attached thereto."²⁴

¹⁸ ICC-01/11-01/11-190-Corr-Red at para. 185, 269.

¹⁹ ICC-01/11-01/11-190-Corr-Red at para. 185.

²⁰ ICC-01/11-01/11-T-3-Red-ENG WT, p. 52, lines 14 to 16.

²¹ Transcript of 10 October 2012, p. 44, lines 17-18.

²² ICC-01/11-01/11-239.

²³ ICC-01/11-01/11-247-Red.

²⁴ ICC-01/11-01/11-249.

32. On 15 January 2013, the Government of Libya responded that, “such press reports are not accurate, that the trials of Saif Al-Islam Gaddafi and Abdullah Al-Senussi will not commence in February 2013. The three articles are simply unfortunate examples of the widespread mis-reporting of information associated with this case due to mistranslation or misunderstanding.”²⁵
33. On 17 January 2013, reports emerged that a trial hearing against Mr. Gaddafi had been conducted in Zintan in connection with allegations that Mr. Gaddafi insulted the Libyan flag and compromised national security during the meeting between Mr. Gaddafi and the ICC delegation on 7 June 2013.²⁶
34. The Prosecutor-General subsequently confirmed that there had been a trial hearing against Mr. Gaddafi, that Mr. Gaddafi was being accused of compromising national security through the exchange of documents with the ICC delegation, and insulting the State’s flag and national emblem, and that the trial had been adjourned until May to enable a counsel to be appointed to Mr. Gaddafi, the ICC delegation to be informed of the proceedings, and for arrest warrants against two other Libyan nationals to be renewed.²⁷ Although it was claimed that this was a ‘public’ hearing, the only footage which has emerged is comprised of photographs of the judges, and the defendant being held in a cage.²⁸
35. The Defence for Mr. Saif Al Islam Gaddafi respectfully requests the Honourable Pre-Trial Chamber to issue an immediate decision on the challenge to admissibility, on the basis that the Libyan authorities have abused the processes of the Court by utilising the extension of time granted to them to launch a prosecution against Mr. Gaddafi, which has absolutely no connection to the ICC case, and which violates Libya’s obligations under the Rome Statute and SCRes 1970.
36. The Defence further requests the Pre-Trial Chamber to order the Libyan authorities to:
- a. immediately surrender Mr. Gaddafi to the ICC, on the grounds that the Libyan authorities have abused Article 95 of the Statute; and
 - b. immediately surrender all Defence documents, which were illegally seized from Counsel and the Defendant, and destroy any related copies or records.

²⁵ ICC-01/11-01/11-251 at para. 3.

²⁶ ‘Gaddafi’s son appears in Libyan court for first time’, Reuters 17 January 2013 <http://www.reuters.com/article/2013/01/17/us-libya-gaddafi-idUSBRE90G0QR20130117>

²⁷ Annex B.

²⁸ Annex A.

37. In light of the urgency of these matters, it would also be appropriate to shorten the deadline for any responses.

3. Submissions

3.1 The Chamber should issue an immediate decision on admissibility, and Mr. Gaddafi should be surrendered forthwith to the custody of the ICC

38. In exercising its discretion under Rule 58 to grant the Government of Libya an additional opportunity to submit observations on the admissibility of the case, the Chamber was under a positive obligation to ensure that such a decision was consistent with the rights of Mr. Gaddafi.²⁹ The Government of Libya has been accorded multiple opportunities to submit information concerning the admissibility of the case; it has no right to submit further information.³⁰ Any interest that the Chamber may have had in receiving more information from the Government of Libya in relation to the admissibility of the case, is now completely outweighed by the countervailing impact of the protraction of the admissibility proceedings on the rights of Mr. Gaddafi, as will be developed below.
39. The propriety of exercising the Chamber's discretion to accord the Government of Libya with a further opportunity to supplement its challenge is also further undermined by the fact that the Libyan authorities have exploited this opportunity by initiating domestic proceedings, which violate their obligations under the Rome Statute, and the specific terms of the Article 95 deferral.
40. In this connection, the Pre-Trial Chamber mandated the postponement of Mr. Gaddafi's surrender to the ICC pursuant to Article 95 of the Statute, which is triggered in connection with domestic proceedings that concern the same underlying conduct as the ICC case, and not Article 94, which is triggered by domestic proceedings relating to different cases. The Libyan authorities therefore have no authority to defer the surrender of Mr. Gaddafi in order to exercise personal jurisdiction over Mr. Gaddafi for acts, which are not connected to the ICC charges.

²⁹ ICC-01/11-01/11-243-Red at para. 38.

³⁰ ICC-01/09-02/11-274 at para 100.

41. It is an abuse of Article 95 to utilise Mr. Gaddafi’s presence on Libyan territory for the purpose of initiating additional processes, which in themselves, violate the ICC Statute, and Libya’s obligations under that Statute.
42. In authorising the Government of Libya to defer its surrender of Mr. Gaddafi pending the resolution of the admissibility challenge, the Chamber indicated that its decision was predicated on an assessment as to whether “such a challenge has been **properly** made pursuant to article 19(2) of the Statute, and rule 58(1) of the Rules” (emphasis added).³¹
43. The Chamber emphasised that the deferral was only temporary, and as such, “Libya must ensure that all necessary measures are taken during the postponement in order to ensure the possibility of an immediate execution of the Surrender Request should the case be found admissible.”³² The Chamber further underscored “Libya’s continuing obligation to cooperate with the Court, as decided by the Security Council and within the legal framework of Part IX of the Statute”, and stressed that “it is expected that Libya will provide all required assistance in order to facilitate an expeditious determination of the Admissibility Challenge.”³³
44. It is clear from the above findings that a challenge to admissibility does not automatically result in the right to defer the surrender of the defendant to the ICC; the Chamber retains the authority to assess whether the challenge has been properly made under Article 19(2) and rule 58(1), and the right to defer surrender is subject to corollary obligations – i.e. the obligation to ensure that the State in question is in a position to execute the surrender request should the challenge be unsuccessful, and the obligation to fully cooperate with the Court in the interim, in particular, in facilitating the expeditious resolution of the admissibility challenge.
45. The propriety of the Government of Libya’s challenge to admissibility is seriously undermined by its decision to exploit the additional time allocated by the Chamber in order to try Mr. Gaddafi for trumped up charges, which are completely unconnected to the underlying conduct, which forms the basis of the ICC case.
46. The drafters of Article 19 and Article 95 envisaged that admissibility proceedings would be resolved in an expeditious manner,³⁴ and that the temporary deferral of a defendant’s surrender was, in this particular context, a proportionate measure. By

³¹ ICC-01/11-01/11-163 at para. 37.

³² At para. 40.

³³ At para. 41.

³⁴ ICC-01/11-01/11-243-Red at paras. 48-52.

parading photos of Mr. Gaddafi being held in a cage, and subjecting him to the spectacle of a show trial, the Libyan authorities have demonstrated that they are more interested in using Mr. Gaddafi's personal presence in their territory to score political points, rather than for the purposes of conducting genuine investigations and proceedings in relation to the conduct underlining the ICC case.

47. The validity of Libya's challenge to admissibility under Article 19(2) and rule 58(1) must also be viewed in connection with Libya's failure thus far to adduce concrete and probative evidence that it is actively investigating the case,³⁵ and Counsel for Libya's frank concession that the Government had challenged the admissibility of the case not because they wished to genuinely investigate him for the same conduct as the ICC, but because they did not wish to surrender him to the ICC.
48. The fact that these domestic proceedings against Mr. Gaddafi are predicated on the Government of Libya's broken promises to firstly, allow Mr. Gaddafi to meet with his counsel on a privileged basis, and secondly, not to take any adverse legal consequences against the delegation for attempting to defend Mr. Gaddafi, further demonstrates that any assurances by the Libyan authorities concerning the genuineness of their investigations, or merits of their requests for more time can be given absolutely no weight.
49. As noted above, a mere two days before Mr. Gaddafi's trial hearing, the Government of Libya claimed that the reports that Mr. Gaddafi would be put on trial within the next month were completely incorrect. In light of the logistics involved, the Government must have known at the time it submitted its filing that there would be a trial hearing against Mr. Gaddafi on 17 January 2013, and that it would directly concern the ICC, but it nonetheless refrained from disclosing such key information to the Court. The reports in question did not specify the subject matter of the trial, and their veracity was borne out by the fact that Mr. Gaddafi was in fact put on trial within the month. The Government's explicit repudiation of these reports was therefore potentially deceptive, and disingenuous at best.
50. The deliberate omission of such information can only be characterised as non-compliance with the Chamber's order of 10 January 2013. It is also part of a consistent pattern of conduct of providing false or misleading information to the Court, for the

³⁵ ICC-01/11-01/11-243-Red at paras. 41-45.

purposes of obtaining more time, and staving off an eventual decision on the admissibility of the case.³⁶

51. Far from taking necessary measures to ensure the possibility of an immediate execution of the ICC arrest warrant, should the challenge be rejected, the initiation of separate domestic proceedings and the convocation of further hearings in May also evinces the clear intention of the Libyan authorities not to surrender Mr. Gaddafi to the ICC following the Chamber's decision on the admissibility of the case. This therefore contravenes the Government's obligation to ensure that they are in a position to immediately execute Mr. Gaddafi's arrest warrant, should their challenge to admissibility be unsuccessful.
52. The Government of Libya cannot simply pick and choose which provisions of the Statute it wishes to be bound by, nor can it seek to enforce its rights under Articles 19 and 95, whilst exhibiting complete disregard for its corollary obligations, as set out in the legal regime of the Statute.³⁷
53. This legal regime necessarily encompasses the privileges and immunities of the Court, as *per* Article 48, and the right of the defendant to communicate with counsel in confidence, as enshrined in Article 67(1), and elaborated in Rule 73(1) of the Rules of Procedure and Evidence. The initiation of domestic criminal proceedings against both Mr. Gaddafi and the ICC delegation exhibits the Libyan authorities' blatant disregard for its obligations under these provisions.
54. It is apparent from the statement of the Prosecutor-General and media reports that the trial against Mr. Gaddafi is predicated on:
 - a. a privileged meeting between Mr. Gaddafi and his lawyer, which was illegally recorded;
 - b. privileged Defence documents, which were illegally seized from Mr. Gaddafi and his Defence counsel;
 - c. an interrogation of Mr. Gaddafi, which was conducted without the benefit of legal representation;
 - d. questioning of guards, who had deceptively indicated that they were not monitoring the privileged visit and did not have the capacity to do so;³⁸ and

³⁶ Transcript 9 October 2012, ICC-01/11-01/11-T-2-Red-ENG, pp. 69-84.

³⁷ ICC-01/11-01/11-163 at para. 28.

³⁸ This raises particular concerns, in light of the observations set out in ICC-01/11-01/11-185-Conf-Exp-Anx22 at para. 28.

- e. coercive interrogations with ICC personnel, which were conducted without the benefit of effective legal representation, and in violation of their privileges and immunities.

55. Apart from the fact that the proceedings are themselves, *ipso facto* illegal, there is absolutely no legal or factual foundation for the underlying allegations.
56. In particular, the Libyan authorities assert that Mr. Gaddafi insulted the Libyan flag during the course of a privileged meeting, notwithstanding the fact that the relevant domestic legal provision only applies when the act is committed in public.³⁹
57. The Libyan authorities' assertions Mr. Gaddafi somehow 'compromised national security' are predicated solely on the fact that during the meeting with his Counsel, Mr. Gaddafi attempted to convey information, which was directly relevant to the admissibility of the case, and the enforcement of his rights before the ICC. In line with the information conveyed during the March meeting, Mr. Gaddafi confirmed to Counsel that Dr. Gehani had informed him that Dr. Gehani had been responsible for preparing the ICC file, but the national authorities had been subsequently unable to conduct investigations against him for serious crimes (such as murder) due to a lack of evidence, and for that reason, they had closed the investigation into these crimes. They were, in any case, more interested in pursuing financial regulatory offences, which they considered to be more profitable. If Mr. Gaddafi confessed to such offences, he could expect leniency, but if he insisted on defending himself, he would be kept in jail without any visits from lawyers or friends until he confessed.
58. Mr. Gaddafi was completely frustrated by the fact that he had been kept in isolation, had been provided confusing and contradictory information concerning the status of the proceedings against him, and had been accorded absolutely no mechanism for voicing these violations of his rights. In order to address the possibility that he might not have the time or opportunity to elaborate on such matters to his Counsel during the meeting, Mr. Gaddafi informed Counsel that these matters were set out in a written document, which he provided to his Counsel for the purpose of raising before the ICC. This document was illegally seized from his Counsel, and appears to form the sole basis of the claims that Mr. Gaddafi compromised national security.

³⁹ Article 205 of the Libyan Criminal Code, 'Insulting the nation and its symbols', Everyone who publicly insulted the Libyan nation or the national flag or the State emblem shall be punishable by imprisonment for a term not exceeding three years.

59. The Libyan authorities have the right to contest the accuracy or reliability of any information or testimony given by Mr. Gaddafi – but they absolutely do not have the right to take criminal measures against both Mr. Gaddafi and his lawyer in relation to the attempt by Mr. Gaddafi to instruct his counsel on matters, which are directly relevant to his rights, and the admissibility proceedings. As found by the ICTY Appeals Chamber, the obligation of States to cooperate with the Court “requires them to allow the Prosecutor and the defence to fulfil their tasks free from any possible impediment or hindrance.”⁴⁰
60. It is completely inimical to the rule of law to penalise a defendant for attempting to participate in his own Defence. The fact that this occurred, notwithstanding the Government’s express guarantees that any statements made within the remit of defending Mr. Gaddafi would not be construed as violations of national security, once more demonstrates the gap between Libya’s promises to the Court, and the ugly reality on the ground.
61. The psychological impact of such proceedings on the defendant is self-evident. Mr. Gaddafi is facing serious criminal charges for attempting to convey his concerns to his lawyer – how can he trust that the same will not occur if he tries again to speak to a lawyer in a frank manner? This mistrust would of course be exacerbated in the case of a lawyer chosen and imposed by the authorities.
62. The Libyan authorities also utilised this trial hearing to repeat their allegations against the ICC delegation, and to confirm their intention to pursue the delegation, including Mr. Gaddafi’s in connection with criminal charges related to the nebulous offence of ‘violating national security’.
63. The Libyan authorities have once again resorted to making spurious allegations regarding the integrity of the ICC delegation. Although allegations concerning ‘escape plans’ and ‘codes’ have been widely reported in the media, to the knowledge of the Defence, these allegations have never been part of the formal investigations or questioning of the authorities, nor is there even a shred of evidence for such allegations.
64. The public pillorying of Mr. Gaddafi’s ICC counsel – at a time when Mr. Gaddafi has not yet appointed or been assigned counsel for domestic proceedings – appears to be

⁴⁰ Prosecutor v. Blaskic, “ Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997”, 29 October 1997, at para. 53.

designed to create a powerful disincentive for any Libyan lawyer to represent Mr. Gaddafi in a vigorous and independent manner.

65. The continued deferral of the Chamber's ultimate decision on the admissibility of the case has also allowed Libya to resurrect the spectre of instigating criminal proceedings against the ICC delegation, notwithstanding the fact that the ICC has not waived the privileges and immunities of the delegation.
66. The timing of these announcements – one week after the Counsel for Mr. Abudullah Al-Senussi requested the Chamber to report the Government of Libya to the Security Council for failing to surrender Mr. Al-Senussi to the ICC and one day after the Government failed to provide any explanation or legal justification to the Chamber for such failure – directly suggests that the Government of Libya is once more, resorting to strong-arm tactics in order to pressure the Court not to issue any adverse consequences against the Government of Libya.
67. By launching such blatantly political proceedings, the Libyan authorities have amply demonstrated that the possibility that Mr. Gaddafi might be accorded independent and impartial treatment in the Libyan judicial system is nothing more than a mirage.
68. Moreover, in the last 10 months, the Government of Libya has publicly defamed the Defence on numerous occasions, threatened Defence team members,⁴¹ taken retaliatory actions against the Defence,⁴² and even threatened to withhold cooperation with the Court unless the Defence was replaced. The Chamber cannot and should not countenance the continuation of such tactics.⁴³
69. As observed by El Zeidy, "a state failing to comply with a provision set out in the Statute is *de facto* in breach of the treaty which would provide the ICC with implied powers to rule on such a violation and find a suitable remedy."⁴⁴ The Chamber has the power and the duty to take measures to ensure that the integrity of its proceedings is not abused in a manner which contravenes the fundamental rights of a party, or the defendant.⁴⁵
70. Based on the consistent pattern behaviour exhibited thus far, there is a reasonable probability that the Libyan authorities will continue to resort to these tactics as long as the authorities believe that such tactics might buy them more time or may influence

⁴¹ ICC-01/11-01/11-228-Conf-Red, at para. 6; ICC-01/11-01/11-152-Conf, at paras 41 and 63.

⁴² ICC-01/11-01/11-190-Corr-Red at para. 265.

⁴³ ICC-01/04-01/06-2582; ICC-01/04-01/10-503-AnxI.

⁴⁴ M. El Zeidy, 'Critical Thoughts on Article 59(2) of the ICC Statute', 4 J. Int'l Crim.Just. 448, pp. 457-458.

⁴⁵ ICC-01/04-01/06-2582, paras.47 and 48; ICC-01/04-01/06-1486 at para. 77 and 78; ICC-01/04-01/06-772, at para. 39.

the outcome of the Chamber's ultimate decision. In these circumstances, the only effective mechanism to sanction conduct, which egregiously violates the Statute, and deter the future occurrence of such conduct, is to issue an immediate decision on the admissibility of the case.

71. Apart from the fact that Article 95 cannot be invoked in connection with sham, or abusive admissibility proceedings, Articles 19 and 95 of the Statute must also be interpreted in a manner which is consistent with Article 57(3)(b) of the Statute, which mandates the Pre-Trial Chamber to issue such orders or seek such cooperation pursuant to Part 9 of the Statute, as may be necessary to assist the person in the preparation of his defence, and Article 57(3)(c), which enables the Chamber to provide for the protection of persons, who have been arrested.
72. Mr. Gaddafi is a person, who has an inherent right to dignity. He should not be used as a pawn or be subjected to abusive and psychologically damaging processes, which are directly related to Libya's failure to implement an ICC judicial decision in his case.
73. The only effective remedy to these violations is to issue an immediate decision on the admissibility challenge, and order that Mr. Gaddafi is immediately surrendered to the custody of the ICC, at which point he will be effectively protected from such abusive prosecutions by virtue of Article 48(4) of the Statute, and Articles 20(1)(c) and 22(1) of the Agreement on Privileges and Immunities. Any other solution renders his rights under the Statute meaningless, and entrusts his life to the vagaries of a show trial.

3.2 Request for the return of privileged documents, and the destruction of all copies

74. The Defence has never waived the privileged nature of the documents, which were seized from Counsel and the defendant. The Libyan authorities have also failed to demonstrate any legal or factual justification for seizing the documents in question, in violation of Article 67(1)(b) of the Rome Statute, Article 80 of the Libyan Criminal Procedure Code, and their formal assurances to the Chamber.
75. In any case, in the absence of a waiver from the Defence, the ICC Pre-Trial Chamber retains the exclusive competence for determining whether the privileged nature of the documents should be lifted. The Pre-Trial Chamber has rendered no such determination.

76. These documents are the property of the Defence, and are integral to the ability of the Defence to both represent Mr. Gaddafi in the admissibility proceedings, and to respond to any false allegations which have been made by the Libyan authorities in relation to the conduct of Counsel and the defendant.

77. It is therefore imperative that they be immediately returned to the Defence, and that any copies, which are not in the possession of the Defence and which have not been consensually provided by the Defence, are destroyed.

78. The power to issue such a determination falls squarely within the Chamber's powers under Article 57(3)(b) and (c) of the Statute. The duty to return such documentation also inheres in Libya's obligation to respect the functional immunity of the Defence, as required by Article 48 (4) of the Statute.⁴⁶

3.3 Regulation 35(2) request to vary time limits

79. Due to the urgency of these issues, the Defence requests the Pre-Trial Chamber to shorten the deadline for any responses.

4. Relief Sought

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

- i. Issue an immediate decision on the admissibility of the case;
- ii. Order the Government of Libya to immediately surrender Mr. Gaddafi to the custody of the ICC;
- iii. Order that the privileged material seized from the Defence should be immediately returned to the Defence, and all copies should be destroyed; and
- iv. Shorten the deadlines for any responses.

⁴⁶ Prosecutor v. Gotovina, Decision on Gotovina Defence Appeal against 12 March 2010 Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia, 14 February 2011, at para. 67.



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

Dated this, 21st Day of January 2013

At The Hague, The Netherlands