

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **3 April 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 Annex A**

**Request to dismiss the “Notification by Libyan Government supplemental to its consolidated reply to the responses of the Prosecution, OPCD and OPCV to its further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi” *in limine***

**Source: Defence for 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**

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**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 28 March 2013, without seeking prior authorisation to do so, the Government of Libya filed a ‘Notification’ informing the Pre-Trial Chamber that a new Prosecutor-General had been elected and sworn into office on 25 March 2013.<sup>1</sup>
2. At the same time, the Government reiterated its request that the Pre-Trial Chamber grant the Government six additional weeks to adduce further evidential samples, and/or travel to Tripoli to inspect the case file against Mr. Gaddafi.
3. There is absolutely no legal or factual basis for seeking to reopen and protract the admissibility proceedings at this stage. The Notification cannot be viewed as anything other than a delaying tactic, which should be dismissed immediately, *in limine*.

## 2. Submissions

4. The Pre-Trial Chamber recently approved the findings of Pre-Trial Chamber II that the Chamber “must ensure that proceedings are fair in the sense that, inter alia, the Government lodging the challenge enjoys the opportunity to respond to the parties and participants’ observations, but equally expeditious in order to avoid unnecessary delays of the entire proceedings”.<sup>2</sup>
5. Although the Government might have a right to be heard in connection with observations submitted by other parties and participants, it has absolutely no right to tender evidence and information in a piecemeal and dilatory manner. The Chamber’s duty to ensure the overall expeditiousness of the proceedings must therefore take precedence.

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<sup>1</sup> Notification by Libyan Government supplemental to its consolidated reply to the responses of the Prosecution, OPCD, and OPCV to its further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi ICC-01/11-01/11-306 (‘ Notification’ ).

<sup>2</sup> ICC-01/11-01/11-288 at para. 10, citing ICC-01/09-01/11-76, para. 15.

6. The Government of Libya has been accorded four, separate opportunities to adduce evidence in relation to the admissibility of the case.<sup>3</sup> The Government was also invited to submit reports on issues touching on the admissibility of the case in January and September 2012.<sup>4</sup>
7. The Government has benefitted from a considerable degree of leeway concerning deadlines. For example, with respect to the Government's January 2013 submissions, the Government only filed copies of the legal provisions, on which they were relying, on 11 February 2013 - that is, 18 days after their deadline.<sup>5</sup> The responses of the Defence and the OPCV were also delayed as a result of the fact that the Government initially filed key components of its evidence on an *ex parte* basis, without seeking the prior authorisation of the Pre-Trial Chamber.
8. The Pre-Trial Chamber has – on multiple occasions – underscored that the burden falls squarely on the Government to establish that the case is inadmissible before the ICC.<sup>6</sup> The Pre-Trial Chamber has also found that:

[a]n incomplete challenge which needs to be supplemented in due course cannot be considered as having been "properly made within the terms of article 19 of the Statute and rule 58 of the Rules". In this regard, the Chamber finds of relevance the finding of the Appeals Chamber that a State has the duty to ensure that its admissibility challenge is sufficiently substantiated by evidence, as it has no right to expect to be allowed to present any additional evidence after the initial challenge.<sup>7</sup>

9. The Government cannot simultaneously assert that its admissibility challenge was properly made for the purposes of triggering Article 95 of the Statute, whilst seeking additional time and a further opportunity to supplement its challenge, and January 2013 submissions, with additional evidentiary materials.<sup>8</sup> As the Government both requested and benefitted from the Pre-Trial Chamber's June 2012 Article 95 decision in order to delay its obligation to surrender Mr. Gaddafi to the ICC, it has waived any

<sup>3</sup> The May 2012 challenge to admissibility, the October 2012 admissibility hearings, the January 2013 additional submissions, and the 4 March 2013 reply.

<sup>4</sup> ICC-01/11-01/11-44-Anx1-Red and ICC-01/11-01/11-205.

<sup>5</sup> ICC-01/11-01/11-273.

<sup>6</sup> ICC-01/11-01/11-159 at para. 9; ICC-01/11-01/11-239 at para. 8.

<sup>7</sup> ICC-01/11-01/11-269 at para. 32.

<sup>8</sup> ICC-01/11-01/11-269 at paras. 32-33.

right or possibility to supplement its challenge or to reformulate it to take into consideration new factual developments.

10. The prejudicial impact of reopening the admissibility proceedings at this juncture also greatly exceeds any potential benefit from doing so. If the Chamber were to accept the Notification, the parties and the OPCV would have a right to respond. It would be clearly unfair to allow the Government to introduce new factual developments, which potentially advance its challenge, without according the parties and participants with an opportunity to put these developments into context or to cite countervailing adverse developments, for example, by referring to:

- a. Multiple attempts by militia to utilise force and death threats to compel the Government to adopt discriminatory and illegal measures against persons associated with the former Gaddafi regime.<sup>9</sup> This includes an incident in which militia took the GNC hostage, in order to force them to pass a particularly extreme version of the implementing legislation of the Isolation Law,<sup>10</sup> which observers have noted “would leave Libya with a paralyzed judiciary”,<sup>11</sup> culminating in an attempted assassination of President Magarief;<sup>12</sup>
- b. A very recent attack by militia against the Ministry of Justice, which appears to have been directed against attempts by the Ministry of Justice to assert control over detainees, who are not being held under the custody of the Ministry of Justice;<sup>13</sup>

<sup>9</sup> ‘Libya PM’s chief of staff feared abducted following confrontation between government, militias’ Associated Press 1 April 2013 [http://www.washingtonpost.com/world/middle\\_east/libya-pms-chief-of-staff-feared-abducted-following-confrontation-between-government-militias/2013/04/01/7b82cc84-9acd-11e2-9219-51eb8387e8f1\\_story.html](http://www.washingtonpost.com/world/middle_east/libya-pms-chief-of-staff-feared-abducted-following-confrontation-between-government-militias/2013/04/01/7b82cc84-9acd-11e2-9219-51eb8387e8f1_story.html); ‘Libya PM’s aide Mohamed al-Ghattous ‘kidnapped’’ BBC News 1 April 2013 <http://www.bbc.co.uk/news/world-africa-21995485?print=true> ; C. Stephen, ‘Libya’s original freedom fighter vows to carry on battle for peace’ The Observer (the Guardian) 23 March 2013, [www.guardian.co.uk/world/2013/mar/23/libya-original-freedom-fighter/print](http://www.guardian.co.uk/world/2013/mar/23/libya-original-freedom-fighter/print)

<sup>10</sup> S. Zaptia ‘GNC members held hostage by armed demonstrators – one member hit on the head’ Libya Herald 6 March 2013 <http://www.libyaherald.com/2013/03/06/gnc-members-held-hostage-by-armed-demonstrators-one-member-hit-on-the-head/>

<sup>11</sup> I. Sharqieh, ‘An Ill-Advised Purge in Libya’ New York Times 18 February 2013 <http://www.nytimes.com/2013/02/19/opinion/an-ill-advised-purge-in-libya.htm>

<sup>12</sup> H. Fornaji, ‘Magarief’s vehicle swap at GNC meeting backfired’ Libya Herald 6 March 2013 <http://www.libyaherald.com/2013/03/06/magariefs-vehicle-swap-at-gnc-backfired/>

<sup>13</sup> ‘Libya PM’s chief of staff feared abducted following confrontation between government, militias’ Associated Press 1 April 2013.

- c. The storming and occupation of a main Tripoli jail by members of the State Security Committee, who have threatened to release all the prisoners unless the Minister of Justice resigns;<sup>14</sup>
- d. The Libyan authorities' failure to implement provisional measures ordered by the African Court on Human and Peoples' Rights with respect to the case of Mr. Saif Al-Islam Gaddafi, and to secure his fundamental rights, as guaranteed by the African Charter on Human and Peoples' Rights;<sup>15</sup>
- e. A video of the 17 January 2013 security hearing against Mr. Gaddafi *et alia*, which was released after the deadline for the Defence response, in which the Presiding Judge clearly refers to the fact that Mr. Gaddafi had been brought directly before a Trial Chamber (the Criminal Court), and not an Accusation Chamber, in contravention of the 23 December 2012 Supreme Court decision;<sup>16</sup>
- f. The issuance of Security Council Resolution 2095, on 14 March 2013, in which the Security Council expressed deep and grave concern at "the lack of judicial process for conflict-related detainees, many of whom continue to be held outside State authority [...] reports of human rights violations and abuses in detention centres [...] continuing reports of reprisals, arbitrary detentions without access to due process, wrongful imprisonment, mistreatment, torture and extrajudicial executions in Libya";<sup>17</sup>

<sup>14</sup> A. Abdul-Wahab, 'SSC gunmen threaten to release Jadida Prison inmates', *Libya Herald* 3 April 2013, <http://www.libyaherald.com/2013/04/03/ssc-gunmen-threaten-to-release-jadida-prison-inmates/>

<sup>15</sup> 'Order on Provisional Measures', In the Matter of African Commission on Human and Peoples' Rights v. Libya, Application no. 002/2013 at paras. 15 and 16, Annex A.

<sup>16</sup> <http://www.youtube.com/watch?v=xYkIsdr0hKc>.

1 minute 04 mark. Judge: "... the visit of the ICC delegation to meet you, this was in June. Now you have been referred to this Court in order to receive a fair and just trial. Therefore you must appoint a lawyer to be present with you today, if you would like to appoint a lawyer you can name him for us, otherwise we will give you a second chance to think and appoint a lawyer to represent you. The Court may also appoint a lawyer for you, what do you say? /inaudible/ comes later, right now this is only a procedures hearing.[ ...]

2 minute 07 mark: Judge: in the Criminal Court, in the Criminal Court, there must be a lawyer"

The Judge uses the term "Court" and "Criminal Court", which translates from Arabic:  and

محكمة الجنايات This is opposed to the "Accusation Chamber", which is referred to as the "Chamber" or "the Accusation Chamber", translated from Arabic:  or غرفة الاتهام

In accordance with Article 145 of the Criminal Procedure Code, the Accusation Chamber is only composed of one judge, and not three judges (as is the case in this hearing). [Article 145 Composition of the Accusation Chamber: "In every Court of first instance, the Accusation Chamber shall be composed of the Court's President or one of the Court judges appointed for this matter by the general assembly."] See also ICC-01/11-01/11-130-Red at paras. 61 and 62.

Notably, the video is shot in such a way that Mr. Gaddafi's mouth is completely hidden throughout the proceedings, which renders it impossible to verify whether he has received any dental treatment as concerns his missing teeth.

<sup>17</sup> S/Res/2095 (2013).

- g. Physical attacks on judges and courtrooms,<sup>18</sup> and prison escapes;<sup>19</sup>
- h. The kidnapping and attack of journalists by militia who are purportedly under government control,<sup>20</sup> and illegal detention of a journalist who attempted to critique corruption in the judiciary.<sup>21</sup> Notably, the latter journalist, who is being detained in the same prison facility where Mr. Al-Senussi is detained and where the Government wishes to transfer Mr. Gaddafi (Al Hadba prison in Tripoli), has been kept in incommunicado detention, refused access to a lawyer, and has not been brought before a judge due to the failure of the Al Hadba prison authorities to bring him to Court;<sup>22</sup>
- i. Continued attacks against ‘Western targets’ by militia associated with official Libyan armed forces, such as the recent alleged sexual assault of British aid workers,<sup>23</sup> which will render it impossible for international counsel or international NGOs to participate in domestic proceedings against Mr. Gaddafi; and
- j. The resurrection in Libya of Sharia forms of corporal punishment, such as lashing.<sup>24</sup>

11. The Defence would like to emphasise that it is not - through this filing - requesting authorisation to reopen the admissibility proceedings to introduce evidence of these incidents. It is simply citing these incidents in order to demonstrate that it would be unfair to permit the Government to adduce additional information on one discrete

<sup>18</sup> ‘Judges’ Association condemns assault on Benghazi member’, Libya Herald 24 February 2013, <http://www.libyaherald.com/2013/02/24/judges-association-condemns-assault-on-benghazi-member/> ‘Derna courthouse bombed’ Libya Herald 30 March 2013 <http://www.libyaherald.com/2013/03/30/26541/>;

<sup>19</sup> ‘Libyan official says nearly 50 inmates escape southern prison, 1 killed’ Associated Press 26 March 2013, [www.foxnews.com/world/2013/03/26/libyan-official-says-nearly-50-inmates-escape-southern-prison-1-killed/print](http://www.foxnews.com/world/2013/03/26/libyan-official-says-nearly-50-inmates-escape-southern-prison-1-killed/print)

<sup>20</sup> ‘TV news strike over militia guards’ Libya Herald 3 April 2013 <http://www.libyaherald.com/2013/04/03/tv-news-strike-over-militia-guards/>;

‘Gunmen storm Tripoli TV station, still holding two people’, Reporters Without Borders 8 March 2013 <http://en.rsf.org/libya-gunmen-storm-tripoli-tv-station-08-03-2013,44185.html> ; ‘A. Elumami, ‘Tripoli TV station attacked, officials kidnapped’, Libya Herald 7 March 2013, [www.libyaherald.com/2013/03/07/tripoli-tv-station-attacked-officials-kidnapped/](http://www.libyaherald.com/2013/03/07/tripoli-tv-station-attacked-officials-kidnapped/)

<sup>21</sup> ‘Call for release of newspaper editor held for more than three months’ Reporters Without Borders 31 March 2013, <http://en.rsf.org/libya-call-for-release-of-newspaper-31-03-2013,44275.html>

<sup>22</sup> ‘Urgent Action: Journalist Held For Anti-Corruption Work’ Amnesty International 26 February 2013, <http://www.amnesty.org/en/library/asset/MDE19/001/2013/en/dde2bedd-45b3-47b3-a93e-ce03debf0da9/mde190012013en.html>

<sup>23</sup> R. Sherlock, ‘British women raped by Libyan soldiers’ Telegraph 29 March 2013, <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/9962028/British-women-raped-by-Libyan-soldiers.html>.

<sup>24</sup> ‘Islamists Implement Lashing Punishment in Libyan Towns’ The Middle East Media Research Institute 15 March 2013, [http://www.memritv.org/clip\\_transcript/en/3776.htm](http://www.memritv.org/clip_transcript/en/3776.htm)

point, whilst disregarding other contemporaneous developments, which illustrate the inability or unwillingness of Libyan authorities to conduct independent and impartial judicial proceedings.

12. The deadline for any responses to the Notification from the OTP, OPCV and Defence is 23 April 2013. It must also be expected that the Government will, once again, seek a right of reply. Thus, whilst both the principles of procedural fairness and Rule 58(3) require that the parties should be granted an opportunity to respond to the information included in the Government's Notification, such a possibility is likely to significantly impede the ability of the Chamber to render an expeditious resolution of the admissibility challenge. The only appropriate remedy, which balances the adversarial nature of the proceedings with the Chamber's duty to ensure the expeditiousness of the proceedings, is to dismiss the Notification *in limine*.

13. In this connection, in its decision of 26 February 2013, the Pre-Trial Chamber noted the considerable amount of time that has elapsed since the filing of the Admissibility Challenge and the need, at the advanced stage of the current proceedings, to proceed to an expeditious resolution of the Admissibility Challenge.<sup>25</sup>

14. These findings are of even greater force over a month later, particularly in light of the fact that the trial against Mr. Gaddafi for alleged security violations is scheduled to recommence on 2 May 2013. The Government has also indicated that the trial, which allegedly pertains to ICC conduct, could commence in May 2013.<sup>26</sup>

15. It is also highly pertinent that the African Court on Human and Peoples' Rights has held that

In view of the alleged length of detention of the Detainee [Mr. Gaddafi] without access to a lawyer, family or friends; and with due regard to the Respondent's alleged failure to respond to the Provisional Measures requested by the Applicant, and the requirements of the principles of justice that require every accused person to be accorded a fair and just trial, the Court decided to order provisional measures *suo motu*;

<sup>25</sup> ICC-01/11-01/11-288.

<sup>26</sup> ICC-01/11-01/11-293-Red at para .50.



In the opinion of the Court, there exists a situation of extreme gravity and urgency, as well as a risk of irreparable harm to the Detainee (emphasis added);<sup>27</sup>

16. The information filed by the Government is also not of such a compelling or decisive nature, which would warrant the reopening of the admissibility proceedings at such an advanced stage of the proceedings. For example, the replacement of the Prosecutor-General is unlikely to cure the paucity of evidence collected by the authorities, to alleviate the endemic security problems besetting law enforcement agencies in Libya, or to resolve issues concerning the custody of Mr. Gaddafi.
17. Although Government has intimated that the replacement of the Prosecutor-General will impact on cooperation with the Court,<sup>28</sup> the Prosecutor-General has absolutely no mandate to engage in cooperation issues or other matters of an intrinsically political nature. Such a role is vested in the Minister of International Cooperation, Mr. Mohamed Imhamid Abdulaziz, who was appointed on 31 October 2012.<sup>29</sup> It is also telling that despite the fact that the Prosecutor-General was sworn in on 25 March 2013, the Government remains in non-compliance of several key ICC orders, such as the Pre-Trial Chamber's orders to surrender Mr. Abdullah Al-Senussi to the ICC, to allow Mr. Senussi's counsel to visit him, and to return seized Defence documents to the ICC.
18. The current Prosecutor-General also does not have any greater legitimacy than the previous Prosecutor-General. Like the National Transitional Council, the General National Congress (GNC) is an interim custodial political body, which is governed by an interim constitutional declaration, which has not been ratified by democratic processes. The objective of the GNC is to adopt a process for the drafting of a permanent constitution, and the establishment of electoral rules, which will govern the first democratic elections in Libya.<sup>30</sup> The GNC will then be dissolved, in the same manner that the NTC was dissolved upon completion of its mandate. The interim

<sup>27</sup> 'Order on Provisional Measures', In the Matter of African Commission on Human and Peoples' Rights v. Libya, Application no. 002/2013 at paras. 16 and 17.

<sup>28</sup> ICC-01/11-01/11-306 at para. 4.

<sup>29</sup> [http://en.wikipedia.org/wiki/Cabinet\\_of\\_Libya](http://en.wikipedia.org/wiki/Cabinet_of_Libya)

<sup>30</sup> Article 30 of the Interim Constitutional Declaration, ICC-01/11-01/11-144-AnxG.

constitutional declaration did not vest the GNC with any greater powers than those, which were vested in the NTC.

19. The recent challenge to admissibility filed in connection with the Senussi case also does not constitute grounds to either delay or reopen the admissibility proceedings concerning Mr. Gaddafi. In accordance with Rule 136(2), Mr. Gaddafi must be accorded the same rights as if he were being tried separately. The dilatory tactics of the Libyan Government in the Senussi case should not, therefore, imperil Mr. Gaddafi's right to an expeditious resolution of the admissibility challenge as concerns his specific case.
  
20. In circumstances such as the above, the Chamber is under a clear duty to proceed with an immediate decision as concerns the admissibility challenge. Over 16 months have elapsed since Mr. Gaddafi was first arrested, and the Government's challenge to admissibility was submitted almost a year ago. Unless and until the Pre-Trial Chamber accepts the admissibility challenge, Mr. Gaddafi remains under the jurisdiction of the ICC, and enjoys a right to expeditious proceedings, and the protection of the law. If the Chamber were to accede to any further delays in the proceedings, it would be derogating from its duty to advance the proceedings "in a diligent and expeditious manner".<sup>31</sup>

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<sup>31</sup> "The Appeals Chamber observes that expeditiousness is a recurrent theme in the Court's legal instruments. The Statute and the Rules of Procedure and Evidence place an onus on all those involved in the trial to act in a diligent and expeditious manner in the performance of their obligations. The duty applies to the Chambers of the Court, the parties and participants". ICC-01/04-01/07-2259 at para. 43.

### 3. Relief Sought

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

- i. dismiss the Notification *in limine*; and
- ii. issue an immediate decision on the challenge to admissibility.



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

Dated this, 3<sup>rd</sup> Day of April 2013

At The Hague, The Netherlands