

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **23 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

**Response to the “Application on behalf of the Government of Libya relating to
Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute”**

Source: Defence for Mr. Saif Al-Islam Gaddafi

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

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Victims Participation and Reparations Section

Other

1. The Defence for Mr. Saif Al-Islam Gaddafi urges the Pre-Trial Chamber to render a decision on the admissibility challenge in his case forthwith. The adage that “justice delayed is justice denied” was never more true than in this case.
2. Mr. Gaddafi has now been held incommunicado in Zintan for over 17 months.
3. The Government of Libya has explicitly acknowledged that Mr. Gaddafi has been held in a secret location for the duration of his detention.¹ Given that no-one is permitted to know the location of his detention, the Government’s claim that he could have received visits from his family is clearly spurious, and is, in any case, contradicted by evidence to the contrary.²
4. The Government of Libya has also not disputed the fact that Mr. Gaddafi has been held in isolation for these 17 months, without access to legal representation, or that he has been interrogated on several occasions without the presence of a Defence Counsel.³
5. In terms of the latter aspect, the Government’s suggestion that Mr. Gaddafi has refused legal representation is entirely implausible and lacking in credibility, particularly in light of consistent reports concerning the

¹ ICC-01/11-01/11-130-Red at para. 35.

² ICC-01/11-01/11-190 at paras. 278-286.

³ ICC-01/11-01/11-293 at para. 52.

authorities' failure to accord legal representation to persons associated with the former regime during the investigation and/or pre-trial phase.⁴

6. The Government has also failed to adduce any evidence that Mr. Gaddafi was informed of his right to counsel prior to being interrogated or confronted by witnesses. Nor has the Government produced any investigative minutes recording the alleged fact that Mr. Gaddafi waived the right to counsel after having been informed of this right.
7. Moreover, Mr. Gaddafi is now aware that his privileged legal visits are covertly monitored, and that his former ICC Defence Counsel was interrogated, detained, and later prosecuted in relation to the contents of this supposedly privileged meeting. It is plainly unreasonable to expect Mr. Gaddafi to have any faith whatsoever in any subsequent promises by those same national authorities that they would respect his right to independent representation or his right to communicate freely with a lawyer in confidence.
8. As underscored by the Libyan Supreme Court, the right to effective legal representation during the investigation stage is a fundamental guarantee under Libyan criminal procedure, which has been completely abrogated in Mr. Gaddafi's case.⁵ The compulsory appointment of counsel for the trial stage, if it occurs, will not obviate or mitigate past violations of the right to representation during investigative procedures, such as interviews or witness confrontations.⁶

⁴Libya: Ensure Abdallah Sanussi Access to Lawyer, Human Rights Watch 17 April 2013, <http://www.hrw.org/news/2013/04/17/libya-ensure-abdallah-sanussi-access-lawyer>. See also ICC-01/11-01/11-281-Red2 at paras. 24 and 204.

⁵ ICC-01/11-01/11-258-Anx8 at p. 4.

⁶ ICC-01/11-01/11-130 at para. 59.

9. The Pre-Trial Chamber has confirmed that it retains the authority to rule on issues such as the Government's request to postpone the surrender of Mr. Gaddafi.⁷ In so doing, the Pre-Trial Chamber acknowledged that it continues to exercise jurisdiction over Mr. Gaddafi, notwithstanding the fact that he is physically detained in Libya.⁸

10. In line with the Chamber's obligation to ensure the fairness of the proceedings before the ICC and the rights of the defendant under Articles 55 and 67(1) of the Statute, the Pre-Trial Chamber should not and must not countenance the continuation of these blatant violations of Mr. Gaddafi's rights, which set an extremely damaging precedent for the ICC, damaging its authority and tarnishing its reputation, perhaps irreparably.

11. It is also unfair and psychologically harmful to Mr. Gaddafi to keep him in a constant state of uncertainty regarding the ultimate forum of his trial, and the question as to whether he will face the death penalty. To prolong this mortal uncertainty constitutes inhumane treatment.⁹

12. The statutory emphasis on resolving admissibility challenges in an expeditious manner is also directly supported by extradition practice: the sovereign right of a State to prosecute certain crimes is ultimately subordinated to a defendant's right to expeditious proceedings, and protection

⁷ ICC-01/11-01/11-163 at para. 37.

⁸ Similarly, in the Gbagbo case, the Pre-Trial Chamber observed that once the ICC arrest warrant was served on Ms. Gbagbo, she would be detained under the jurisdiction of the Pre-Trial Chamber, notwithstanding the fact that she was physically detained in Cote d'Ivoire: ICC-01/11-01/11-284 at para. 41.

⁹ *Soering v United Kingdom* (1989) 11 E.H.R.R. 439, [100]-[110]; *Pratt v Attorney-General of Jamaica* [1994] 2 AC 1, 33B-F, 35G; *Guerra v Baptiste* [1996] AC 397, 413B-416D; *Henfield v Attorney General of the Bahamas* [1997] AC 413, 425D-429E.

against any unnecessary or unreasonable protraction in the length of pre-trial detention.¹⁰

13. For these reasons, Counsel for Mr. Gaddafi fully endorses previous Defence submissions concerning the imperative of rendering an immediate decision on the Government's challenge to the admissibility of the case.
14. Pursuant to Rule 136 of the ICC Rules of Procedure and Evidence, Mr. Gaddafi must be accorded the same rights under the Statute as if he were being tried separately. Accordingly, the fact that the Government of Libya has now challenged the admissibility of the case against Mr. Abdullah Al-Senussi must not be allowed adversely to impact on Mr. Gaddafi's rights, including his right to an expeditious resolution of the challenge.
15. The Government also explicitly requested the Chamber to separate its admissibility challenges regarding Mr. Gaddafi from that of Mr. Al-Senussi, and in so doing, argued that "where there are two or more

¹⁰ "We also note in this regard that the European Convention on Extradition provides that provisional detention may be terminated after as few as 18 days if the requesting State has not provided the proper documents to the requested State. In no case may the provisional detention extend beyond 40 days from the date of arrest." Prosecutor v. Barayagwiza, 'Decision' (ICTR Appeals Chamber), 3 November 1999, at para. 97.

Article 9(4) of the United Nations Model Treaty on Extradition specifies that unless the requesting State furnishes the requisite extradition documentation within 40 days of the person's arrest, the person shall be liberated. Article 10 further stipulates that the extradition request must be determined in a 'prompt manner'. http://www.unodc.org/pdf/model_treaty_extradition.pdf

It is also notable that Article 8(5) of the Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Great Socialist People's Libyan Arab Jamahiriya on Extradition provides that "if the requested State does not receive all of the documents mentioned in Article 6 of this Treaty within sixty (60) days of the date of the provisional arrest, the person may be released". Article 6(2)(b) of that treaty requires the requesting State to adduce "such evidence as would justify committal for trial under the laws of the requested State". Article 15(1) imposes an obligation on the requested State to notify the requesting State of its decision "as soon as possible". <http://www.official-documents.gov.uk/document/cm75/7552/7552.pdf>

suspects, the admissibility assessment must consider the case against each suspect as separate and distinct inquiries”.¹¹

16. Having contrived to benefit from additional time to mount its admissibility challenge against Mr. Al-Senussi, the Government cannot now join the challenges, or seek to rely upon the one filed latest in time in order to supplement its earlier challenge against Mr. Gaddafi.
17. The Article 19 application concerning Mr. Al-Senussi is also comprised of information and evidence which were not included in the initial challenge concerning Mr. Gaddafi. The Defence has never had an opportunity to seek instructions from Mr. Gaddafi in relation to such matters, and should not have to.
18. In light of the fact that Mr. Gaddafi is facing trial on 2 May 2013 for allegations concerning his legitimate attempts to instruct his ICC Counsel and apprise her of violations of his human rights, it is clear that Mr. Gaddafi’s right to legal representation will only ever be illusory as long as he is detained in Libya.
19. It is not feasible for Counsel to attempt to either advise Mr. Gaddafi or obtain instructions from him as long as he is being detained in an environment in which any information which he conveys to his Defence could potentially be used against him as evidence of ‘national security violations’ in the 2 May 2013 trial proceedings.
20. Accordingly, in the same manner that the Pre-Trial Chamber determined that it would not “consider the admissibility of the case against Mr Al-

¹¹ ICC-01/11-01/11-130 at para. 69.

Senussi in resolving the Article 19 Application [against Mr. Gaddafi]”,¹² the Chamber must also exclude from its consideration of the latter any legal or factual arguments set out in the challenge to the admissibility of the case against Mr. Al-Senussi.

Relief Sought

21. For the reasons set out above, the Defence for Mr. Saif Al-Islam Gaddafi adopts and reiterates previous Defence requests for the Honourable Pre-Trial Chamber to issue an immediate decision on the Government’s challenge to the admissibility of the case concerning Mr. Gaddafi.

22. The Defence further requests the Pre-Trial Chamber to confirm that it will exclude any information from its consideration which falls outside the parameters of the challenge concerning Mr. Gaddafi, and related responses.



John R.W.D. Jones QC, Counsel for Mr. Saif Al-Islam Gaddafi

Dated this, 23rd Day of April 2013
At The Hague, The Netherlands

¹² ICC-01/11-01/11-134 at para. 8.