

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: **10 March 2014**

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

**Public redacted version of "Request for Leave to Appeal the Pre-Trial
Chamber's Failure to Issue a Decision"**

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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I. Introduction

1. Since 7 May 2013,¹ the Defence has attempted to enforce Mr. Gaddafi's rights by filing multiple urgent requests for the Pre-Trial Chamber to issue a finding of non-compliance as concerns Libya ("the Defence Requests").²
2. In so doing, the Defence has drawn the attention of the Pre-Trial Chamber to the decisions of the African Court and the United Nations Working Group,³ which both decry the existence of egregious violations of Mr. Gaddafi's rights – including his illegal and arbitrary detention, and a potentially irreparable risk of harm to his mental and physical integrity if he continues to be detained in Libya.
3. However, notwithstanding the fact that over 9 months has elapsed since the filing of the first Defence request, the Pre-Trial Chamber has not issued a ruling.
4. The failure to issue a decision equates to a constructive dismissal of these requests. Since these requests were filed on an 'urgent' basis,⁴ at the very least, the Chamber's refusal to rule on the issues constitutes a denial of a core aspect of the request – namely, an urgent ruling.
5. Time is of the essence as concerns arbitrary detention; if a failure to bring a person within the protection of the law within a matter of days violates internationally recognised human rights, then 9 months must be considered to be absolutely unacceptable in accordance with any standard of the law.
6. Libya has asserted that the ICC arrest warrant has been executed against Mr. Gaddafi.⁵ He therefore falls under the jurisdiction of the ICC,⁶ notwithstanding his non-surrender to the physical custody of the ICC.

¹ ICC-01/11-01/11-332.

² The Requests are set out at ICC-01/11-01/11-489-Red, footnote 1. See also ICC-01/11-01/11-49.

³ ICC-01/11-01/11-308, ICC-01/11-01/11-491.

⁴ ICC-01/11-01/11-489-Red, para.3.

⁵ ICC-01/11-01/11-128-Conf, p. 6. In its filing of 2 January 2014, Libya also asserted that the arrest warrant had been executed, within the meaning of Rule 123 of the Rules of Procedure and Evidence: ICC-01/11-01/11-496, para.4.

7. The Pre-Trial Chamber has the power and the duty to take steps to ensure that Mr. Gaddafi is in a position to exercise his rights under the Statute, including his right to an effectively participate in his Defence.⁷
8. As found by the ICTR Appeals Chamber,
- “if an accused is arrested or detained by a state at the request or under the authority of the Tribunal even though the accused is not yet within the actual custody of the Tribunal, the Tribunal has a responsibility to provide whatever relief is available to it to attempt to reduce any violations as much as possible”.⁸
9. The Chamber’s protracted silence as concerns Libya’s non-compliance has effectively denuded the surrender order of any force or legal weight: a law without a sanction can hardly be described as a legal obligation.
10. By remaining silent in the face of Libya’s repeated public assertions that it will not cooperate with the ICC,⁹ the Chamber has confirmed implicitly that Libya can flout judicial orders with impunity.
11. As a judicial entity, which exercises jurisdiction over Mr. Gaddafi and which is required to respect internationally recognised human rights in so doing, the Pre-Trial Chamber must also give full deference to the fact that,
- “duties to comply with international human rights that are peremptory and *erga omnes* norms such as the prohibition on arbitrary detention rest not only on the Government but extend to all officials, including judges, police and security officers, prison officers with relevant responsibilities. **No person can contribute to human rights violations.**”¹⁰
12. Pursuant to Article 82(1)(d) of the Statute, the Defence therefore submits a request for leave to appeal in relation to the issue as to whether the Pre-Trial

⁶ ICC-02/11-01/12-2-Red, para. 41.

⁷ ICC-01/04-02-12/67, para.4.

⁸ *Prosecutor v. Kajelijeli*, Appeals Judgment, 23 May 2005, para. 223, citing with approval the Separate Declaration of Judge Vorah, *Semanza*, Decision, 31 May 2000, para. 6

⁹ ICC-01/11-01/11-489-Red, footnote 4; ICC-01/11-01/11-434, paras. 5-6.

¹⁰ Opinion no. 60/2012, A/HRC/WGAD/2012/60, para. 21.

Chamber erred by failing to issue a decision on the Defence Requests in a timely manner.

I. Factual Background

13. Mr. Saif Al-Islam Gaddafi has been held in solitary confinement in a secret location for over 27 months.
14. On 15 March 2013, the African Court of Human Rights determined that “there exists a **situation of extreme gravity and urgency, as well as a risk of irreparable harm** to the Detainee”.¹¹
15. The Court therefore ordered Libya to appoint Counsel to Mr. Gaddafi, allow family visits, refrain from taking any action that might prejudice Mr. Gaddafi’s mental and physical integrity or health, and to report back to the Court concerning the steps taken.
16. Libya did not comply with these requests.
17. On 31 May 2013, the ICC Pre-Trial Chamber ruled that Mr. Gaddafi must be prosecuted before the ICC and not Libya.¹² Key aspects of the Chamber’s decision included the fact that after a period of over 18 months, Libya had not secured legal representation for Mr. Gaddafi in relation to proceedings involving serious charges, and he was not detained under the effective control of the Government. The Chamber therefore ordered Libya to surrender Mr. Gaddafi immediately to the custody of the ICC. The Appeals Chamber denied Libya’s request to suspend the operation of the admissibility decision and the surrender order pending the Appeals Chamber’s resolution of Libya’s appeal.¹³
18. Over 9 months later, Libya has still failed to surrender Mr. Gaddafi to the ICC. The Libyan authorities have therefore obstructed his right to be brought

¹¹ Annex A to ICC-01/11-01/11-308.

¹² ICC-01/11-01/11-344-Red, para. 219.

¹³ ICC-01/11-01/11-387.

within the protection of the law by refusing to surrender him to the custody of the ICC.

19. On 13 December 2013, the United Nations Working Group on Arbitrary Detention issued an Opinion in which it declared that,

“In grave violation of his fundamental rights, Mr. Gaddafi has been deprived of liberty for two years incommunicado, without having been able to appear before the judicial authorities to challenge the legitimacy of the detention, without access to a lawyer, without having any facilities for the preparation of his defence; the detention which has been extended far beyond the maximum period of time and in violation of the procedure provided for in Libyan law. The gravity of the violations, their nature in this case, and the Government’s inability to rectify the violations, has made impossible to guarantee Mr. Gaddafi’s right to fair trial in Libya.”¹⁴

20. The Working Group therefore determined that Mr. Gaddafi’s detention was arbitrary, and found that,

“the adequate remedy would be to discontinue both the domestic proceedings against Mr. Gaddafi and his detention under those proceedings without prejudice to the Government’s obligations before the ICC in the proceedings originated from the investigation into the situation referred to the ICC by the UN Security Council.”

21. Two months later, Libya has neither discontinued the domestic proceedings against Mr. Gaddafi nor surrendered him to the custody the ICC. His continued detention in Libya is therefore arbitrary, and contrary to both Libya’s domestic and international legal obligations.

22. On 13 February 2014, Human Rights Watch issued a report concerning a visit, which its representatives purportedly conducted with Mr. Gaddafi in Zintan.¹⁵

23. It is apparent from this report that,

- i. Mr. Gaddafi is still held in solitary confinement, in a secret location, and has had no visits from family members or friends;

¹⁴ ICC-01/11-01/11-491-AnxA.

¹⁵ ‘Gaddafi Son, Ex-Officials Held Without Due Process’ HRW 13 February 2014, <http://www.hrw.org/news/2014/02/13/libya-gaddafi-son-ex-officials-held-without-due-process>

- ii. Mr. Gaddafi does not appear to be detained under the effective custody of the Government;
- iii. Mr. Gaddafi is not yet represented by Counsel in connection with the proceedings in Tripoli, notwithstanding the fact that the proceedings have now proceeded to the trial phase; and
- iv. Mr. Gaddafi has not been granted access to the case file against him, and has been subjected to multiple interrogations –without Counsel - which were conducted by irregular militia and anonymous persons, amongst others; and
- v. During these interrogation sessions, Mr. Gaddafi was coerced into signing multiple confessions.

24. Human Rights Watch explicitly noted that Mr. Gaddafi's ability to raise sensitive matters concerning his case may have been impeded by the fact that he was interviewed in a room with the door open, and guards were sitting outside, presumably within earshot.¹⁶

25. In light of the fact that HRW reported that former Gaddafi officials detained at Al Hadba had also been subjected to significant due process violations, and, in at least one case, appeared to have been beaten, it is likely that Mr Gaddafi's welfare and rights would be even more gravely prejudiced if he were to be transferred to Tripoli.

26. On 24 February 2014, Libya filed a statement from the Prosecutor-General, which asserted that two anonymous lawyers had visited Mr. Gaddafi in Zintan and that he had accepted these anonymous persons as his lawyers.¹⁷ No evidence was filed in support of this assertion (such as a signed power of

¹⁶ It should also be noted that the Defence and Mr. Gaddafi's family were not notified in advance that the visit with Mr. Gaddafi would take place. An unrequested visit from NGO representatives does not in any way compensate for or ameliorate Libya's failure to give effect to Mr. Gaddafi's fundamental right to receive legal and family visits. There is a crucial difference between what Mr. Gaddafi would be willing and able to confide to his lawyer within the confines of a privileged meeting, and what he might reveal to third parties, who have indicated that they intend to publish their account of the meeting.

¹⁷ ICC-01/11-01/11-519-Anx2.

attorney), nor were any dates or other forms of corroboration provided in connection with the alleged visit.¹⁸

27. The statement is also contradicted by Libya's accompanying submissions, which implies that their representation was accepted by the office of the Prosecutor-General and not by the respective defendants.¹⁹
28. The accompanying submissions also assert that the lawyers had "received permission to visit Mr. Gaddafi",²⁰ not that they had actually visited him.
29. The fact that Counsel for Libya were unwilling to include a positive assertion that the lawyers had actually visited Mr. Gaddafi in their signed submissions should be considered in light of multiple instances, in which Libya has submitted inconsistent, unreliable and potentially misleading information to the Chamber.²¹
30. Moreover, if Libya had possessed sufficient control and authority over Zintan in order to secure the implementation of the lawyer's visit to Mr. Gaddafi, [Redacted].²² Libya cannot disavow any control over Zintan as concerns its ability to implement ICC orders, whilst simultaneously averring to the Court that it possesses the power and authority to implement domestic orders in Zintan.
31. In any case, Libya has confirmed that under Libyan law, it is the responsibility of the Accusation Chamber and not the Prosecutor-General, to appoint Counsel for a defendant.²³ The statement from the Prosecutor-General is thus *ultra vires*, and irrelevant to the Chamber's assessment as to whether the defendant's rights have been respected under domestic law.

¹⁸ [Redacted]

¹⁹ ICC-01/11-01/11-519-Red, para. 17.

²⁰ ICC-01/11-01/11-519-Red, para. 17.

²¹ ICC-01/11-01/11-281-Red2, paras. 19-20, 109.

²² [Redacted]

²³ ICC-01/11-01/11-258-Red2, paras. 23 and 96. This key procedural safeguard was not, however, respected as the Accusation Chamber confirmed the case for trial, without having first appointed a lawyer.

32. It is also self-evident that any lawyer selected, appointed, or procured by the Prosecutor-General would be unable to represent Mr. Gaddafi in an independent and effective manner.
33. The ability of such ‘anonymous’ lawyers to represent Mr Gaddafi in an independent manner would also be undermined by the failure of the Libyan authorities to provide effective security and protection to such lawyers, and to eliminate impunity as concerns retaliatory attacks on the legal profession.²⁴
34. As set out in a recent United States Human Rights Report on Libya,
 “Intimidated judges and prosecutors and underresourced courts struggled to deal with sensitive and complex political cases. Additionally, judges and prosecutors cited concerns about the overall lack of security in and around the courts, further hindering the re-establishment of the rule of law. Vigilantes threatened detainees that they would be killed if released, and, conversely, escapees threatened their former jailers.”²⁵
35. On 27 February 2014, the Libyan authorities confirmed the continuation of the national security proceedings against Mr. Gaddafi and others, which are predicated on illegally seized privileged Defence documents.²⁶
36. If the proceedings were to progress to an actual trial, then the paucity of evidence and absurdity of the charges would become abundantly clear. In

²⁴ On 5 March 2014, the bodies of a lawyer and her husband were found in Benghazi. Their bodies exhibited gun shot wounds and there is speculation that the lawyer may have first been raped. They had been abducted by militia. N. Ibrahim, ‘Bodies of kidnapped husband and wife found in Benghazi’ *Libya Herald* 5 March 2014 <http://www.libyaherald.com/2014/03/05/bodies-of-kidnapped-husband-and-wife-found-in-benghazi/#ixzz2vAjczXvV>

²⁵ Libya, Country Report on Human Rights Practices, 2013, p. 11. <http://www.state.gov/documents/organization/220578.pdf>

²⁶ “The decision of the Zintan Court, west Libya postponed the trial of Saif Al-Islam Gaddafi in the case in which he is accused of breach of national security and assistance with foreigners by providing information that would harm security. No new date has been announced... Mr. Srour [spokesperson for the Attorney General’s Office] stated ‘the trial will be postponed each time because of the absence of the other accused’”, *Al Jazeera*, “Postponement of trial of Saif Al-Islam Gaddafi in Zintan”, 27 February 2014, <http://www.aljazeera.net/news/pages/bf7d21f3-8f14-4808-a524-8040d993d864>. Also reported in *Elaph*, “Postponed trial of Saif Al-Islam Gaddafi”, 27 February 2014, <http://www.elaph.com/Web/News/2014/2/881431.html> and *Al Hayat*, “Postponement of trial of Saif Al-Islam Gaddafi”, 27 February 2014, <http://alhayat.com/Articles/793918/%D8%AA%D8%A3%D8%AC%D9%8A%D9%84-%D9%85%D8%AD%D8%A7%D9%83%D9%85%D8%A9-%D8%B3%D9%8A%D9%81-%D8%A7%D9%84%D8%A5%D8%B3%D9%84%D8%A7%D9%85-%D8%A7%D9%84%D9%82%D8%B0%D8%A7%D9%81%D9%8A>

contrast, holding out the threat of such a trial appears to have the two-fold purpose of firstly, giving Libya leverage to extract further concessions from the ICC, and secondly, creating a very public disincentive for any lawyer of a former Gaddafi official to represent their client in an independent manner.

37. Given that Mr. Gaddafi is being prosecuted for communicating concerns regarding violations of his rights during a meeting which was covertly video-taped, it is also impossible to expect that either he or any other Gaddafi official could communicate freely in relation to particularly sensitive concerns.
38. After 27 months of egregious mistreatment, there is no prospect of Mr. Gaddafi having a fair trial in Libya.
39. Libya was accorded multiple opportunities to demonstrate its willingness and ability to respect Mr. Gaddafi's right to a fair trial. Libya not only failed to do so, but also flagrantly violated key rulings from the African Court of Human Rights, ICC, and United Nations Working Group on Arbitrary Detention.
40. In such circumstances, the Pre-Trial Chamber's had a duty to take all necessary measures to ensure the implementation of the surrender order.
41. Mr. Gaddafi has a fundamental right of access to justice. Given Mr. Gaddafi's isolation, and the fact that the ICC is the only Court which exercises lawful jurisdiction over Mr. Gaddafi, the Pre-Trial Chamber was under a heightened duty to consider any applications from his Defence.
42. Although the Pre-Trial Chamber's power to issue a finding of non-compliance is discretionary, it has no power simply to abstain from ruling on a request so as to render it moot. Whenever a judicial entity is vested with a discretionary power – it cannot fetter its power to exercise such a discretion.²⁷
43. The Pre-Trial Chamber's failure to issue a ruling on the Defence Request therefore constitutes a fundamental error, which must be corrected by the Appeals Chamber.

²⁷ ICC-01/04-01/06-568, paras 65-67.

II. Submissions

A failure to issue a decision within a reasonable time can be equated to a constructive refusal of the Defence Requests

44. The Defence is aware of the workload currently faced by the Pre-Trial Chamber. Nonetheless, irrespective as to whether it is intentional or not, the Pre-Trial Chamber's failure to issue a finding of non-compliance in a timely manner has deprived the Defence of the object of the request – to ensure that Mr. Gaddafi's rights under the Rome Statute are not further prejudiced through his continued detention in Libya.
45. The Defence Requests have repeatedly stressed the imperative of obtaining an urgent ruling in connection with Libya's failure to comply with key ICC orders.
46. In its Urgent Request submitted on 9 December 2013, the Defence submitted that,

“The lack of any ruling on the Requests not only constitutes a real risk to Mr. Gaddafi and those associated with proceedings against him, but also denies Mr. Gaddafi's fundamental right to be heard in proceedings in before the Court. In other words, a failure to rule on the Requests constitutes a direct denial of the right to be heard and of the right of access to justice. Justice delayed is justice denied.

5. The right to be heard is an intrinsic element of the fundamental right to a fair trial pursuant to article 67(1). It is a right guaranteed at both the national and international level. Most notably it is not a theoretical or illusory right and therefore, in order for it to be effective, the Chamber is “under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties”.²⁸

47. The ICTR Appeals Chamber has found that a Pre-Trial Chamber has a duty to issue a decision on requests which concern the legality of the defendant's detention in a timely manner.²⁹ The Appeals Chamber further underlined that

²⁸ ICC-01/11-01/11-489-Red, paras. 4-5.

²⁹ *Prosecutor v. Barayagwiza*, Appeals Chamber Decision of 3 November 1999, paras. 87-90.

a failure to issue a decision can attract appellate intervention in order to give effect to the right to a remedy.³⁰

48. The principles of interlocutory appellate review are also squarely applicable to the Pre-Trial Chamber's failure to issue a decision in the present circumstances.
49. As articulated by the Appeals Chamber, the objective of Article 82(1)(d) is to "pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial".³¹ Immediate appellate intervention is required in the current case in order to pre-empt the further accumulation of negative consequences as concerns Mr. Gaddafi's rights, which could irreparably prejudice his right to a fair trial before the ICC.
50. This is in line with the approach of the ECCC concerning the failure of the Co-Investigation Judge to rule on a Defence request within a timely manner. In its decision, the Pre-Trial Chamber found that

"with the passage of time, the failure of the Co-Investigating Judge to decide on the Request made it impossible for the Charged Person to obtain the benefit which he sought. The Charged Person was asking that his mental capacity to assist in his own defence and participate effectively in any and all criminal proceedings be examined by an expert. The Pre-Trial Chamber notes that in the case of *Boodhoo and others v. Attorney-General of Trinidad and Tobago*, the Privy Council found that "delay in producing a judgment would be capable of depriving an individual of the right to the protection of the law" in circumstances where "the parties were unable to obtain from the decision the benefit which they sought".³²

51. The Pre-Trial Chamber therefore found that "the failure of the Co-Investigating Judges to rule on the Request as soon as possible, in circumstances where a delay in making a decision deprives the Charged

³⁰ *Prosecutor v. Barayagwiza*, Appeals Chamber Decision of 3 November 1999, para. 109.

³¹ ICC-01/04-168, para. 19.

³² Decision on Ieng Sary's Appeal regarding the Appointment of a Psychiatric Expert, 21 October 2008. 002/19-09-2007-ECCC/OCIJ (PTC10), paras. 22, emphasis added.

Person of the possibility of obtaining the benefit he seeks, amounts to a constructive refusal of an application, which can be appealed [...]”.³³

52. Similarly, given that the Defence Requests were predicated on the need for an urgent ruling, the Pre-Trial Chamber’s failure to issue a timely adjudication of these Requests has deprived the Defence of the particular benefit which was sought.
53. For the purpose of Article 82(1)(d), an appealable “issue” is constituted by a subject, the resolution of which is essential for the determination of matters arising in the judicial cause under examination.³⁴ Under this test, the existence or not of a ‘ruling’ is clearly essential to the determination of the matters arising in the judicial cause under examination.
54. The failure to issue a timely decision is also analogous to a failure to issue a reasoned decision: in both circumstances, the applicant is deprived of the right to be apprised of the legal and factual reasons for denying the requested relief.
55. Since the absence of legal or factual reasons can constitute an appealable issue for the purposes of Article 82(1)(d),³⁵ there is no reason why the absence of a ruling itself cannot constitute an appealable issue.
56. Finally, the right to a fair trial includes the right to a fair appeal.³⁶ The Defence must have the right to seek appellate intervention if the Pre-Trial Chamber has failed to provide an appropriate remedy within a reasonable time frame. To hold otherwise would create a judicial lacuna, which would be incompatible with a defendant’s fundamental right to have access to justice.³⁷

The issue impacts significantly on the fairness and expeditiousness of the proceedings

57. By declining to issue a finding of non-compliance, the Chamber has failed to take all necessary measures within its power to ensure the implementation of

³³ Para. 23.

³⁴ ICC-01/04-168, para. 9.

³⁵ ICC-01/04-01/06-489, para. 14.

³⁶ ICC-01/04-01/06-T-91-ENG, p. 29 lines 13-15.

³⁷ See for example, Dissenting Opinion of Judge Van den Wyngaert, *Prosecutor v. Katanga*, Trial Judgment, ICC-01/04-01/07-3436-AnxI, para. 112.

ICC orders, which are central to Mr. Gaddafi's enjoyment of his rights under the ICC Statute.

58. As emphasised by the Defence in May 2013, Mr. Gaddafi's continued detention in Libya could irreversibly prejudice his ability to participate in his Defence before the ICC.³⁸ If a mere 15 days in isolation can trigger irreversible psychological harm for a detainee,³⁹ Mr. Gaddafi's state after over 27 months must be considered to be critical.
59. Libya's failure to surrender Mr. Gaddafi to the custody of the ICC has also consigned Mr Gaddafi to a legal black hole for the last 9 months; he has no means to exercise his rights under the ICC Statute, and at the same time, the continuation of unauthorised domestic proceedings against Mr. Gaddafi puts him at risk of double jeopardy (*ne bis in idem*) as concerns the 2011 allegations.
60. In particular, as concerns his rights under the ICC Statute, although Mr. Gaddafi has a right under Articles 59 and 60 of the Statute to challenge his detention and seek provisional release, since the Libyan authorities have neither brought him before a domestic judge in accordance with Article 59, nor surrendered him to the ICC to enable the ICC Pre-Trial Chamber to review the continued necessity and justification for his detention,⁴⁰ his right to challenge the legality of his detention and seek provisional release is illusory.
61. The Pre-Trial Chamber was obliged to exercise its discretion as to whether to issue a finding of non-compliance in a manner which both respects Mr. Gaddafi's rights under the Statute, and is consistent with internationally recognised human rights.
62. The findings of the Working Group on Arbitrary Detention underscored the imperative of taking all necessary measures to ensure that Mr. Gaddafi is brought within the protection of the law before the ICC as soon as possible.

³⁸ ICC-01/11-01/11-332, para. 63.

³⁹ ICC-01/11-01/11-332, para. 63. See also <https://www.un.org/News/Press/docs/2011/gashc4014.doc.htm>

⁴⁰ As mandated by Article 60 of the Statute.

63. There is also compelling evidence that Mr. Gaddafi's continued detention in isolation has impacted on his ability to exercise his right to silence.⁴¹
64. Mr. Gaddafi has clearly acted to his detriment and continues to remain at risk of severely prejudicing his future Defence case before the ICC through his exposure to coercive interrogations, which exploit his precarious mental state.
65. The Defence cannot protect Mr. Gaddafi's right to silence under Article 55 or Article 67(1) as long as militia, Libyan prosecutors, and other persons and entities continue to enjoy access to Mr. Gaddafi unfettered by any requirement that they obtain the prior consent of the Defence or that Mr. Gaddafi be represented by his ICC Defence during such meetings.
66. This situation is simply not acceptable. Any acts, statements or procedures which are either incompatible or inconsistent with the immediate implementation of the surrender order need to be strongly condemned.
67. The violations of Mr. Gaddafi's rights are so grave that they cannot be cured or remedied by token measures implemented at the 11th hour; as found by the Working Group, the only appropriate remedy at this juncture is to either release Mr Gaddafi or surrender him to the ICC.
68. The ICC Appeals Chamber has also concluded that in assessing whether the criteria under Article 82(1)(d) are met, the Chamber must into account that the principles of fair trial "are not confined to trial proceedings but extend to pre-trial proceedings" and that any "[b]reach or violation from the rules of fair trial at the pre-trial stage of proceedings may have implications on the proceedings and may affect the outcome of the trial".⁴²
69. The Pre-Trial Chamber's failure to issue a ruling on non-compliance has significantly affected Mr. Gaddafi's right to an appropriate remedy as concerns these violations, and thereby jeopardised his right to a fair trial before the ICC.

⁴¹ Gaddafi Son, Ex-Officials Held Without Due Process' HRW 13 February 2014, <http://www.hrw.org/news/2014/02/13/libya-gaddafi-son-ex-officials-held-without-due-process>

⁴² ICC-01/11-01/11-168, para. 11.

70. The Pre-Trial Chamber's failure to sanction Libya for not surrendering Mr. Gaddafi to the custody of the ICC has also deprived the Defence of the right to a remedy as concerns Libya's non-compliance, and has prejudiced the Defence irreversibly in connection with a potential second challenge to the admissibility of the case.
71. If Libya were to file a second admissibility challenge, then it would presumably invoke Article 95 of the Statute in order to postpone its obligation to surrender Mr. Gaddafi. The Pre-Trial Chamber has previously declined to factor non-compliance into consideration when adjudicating either the Article 95 postponement request submitted in the Senussi case or Libya's challenge to the admissibility of the Senussi case.⁴³
72. Since it is likely that the Chamber will adopt the same approach in connection with any future challenge filed in connection with Mr. Gaddafi, the Chamber's failure to act has thus deprived Mr. Gaddafi of the right to an effective remedy as concerns Libya's non-compliance, and created an appearance of partiality by objectively tipping the scales in favour of Libya.
73. In terms of the impact on the expeditiousness of the proceedings, although the Pre-Trial Chamber has found that the case against Mr. Gaddafi must be prosecuted before the ICC, the Chamber has interpreted the Statute to preclude the commencement of the confirmation proceedings until Mr. Gaddafi has appeared in person before the Court.⁴⁴
74. Mr. Gaddafi's continued detention in Libya therefore severely prejudices his right to be tried in an expeditious manner, and his right not to be detained for an unreasonable length of time during the pre-trial proceedings.

An immediate decision of the Appeals Chamber would materially advance the proceedings

⁴³ ICC-01/11-01/11-354, para. 35.

⁴⁴ ICC-01/11-01/11-440

75. As a result of the 31 May 2013 decision on admissibility, the ICC is the only Court which lawfully exercises jurisdiction over Mr Gaddafi's case and his related detention.
76. Libya's failure to surrender Mr. Gaddafi to the ICC therefore renders his current detention in Libya *per se* illegal and arbitrary.
77. In any case, even if the Appeals Chamber had granted suspensive effect (which it did not), Mr Gaddafi's detention would have been arbitrary under Libyan law by virtue of the fact that his case was not transferred to the Accusation Chamber within the required time period under Libyan law.⁴⁵
78. As found by Judge Van den Wyngaert,
- "Crucially a determination at the outset that the deprivation of liberty in a particular case is lawful and is not arbitrary does not last in perpetuity. Since the conditions under which the detention is lawful are liable to change or lapse, and since an initially lawful detention becomes arbitrary if it is upheld for longer than necessary, it must be possible for detained persons to have access to a court to determine the continued lawfulness of their detention on a periodic basis."⁴⁶
79. The Pre-Trial Chamber also cannot ignore the reality that the general prospects for fair and impartial proceedings in Libya have significantly worsened rather than improved with the passage of time.
80. A recent United States of American State Department Report on the Human Rights situation in Libya describes a litany of human rights abuses and due process violations, in the followings terms,

⁴⁵ Article 176 of the Criminal Procedure Code provides that the Prosecutor may detain a suspect for six days, upon expiration of which a Judge may extend the provisional detention for a maximum term of 30 days. After this, the aforementioned Tribunal of judges may extend the detention during the investigation phase for a maximum period of 90 days. Although this period may be extended if the circumstances of the investigation so require, a specific determination must be made to this effect: ICC-01/11-01/11-190-Anx1. No such determination was made in the October and December 2012 detention orders. In the absence of such a determination, Mr. Gaddafi should have been released after he had been detained for 126 days without being referred to the Accusation Chamber.

⁴⁶ Décision relative à la demande de mise en liberté des témoins détenus DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350 , **Dissenting opinion of Judge Christine Van den Wyngaert**, ICC-01/04-01/07-3405-Anx , para. 14, citing Human Rights Committee, *A v. Australia*, "Views", 30 April 1997, communication no. 560/1993, para. 9.4

“the most serious human rights problems during the year resulted from the absence of effective justice and security institutions. Consequences of the failure of the rule of law included arbitrary and unlawful killings, including politically motivated killings by groups outside or only nominally under government control; torture and other cruel, inhuman, or degrading treatment or punishment; and harsh and life-threatening conditions in (sometimes illegal) detention and prison facilities. Other important human rights abuses included arbitrary arrest and detention; lengthy pretrial detention; denial of a fair public trial; an ineffective judicial system staffed by intimidated judicial authorities; [...] Impunity was a serious problem. The scarcely functioning criminal courts struggled to try abusive Qadhafi-era officials, but generally skirted the pressing problem of abuses during the year by post-Qadhafi militias, in part because of militia intimidation of judges. When authorities did attempt to conduct trials, threats and acts of violence often influenced and curtailed judicial proceedings. Aside from adopting but not yet implementing legislation to provide a new legal framework and sponsoring dialogues on its implementation throughout the country, the government did not take concrete steps by year’s end to advance transitional justice. There were rare investigations and still fewer prosecutions of those believed to have committed abuses. The militias that spearheaded Qadhafi’s overthrow continued to fill a security vacuum in many parts of the country, often where they had their tribal roots, and were only nominally under government authority. They varied widely in their makeup and degree of responsiveness to the authority of the state, violated human rights and humanitarian norms, and committed unlawful killings, physical violence, and other abuses. The state failed to develop an ability to control such militia groups, even where they were formally or quasi-formally under state control, or to prosecute human rights abuses that they committed.”⁴⁷

81. Given that US State Department Reports have previously been admitted as evidence of criminal responsibility in ICC proceedings,⁴⁸ the willingness of a key political ally of Libya to compile such a damning report is certainly reliable and probative for the purposes of the current proceedings.
82. In light of Mr. Gaddafi’s vulnerability, and the volatile situation in Libya, the Defence Requests were predicated on the urgent need to take all necessary

⁴⁷ Libya, Country Report on Human Rights Practices, 2013, pp.1-2. <http://www.state.gov/documents/organization/220578.pdf>

⁴⁸ ICC-01/04-01/07-2635.

measures to secure Libya's compliance with the ICC surrender order, which would end Mr. Gaddafi's arbitrary detention, and enable him to benefit from his right to representation before the ICC in an effective manner.

83. The precariousness of Libya's political and security situation amplifies rather than lessens the imperative of issuing a timely ruling on non-compliance.

84. The United Nations Working Group on Arbitrary Detention has thus underlined that the fact that Libya has undergone a significant political transition is not a valid basis to postpone ruling on Libya's compliance with legal obligations:

“human rights also apply in periods of transition. Previous opinions adopted by the Group have emphasized that not only do human rights apply in periods of transition but so do the international system of supervision and international law based on State responsibility”.⁴⁹

85. For the purposes of deciding an Article 82(1)(d) request, the Chamber “must ponder the possible implications of a given issue being wrongly decided on the outcome of the case [which] involves a forecast of the consequences of such an occurrence”.⁵⁰

86. If the Chamber erred by failing to issue an immediate ruling on these Requests, then the ICC will have contributed or at least, failed to take all reasonable steps to attempt to remedy the violations of Mr. Gaddafi's rights under the Rome Statute.

87. Immediate appellate intervention is therefore required to ensure that the future proceedings before the ICC are not irreparably tainted by the current and ongoing violations of Mr. Gaddafi's rights.

III. Relief Sought

⁴⁹ Opinion no. 60/2012, A/HRC/WGAD/2012/60, para. 12,
<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/164/17/PDF/G1316417.pdf?OpenElement>

⁵⁰ ICC-01/04-168, para. 13.

88. The Defence for Mr. Saif Al-Islam Gaddafi respectfully requests the Honourable Pre-Trial Chamber to grant leave to appeal in relation to whether the Pre-Trial Chamber erred by failing to rule on the Defence Requests.



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

Dated this, 10th Day of March 2014

At London, United Kingdom