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**International
Criminal
Court**

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Date: **20 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

With Public Annex A

**Defence Request for Leave to Reply to Responses to its "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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Detention Section

**Victims Participation and Other
Reparations Section**

I. Introduction

1. The Defence for Mr. Saif Al-Islam Gaddafi respectfully requests the leave of the Pre-Trial Chamber to submit a reply to its 'Request for leave to appeal the Pre-Trial Chamber's failure to issue a decision',¹ in relation to the two discrete issues:
 - i. Whether the "status of Gaddafi's detention in Libya, prospects of national proceedings in Libya, and the volatile security situation in Libya"² are irrelevant to the Chamber's duty to issue a timely decision concerning Libya's failure to surrender Mr. Gaddafi to the ICC, or whether an overly formulistic definition of a 'decision', which is not required by the actual texts of the ICC, would be incompatible with Mr. Gaddafi's right to be heard, and Article 21 of the Statute; and
 - ii. Whether it is legally correct and indeed, legally acceptable for Libya to advance the notion that because Mr. Gaddafi has not been surrendered to the ICC, he cannot avail himself of rights under the Statute, including the right to be heard.
2. These issues arise from the respective responses of the Prosecution,³ and Libya,⁴ but are linked intrinsically to the overarching issue concerning the role that Mr. Gaddafi's rights (and potential violations of these rights) should play in the Pre-Trial Chamber's decision making process.

¹ ICC-01/11-01/11-522-Red.

² ICC-01/11-01/11-526, para. 13.

³ ICC-01/11-01/11-526, para. 13 *et seq.*

⁴ ICC-01/11-01/11-527, paras. 16-23.

II. Submissions

3. The underlying premise of the Prosecution's submission that the "status of Mr. Gaddafi's detention in Libya, prospects of national proceedings in Libya, and the volatile security situation in Libya"⁵ are irrelevant to a finding of non-compliance, appears to be that violations of the rights of Mr. Gaddafi fall outside of the ambit of the Pre-Trial Chamber's competence, if they occur in Libya.
4. There is good cause to address the short-sightedness of such an approach, in particular, as concerns the likelihood that such violations could act as a bar to Mr. Gaddafi's future prosecution before the ICC.
5. The purpose of issuing a finding of non-compliance is to ensure that the Court is in a position to "exercise its functions and powers under this Statute," by sanctioning States for impeding the Court's ability to do so.⁶
6. Libya's failure to surrender Mr. Gaddafi has not only threatened the immediate ability of the Court to advance the proceedings against Mr. Gaddafi (and therefore exercise its functions and powers), it also jeopardises the future ability of the Court to bring Mr. Gaddafi to trial.
7. Any discretion, which is vested in a potential Article 87(7) decision, is subordinate to the Chamber's duty to take all necessary steps to ensure Mr. Gaddafi's ability to exercise his rights under the Statute.⁷

⁵ ICC-01/11-01/11-526, para. 13.

⁶ Article 87(7) of the Statute

⁷ ICC-01/04-169 at para. 2. In a separate opinion. Judge Pikiš has opined that discretionary powers must in general take into consideration the interests of justice and the efficacy of the proceedings - ICC-01/04-01/06- 1444-Anx at para. 6. The ICTY Appeals Chamber has also found that discretionary powers must comport to the rights of the accused. For example, in the Prosecutor v. Haradinaj, the Appeals Chamber found that the Trial Chamber's discretion to evaluate the credibility of witnesses

8. The Chamber has no discretion to ignore clear findings that Mr. Gaddafi's continued presence in Libya imperils his mental and physical integrity,⁸ which could affect his ability to participate effectively in proceedings before the ICC.
9. The Chamber has no discretion to contribute to or acquiesce in, in any way, a situation of arbitrary detention involving a defendant, who should be transferred to the custody of the ICC.⁹
10. To characterise the Defence Request for an Appeal as a 'disagreement' with the Chamber concerning the timing for such a decision, or the urgency of the underlying applications,¹⁰ ignores the fact that the urgency is not based purely on the opinion of the Defence, but is founded in the decision of the Appeals Chamber, and other independent judicial entities.
11. The Pre-Trial Chamber's discretion to make factual determinations concerning 'urgency' is fettered by the fact that the current situation addresses a situation of shared responsibility between the Appeals Chamber and the Pre-Trial Chamber.
12. The Appeals Chamber has expressly found that Mr. Gaddafi must be surrendered immediately to the ICC.¹¹ The fact that this must occur before the

must be reconciled with the accused's right to a reasoned opinion, Appeals Judgment, 27 July 2010, at para 196.

⁸ ICC-01/11-01/11-522-Red, para. 2.

⁹ Opinion no. 60/2012, A/HRC/WGAD/2012/60, para. 21, cited to in ICC-01/11-01/11-522-Red, fn. 10. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, General List No 131), para 159.

¹⁰cf ICC-01/11-01/11-526, para. 11.

¹¹ ICC-01/11-01/11-387.

issuance of its appeal judgment on the admissibility challenge is inherent in the Appeals Chamber's rejection of the request for suspensive effect.

13. According to Article 21(3), even if the Pre-Trial Chamber is not *per se* bound by these decisions, the Chamber also has no discretion to disregard the principles of internationally recognised human rights law underpinning the decisions of the African Court of Human and Peoples Rights, and the United Nations Working Group on Arbitrary Detention.

14. The force of such decisions is in any case strengthened by Security Council Resolution 2144, issued on 14 March 2014, in which the Security Council:¹²

*Expressing grave concern at the worsening security situation and political divisions in Libya, including abductions, assassinations, and violent clashes between armed groups,
[...]*

Recalling its decision in resolution 1970 (2011) to refer the situation in Libya to the Prosecutor of the International Criminal Court, and the importance of cooperation for ensuring that those responsible for violations of human rights and international humanitarian law, including attacks targeting civilians, are held accountable,

*“Expressing grave concern at the lack of judicial process for conflict-related detainees, including children, many of whom continue to be held outside state authority, and at reports of human rights violations and abuses, including torture and sexual and gender-based violence, in detention centres, and, in that regard, underlining that all parties in Libya should extend full cooperation to UNSMIL on all issues pertaining to the promotion and protection of human rights,
[...]*

*Acting under Chapter VII of the Charter of the United Nations,
[...]*

3. Calls upon the Libyan government to continue to cooperate fully with and provide any necessary assistance to the International Criminal Court and the Prosecutor as required by resolution 1970

¹² <http://www.un.org/News/Press/docs//2014/sc11315.doc.htm>

(2011);

“4. Condemns cases of torture and mistreatment, and deaths by torture, in detention centres in Libya, calls upon the Libyan government to take all steps necessary to accelerate the judicial process, transfer detainees to State authority and prevent and investigate violations and abuses of human rights, calls for all Libyan parties to cooperate with Libyan government efforts in this regard, calls for the immediate release of all individuals arbitrarily arrested or detained in Libya, including foreign nationals [...]”¹³

15. According to the terms of the demands set by the Security Council acting under Chapter VII, Libya must cooperate fully with the ICC. If, however, Libya succeeds in its admissibility appeal and Mr. Gaddafi has not yet been transferred to the ICC, then Libya would still be obliged to release him immediately as a person “arbitrarily arrested or detained in Libya”. The UN Working Group on Arbitrary Detention has found that Mr. Gaddafi is arbitrarily detained and that the only remedy is his transfer to the ICC or immediate release.
16. A positive appellate ruling on the admissibility challenge would thus not modify or qualify Libya’s obligation to release Mr. Gaddafi, which stems from Libya’s domestic and international legal obligations.¹⁴
17. There are thus only two options: cooperation with the ICC by surrendering Mr. Gaddafi to the custody of the ICC, or ‘impunity’ for Mr. Gaddafi.

¹³ Security Council Resolutions have been held to meet the criteria for admission as evidence of criminal responsibility: ICC-01/04-01/06-2589-Corr. A resolution is also clearly admissible as evidence of the legal obligations set out in the resolution itself.

¹⁴ As noted above, the UNWGAD has confirmed that Mr. Gaddafi is a victim of arbitrary detention and must either be released or surrendered to the ICC. UNWGAD further confirmed that the gravity of the violations was such that they could not be ‘cured’: ICC-01/11-01/11-491, para. 3.

18. When facing a similar situation in the Lubanga case (i.e the potential release of Mr. Lubanga from custody in the DRC due to the arbitrariness of his detention), the Pre-Trial Chamber recognised that it was impelled to act as a matter of urgency, in order to ensure that Mr. Lubanga’s prospective release would not frustrate the ability of the ICC to secure his arrest and transfer to the custody of the ICC.¹⁵
19. The Appeals Chamber has also stressed that where national courts are unwilling and unable to prosecute a case, “the International Criminal Court must be able to step in” (emphasis added).¹⁶ Having found that the case is admissible before the ICC, the Pre-Trial Chamber’s discretion is subordinate to its duty to ensure that the ICC can “step in” and thereby eliminate impunity.
20. It is unthinkable that given the potential implications (including the prospect of impunity), there is no right to review the Chamber’s failure to take a decision itself or failure to issue a ‘formal’ decision.
21. The key issue should be whether the acts or omission of the Chamber have impacted on the judicial rights of the parties. As found by the late President Cassesse, “in international proceedings pure formalities should not gain the upper hand whenever important rights might be at stake.”¹⁷

¹⁵ ICC-01/04-01/06-8-Cor, paras. 98 to 100.

¹⁶ ICC-01/04-01/07-1497 at para. 85.

¹⁷ In the matter of El Sayed, ‘Order Assigning the Matter to the Pre-Trial Judge’, CH/PRES/2010/01, para. 16.

22. The Prosecution's reliance on the DRC appeals decision on the Prosecution request for extraordinary review is therefore inapposite.¹⁸ The Defence is not advocating for the creation of a new right to appeal: the Defence request was framed within the clear terms of Article 82(1)(d).
23. The Appeals Chamber's decision was also predicated on the fact that there was no lacuna in the texts as concerns a right to appeal, and the Prosecution's application was not supported by the sources of law under Article 21.
24. The Appeals Chamber did, however, accept that the criteria and terminology used in Article 82(1)(d) is subject to judicial interpretation.¹⁹ It also expressly accepted that its interpretation and application must be consistent with internationally recognised human rights law.²⁰
25. Whereas internationally recognised human rights law might not support the existence of a right to appeal interlocutory appeals, it does support a defendant's right of access to justice, which in turn translates to a right to a decision, whether it be issued by the Pre-Trial Chamber, or in the absence of a timely ruling, by the Appeals Chamber.²¹ The right of access to justice, which

¹⁸ ICC-01/11-01/11-526, para. 6.

¹⁹ ICC-01/04-168, paras. 6-19.

²⁰ ICC-01/04-168, para. 38.

²¹ ICC-01/11-01/11-489-Red, paras. 4-5. See also In the matter of El Sayed, 'Order Assigning the Matter to the Pre-Trial Judge', CH/PRES/2010/01, para. 20:

"The right of access to justice (and the consequential right to be afforded judicial remedy) for the protection of one's rights is part of international customary law, as evidenced by international instruments, as well as by case law and pronouncements of States and international tribunals".

See also paras 21-26, in particular, the pronouncement at para. 26 that:

"the right of access to justice is regarded by the whole international community as essential and indeed crucial to any democratic society. It is therefore warranted to hold that the customary rule prescribing it has acquired the status of a peremptory norm (jus cogens)",

and para. 35:

"Whether or not it is held that the international general norm on the right to justice has been elevated to the rank of jus cogens (with the consequence that States may not derogate from it

refers to a right to bring a claim before a Court, would be meaningless if there is not an attendant right to an adjudication of that claim.²²

26. The putative existence of a right of automatic appeal as concerns a decision on the modalities of victim participation in the situation phase is thus not remotely comparable to the Chamber's failure to issue a decision on a request for measures which aim to safeguard Mr. Gaddafi's life by implementing the Appeals Chamber's ruling on suspensive effect.

27. This is where the relevance of Mr. Gaddafi's detention in Libya (and related violations) and the security situation comes squarely into play. It would be fundamentally incompatible with, and antithetical to, internationally recognised human rights law for the defendant not to have any recourse concerning a failure of the Chamber to render a decision, which is critical to securing his rights.

28. The notion of a 'decision' for the purpose of Article 82(1)(d) must therefore be framed by the imperative of ensuring that there is not a denial of access to justice.

29. In terms of the second issue, leave to reply is particularly warranted by virtue of the fact that despite not being a party to the proceedings, Libya appears to

either through treaties or national legislation), it is axiomatic that an international court such as the STL may not derogate from or fail to comply with such a general norm."

²² In the matter of El Sayed, 'Order Assigning the Matter to the Pre-Trial Judge', CH/PRES/2010/01, para. 36:

"every individual has the right to bring his or her claims before a court of law and to have them adjudicated by a competent judge".

have arrogated to itself a right to respond to each and every filing in the case file – which is a practice unsupported by any other case before the ICC.²³

30. Whereas Libya was the “triggering force” for the admissibility challenge, once this challenge was dismissed, Libya lost any right to be considered as a party in connection with the proceedings against Mr. Gaddafi before the ICC, as distinct from its status as a party in its admissibility appeal.²⁴

31. It is, therefore, incorrect for Libya to claim that the proceedings before the Pre-Trial Chamber are “admissibility proceedings”,²⁵ Moreover, this assertion is irreconcilable with the Pre-Trial Chamber’s dismissal of the admissibility challenge and the Appeals Chamber’s dismissal of the request for suspensive effect.

32. It should be noted that Libya has at no stage agreed to surrender Mr. Gaddafi to the ICC. A State can only cite logistical impediments to surrender if it has in fact made a decision to surrender the person to the Court. Libya refers obliquely to the “complex dynamics of the relationship between Zintan and Tripoli in recent weeks.” This submission is both outdated²⁶ and irrelevant in the absence of any evidence that the Libyan government has ever requested the Zintan authorities to surrender Mr. Gaddafi to the ICC.

²³ The fact that a State might have obligations arising from a decision does not give it the status of a party to the proceedings: ICC-01/04-01/06-2779. Similarly, the fact that a State is conducting domestic investigations against a person does not afford it standing in the proceedings before the ICC: ICC-01/09-01/11-313. Apart from the fact that there are no admissibility proceedings pending before the Pre-Trial Chamber, even if there were, “the fact that the Government [...] is a party to the article 19 proceedings does not mean per se that it is a party to the criminal proceedings against the suspects”: ICC-01/09-01/11-31, para. 11.

²⁵ ICC-01/11-01/11-527, para. 18 *et seq.*

²⁶ The submission cited to by Libya was filed on 14 August 2013 (ICC-01/11-01/11-402), and must be considered to be superseded by recent events concerning the political situation in Libya: see Annex A.

33. Libya's failure to state for the record that it will surrender Mr. Gaddafi to the ICC at any juncture of these proceedings (which have now lasted over 52 months) should have been dispositive of the matter. There was therefore no basis for the Pre-Trial Chamber to refrain from issuing a ruling.
34. The Chamber should also reject Libya's reliance on its own non-compliance when it argues that Mr. Gaddafi is not entitled to invoke his rights under Article 67(1) because he has not been surrendered to the ICC.²⁷
35. Libya's response also contains indications that it continues to oppose Mr. Gaddafi's surrender to the ICC, which is therefore further evidence of non-compliance.
36. For example, Libya relies on a decision by its Prosecutor-General to appoint lawyers to Mr. Gaddafi and to authorise their visit to Mr. Gaddafi.
37. The appointment of Counsel by the Prosecutor-General is itself, a violation of Mr. Gaddafi's right to choose counsel, the independence of the Defence, and the December 2012 Libyan Supreme Court Decision which found that it was illegal, discriminatory and unconstitutional to vest the responsibility for taking such measures in the Prosecutor-General rather than a Judge.²⁸ The appointment of Counsel for domestic proceedings in Libya is also incompatible with the Prosecutor-General's duty to direct his efforts to implementing the surrender order, which should take place immediately, indeed which should have taken place many months ago.

²⁷ ICC-01/11-01/11-527, para. 18 et seq.

²⁸ ICC-01/11-01/11-258-Anx8, pp. 6-7.

38. For the 18 months that the admissibility challenge was pending before the Pre-Trial Chamber, Libya failed to secure legal representation for Mr. Gaddafi. It also failed to appoint a lawyer to assist him to assert his rights in connection with the hearing in Tripoli which was conducted in his absence.
39. It is, therefore, untenable now to claim that Mr. Gaddafi's rights are being respected because anonymous lawyers have been given authorisation by the Prosecutor-General to visit him, in circumstances where the UNWGAD has ordered that Mr. Gaddafi should be either surrendered to the ICC or released. Further doubt is cast on the Prosecutor-General's motivations, and their political context, by recent remarks by the former Prime Minister Zeidan.²⁹
40. Finally, the Chamber cannot disregard the fact that former Prime-Minister Zeidan has fled the country over concerns regarding politically motivated justice in Libya. He has even gone so far to proclaim that the lack of Government control and security is such that "any Libyan faces danger".³⁰

²⁹Libya has asserted that the character and credibility of its new Prosecutor-General is relevant to cooperation between Libya and the ICC: ICC-01/11-01/11-306, para. 4: "The appointment of the first Prosecutor-General by the General National Congress will have significant implications on further cooperation with the Court as well as the progress of the case against Mr Saif Al-Islam Gaddafi".

It is therefore pertinent that the former Prime Minister has accused this same Prosecutor-General of acting from political motives:

"I have not been charged, this is only in the media and from particular individuals, it is not a judicial order or the Attorney-General. At the moment the judiciary is in a state that is not conducive to work and the conduct of the Prosecutor-General after the vote of confidence gives the impression that at the moment there is politicization of the judiciary or attempts to politicize the judiciary and the Prosecutor-General himself, I know him well and he was the first person I dealt with and met in office but since he has pushed for this order at this time and I request that he withdraws this order the travel ban as it is covered in political motive ..." [unofficial translation, emphasis added]

Interview with former Prime Minister Zeidan broadcast on Al-Arabiya on 15 March 2014 at http://www.youtube.com/watch?v=bUpY_pHpSCU&feature=youtu.be

[04:43 to 05:37]

See also Annex A.

³⁰ France 24 interview broadcast on 13 March 2014:

41. If Libya is not a fair or safe environment for one of the bastions of the revolution, then there is a clear urgency for all necessary measures to be taken to bring Mr. Gaddafi within the protection of the ICC.

RELIEF SOUGHT

42. For the reason set out above, the Defence for Mr. Saif Al-Islam Gaddafi respectfully requests the Honourable Pre-Trial Chamber to grant it leave to reply to

- i. Whether the “status of Gaddafi’s detention in Libya, prospects of national proceedings in Libya, and the volatile security situation in Libya” are irrelevant to the Chamber’s duty to issue a timely decision concerning Libya’s failure to surrender Mr. Gaddafi to the ICC, or whether an overly formulistic definition of a ‘decision’, which is not required by the actual texts of the ICC, would be incompatible with Mr. Gaddafi’s right to be heard, and Article 21 of the Statute; and
- ii. Whether it is legally correct and acceptable for Libya to advance the notion that because Libya has not surrendered Mr. Gaddafi to the ICC, he cannot avail himself of rights under the Statute, including the right to be heard.

Presenter: do you feel your life would be under threat if you returned?

Zeidan: From some of the militias, yes any Libyan faces danger whilst there are weapons on the street, any Libyan faces danger whilst there are militia present and weapons available on streets, any Libyan would face danger, not just me" [04:02 to 04:19]

http://www.france24.com/ar/20130313ns_mchannel=reseaux_sociaux&ns_source=twitter

A handwritten signature in black ink, appearing to read "John Jones". The signature is written in a cursive, flowing style.

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

Dated this, 20th Day of March 2014

At London, United Kingdom