

**Cour
Pénale
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**International
Criminal
Court**

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

Date: **29 January 2013**

PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernández de Gurmendi, Presiding Judge
Judge Hans-Peter Kaul
Judge Christine Van den Wyngaert

SITUATION IN LIBYA

IN THE CASE OF

***THE PROSECUTOR v. SAIF AL-ISLAM GADDAFI and ABDULLAH AL-
SENUSSI***

Public

Public Redacted Version of the “Urgent Defence Request to Dismiss “Libyan Government’s further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi””

Source: Defence of 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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. Introduction

1. On 18 July 2012, the Pre-Trial Chamber issued a decision confirming its understanding that that the Chamber “may base its decision on the admissibility of the case exclusively on information which is accessible to the other parties to the admissibility proceedings”.¹
2. This decision was issued before the handover after the Libyan national elections, and as such, Counsel for the Government of Libya were in a position to obtain instructions in connection with a potential request for leave to appeal, if they were of the view that it could impact on their ability to reply to the Responses of the Prosecution, Defence and Office of Public Counsel for Victims (OPCV). The Government did not do so, nor at any point of the subsequent proceedings have they requested the Chamber to reconsider the decision in question.
3. At the hearing on 9 October 2012, the Government of Libya claimed that it had difficulties presenting certain submissions due to ‘security concerns’. The Chamber admonished the Government, and reminded them that if they had any such concerns, they should have raised them in a timely manner before the hearing, so that the Chamber was in a position to take appropriate measures, without impacting on the timing or organisation of the admissibility hearing.²
4. In a subsequent filing, the Defence for Mr. Gaddafi expressly referred to the Pre-Trial Chamber’s decision stipulating that the Chamber could only base its decision on information which had been filed *inter partes*.³ The Defence further noted that the Government had not appealed this decision, and as such, it remained applicable.⁴
5. On 7 December 2012, the Pre-Trial Chamber issued a decision, which requested the Government of Libya to submit further information and evidence on certain issues concerning the admissibility of the case by 23 January 2013, and granted the Prosecution, OPCV, and Defence a right to file a response to such submissions by 11 February 2013.⁵

¹ ICC-01/11-01/11-187-Red at para. 10.

² ICC-01/11-01/11-T-2-CONF-ENG pp. 35-36.

³ ICC-01/11-01/11-228-Conf-Red at para. 83.

⁴ ICC-01/11-01/11-228-Conf-Red at para. 83,

⁵ ICC-01/11-01/11-239.

6. The Government of Libya did not appeal this decision, nor did it subsequently indicate that it might have any difficulty in complying with the terms of the decision, in accordance with the modalities stipulated in the Chamber's decision of 18 July 2012.
7. On 25 January 2012 (that is, the day after the deadline), the Defence received the public redacted version of the Government's further submissions on the admissibility of the case. Large swathes of its evidence were filed on a confidential *ex parte* (Chambers, Prosecution only) basis.
8. There was no indication that the Government had sought, or been granted, prior authorisation to file its submissions in this manner.
9. The Government also failed to adduce any coherent reasons as to why it could breach its so called confidentiality of investigation by disclosing information to the Judges, and the Prosecution – and in many cases, the public - but could not do so as regards the Defence.
10. Decisions of the Chamber are binding until and unless they are reversed by the Chamber, or the obligation to comply with the Chamber is suspended by the Appeals Chamber.⁶ As a participant to the proceedings, the Government of Libya cannot simply pick and choose the manner in which it complies with the Chamber's decision: cooperation with the Court translates to an obligation to cooperate with all aspects of the Court, and not just the organ of the Court, which happens to support the Government of Libya's stance in the proceedings.
11. By filing its evidence on an *ex parte* basis on the very day that its submissions were due, the Government has attempted to create a *fait accompli*: either the Chamber allows the Government to rely on *ex parte* evidence in order not to delay the proceedings – which achieves the Government objective of excluding the Defence from the proceedings – or the Chamber orders the Government to refile its submissions – which once again, allows the Government to frustrate an expeditious resolution of the admissibility challenge.
12. Neither result is acceptable. Time and time again, the Government has effectively been awarded for its non-compliance by being accorded more time. The Pre-Trial Chamber also cannot continue to allow the Government to fashion its cooperation with the Court in a manner, which is directly deleterious to the rights of the Defence.
13. In these circumstances, the Defence respectfully submits that the Chamber should dismiss the submissions *in limine*, due to the Government's failure to comply with an

⁶ ICC-01/04-01/06-2582.

express term of the Chamber's previous decisions: that the Defence should have a right to respond on an *inter partes* basis.

14. Alternatively, in accordance with the explicit terms of the Pre-Trial Chamber's decision of 18 July 2012, the Chamber should exclude from its consideration any information which has not been submitted on an *inter partes* basis. This would also include any analysis for the ICC Prosecution, which has been based on information provided by the Government, which has not been disclosed to the Defence.
15. Given that the Pre-Trial Chamber indicated in its decision of 7 December 2012 that the Chamber would not be in a position to substantiate whether the admissibility challenge meets the criteria under Article 17 of the Statute in the absence of such information,⁷ the Government of Libya has completely failed to discharge its burden in challenging the admissibility of the case. The challenge must therefore be dismissed forthwith.

2. Submissions

2.1 The Government has failed to adduce any legal grounds which would warrant filing the information in question on an ex parte basis

16. Although Rule 58(2) of the Rules of Procedure and Evidence accords the Chamber with a level of discretion to organise the procedure for determining the admissibility of the case, this discretion is curtailed by various caveats.
17. Firstly, Rule 58(3) expressly stipulates that the challenge shall be transmitted to the defendant, who shall be allowed to submit written observations in relation to the challenge. As recognised by the Appeals Chamber, the Chamber's discretionary powers in Rule 58(2) do not apply to this particular aspect of Rule 58.⁸ The wording of Rule 58(3) can also be contrasted to Rule 59(2): whereas the latter envisages that the Registrar may need to redact the version of the admissibility challenge, which is provided to participating victims, in order to comply with the Court's duty to preserve the confidentiality of information, the former does not.
18. Secondly, if a party or participant has any objection to the manner in which the Chamber has exercised its discretion in organising the admissibility proceedings, then

⁷ See for example, ICC-01/11-01/11-239 at paras. 13-14.

⁸ ICC-01/09-01/11-307 at para. 89.

they must indicate their objection or request leave to appeal this aspect of the procedure in a timely manner.⁹ The 18 July 2012 decision expressly put the Government of Libya on notice that the Chamber would not base its decision on *ex parte* information. At no point in time has the Government of Libya contested this decision or sought alternative relief. As recently underscored by Trial Chamber V, a party cannot unilaterally decide on the date on which they have been ordered to disclose evidence, to withhold such evidence from the Defence, nor can they wait until the expiry of the deadline for disclosure to raise any logistical impediments to such disclosure.¹⁰ A failure to seek timely relief can result in the dismissal *in limine* of the application in question.¹¹

19. Thirdly, the Chamber's discretion under Rule 58(2) is subject to its overarching duty under the Statute to ensure the rights of the defendant, and the expeditiousness of the proceedings.¹²
20. Apart from the fact that the Government should be barred from raising this matter in such a tardy manner, the *malapropos* reliance by the Government on ICC case concerning non-disclosure has weakened the Government's case.
21. In citing this case law, the Government has failed to refer to the fact that although the decisions in question permit the Prosecution to withhold information from the Defence (if strict criteria concerning necessity and proportionality have been met), they do not permit the Prosecution to subsequently rely on this information.¹³ Rather, the Prosecution has two choices: the Prosecution can either disclose the information to the Defence and rely upon it at the confirmation hearing or the trial, or, the Prosecution can withhold it, in which case, the Prosecution must forego reliance on the information in question.
22. In this manner, the jurisprudence of the ICC has ensured that such non-disclosure for witness protection is utilised solely to protect the witnesses in question, and not to accord one of the parties an unfair litigation advantage over the other, or to exclude the other party from being able to comment on evidence, which may become the foundation of the Chamber's decision.

⁹ ICC-01/09-01/11-101 at para. 41.

¹⁰ ICC-01/09-01/11-493 at para. 5.

¹¹ ICC-01/09-01/11-493.

¹² ICC-01/11-01/11-243-Red at paras. 38-39, 50-51; ICC-01/04-01/07-2259 at para. 43.

¹³ See for example, Rules 81(2) and Rule 81(5), and ICC-01/04-01/06-102 at paras. 95-100

23. Apart from the fact that ICC Chambers cannot base decisions on the merits on information which has not been disclosed to the Defence, in light of the fact that the non-disclosed information might be relevant to Defence preparation, or exculpatory, the Appeals Chamber has also stipulated that the non-disclosure of this information should not be permitted to prejudice the overall fairness and adversarial nature of the proceedings.¹⁴ In some cases, in order to ensure that the fair and adversarial nature of the proceedings is not prejudiced, the Prosecution may even be required to withdraw allegations or charges, if they are not in a position to disclose the information to the Defence due to legal obligations to information providers.¹⁵
24. To apply this case law to the current context, the Government can only withhold information from the Defence on the proviso that the Chamber would then be expressly precluded from relying upon it to determine whether the admissibility criteria have been met. Moreover, if the information withheld from the Defence prevents the Defence from raising key issues pertaining to the rights of the defendant, then the application itself should be dismissed.
25. Finally, although the Government has cited the provisions of the Statute concerning the protection of national security information, it has completely failed to follow the procedures set out in these provisions. Article 72(7) also expressly permits the Chamber to make adverse inferences against the State in relation to information, which has not been disclosed to the defendant.

2.2 The Government has failed to adduce any factual grounds, which would warrant filing the information in question on an ex parte basis

26. In its filing, the Government has asserted that it is not able to provide the information in question to the Defence, due to its domestic legal provisions concerning the ‘confidentiality of investigations’.
27. Earlier in the proceedings, the Government asserted that this provision precluded them from providing information to any section of the Court. Now, they appear to have revised this legal position in order to assert that it only prevents them from disclosing the information to the Defence and the OPCV: that is, the only two participants, which have opposed their challenge to the admissibility of the case.

¹⁴ ICC-01/04-01/07-476 at para. 63 ; ICC-01/04-01/07-475 at para. 62.

¹⁵ ICC-01/04-01/06-1019 at para. 28; ICC-01/04-01/06-1401 at para. 6.

28. The domestic legal and factual basis of this position is completely flawed. The Government has expressly recognised that under domestic law, Mr. Gaddafi has the right to receive the evidence in question.¹⁶ This is consistent with Article 61 of the Criminal Procedure Code, which clarifies that the confidentiality of investigations only applies vis-à-vis the public, and not Court officials, the Defence or civil parties.¹⁷
29. The Government further claimed that Mr. Gaddafi has not received the evidence in question – not because there are any security and confidentiality impediments to such disclosure – but because Mr. Gaddafi, who is not represented, has not requested it.¹⁸ If the Government does not believe that there are any security impediments to the disclosure of such information to Mr. Gaddafi, or his domestic counsel, then the Government cannot credibly claim that there would be security impediments as concerns the disclosure of such information to Mr. Gaddafi's ICC Defence team, which is composed solely of two Counsel, who are based in The Hague, and who are bound by strict obligations of confidentiality under both the Code of Professional Conduct for Counsel and the Staff Rules.
30. It would also appear from the fact that the Government has failed to assert or apply the principle of confidentiality of investigations in a consistent or logical manner that the Government's sole objective of raising this provision is - once again - to prevent Mr. Gaddafi from effectively voicing his concerns and views concerning the admissibility challenge through his ICC Counsel.
31. The primary purpose of the principle of confidentiality of investigation is to preserve the presumption of innocence of the defendant. The Government has completely flouted this rationale by publicly disclosing information, which is significantly prejudicial to the defendant, including alleged confessions to crimes.¹⁹ The public disclosure of this information has much greater potential to taint the integrity of the investigative process than the disclosure of evidence on a strictly confidential basis to the Defence. Moreover, given that the defendant has a direct right to receive the materials in question, the disclosure of such information to the ICC Prosecution has

¹⁶ ICC-01/11-01/11-258-Red2, at para 93.

¹⁷ ICC-01/11-01/11-190-Anx1, p.3. The Government has also repeatedly asserted that the Libyan criminal system is based on the Italian model. It is thus notable that Article 704 of the Italian Code of Criminal Procedure specifies that the Defence has the right to receive the extradition request and to be heard in relation to its contents in extradition proceedings.

¹⁸ ICC-01/11-01/11-258-Red2, at para 93.

¹⁹ ICC-01/11-01/11-258-Anx9 at p. 3; ICC-01/11-01/11-258-Anx10 at p. 3.

far more prejudicial consequences, than the disclosure of such information to Mr. Gaddafi's Counsel.

32. In terms of the security of witnesses or Court participants, the Government has publicly identified the persons involved in investigating and adjudicating Mr. Gaddafi's case.²⁰ The Government has also publicly announced in its filing that several named insiders have been interrogated as witnesses against Mr. Gaddafi.²¹ Given the alleged proximity of these persons to Mr. Gaddafi, if the Government's concern was predicated on the need to protect the interests of witnesses, such insider witnesses should have been given much greater consideration. The public dissemination of the names of former Gaddafi officials, irrespective of any security concerns that they might have, demonstrates the inability of Libyan authorities to appreciate and apply witness protection concerns in an impartial manner.

33. [REDACTED].

34. In its 1 May 2012 challenge, the Government already disclosed witness summaries on an *inter partes* basis, along with the initials of the witnesses, and their position or relationship to the defendant. In both the 1 May 2012 challenge and the further submissions, the Government also disclosed the names of persons involved in the investigation. The further information requested by the Pre-Trial Chamber, such as confirmation as to whether the statements were signed, the date of the interviews, and the provenance of the statements, does not engage any further security or witness protection concerns.

35. The types of documentary evidence requested by the Chamber also do not necessarily engage any security concerns. For example, in addition to witness statements, the Pre-Trial Chamber requested:

- intercept evidence, which the Libyan authorities have already discussed publicly on Al Jazeera,²² and which according to Dr. Gehani – are freely available in Libya;²³
- speeches and telephone calls from Mr. Gaddafi, which the defendant would already be familiar with if the contents are authentic and have any probative value; and
- photographic material, flight manifests and bank payments.

²⁰ ICC-01/11-01/11-258-Anx 18 at p. 4.

²¹ ICC-01/11-01/11-258-Anx3, p. 3.

²² ICC-01/11-01/11-190-Anx16A.

²³ Transcript of 10 October 2012, ICC-01/11-01/11-T-3-Red-ENG at p. 56 line 24 to p. 57 line 5.

36. The Government has apparently elected to submit flight manifests, but there is no indication as to why the disclosure of such manifests would create any risk to witnesses or the integrity of the investigations. In light of the plethora of independent reports, which suggest that *thuwar* and NTC allegations and evidence concerning mercenaries were fabricated or obtained through coercive questioning and torture,²⁴ by not disclosing the evidence to the Defence, it appears that the Government is simply attempting to shield such evidence from an analysis of probative value.
37. The Chamber also requested directions, orders, and decisions by authorities in charge of the investigation. Given that the Government has already disclosed the names of the prosecutors and investigators working on the case, the disclosure of the underlying reports to Counsel bound by the Code of Conduct would not generate any further risk.
38. In terms of the Government's highly insulting and ludicrous claim that disclosure to the ICC Counsel could result in the "destruction of evidence, threatening witnesses and their families, harming or assassinating the Prosecutor-General's professional staff, and facilitating prison escapes or carrying out terrorist bombings to foment chaos and jeopardise national security", the Defence notes that this allegation is simply part of a pattern of unfounded accusations, which the Government has launched against the Defence.²⁵
39. The Government has also displayed a consistent trend of falsely attributing attacks and events to former Gaddafi officials.²⁶ This tendency to invoke the specter of Gaddafi loyalists has been criticised as a feeble attempt by the authorities to try to incite the popular sentiment against the former regime in order to disguise the inadequacies of the current regime, or the presence of other violent elements in Libya.²⁷
40. The fact that the authorities try to blame everything on 'Gaddafi loyalists' (including at one point, falsely attributing the attack on the United States Embassy to 'Gaddafi loyalists'), also demonstrates the inability of the Libyan authorities to assess the

²⁴ Report of the UN International Commission of Inquiry on Libya, A/HRC/19/68, 2 March 2012 at paras 493, 688-689; UNHCR concerned as sub-Saharan Africans targeted in Libya, News Stories, 26 August 2011, <http://www.unhcr.org/4e57d1cb9.html>; UNHCR Chief Guterres calls for safety of third-country nationals in Libya, News Stories, 22 August 2011, <http://www.unhcr.org/4e526e746.html>; The battle for Libya: killings, disappearances and torture, Amnesty International 2011, MDE 19/025/2011, at pp. 9, 70-71, 79-87 http://amnesty.org.uk/uploads/documents/doc_21834.pdf; Libya: Stop Arbitrary Arrests of Black Africans, Human Rights Watch, 4 September, 2011, <http://www.hrw.org/news/2011/09/04/libya-stop-arbitrary-arrests-black-africans>

²⁵ See for example, ICC-01/11-01/11-255 at para. 68.

²⁶ Admissibility hearing evidence, ICC-01/11-01/11-216-Anx4C.4.

²⁷ ICC-01/11-01/11-216-Anx4C.4; ICC-01/11-01/11-216-Anx4D.4.

potential responsibility of members of the former Gaddafi regime, with anything remotely resembling the presumption of innocence, or to address witness protection or legitimate security concerns in an impartial manner.²⁸

41. Such bald accusations also completely fail to meet the ICC requirement that any allegations regarding witness protection must be substantiated with objective information, which demonstrates the linkage between existence of a risk, and disclosure to the Defence (as opposed to the public at large).²⁹
42. In the absence of any logical rationale for the non-disclosure of such information to the Defence, it would appear that the Government has sought to file this information on an *ex parte* basis due to the fact that both the Defence and the OPCV conducted an in-depth analysis of the summaries and the alleged charges against Mr. Gaddafi. The present exclusion of the Defence and the OPCV therefore appears to be a form of litigation retaliation, which is designed to protect the Government from any further such dissection of its evidence.
43. Moreover, the manner the authorities are exploiting the principle of confidentiality of investigations in order to exclude the Defence from the adversarial process, whilst simultaneously publicly broadcasting adverse evidence from the investigations in order to impugn the defendant's credibility and suggest potential lines of testimony to witnesses, demonstrates the complete inability of the Libyan authorities to apply their domestic procedures in an independent and impartial manner.

2.3 The non-disclosure of such extensive information will irretrievably prejudice the Chamber's ability to resolve the admissibility challenge in a fair and adversarial manner

44. As noted above, the possibility of a party to withhold information from another party or participants is subject to the overarching principle that such non-disclosure should not deprive the proceedings of their adversarial character. In the present case, the Government has not withheld limited or discrete details from the Defence, such as names, birthdates, or addresses: it has withheld the evidence in its entirety. Such a measure is clearly unnecessary and disproportionate. Indeed, if the Government lacks the ability to prepare proportionate redactions in connection with ICC proceedings, then it is clear that the implementation of such crude protection measures at a

²⁸ ICC-01/11-01/11-216-Anx4D.13.

²⁹ ICC-01/04-01/07-475 para . 71-72.

domestic level will render the domestic proceedings completely unfair and unworkable.

45. In its decision of 7 December 2012, the Pre-Trial Chamber stated that it was “necessary” for the Chamber to receive the following information, *inter alia*, in order to render a decision on the admissibility of the case:

- concrete, tangible and pertinent evidence that investigations are currently ongoing comprised of 1) directions, orders, and decisions issued by investigation authorities, or reports, updates and notifications or submissions in the investigation file related to concrete and progressive steps and 2) concrete samples of evidence, which did not necessarily need to be witness statements;³⁰
- information concerning the investigative steps, which have been taken after the admissibility challenge, and what evidence may have been collected as a result of such steps;³¹
- for the statements that had previously been included in Annex C: the date the statement was recorded, whether the statement was signed, witnessed or sworn, persons present when statement was recorded and whether they were affiliated with the State or any other organisation, the modalities of recording the statements, how the statement came into the investigating authorities, whether any steps have been taken to verify the reliability of the statements;³² and
- evidence falling under the first category above in support of the Government’s contention that the conduct is the same as the Court’s investigation.³³

46. It would appear that the aforementioned evidence and documentation has been filed on a confidential *ex parte* (Chambers, Prosecution only) basis.

47. If the Chamber characterised such information as ‘necessary’, then it follows that withholding such information from the Defence (and the OPCV) would exclude them from participating in the essential elements of the Chamber’s admissibility

³⁰ At paras. 9- 12.

³¹ At para. 14.

³² At para. 17.

³³ At para. 28.

determination. Such wholesale exclusion necessarily deprives the admissibility proceedings of their adversarial character, and renders them unfair.

48. Accordingly, given that firstly, the Government of Libya failed to disclose the material in question to the Defence within the stipulated deadline, and secondly, the withheld information forms the core basis of the materials requested by the Chamber, the Government of Libya has completely failed to discharge its burden in challenging the admissibility of the case. As such, rather than unnecessarily protracting the admissibility proceedings, the Chamber should issue an immediate decision on the admissibility of the case.
49. Without this information, the Defence is completely deprived of the ability to verify whether the Government is actively investigating the defendant, and whether such investigations encompass the same conduct as the ICC case. In terms of the latter aspect, the ICC Prosecution has correctly observed that,

the admissibility regime is not exclusively concerned with the rights of the State: it also guarantees the rights of the accused/suspect against re-trial (*ne bis in idem*) while also ensuring the effective operation of the goal of the Statute to end impunity, by enabling the ICC to act where a State is inactive in relation to a particular case.³⁴

50. The Chamber's finding concerning whether the admissibility challenge encompasses the same conduct as the ICC case will have significant ramifications for the defendant. If there is not a proper correlation between the two, the defendant may be vulnerable to future prosecutions before the ICC, even if the challenge succeeds, or *vice versa* in the contrary situation
51. The defendant's protection against *ne bis in idem* will be completely eroded if the admissibility proceedings were to devolve into an *ex parte* negotiation between the Prosecution and the State in question. It would also result in completely unbalanced results depending on whether the ICC Prosecution has targeted members of the Government, or members of the opposition/deposed Government, as in the latter case, there is a likely to be a direct correlation of interests between the Prosecution and the Government challenging admissibility.

³⁴ ICC-01/09-01/11-183 at para 91, citing ICC-01/09-01/11-101 at para. 44, which in turn, cited ICC-01/04-01/07-1497, para.85.

52. Both international and domestic courts have recognised that the defendant has a direct interest in being able to contest the underlying factual basis of the extradition request, and that failure to disclose such information to the Defence can prejudice the overall fairness of the proceedings, and warrant the dismissal of the extradition application.
53. For example, the United Nations Human Rights Committee has held that the defendant's right to fair extradition proceedings – in particular, the right to equality before the court and the defendant's right to an effective remedy – was violated in circumstances in which the Prosecution was in a position to appeal adverse decisions concerning the extradition proceedings, but the defendant was not.³⁵
54. In line with this jurisprudence, the fact that the ICC Prosecution has had access to the *ex parte* materials exacerbates rather than remedies the prejudice to the defendant. The Prosecution – which has consistently supported the Government's challenge – has now been placed in a privileged position in terms of its ability to advance its support for the Government's challenge. Moreover, given that the Libyan Government has asserted that it submitted evidence and information to the ICC Prosecution,³⁶ which may have become part of the ICC case file, there is an objective appearance that the Prosecution has a clear disincentive to challenge the reliability or probative value of such evidence.
55. Domestic jurisdictions have also rejected extradition requests on the grounds that the requesting State has provided misleading evidence, or failed to disclose relevant information, which could have allowed the Defence to contest the fairness of the extradition or raise a statutory defence to extradition.³⁷ This would be the case if the State failed to disclose evidence to the Defence, which would have undermined the probative value of the information relied upon by the State.³⁸
56. Indeed, the possibility that the evidence against the defendant was obtained by torture or cruel treatment constitutes a key bar to a defendant's extradition to a particular country. It is self-evident that the defendant will not be able to raise such matters if the requesting country refuses to disclose to the Defence the evidence, which forms the basis of the extradition request. The defendant's right to access such materials

³⁵ Sholam Weiss v. Austria, CCPR/C/77/D/1086/2002, UN Human Rights Committee (HRC), 8 May 2003 at para. 9.6.

³⁶ ICC-01/11-01/11-130-Red, para. 45, 50, 96; Transcript of 9 October 2012, ICC-01/11-01/11-T-2-Red-ENG WT, pp. 12, 14 and 18.

³⁷ C. Nicholls, Cl. Montgomery and J. B. Knowles, The Law on Extradition and Mutual Assistance – International Criminal Law: Practice and Procedure, (Cameron May, London 2004), p. 138. See also Federal Court of Australia - Cabal v United Mexican States [2001] FCA 427, 18 April 2001, para 305.

³⁸ Wellington v. Governor of Her Majesty's prison Belmarsh, [2004] EWHC (Admin) 178, paras 114 and 115.

therefore stems from their right to an effective remedy against such potential abuses of their rights.

57. For this reason, United Kingdom courts have determined that Article 13 of the European Convention on Human Rights (the right to an effective remedy) should apply to extradition proceedings, for the following reasons:

Equality of arms requires that, in normal circumstances, the party contesting extradition should be aware of, and thus able to comment on, the material upon which the court will be basing its decision.

[...]

If the judge concludes that fairness requires that the material be disclosed, but the requesting authority or State is not prepared to agree to this, then the appropriate course will be for the judge to hold that fair process is impossible, that to grant the application for extradition in the circumstances would involve an abuse of process, and to discharge the person whose extradition is sought.³⁹

58. Similarly, the failure of a State to disclose information within its control, which is relevant to a person's complaint that their rights may have been abused, can give rise to adverse inferences being drawn against the State.⁴⁰ As noted *supra*, this is consistent with Article 72(7) of the Statute, and the jurisprudence of the Court concerning material withheld pursuant to Article 54(3)(e).

59. In a domestic scenario, the rejection of an extradition request can create a form of *de facto* impunity for the defendant from domestic prosecution. The fact that domestic courts are willing to dismiss extraditions requests rather than countenance applications, which fail to comport with the requirements of a fair and adversarial process, underscores the importance of the defendant's right to effectively participate in such proceedings.

60. In contrast, the rejection of an admissibility challenge at the ICC simply means that the defendant will be tried before the ICC rather than by the challenging State; there are no impunity gaps. Indeed, the admissibility regime is premised on the principle

³⁹ R (on the application of the United States of America) v. Senior District Judge, Bow Street Magistrates' Court, 6 September 2006, at paras. 90 and 92.

⁴⁰ Estamirov and others v. Russia, application no. 60272/00, 12 October 2006, paras. 102 -103; see also *Inter alia* Israilova and Others v. Russia, no. 35079/04, 28 October 2010, para. 145, *Musikhanova and Others v. Russia*, no. 27243/03, 4 December 2008, para. 107; *Mikheyev v. Russia*, no. 77617/01, 26 January 2006 para. 104

that if a State is unable to satisfy the ICC that it is willing and able to investigate the defendant, “the International Criminal Court must be able to step in”.⁴¹

61. A significant amount of time has elapsed since the Government first challenged the admissibility of the case. During this time, the Government has failed to discharge its burden in challenging the admissibility of the case. The further submissions completely fail to comport with the requirements of Rule 58(3), and the Chamber’s decision of 18 July 2012. If the Pre-Trial Chamber were to accord the Government more time to submit the *ex parte* evidence to the Defence, then it would be abdicating from its duty to step in, in order to ensure the expeditious and effective prosecution of Mr. Gaddafi’s case. The only fair and effective remedy is therefore to issue an immediate decision on the admissibility of the case, which excludes the Government’s further submissions.

3. Relief Sought

62. 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 Government of Libya’s further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi; and
- ii. issue an immediate decision on the admissibility of the case.



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

Dated this, 29th Day of January 2013

At The Hague, The Netherlands

⁴¹ ICC-01/04-01/07-1497 at para. 85.