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PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernandez 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

Libyan Government's Response to Urgent Defence Request of 21 January 2013

Source: The Government of Libya, represented by:
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Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. INTRODUCTION

1. Libya respectfully submits this Response to the “Urgent Defence Request” of 21 January 2013¹ in which the OPCD asserts that the Chamber should make “an immediate decision on the admissibility of the case, and [...] order the Government of Libya to immediately surrender Mr. Gaddafi to the custody of the ICC.”² It also seeks documents from the Libyan Government which it alleges to be privileged material which has been “seized”.

II. BASIS FOR THE OPCD’S REQUEST

2. The OPCD’s primary contention is that “[o]n 18 January 2013, in complete contravention of the Government of Libya’s written assurances to the Court, the Libyan authorities put Mr. Saif Al Islam Gaddafi on trial.”³ The OPCD also alleges that Libya has thereby “exploited their control over Mr. Gaddafi, and the further time accorded by the Chamber to formulate additional admissibility submissions, in order to launch a completely unrelated, and abusive prosecution.”⁴ It is alleged in particular that: “Mr. Gaddafi is essentially being tried for attempting to communicate with the ICC via his Counsel in relation to the fact that his rights had been violated.”⁵
3. The OPCD further contends “that the allegations are predicated on privileged Defence materials, which were illegally seized from the Defence and the defendant, and information garnered from a privileged meeting, which was illegally and deceptively monitored.”⁶ The OPCD thus concludes that: “[t]he mere existence of such a trial therefore exhibits the Government of Libya’s

¹ ICC-01/11-01/11-255 (“Request”).

² Request, para. 11.

³ *Id.*, para. 1.

⁴ *Id.*, para. 3.

⁵ *Id.*, para. 4.

⁶ *Id.*, para. 5.

complete disregard for its obligations under the Rome Statute”⁷ and that “[t]he only effective remedy in such circumstances is to issue an immediate decision on the admissibility of the case, and to order the Government of Libya to immediately surrender Mr. Gaddafi to the custody of the ICC.”⁸

III. SUBMISSIONS IN RESPONSE

4. Libya concurs with the OPCD’s express admission that the national security proceedings against Mr. Gaddafi have “absolutely no connection with the ICC case” for the purposes of its Admissibility Challenge.⁹ Accordingly, it is Libya’s principal submission in response to the Urgent Defence Request that the allegations of abuse of process against Libya are unsubstantiated and manifestly beyond the scope of the admissibility proceedings presently before the Pre-Trial Chamber.
5. The OPCD’s argument adopts a curious and inconsistent logic. The essence of its submission is that the national security prosecution against Mr. Gaddafi “violates Libya’s obligations under the Rome Statute” *because* it has “absolutely no connection with the ICC case”.¹⁰ Libya agrees with OPCD that the recent proceedings against Mr. Gaddafi are not connected with the admissibility proceedings. It is exactly for this reason that they cannot – and do not – constitute a violation of Libya’s obligations to the Court.
6. The OPCD’s argument is based on two false premises. First, it assumes that pending determination of an admissibility challenge, Libya is prohibited from initiating any proceedings other than those relating to the same conduct in proceedings before the ICC. The OPCD has been unable to identify any provision of the Rome Statute in support of that contention, which is erroneous. Libya has made no secret of the fact that its national proceedings are broader in

⁷ *Id.*, para. 6.

⁸ *Id.*, para. 11.

⁹ *Id.*, para. 35.

¹⁰ *Id.*, para. 35.

scope than those before the Court. By way of example, its Application expressly indicates that the investigation against Mr. Gaddafi encompasses both “financial crimes and crimes against the person”.¹¹ Since the filing of the 1 May 2012 Admissibility Challenge, entirely separate criminal proceedings have also been brought against Mr Gaddafi arising from alleged breaches of national security taking place during the June 2012 visit of OPCD counsel to Zintan.

7. Second, the OPCD assumes that proceedings that have “absolutely no connection with the ICC case” nevertheless fall within the jurisdiction of the Pre-Trial Chamber in these admissibility proceedings. Libya has already confirmed in relation to Mr. Al-Senussi’s submissions that “the case relating to crimes against the person (which forms the basis of Libya’s admissibility challenges for both Mr Gaddafi and Mr Al-Senussi) and the national security case against Mr. Gaddafi are completely separate trials which are being dealt with in entirely distinct national proceedings.”¹²
8. The OPCD suggests that its argument for an immediate determination of the admissibility challenge may be based on “abuse of right”. Towards the end of the Request, it asserts that “[i]t is an abuse of Article 95 to utilise Mr. Gaddafi’s presence on Libyan territory for the purpose of initiating additional processes, which in themselves, violate the ICC Statute, and Libya’s obligations under that Statute.”¹³ Presumably, what the OPCD is trying to argue is that the additional proceedings are intended to “evade the obligation”¹⁴ of Libya under the Rome Statute. It is not clear to Libya how these additional proceedings relate to surrender obligations arising under Article 95 with respect to the “postponement of the execution of a request in respect of an admissibility

¹¹ See Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11 (1 May 2012), paras. 23 & 42 (“Application”).

¹² ICC-01/11-01/11-260, para. 17.

¹³ Request, para. 41 (emphasis added).

¹⁴ *Case of the Free Zones of Upper Savoy and the District of Gex, (France v Switzerland)* (1932), PCIJ (Ser. A) No. 32, at para. 225.

challenge". Several months prior to the recent "completely unrelated"¹⁵ proceeding that the OPCD complains of, Libya made an admissibility challenge and proffered substantial probative evidence in support. The assertion that Libya's Article 19 Application is not made in good faith, thus rendering Article 95 inapplicable, is therefore wholly without merit.

9. In any event, it is a well-established principle of international law that such an abuse of a right "cannot be presumed, and it rests with the party who states that there has been such misuse to prove his statement."¹⁶ In this regard, the OPCD has manifestly failed to establish that the ongoing criminal proceedings against Mr. Gaddafi concerning threats to national security constitute an "abuse of process" or that they are being pursued in bad faith. Despite bearing the burden of proof in relation to this matter, the OPCD makes nothing more than unsubstantiated allegations to support its claim.

10. As a purportedly separate strand of its abuse of process argument the OPCD requests the return of certain privileged documents and the destruction of all copies of these documents. It will be recalled that the alleged breaches of national security which led to the additional charges being brought against Mr Gaddafi took place in the context of the alleged transmission of certain information from a notorious Gaddafi regime fugitive via the OPCD counsel, and the OPCD counsel's alleged possession of a concealed electronic device (in a pen) during a privileged meeting with Mr. Gaddafi. It is alleged that these materials, together with other privileged documents, were seized from defence counsel. As the purportedly privileged nature of any such materials has not been waived, it is not proper for the OPCD to seek the return and / or destruction of such documents via counsel for Libya or for counsel for Libya to engage in argument on the substance of the national security allegations

¹⁵ Request, para. 3.

¹⁶ *Case concerning certain German interests in Polish Upper Silesia (The Merits)*, (*Germany v Poland*) (1926), PCIJ (Ser. A) No. 7, at 30.

pertaining to these documents through its Urgent Defence Request. Given the purportedly privileged nature of the documents involved and given counsel's duties to comply with their ICC and home country professional conduct rules – the only proper channel for such a request would be the diplomatic one (ie. channelling such a request through the Libyan Embassy in the Hague).

11. It is Libya's case that it would not be appropriate for the Pre-Trial Chamber to make the order requested in circumstances where the Libyan Court - in the context of the separate national security criminal proceedings against Mr Gaddafi - has yet to determine the following questions:

- (a) Whether OPCD counsel's conduct in June 2012 constituted an unlawful abuse of Article 80 of the Libyan Code of Criminal Procedure on "attorney-client" privilege;
- (b) Whether the evidence of the alleged abuse of privilege was obtained in violation of the procedural rules applicable to privilege; and
- (c) Whether such evidence, if obtained in violation of procedural rules applicable to privilege, is admissible in criminal proceedings before Libyan courts.

These are clearly matters of Libyan criminal law and procedure. They are properly a matter for national courts and do not fall within the ambit of admissibility proceedings before the ICC.

12. The separate question of the scope of the OPCD counsel's functional immunities and privileges under international law is a matter which ought to be determined separately by the organs of the ICC rather by than the Pre-Trial Chamber within these admissibility proceedings. Indeed, it may be recalled that following the meeting between the ICC President and the Attorney-General of Libya on 22 June 2012, the President issued the following statement:

The ICC takes very seriously the information reported by Libyan authorities in relation to the ICC staff members' visit. The ICC fully understands the importance of the matter for the Libyan authorities and the people of Libya.

The Court attaches great importance to the principle that its staff members, when carrying out their functions, should also respect national laws. The information reported by the Libyan authorities will be fully investigated in accordance with ICC procedures following the return of the four staff members.

The ICC deeply regrets any events that may have given rise to concerns on the part of the Libyan authorities. In carrying out its functions, the Court has no intention of doing anything that would undermine the national security of Libya.¹⁷

13. The Statement of the ICC President is consistent with Article 24 of the Agreement on the Privileges and Immunities of the ICC which provides as follows:

1. The Court shall cooperate at all times with the appropriate authorities of States Parties to facilitate the enforcement of their laws and to prevent the occurrence of any abuse in connection with the privileges, immunities and facilities referred to in the present Agreement.

2. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying privileges and immunities under the present Agreement to respect the laws and regulations of the State Party in whose territory they may be on the business of the Court or through whose territory they may pass on such business. They also have a duty not to interfere in the internal affairs of that State.

14. In order to avoid any questions regarding the scope of future privileged visits by defence counsel – whether for Mr. Gaddafi or Mr. Al-Senussi – Libya is in the process of agreeing a protocol for future visits with the ICC Registry so that the applicable regulations are clear.

¹⁷ ICC Press Release: Statement on the Detention of Four Staff Members, ICC-CPI-20120622-PR815 (22 June 2012).

15. Libya notes that the detention regulations adopted by international criminal jurisdictions contain express prohibitions on abuse of privilege and impose limits on the right of counsel to transmit materials to detainees. A useful example is the ICTY United Nations Detention Unit Regulations to Govern the Supervision of Visits to and Communications with Detainees.¹⁸ Its regulations provides that “[c]orrespondence addressed to or from counsel for the detainee shall not be interfered with” unless there are “reasonable grounds for believing that this facility is being abused” in order to: (i) arrange escape; (ii) interfere with or intimidate a witness; (iii) interfere with the administration of justice; or (iv) otherwise disturb the maintenance of security and good order in the detention unit.¹⁹

16. The regulation on interference with correspondence applies equally to documents passed by counsel to and from a detainee during a visit.²⁰ Other regulations provide for “personal searches of clothing and X-ray examination of possessions on entry”,²¹ the immediate termination of visits if there are “reasonable grounds for intervention” or the belief that the regulations “are being breached in any way” including “visits by counsel”,²² and that “[a]ll visits shall be conducted within the sight of the staff of the detention unit”.²³ If such limitations apply to the UN Detention Unit in the safe confines of The Hague, they should apply *a fortiori* to the much more challenging security situation currently prevailing in Libya.

17. Other than its unsubstantiated allegations concerning “abuse of process”, the OPCD makes several other assertions that, upon closer examination, are either

¹⁸ IT/98/REV.4.

¹⁹ Regulation 11 (emphasis added).

²⁰ Regulation 41(B).

²¹ Regulation 38.

²² Regulation 42.

²³ Regulation 43.

mere assertions without supporting evidence, a misrepresentation of evidence, or are simply false. For example, the OPCD makes much of the fact that prior to the June 2012 visit, Libya assured the Court that any statements made by the OPCD which are made within their proper remit of defending Mr Gaddafi in criminal proceedings would not and cannot constitute a violation of Law No. 37.²⁴ This assurance was given in response to the Defence's prior assertion that:

*"The promulgation of law no. 37 on 3 May 2012 by the National Transitional Council on has also had a chilling effect on the independence of the Defence. Article 1 of Law 37 declares that firstly, Libya is in a state similar to armed conflict, and secondly, that anyone who praises Saif Al Islam Gaddafi, suggests that he is a reformer, makes false allegations or press releases during this state of conflict, can be criminally sanctioned, potentially for life if the statements or press releases cause harm to the country."*²⁵

18. With greater diligence – or even a cursory internet search – it would become apparent to the OPCD that on 27 June 2012, the Supreme Court of Libya ruled that Law No. 37 was unconstitutional. Non-governmental human rights organizations such as Lawyers for Justice in Libya hailed this decision as “a historical day for justice and the rule of law in Libya” and a “vital step towards instilling confidence in the Libyan judicial system, a system which today asserted its independence and moved closer towards affirming the rule of law in Libya.”²⁶ As such, not only has Law No. 37 had no bearing at all upon the national security case brought in relation to Mr Gaddafi, but even if it had, that law has been unconstitutional for many months. This is yet another instance of OPCD's failure to proceed with diligence in making allegations against Libya.

²⁴ Request, para. 45.

²⁵ ICC-01/11-01/11-152-Red, para. 81.

²⁶ <http://www.libyanjustice.org/news/news/post/28-lfjl-applauds-the-supreme-court-of-libya%E2%80%99s-decision-on-law-37>

19. The OPCD also makes a range of serious and erroneous allegations against Libya's ICC Coordinator, Professor Ahmed El-Gehani. By way of example, it is alleged that Mr. Gaddafi confirmed to OPCD counsel during the visit that Professor El-Gehani had told him that the Libyan judiciary had been "unable to conduct investigations against him for serious crimes (such as murder) due to a lack of evidence, and for that reason, they had closed the investigation into these crimes", and that if Mr. Gaddafi confessed to "financial regulatory offences" he could "expect leniency" or otherwise "be kept in jail without any visits from lawyers or friends until he confessed."²⁷ Whether or not Mr. Gaddafi relayed such a story to OPCD counsel, it is a manifestly absurd and patently false statement that was never made by Professor El-Gehani.

20. Yet another unsubstantiated assertion is OPCD's reference to "Counsel for Libya's frank concession that the Government had challenged the admissibility of the case not because they wished to genuinely investigate him for the same conduct as the ICC, but because they did not wish to surrender him to the ICC."²⁸ There is no indication whatsoever in the Request as to when or where counsel for Libya has ever made such a "concession". It is presumed that this complaint originates from the hearing at which counsel for Libya made clear that the timing of its admissibility challenge was prompted by the surrender request²⁹ but there was absolutely no concession at all that the underlying investigation giving rise to that admissibility challenge was not genuine. There could be no such concession by counsel for Libya as the genuineness of the Libyan investigation is, Libya submits, beyond doubt.

21. Further, the OPCD alleges that "a mere two days before Mr. Gaddafi's trial hearing, the Government of Libya claimed that the reports that Mr. Gaddafi

²⁷ Request, para. 57.

²⁸ Request, para. 47.

²⁹ ICC-01/11-01/11-T-3-CONF-ENG ET 10-10-2012 44/66

would be put on trial within the next month were completely incorrect.”³⁰ This presumably refers to the Observations by Libya in response to the OPCD Notification of 8 January 2013, submitted on 15 January 2013, in which the OPCD alleged – based solely on media reports and without any attempt at verification – that “the trials of Mr. Saif Al Islam Gaddafi and Mr. Abdullah Al-Senussi are scheduled to start in a month’s time i.e. the beginning of February 2013”. The OPCD’s submission and Libya’s response clearly related to the trials of Mr. Saif Al Islam Gaddafi and Mr. Abdullah Al-Senussi for crimes against the person, and not to a trial against Mr. Gaddafi that has no relation whatsoever to the admissibility proceedings. In its Observations, Libya confirmed “that such press reports are not accurate, that the trials of Saif Al-Islam Gaddafi and Abdullah Al-Senussi will not commence in February 2013.”³¹ Libya has subsequently clarified that: “Counsel were not informed of the Zintan hearing in advance as it was considered to be irrelevant to Libya’s admissibility challenge before the ICC.”³² Notwithstanding this obvious distinction, and its own express admission that the 17 January 2013 proceeding has “absolutely no connection with the ICC case”³³, the OPCD still unfairly chooses to maintain that Libya’s “repudiation” of these media reports was “potentially deceptive, and disingenuous at best.”³⁴

22. These illustrative examples are indicative of the Defence’s general approach, which is to make an endless succession of repetitive and “urgent” submissions that make unsubstantiated allegations and misrepresentations to undermine Libya’s admissibility challenge and which do little to advance the admissibility proceedings. By way of example, the presumptive and contradictory “abuse of process” argument in the present Request simply recycle previous baseless arguments to cast aspersions against Libya. Responding to these kinds of

³⁰ Request, para. 49.

³¹ ICC-01/11-01/11-251, para. 3.

³² ICC-01/11-01/11-260, para. 17.

³³ *Id.*, para. 35.

³⁴ Request, para. 49.

repetitive and unsubstantiated submissions is a distraction from Libya's efforts to vigorously pursue its transitional justice strategy and judicial capacity-building efforts with the assistance and support of the UN Support Mission in Libya and civil society under difficult circumstances.

23. In a press statement read out at a meeting organised by Human Rights Watch, Libya's Minister of Justice, Mr. Salah Marghani, recently emphasized that "[c]ooperating with activists and human rights societies is central to the Ministry's policies" and that Libya will soon adopt laws "on transitional justice, prohibiting trials of civilians in front of military courts and preventing torture." These measures, he explained "would promote reconciliation and enable trials to take place in Libya without compromising international standards." The representative of Human Rights Watch remarked that the Minister's statement was "impressive" and "quite a commitment".³⁵

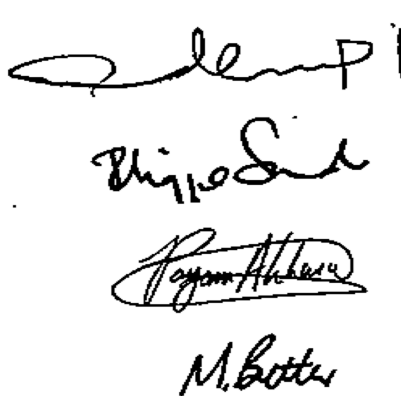
24. Amidst the many competing priorities of post-conflict stabilization and reconstruction, Libya submits that it is plainly acting properly in the admissibility proceedings before the ICC. It is not litigating its case before the media, and is exercising considerable restraint in the face of erroneous and inappropriate accusations. Libya regrets the unsubstantiated allegation that it is acting in bad faith and has engaged in an "abuse of process", claims that are unbecoming of an organ of the International Criminal Court.

IV. CONCLUSION

25. For the reasons set forth above, Libya respectfully requests that the Pre-Trial Chamber dismiss in its entirety the OPCD Request.

³⁵ Justice Minister regrets slow progress, *Libya Herald*, <http://www.libyaherald.com/2013/02/06/justice-minister-regrets-slow-progress/>

Respectfully submitted:



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Dated this 11th day of February 2013
At London, United Kingdom