

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: 7 May 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**  
**With Public Annexes 1,2,and 3**

**Addendum to the “Urgent Defence Request” of 21 January 2013, and Request for  
Finding of Non-Compliance**

**Source: Defence for Mr. Saif Al-Islam Gaddafi**

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

**The Office of the Prosecutor**

Ms. Fatou Bensouda

**Counsel for the Defence**

Counsel for Saif Al-Islam Gaddafi:

Mr. John R.W.D Jones QC

Counsel for Abdullah Al-Senussi:

Mr. Ben Emmerson QC

Mr. Rodney Dixon

Ms. Amal Alamuddin

Mr. Anthony Kelly

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**

Ms. Paolina Massidda

Ms. Sarah Pellet

Mr. Mohamed Abdou

**The Office of Public Counsel for the  
Defence**

**States' Representatives**

Mr. Phillipe Sands QC

Mr. Payam Akhavan

Ms. Michelle Butler

**Amicus Curiae**

**REGISTRY**

---

**Registrar**

Mr. Herman von Hebel, Registrar

**Deputy Registrar**

Mr. Didier Daniel Preira, Deputy  
Registrar

**Victims and Witnesses Unit**

**Counsel Support Section**

**Detention Section**

**Victims Participation and  
Reparations Section**

**Other**

## **1. Introduction**

1. On 2 May 2013, Mr. Saif Al-Islam Gaddafi was brought before a Libyan court to face spurious and abusive charges that are predicated on privileged documents and information, which were illegally seized during the meeting between Mr. Gaddafi and his Counsel on 7 June 2012.
2. The public convocation of this hearing exemplifies the Government of Libya's utter disregard for both its obligations towards the ICC and Mr. Gaddafi's rights under the Rome Statute, which include the privileges and immunities of his Defence and his right to privileged communications with his Counsel.
3. The announcement of the Libyan authorities that the hearing will be delayed until September 2013 to enable the authorities once more to obtain the attendance of Mr. Gaddafi's co-defendants – which includes the four members of the ICC delegation - is part of a consistent practice by the Libyan authorities to wield the threat of criminal proceedings in order to attempt to obtain inappropriate concessions from the ICC.
4. The very public condemnation of other persons associated with the Defence would also appear to serve the purpose of retaliating against and intimidating any person who might wish to assist Mr. Gaddafi to defend himself in a court of law.
5. The continuation of these proceedings – which are premised on illegally seized Defence documents – constitutes a direct breach of the Pre-Trial Chamber's order that the Libyan authorities were obliged to surrender these documents, and destroy any copies.
6. At the same time, the absence of any legal ramifications for their past and continuing acts of non-compliance appears to have emboldened Libyan authorities to such an extent that key Government officials now routinely announce that they have absolutely no intention of ever surrendering Mr. Gaddafi to the custody of the ICC, should their admissibility challenge fail.<sup>1</sup>

---

<sup>1</sup> Libyan Minister of Foreign Affairs to "Al-Sharq Al-Awsat": We will not surrender Saif Al-Islam Gaddafi for the International Court, 3 April 2013, BBC Interview with Prime Minister Ali Zeidan, 1 May 2013 (English translations in Annex1).

7. Libyan officials also appear to be privy to information concerning the outcome or at least timing of the decision on the admissibility challenge,<sup>2</sup> which, if true, would suggest that there has been at least a degree of politicking behind closed doors, which is inimical to the appearance of the independence and impartiality of the ICC.
8. This appearance must be dispelled. The ICC is a court of law, and States should not be permitted to ignore the authority of the Court with impunity, or to initiate unfounded prosecutions with a view to either extracting legal concessions from the Court or intimidating the Defence.
9. The Defence therefore requests the Pre-Trial Chamber to make an immediate finding of non-compliance on the part of Libya, which should be reported to the Security Council.
10. The Chamber's silence thus far on such fundamental matters, coupled with its failure to issue a timely decision on the admissibility challenge, has effectively rewarded Libya for its non-compliance by extending the time period over which Libya has lawfully exercised physical custody of Mr. Gaddafi.
11. The only appropriate remedy in these circumstances is thus for the Chamber to revoke its Article 95 postponement decision, and order Mr. Gaddafi's immediate surrender to the custody of the ICC.

## **2. Procedural History**

12. On 27 April 2012, the Pre-Trial Chamber ordered the Libyan authorities to implement a privileged visit between Mr. Gaddafi and his Defence.<sup>3</sup>
13. On 7 June 2012, during the visit to Mr. Gaddafi, the ICC delegation was arrested and detained for 26 days. Without the knowledge of the ICC delegation, the 'privileged' visit was surreptitiously recorded and monitored.
14. In violation of Article 80 of the Libyan Code of Criminal Procedure, and without first seeking an order of the ICC,<sup>4</sup> the Libyan authorities seized various privileged Defence documents from the Defence Counsel and the defendant,

---

<sup>2</sup> 'Libya expects ICC ruling on Saif al-Islam trial in May: lawyer' *Reuters* 2 May 2013, <http://www.reuters.com/article/2013/05/02/us-libya-gaddafi-icc-idUSBRE9410HK20130502>

<sup>3</sup> ICC-01/11-01/11-129, at paras. 11-12.

<sup>4</sup> ICC-01/11-01/11-190-Corr-Red at paras. 272- 273.

and interrogated the guards monitoring the visit, Mr. Gaddafi, and the ICC delegation on issues which should have been protected by legal professional privilege.<sup>5</sup>

15. On 18 January 2013, a trial hearing was conducted against Mr. Gaddafi in relation to allegations that he had breached national security whilst meeting with his Counsel on 7 June 2013.

16. On 21 January 2013, the Defence for Mr. Gaddafi requested the Pre-Trial Chamber to:

issue an immediate decision on the challenge to admissibility, on the basis that the Libyan authorities have abused the processes of the Court by utilising the extension of time granted to them to launch a prosecution against Mr. Gaddafi, which has absolutely no connection to the ICC case, and which violates Libya's obligations under the Rome Statute and SCRes 1970.<sup>6</sup>

17. The Defence further requested the Chamber to:

order the Libyan authorities to:

- a. immediately surrender Mr. Gaddafi to the ICC, on the grounds that the Libyan authorities have abused Article 95 of the Statute; and
- b. immediately surrender all Defence documents, which were illegally seized from Counsel and the Defendant, and destroy any related copies or records.<sup>7</sup>

18. On 1 March 2013, the Pre-Trial Chamber issued its 'Decision on the Urgent Defence request, in which the Chamber found that "Libya must return to Counsel the originals of the materials belonging to the Defence and seized in Zintan as well as destroy any copies thereof".<sup>8</sup>

19. The Pre-Trial Chamber also noted the "concerns raised by the OPCD but considers that they can be appropriately addressed in its final decision on the Admissibility Challenge to be taken in due course".<sup>9</sup>

20. Although the Government of Libya sought both leave to appeal and reconsideration of this decision, the Pre-Trial Chamber rejected both requests on 24 April 2013.<sup>10</sup>

<sup>5</sup>ICC-01/11-01/11-190-Corr-Red at paras.263 and 265.

<sup>6</sup> ICC-01/11-01/11-255 at para. 35.

<sup>7</sup> ICC-01/11-01/11-255 at para. 36.

<sup>8</sup>ICC-01/11-01/11-291 at para. 27.

<sup>9</sup> At para. 24.

<sup>10</sup>ICC-01/11-01/11-316-Corr.

21. On 2 May 2013, it was reported that a hearing was convened against Mr. Gaddafi in Zintan, in connection with allegations concerning violations of national security related to the meeting between Mr. Gaddafi and his Counsel on 7 June 2012.
22. The Libyan authorities did not formally notify the ICC concerning their intention to convoke this hearing. They also failed to submit a request to the ICC for a waiver of privileges and immunities as concerns any of the persons charged in connection with these proceedings, or any of the materials, which are the subject matter of the proceedings.
23. The Defence was not officially notified of the hearing, and has not been provided with any official documents or information concerning the charges. It has, however, discovered a partial video of the hearing on You Tube.<sup>11</sup>
24. Although the video of the hearing does not appear to be complete, and may have been edited in an unreliable manner, the following is apparent:
  - i. The proceedings continue to encompass the four members of the ICC delegation, notwithstanding the fact that Libya has never requested the ICC to waive their privileges and immunities;
  - ii. Certain individuals have been named as co-defendants, although the only knowledge that the Libyan authorities possess as concerns the relationship of these individuals to the Defence stems from illegally seized privileged Defence documents;
  - iii. Mr. Gaddafi has once again been brought before a panel of three judges, constituting a Trial Chamber, rather than an Accusation Chamber; and
  - iv. The trial hearings have been postponed until mid-September, and Mr. Gaddafi will remain under the control of the Zintan authorities until at least this date.
25. At a subsequent press-conference, it was announced that Mr. Gaddafi is being charged with ‘conspiring with foreign entities’ and insulting the Libyan flag.<sup>12</sup>

---

<sup>11</sup> Annex 2.

<sup>12</sup> Annex 3.

26. It would therefore appear from the charge of ‘conspiring with foreign entities’ that the Libyan authorities consider Mr. Gaddafi’s legitimate attempt to express his wish to be tried before the ICC, and to communicate his concerns to his Counsel, constitute crimes under Libyan law.

### 3. Submissions

27. Although the Pre-Trial Chamber granted the request of the Libyan Government to postpone the surrender of Mr. Gaddafi pending its consideration of the admissibility challenge, this decision did not give the Libyan Government an unfettered right either to subject Mr. Gaddafi to domestic criminal proceedings that have no *prima facie* nexus to the ICC case, or to deprive Mr. Gaddafi of his rights under the ICC Statute.
28. To the contrary, the Chamber emphasised that in exercising physical custody over Mr. Gaddafi, Libya must refrain from any actions which could impede, or delay the ability of Libya to comply with its obligations to the Court, including implementation of the surrender request.<sup>13</sup> The decision of the Libyan authorities to continue the national security prosecutions against Mr. Gaddafi and other persons constitutes a direct violation of the Pre-Trial Chamber’s order for the surrender of privileged documents, and Libya’s obligations under the Rome Statute, including the privileges and immunities set out in Article 48.
29. Article 95 of the Statute does not permit the Libyan authorities to maintain physical custody over Mr. Gaddafi in connection with allegations falling outside of the scope of the ICC-related case.
30. The application of Article 95 is also subject to the Chamber’s overriding duty to ensure that Mr. Gaddafi’s continued detention within the custody of national authorities does not infringe on his rights under the ICC.

*3.1 The continuation of the national security prosecutions violates the Pre-Trial Chamber’s order concerning the surrender of privileged materials, Libya’s obligations under the Rome Statute, and the terms of the Article 95 decision on postponement of surrender*

---

<sup>13</sup>ICC-01/11-01/11-163 at para. 40.

31. As noted above, although the Defence has not been officially notified of the charges against Mr. Gaddafi, it is apparent from the names of the co-defendants that the prosecution is predicated on information which stems from illegally seized privileged materials.
32. In any case, the Government has not transmitted the Defence documents to the Registry nor is there any indication that it has destroyed any copies.
33. The Government was not granted suspensive effect as concerns its obligation to surrender these documents. It has thus remained in non-compliance with the order for the return of Defence documents for over two months.<sup>14</sup>
34. Moreover, notwithstanding repeated findings from the Pre-Trial Chamber that Libya is bound by the terms of the Rome Statute, including Article 48, the Government of Libya has failed to request the ICC to waive the privileges and immunities of either the four ICC officials, or their three co-defendants.
35. In this connection, as concerns Mr. Gaddafi himself, Article 48(4) of the Statute provides that “any other person required to be present at the seat of the Court shall be accorded such treatment as is necessary for the proper functioning of the Court, in accordance with the agreement on privileges and immunities of the Court.”
36. As the defendant, who has a right to effectively participate in his case, Mr. Gaddafi is clearly a person who is required to be present at the seat of the Court.<sup>15</sup> The operation of Article 48(4) is not contingent on the person in question actually being present at the seat of the Court; its protection extends to any person who is ‘required to be present’.<sup>16</sup>
37. The ICTY Appeals Chambers has clarified firstly, that the phrase ‘other persons required to be present at the Court’ should be interpreted in conjunction with the phrase “necessary for the proper functioning”, and as such, should encompass persons who play a key role in the judicial proceedings before the Court, and secondly, that in order for such protection to be effective, it cannot

---

<sup>14</sup>ICC-01/04-01/06-2582 at para. 48.

<sup>15</sup> The equivalent Statutory provisions of the ICTR and ICTY concerning privileges and immunities (Article 28(4) and Article 30(4) respectively) expressly cite the accused as an example of a person, who is required to be present at the seat of the Court.

<sup>16</sup>This interpretation is supported by the terms of Article 22(1) of the Agreement on the Privileges and Immunities of the Court, which explicitly extends protection to scenarios, in which persons are not physically present at the court, for example, time spent on journeys in connection with a person’s appearance before the Court.



be limited to the time period when the person is physically present at the seat of the Court.<sup>17</sup>

38. Clearly, the proper functioning of the Court requires that a defendant should be able to communicate freely with his counsel on Defence matters, without fear of retaliation or prosecution by domestic authorities.<sup>18</sup> This is particularly the case as concerns communications which occurred within the context of an official ICC mission, such as was ordered by the Chamber.
39. The fact that a State cannot unilaterally decide to prosecute an ICC defendant for non-ICC related crimes is further bolstered by Article 89(4) of the Statute, which provides that:

If the person being sought is being proceeded against or is serving a sentence in the requested State for a crime different from that for which surrender to the Court is being sought, the requested State, after making its decision to grant the request, shall consult with the Court.

40. Critically, this article requires the State to firstly, consent to the surrender of the defendant to the ICC, and secondly, consult with the Court concerning the modalities of pursuing such domestic proceedings.
41. At no point in time has the Government ever indicated to the ICC that it would be willing to implement the Court's surrender request. To the contrary, as noted above, Government officials have recently emphasised their obdurate opposition to Mr. Gaddafi's surrender to the ICC.
42. Article 89(4) also regulates the situation of domestic proceedings, which were initiated prior to the receipt of the Court's surrender request. This is apparent from the use of the tense "is being proceeded against", which clearly indicates that the domestic prosecution must be in existence at the time that the surrender request was issued.
43. Neither Article 89(4) nor any other provisions of Part 9 permit a State to initiate proceedings against a defendant in relation to events which postdate the issuance of a surrender request. The only possibility for such prosecutions would be pursuant to Article 70 of the Statute (offences against the

<sup>17</sup> Prosecutor v. Gotovina, 'Decision on Gotovina Defence Appeal Against 12 March 2010 Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia', 14 February 2011, at paras. 27 -33. See also paragraph 7 of Annex A (the Memorandum of the Assistant Secretary General for Legal Affairs, Mr. Larry Johnson, 26 November 2007, ICC-01/11-01/11-284-AnxA.

<sup>18</sup> This is consistent with the findings of the ICTY Appeals Chamber in the above-cited Gotovina decision, at para. 31.

administration of justice), in conjunction with Rule 162 of the Rules of Procedure and Evidence.

44. Rule 162 specifies that it is for the ICC Chamber to determine whether it should exercise jurisdiction, or defer the matter to national courts. It is therefore a breach of the Statute for domestic authorities to arrogate to themselves the right to initiate criminal prosecutions against an ICC defendant for conduct related to the execution of an official ICC mission.
45. A further consequence of the initiation of the national security prosecutions against Mr. Gaddafi is that the Libyan authorities cannot be considered to be actively prosecuting Mr. Gaddafi for the ICC related allegations, for the duration of the national security trial.
46. During the press-conference convened on 2 May 2013, the local authorities announced that the national security trial against Mr. Gaddafi would be conducted in Zintan.<sup>19</sup> Given that the Government has maintained that the ICC-related case against Mr. Gaddafi will be conducted in either South Tripoli or Tripoli, it would appear that the national security proceedings would need to be concluded before the commencement of the ICC-related trial.
47. Essentially, the Libyan authorities are now doing exactly what the Pre-Trial Chamber has expressly stipulated that they cannot do: namely, they cannot retain physical custody over Mr. Gaddafi for the purpose of prosecuting him for non-ICC related crimes, with a view to conducting ICC related prosecutions at a later stage.
48. In their 23 January 2012 filing, the Libyan Government requested to postpone the surrender of Mr. Gaddafi so that they could prosecute him for serious crimes, which did not overlap with the ICC case, although they foreshadowed that they might initiate charges related to the ICC case at a later stage.<sup>20</sup> The Pre-Trial Chamber unequivocally rejected this request, finding that the Statute does not permit a State to postpone surrender for the purpose of pursuing charges, which are not related to the ICC case.<sup>21</sup>
49. In a subsequent 22 March 2012 filing, the Libyan Government again sought to defer its obligation to surrender Mr. Gaddafi to the ICC on the basis that it

---

<sup>19</sup> Annex 3.

<sup>20</sup> ICC-01/11-01/11-44-Anx1-Red.

<sup>21</sup> ICC-01/11-01/11-72.

intended to challenge admissibility in the near future.<sup>22</sup> The Pre-Trial Chamber again rejected the request, concluding that the right to postpone surrender could only be invoked when there is an admissibility challenge under consideration.<sup>23</sup>

50. Although the Pre-Trial Chamber eventually granted a later postponement request, which was filed contemporaneously with an admissibility challenge, the Chamber also underscored that :

Since it is the Chamber that has issued the warrant of arrest and the related request for surrender to the Court, the Chamber has the authority to decide that a state may postpone the execution of a surrender request to the extent that such a challenge has been properly made pursuant to article 19(2) of the Statute and rule 58(1) of the Rules (emphasis added).<sup>24</sup>

51. Libya only has the right to challenge jurisdiction under article 19(2)(b) of the Statute if it is investigating or prosecuting the ICC related case. Its entitlement to postpone surrender pursuant to Article 95 is thus confined to such circumstances. By contrast, an admissibility challenge cannot be said to have been properly made pursuant to article 19(2) if the domestic investigations or prosecutions concerning the ICC case are set aside to enable the domestic authorities to conduct proceedings, which are completely unrelated to the ICC case.
52. It is therefore completely abusive for the Libyan authorities to exploit the Chamber's Article 95 postponement decision in order to launch an additional criminal prosecution against Mr. Gaddafi, which would not in itself, have triggered an Article 95 postponement decision.

*3.2 The continuation of the national security proceedings against Mr. Gaddafi violates his rights under the Statute, and as such, Mr. Gaddafi's continued physical presence in Libya is directly incompatible with his fair trial rights before the ICC*

53. Every aspect of the Rome Statute, including the Part 9 cooperation regime and article 95 in particular, must be interpreted and applied in a manner which is consistent with internationally recognised human rights. This includes “ first

---

<sup>22</sup> ICC-01/11-01/11-82.

<sup>23</sup> ICC-01/11-01/11-100 at para. 18

<sup>24</sup> ICC-01/11-01/11-163 at para. 37.

and foremost, in the context of the Statute, the right to a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety” .<sup>25</sup>

54. In line with the fact that the burden for challenging the admissibility of the case falls on the challenging State, pending the outcome of the challenge, the Pre-Trial Chamber must also operate under the assumption that the case will be prosecuted before the ICC. As such, the Pre-Trial Chamber remains under a positive duty to ensure that the defendant will be in a position to exercise his fair trial rights under the Rome Statute, should the challenge be rejected.
55. It therefore follows that as the ICC Pre-Trial Chamber is ultimately responsible for determining whether to grant an Article 95 postponement of surrender request, it must take into consideration the impact of such a decision on the ability of the defendant to avail himself of his rights under the Statute. In circumstances in which a failure to surrender the defendant to the custody of the ICC would prejudice the defendant’s right to a fair trial before the ICC, the request for postponement should be rejected or the postponement decision should be revoked.
56. This is consistent with the fact that the ICC Appeals Chamber recently acknowledged that even if a defendant is detained outside the authority of the Court, the ICC retains an obligation to ensure that the conditions under which the defendant is detained do not infringe upon the defendant’s fair trial rights before the ICC.<sup>26</sup>
57. The national security prosecution, which has been initiated against Mr. Gaddafi, constitutes a complete violation of his rights under the Statute.
58. The mere fact of prosecuting Mr. Gaddafi for attempting to communicate his Defence strategy and concerns to his Counsel constitutes an utter repudiation of his right under article 67(1) to freely communicate with his Defence in confidence.
59. The contemporaneous prosecution of his former Defence counsel – in complete violation of the privileges and immunities of the ICC – has also utterly undermined his right to effective legal representation before the ICC. No Counsel can assume the risk of visiting Mr. Gaddafi and attempting to communicate with him in an environment in which the Counsel could

---

<sup>25</sup>ICC-01/04-01/06-772 para. 37

<sup>26</sup>ICC-01/04-02/12-67 at para. 8.

potentially be arrested, strip-searched, their documents seized, their confidential strategy monitored, and legitimate Defence interaction cited as evidence for spurious national prosecutions. Mr. Gaddafi has therefore been deprived of the ability to effectively participate in his case for the last 17 months.

60. As the Chamber is aware, the national security proceedings have also had significant consequences for the security and protection of actual and potential Defence witnesses.
61. The fact that there have been absolutely no consequences in connection with the Government's utter disregard for the authority of the ICC also sends the regrettable message to potential Defence witnesses that the ICC is either unwilling or unable to take any measures to protect persons affiliated with the Defence from retaliatory measures. Unless immediate remedial measures are taken, the Defence will find itself in the position that it will be unable to obtain the cooperation and assistance of persons, who may possess key exculpatory information, due to the legitimate concern of such persons that they will be subjected to retaliatory measures by the Libyan authorities.
62. During the press-conference, the authorities also confirmed that Mr. Gaddafi continues to be held in isolation.<sup>27</sup>
63. The United Nations Special Rapporteur on Torture, and other Cruel and Inhumane Treatment, Juan Méndez, has observed in connection with solitary confinement that "medical studies and anecdotal evidence has additionally shown that this form of social isolation and sensory deprivation can cause serious harm to the physical and mental state of a detainee, even after a short period of time".<sup>28</sup> For this reason, "solitary confinement that is either indefinite or prolonged, as I have defined as exceeding 15 consecutive days in length, should be subject to an absolute prohibition because of the severe pain and suffering that it inflicts."<sup>29</sup> For this reason, the Special Rapporteur concluded that the "extradition of a detainee to a State that practices prolonged solitary confinement with limited recourse would violate Article 3 [of the ECHR]."<sup>30</sup>

---

<sup>27</sup> Annex 3.

<sup>28</sup> 'Submission By Juan E. Méndez, United Nations Special Rapporteur On Torture And Other Cruel, Inhuman, Or Degrading Treatment Or Punishment', Ahmad et al. v. United Kingdom, Application Nos. 24027/07, 11949/08 and 36742/08 at p. 2.

<sup>29</sup> At p. 2.

<sup>30</sup> At. p3.

64. The injunction in Article 21(3) that the Rome Statute must be interpreted and applied in a manner which is consistent with internationally recognised human rights law, clearly prohibits the Chamber from allowing a State to benefit from Article 95, in circumstances in which it would potentially subject the defendant to cruel and inhumane treatment.
65. The 2 May hearing against Mr. Gaddafi *et alia* for alleged ‘national security violations’ must also be viewed against the current political context, in which militia have successfully railroaded legal and political processes, in order to force through a vehemently anti-Gaddafi agenda. These developments illustrate the impossibility of securing Mr. Gaddafi’s rights under either the Rome Statute or Libyan law in an effective manner, whilst he remains under Libyan custody.
66. After a week during which armed militia surrounded key Ministries, including the Ministry of Justice, and threatened to maintain their hold unless the Political Isolation law was passed in its most extreme form, the General National Congress ultimately acceded to this demand.<sup>31</sup> Under the broad terms of this law, many key Government officials, who were responsible for liaising with facilitating international cooperation and attempting to reform Libya’s judicial system, are likely to be forced from office.<sup>32</sup>

<sup>31</sup> Shennib, G. and Donati, J. ‘Libyan parliament bans ex-Gaddafi officials from office’ *Reuters* 5 May 2013, <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/10039350/Libya-votes-to-ban-senior-Gaddafi-officials-from-government.html> ; ‘Under militia pressure, Libyan parliament passes law banning Gadhafi-era officials from posts’ *Associated Press* 5 May 2013, [http://www.washingtonpost.com/world/middle\\_east/libya-parliament-passes-law-banning-senior-gadhafi-era-officials-from-government/2013/05/05/a3b9e2ca-b5a1-11e2-b568-6917f6ac6d9d\\_story.html](http://www.washingtonpost.com/world/middle_east/libya-parliament-passes-law-banning-senior-gadhafi-era-officials-from-government/2013/05/05/a3b9e2ca-b5a1-11e2-b568-6917f6ac6d9d_story.html) ; ‘Libya gunmen press siege of ministries’, *Agence France Presse* 1 May 2013, <http://english.alarabiya.net/en/News/africa/2013/05/01/Libya-gunmen-press-siege-of-ministries-.html> ; Mohamed, E. and Michael, M. ‘Storming Ministries, Libya’s Militias Put Pressure’, *Associated Press* 30 April 2013, <http://abcnews.go.com/International/wireStory/militiamen-besiege-libyas-justice-ministry-19072547?singlePage=true#.UYdyTKJHJqw>

<sup>32</sup> One of the overarching objectives of promoting the law was apparently to seek the ouster of Prime Minister Zeidan, the Justice Minister Marghani, and the Foreign Minister Abdel-Aziz. Notwithstanding the fact that the law has been passed, militia have continued to barricade key Ministries in order to achieve this objective. Elumami, A. ‘Militiamen at ministries say they intend to stay’ *Libya Herald* 6 May 2013, <http://www.libyaherald.com/2013/05/06/militiamen-at-ministries-say-they-intend-to-stay/> ; ‘Libya gunmen besieging ministries demand govt quits’ *Agence France-Presse* 6 May 2013, <http://www.globalpost.com/dispatch/news/afp/130506/libya-gunmen-besieging-ministries-demand-govt-quits-0> ; Khan, U. ‘Victorious militiamen want Zeidan out’ *Libya Herald* 6 May 2013, <http://www.libyaherald.com/2013/05/06/victorious-militiamen-want-zeidan-out/> ; Mezran, K. and Pack, J. ‘Libyan stability at risk’ *Foreign Policy* 2 May 2013, [http://mideast.foreignpolicy.com/posts/2013/05/02/libyan\\_stability\\_at\\_risk](http://mideast.foreignpolicy.com/posts/2013/05/02/libyan_stability_at_risk) ; Abdul-Wahab, A. ‘SSC gunmen threaten to release Jadaida Prison inmates’ *Libya Herald* 3 April 2013, <http://www.libyaherald.com/2013/04/03/ssc-gunmen-threaten-to-release-jadida-prison-inmates/>

67. The continuation of the national security proceedings against Mr. Gaddafi cannot be viewed as a temporary aberration, which will be resolved in time or abandoned if Libya obtains suitable concessions. In this current context, the only method to maintain an official position in the government, judiciary or police is to both adapt to and adopt the current anti-Gaddafi animus. Anyone suspected of promoting the rights of former Gaddafi officials could be accused of opposing the 17 February revolution, which is an automatic ground for exclusion from office.<sup>33</sup> It would therefore be politically and legally untenable for anyone currently in office to be seen to be taking a pro-Gaddafi or anti-revolution stance by abandoning a domestic prosecution, which the authorities have presented as being vital to national security.
68. The promulgation of the Political Isolation law will thus erode the judicial protections for former Gaddafi officials by targeting experienced judges, and any judges, who might rule in a manner which is deemed contrary to the ‘goals’ of the 17 February revolution. Consequently, trial by an independent judiciary in Libya is an even more distant aspiration than before.
69. As noted by the Defence in its February 2013 response, the impetus to pass the Political Isolation law gained momentum after the Supreme Court issued its December 2012 decision, and would appear to have the objective of directly interfering in the judicial process:

A group of members of the GNC publicly demanded on 24 December that the adoption of the law be expedited in order to ensure that anyone perceived to be associated with the former regime could be removed from the judicial establishment. In terms of the nexus between this decision and the adoption of the law, protests demanding the adoption of the law commenced on the day the decision was issued, and the GNC approved the passage of the law three days later.

On the same day that the decision to adopt such a law was approved, the GNC created a Justice and Judicial Affairs committee, which “discussed the fact that the judges presiding in some of the trials of the former regime officials had taken part in the “special courts” of the Gaddafi era. [...] the committee said that it was important to exclude these figures from the current trials to ensure the transparency and integrity of the process”.

---

<sup>33</sup> S. Zaptia, ‘Political Isolation Law passed overwhelmingly’ *Libya Herald* 4 May 2013, <http://www.libyaherald.com/2013/05/05/political-isolation-law-passed-overwhelmingly/>

Notably, the judges referred to were the ones who had granted adjournments in the trials of former Gaddafi officials, due to the fact that the defendants had not been accorded legal representation during the pre-trial phase, and had not had access to evidence or information concerning the charges. It would therefore seem that the Isolation Law is being used as a stick to threaten or remove any judges, who attempt to issue independent decisions, which uphold the rights of highly unpopular defendants.<sup>34</sup>

70. Although the Interim Constitutional Declaration enshrines an individual's right of recourse before the judiciary, the GNC have violated this key constitutional protection by promulgating an ancillary law, which stipulates that individuals cannot challenge the constitutionality or fairness of the Political Isolation law before the Courts.<sup>35</sup> Mr. Gaddafi will therefore have absolutely no mechanism to contest the application of the Political Isolation law to his proceedings.
71. The recent political crisis has also underscored the complete lack of control exercised by the Government over the apparatus of law enforcement and security. Even if the Government exercises formal authority over Mr. Gaddafi, it is clear that they do not exercise any effective control over the array of militia, who possess a deep animus against anyone associated with the former Gaddafi regime. The Government therefore lacks the measures to secure Mr. Gaddafi the necessary guarantees of an independent and impartial trial under Libyan law, let alone Mr. Gaddafi's rights under the Rome Statute.
72. This degree of political interference by various militia has, and will continue to have a direct impact on the judicial processes against Mr. Gaddafi.
73. For example, although the Government has sought to portray the Supreme Court's decisions of June 2012 (revoking NTC law 37) and December 2012 (declaring People's court procedures as unconstitutional) as embodying Libya's commitment to the rule of law, it has not been able to demonstrate that these precepts have been applied to Mr. Gaddafi's case or those of other persons associated with the Gaddafi regime.
74. To the contrary, it would appear that these decisions exist in a vacuum, and that law enforcement authorities have disregarded them with impunity. For example,

<sup>34</sup> ICC-01/11-01/11-281-Red2 at paras. 171-173.

<sup>35</sup> Lawyers for Justice in Libya, 'Lawyers for Justice in Libya Condemns the GNC's Amendments to Libya's Constitutional Declaration', 17 April 2013, <http://www.libyanjustice.org/news/news/post/74-lawyers-for-justice-in-libya-condemns-the-gncs-amendments-to-libyas-constitutional-declaration>



even though the Supreme Court found that it was unconstitutional to prosecute a person for praising Muammar Gaddafi or his children, or for spreading false rumours, propaganda or information with the aim of harming national defence, Mr. Gaddafi is currently being prosecuted due to the fact that the authorities consider that the privileged information which he attempted to convey to his Defence was false, and harmful to national defence. Other co-defendants have also been charged due to the mere fact that their association with the Defence constitutes support for Mr. Gaddafi.

75. Similarly, notwithstanding the fact that the December 2012 Supreme Court decision clarified that all defendants must first be brought before an Accusation Chamber, and have a right to legal representation during the investigations phase, Mr. Gaddafi has still been brought before directly before a Trial Chamber for these national security proceedings (as illustrated by the panel of three judges hearing his case on 2 May 2013), rather than an Accusation Chamber.
76. Moreover, as reported by Human Rights Watch, Mr. Al-Senussi has been interrogated on several occasions without the assistance of counsel, notwithstanding his express wish for legal representation.<sup>36</sup>
77. Finally, if militia are willing and able to defy the government by taking key Ministries hostage in order to ensure the lustration of anyone associated with the former Gaddafi regime from office, what would they do if there was a remote possibility that Mr. Gaddafi might be acquitted?
78. The United Nations Human Rights Committee also underscored in its General Comment 8 on the right to liberty in article 9(1) that “State parties have in accordance with article 2(3) also to ensure that an effective remedy is provided in other cases in which an individual claims to be deprived of their liberty in violation of the Convention”. The defendant must have an effective remedy in the sense that the courts must actually have the power to order the defendant’s release if detention is not justified, and to implement the modalities of the defendant’s release.<sup>37</sup>

---

<sup>36</sup> Libya: Ensure Abdallah Sanussi Access to Lawyer’, Human Rights Watch 17 April 2013, <http://www.hrw.org/news/2013/04/17/libya-ensure-abdallah-sanussi-access-lawyer>.

<sup>37</sup> A v. Australia, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (30 April 1997), at para 9.5. . <http://www1.umn.edu/humanrts/undocs/html/vws560.html>

79. The fact that the Central Government does not exercise effective control over Mr. Gaddafi also does not exempt them from their obligations towards the ICC, nor does it mitigate their failure to comply with judicial orders, for example, concerning the surrender of privileged Defence documents.
80. As recently observed by Pre-Trial Chamber II, States are under a positive duty to consult with the Court in relation to any problems that they might face in executing ICC decisions. If a State fails to either execute the Court's decisions or engage in this consultative process, then it is open to the Court to make a finding that the State in question is engaging in a deliberate pattern of non-compliance.<sup>38</sup>
81. In the current case, the Court can no longer countenance Libya's Janus-faced strategy of on the one hand, asserting that the Government exercises full control and authority over Mr. Gaddafi for the purposes of article 17(3) of the Statute, whilst on the other, distancing themselves from the statements and actions of the Zintan authorities or prosecuting authorities whenever the Government is required to exercise any control over these authorities.<sup>39</sup>
82. If the Government does exercise full authority over the events in Zintan and the conduct of the national security proceedings against Mr. Gaddafi, then it must accept full responsibility for the fact that the domestic prosecution of Mr. Gaddafi constitutes a blatant violation of the Chamber's order to surrender privileged Defence documents, and Libya's obligations under Article 48 and Part 9 of the Rome Statute. It is therefore necessary and appropriate for the Chamber to make a finding of non-compliance, and to immediately report Libya to the Security Council for this non-compliance.
83. If, however, the Government wishes to claim that the actions and statements of the various authorities presiding over the events in Zintan do not represent the official position of the Government, then it must also concede that it does not exercise the level of authority over Mr. Gaddafi, which is required to trigger the inadmissibility of the case before the ICC. The term 'genuinely' in article 17 requires the Court to examine the reality on ground. The Court's duty to

---

The European Court of Human Rights has also concluded that the right to a fair trial necessarily encompasses the right to the enforcement of a judgment of acquittal: *Assanidze v. Georgia*, Application no. 71503/01, Judgment of 8 April 2004, paras 181-184.

<sup>38</sup> ICC-02/05-01/09-151 at para. 21.

<sup>39</sup> Transcript of 10 October 2012, ICC-01/11-01/11-T-3-Red-ENG at p. 20.

eliminate impunity cannot be entrusted to mere assurances, which the Government lacks the capacity to enforce.

84. Either possibility invites but one remedy: Mr. Gaddafi must be immediately transferred to the custody of the ICC due to the Government's inability to secure Mr. Gaddafi's rights under the Rome Statute, or its contumacious refusal to do so.

#### **4. Relief Sought**

85. For the reasons set out above, the Defence for Mr. Saif Al-Islam Gaddafi respectfully requests the Honourable Pre-Trial Chamber to:

- i. issue a finding of non-compliance as concerns the Government of Libya's failure to implement the Chamber's decision of 1 March 2013; and
- ii. revoke its decision postponing the surrender of Mr. Gaddafi to the custody of the ICC.



---

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

Dated this, 7<sup>th</sup> Day of May 2013

At The Hague, The Netherlands