



Original: **English**

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

Date: **29 May 2013**

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 the Saif Al-Islam Gaddafi "Addendum to the
"Urgent Defence Request" of 21 January 2013, and Request for Finding of Non-
Compliance"**

Source: The Government of Libya in the case of Mr Saif Al-Islam Gaddafi
represented by:
Professor Ahmed El-Ghani
Professor Philippe Sands QC
Professor Payam Akhavan
Ms Michelle Butler

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

Professor William Schabas

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

State's Representatives

Professor Ahmed El-Ghani

Professor Philippe Sands QC

Professor Payam Akhavan

Ms. Michelle Butler

Amicus Curiae

REGISTRY

Registrar

Mr. Herman von Hebel

Counsel Support Section

Deputy Registrar

Mr. Didier Daniel Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Section
Other**

I. INTRODUCTION

1. The Government of Libya makes this submission in response to the Saif Al-Islam Gaddafi “Addendum to the “Urgent Defence Request” of 21 January 2013, and Request for Finding of Non-Compliance” filed on 7 May 2013 (“Gaddafi Addendum”).¹
2. The Gaddafi Addendum relates to the OPCD’s “Urgent Defence Request” of 21 January 2013 (“21 January 2013 Urgent Defence Request”).² Libya responded to that request on 11 February 2013³ and the Chamber rendered a decision on 1 March 2013 (“the 1 March 2013 Decision”).⁴
3. The Gaddafi Addendum advances three principal submissions relating to:
 - a. the legality of domestic criminal proceedings against Mr. Gaddafi and four ICC staff members (that are unrelated to the ICC case);
 - b. the ongoing Admissibility Challenge⁵; and
 - c. the 1 March 2013 Decision concerning the return of documents held to be privileged.⁶
4. Based on these submissions, the defence for Mr. Gaddafi argues that the Chamber should “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 “revoke its decision postponing the surrender of Mr. Gaddafi to the custody of the ICC”.⁷

¹ ICC-01/11-01/11-332.

² ICC-01/11-01/11-255.

³ “Libyan Government’s Response to Urgent Defence Request of 21 January 2013”, 11 February 2013, ICC-01/11-01/11-274 [Libyan Government’s Response].

⁴ “Decision on the “Urgent Defence Request””, 1 March 2013, ICC-01/11-01/11-291.

⁵ “Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute”, 1 May 2012, ICC-01/11-01/11-130 [“the Admissibility Challenge”].

⁶ “Decision on the “Urgent Defence Request””, 1 March 2013, ICC-01/11-01/11-291.

⁷ Gaddafi Addendum, Para. 85.

5. The Government of Libya opposes the Defence Motion for the reasons set forth below. In sum, the Gaddafi Addendum attempts to re-litigate issues that have already been decided by the Chamber in its 1 March 2013 Decision and which, in any event, are at best of marginal relevance to the admissibility proceedings. It is further submitted that the Defence makes unsubstantiated allegations that are directly contradicted by its own documentary evidence, and further makes demands that are unreasonable and unrealistic in terms of the speed with which Libya complies with decisions of the Chamber.

II. PRELIMINARY ARGUMENT: DEFENCE ATTEMPT TO RE-LITIGATE MATTERS ALREADY DECIDED BY THE PRE-TRIAL CHAMBER

6. The first two submissions relate to (1) the legality of domestic criminal proceedings against Mr. Gaddafi and four ICC staff members (that by the defence's own admission are "wholly unrelated" to the ICC case⁸) and (2) to the merits of the Admissibility Challenge presently being considered by the Chamber. The Defence argues with regard to 1 and 2 that:
 - i. The postponement of the surrender of Mr. Gaddafi "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"⁹;
 - ii. Article 95 "does not permit the Libyan authorities to maintain physical custody over Mr. Gaddafi in connection with the allegations falling outside of the scope of the ICC-related case"¹⁰;
 - iii. Article 89(4) or Part 9 generally of the Statute mandates that a State cannot unilaterally decide to prosecute an ICC defendant for non-ICC related crimes¹¹;

⁸ *Ibid*, Para. 27.

⁹ *Ibid*, Para. 28.

¹⁰ *Ibid*, Para. 29, 45 – 52.

¹¹ *Ibid*, Para. 39 – 44, 82.

- iv. “[T]he 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”¹²;
 - v. The “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”;¹³
 - vi. The “national security proceedings have also had significant consequences for the security and protection of actual and potential Defence witnesses”¹⁴;
 - vii. The promulgation of the Political Isolation law means that “trial by an independent judiciary in Libya is an even more distant aspiration than before”; and
 - viii. Mr. Gaddafi is being subject to “cruel and inhumane treatment” through being held in isolation.¹⁵
7. By advancing these submissions, the Defence seek to re-litigate issues that have already been decided by the Chamber in its 1 March 2013 Decision or otherwise attempts to supplement the Defence Response to Libya’s Article 19 Challenge. Issues (i) to (vi) were raised at great length by the OPCD in the 21 January 2013 Urgent Defence Request, in particular at paragraphs 1-11, 40-46, 54-59 and 71-73. In the Government’s Response, in particular at paragraphs 6 – 10, 19 – 24, Libya refuted each of the unsubstantiated Defence arguments.
8. In its 1 March 2013 Decision, the Chamber decided with regard to issues (i) to (vi):

¹² *Ibid*, Para. 58.

¹³ *Ibid*, Para. 45.

¹⁴ *Ibid*, Para. 60.

¹⁵ *Ibid*, Para. 62 – 64.

that the admissibility proceedings are well advanced. The Chamber has conducted a hearing on issues related to the admissibility of the case and has received the additional submissions it requested from Libya as well as responses thereto from the other parties and participants to the proceedings. The Chamber notes the concerns of the OPCD but considers that they can be appropriately addressed in its final decision on the Admissibility Challenge to be taken in due course.¹⁶

9. Further, as regards the remaining issues raised by the Defence in Submissions 1 and 2 – specifically (vii) to (viii) (outlined above) – these are, at best, marginally relevant to the merits of Libya’s Admissibility Challenge, but are irrelevant to the 21 January 2013 Urgent Defence Request.
10. Accordingly the Defence Addendum on these issues must be summarily dismissed. By definition, an “Addendum” to the 21 January 2013 Urgent Defence Request is tantamount to an attempt to re-litigate the 1 March 2013 Decision. Logically, having been explicitly ruled upon in the 1 March 2013 Decision, and the deadline having expired for appealing that Decision, the issues cannot now supplement the 21 January 2013 Urgent Defence Request.
11. Further, such an Addendum cannot be used to raise “concerns” purportedly relevant to the merits of the Admissibility Challenge. In order to make such submissions, the Defence must file a Motion for reconsideration of the 1 March Decision or show good cause in order to be able to supplement its Response to Libya’s Admissibility Challenge. The Defence should not be allowed to disregard procedures and evidentiary thresholds intended to ensure the regularity and fairness of ICC proceedings.
12. This is particularly important with regard to the particular issues raised. Issues (i) – (iii) and (v), relate to significant and complex matters of state sovereignty. As set forth previously, the object and purpose of Article 95 is to uphold the

¹⁶ 1 March 2013 Decision, Para. 24.

state's fundamental right to conduct criminal proceedings, including in respect of national crimes.¹⁷

13. Further, it appears that the Defence disregards its obligation not to make serious allegations that are wholly unsubstantiated, including in particular those contained within submissions (vi) to (viii). The Defence assertion, at paragraph 73 of the Gaddafi Addendum, that the Supreme Court's "decisions of June 2012 (revoking NTC law 37) and December 2012 (declaring People's Court procedures as unconstitutional) have not been shown to have been "applied to Mr. Gaddafi's case" is demonstrably without foundation. As noted previously in these proceedings, in response to the previous Prosecutor-General's attempts to use the People's Court procedures in relation to the cases of former "Gaddafi era" officials, the Supreme Court of Libya held, "there is no room for pleading that crimes viewed by the People's Court had special gravity and political considerations, since the type of crime and degree of gravity do not justify the laws' violation of the constitutional rules which are superior to them".¹⁸ As previously clarified by the Government, this Decision applies specifically to the case of Mr. Saif Al-Islam Gaddafi.

14. Further, in direct contradiction to the Defence assertions of abuse against Mr. Gaddafi, Annexes 2 and 3 (at page 1) to the Gaddafi Addendum itself demonstrate that far from being subject to inhumane treatment, Mr. Gaddafi appeared to objective observers at his court hearing as fit and healthy with "no complaints to make".¹⁹ Moreover, despite claims of fair trial violations, the material that the Defence seeks to rely upon demonstrates that Mr. Gaddafi was represented at the hearing by a lawyer selected by his aunt together with another lawyer appointed by the Peoples Lawyers Administration.

¹⁷ "Libyan Government's reply to "Response on behalf of Abdullah Al-Senussi to the Submission of the Government of Libya for Postponement of the Surrender Request for Mr. Al-Senussi"", ICC-01/11-01/11 – 339, 20 May 2013, Para. 8 – 21.

¹⁸ "Libyan Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi", ICC-01/11-01/11-258, 23 January 2013, Para. 76; see also Para. 75, 77 – 78.

¹⁹ <http://www.bbc.co.uk/news/world-middle-east-22391181> corroborating comments made by former Minister of Defence, Usama Al-Juweili, Annex 3 of the Gaddafi Addendum.

15. The Defence also makes much of the Political Isolation Law and its impact on fair trials before Libyan courts. Libya is not alone in adopting lustration laws in a transitional context. Many countries, including European States emerging from decades of communist rule, have adopted similar administrative measures as part of their democratization process. Indeed, the purpose of such laws is to exclude from public office persons implicated in the human rights abuses of previous regimes who cannot be trusted to uphold the rule of law. Such laws may be an improvement upon, and are in any event not an impediment to, the realization of fair trial guarantees. Further, in the new Libya, the Supreme Court is empowered to determine whether such legislative measures require further safeguards as required by international standards. The manifestly lawful object and purpose of the Political Isolation Law, and the availability of judicial review, demonstrate the lack of merit in the alarmist Defence arguments in this regard.
16. Crucially, the Defence fails to explain how these submissions are actually relevant to the 21 January 2013 Urgent Defence Request or, alternatively, why the Chamber ought, at this stage, to take them into account when assessing the merits of the Admissibility Challenge. Accordingly, the Defence attempts to re-litigate issues that are either irrelevant or already decided by the Chamber, and further, to make unsubstantiated allegations against Libya.

III. RETURN OF THE DEFENCE DOCUMENTS

17. In the Gaddafi Addendum, the Defence submits that Libya has failed to return documents to the OPCD in violation of the Pre-Trial Chamber's "1 March Decision" and the Trial Chamber should therefore issue "a finding of non-compliance as concerns the Government of Libya's failure to implement the Chamber's decision".²⁰
18. The Gaddafi Addendum does not approach the issue fairly or reasonably, and disregards the procedural history in order to distort the true timeline. First, it should be noted that on 11 March 2013, the Government of Libya sought leave to

²⁰ Gaddafi Addendum, Para. 85.

appeal and reconsider the 1 March Decision.²¹ On 24 April 2013, the Pre-Trial Chamber refused both requests.²² On 7 May 2013, the Defence filed the Gaddafi Addendum. Thus the Defence is seeking to have the Chamber refer Libya to the Security Council and revoke its Article 95 postponement decision, on the basis of a mere two-week period. This request is unreasonable.

19. The Libyan Government reiterates that it does not dispute the binding character of the provisions of Security Council Resolution 1970, or its obligations under the ICC Statute. However, to suggest that anything short of immediate compliance should be reported to the Security Council trivializes the gravity of this remedy of last resort. It further ignores the realities of national judicial procedures and governmental decision-making as well as the balancing of judicial proceedings with a multitude of other transitional imperatives in the aftermath of a prolonged period of authoritarianism.

20. The Chamber's final decision (the 24 April 2013 Decision) had to be communicated to the Ministry of Foreign Affairs, the Ministry of Justice, the Prosecutor-General's Office and the Zintan Court, which in turn must act according to the relevant domestic procedures mandated by Libyan law. Contrary to the Gaddafi Addendum's wholly unrealistic expectations, it is neither possible nor desirable to circumvent these procedural requirements which, like any other legal system, require a reasonable period of time.

21. The separation of powers prohibits the Executive from interfering in proceedings before Libyan courts. As previously set forth in the Gaddafi²³ and Al-Senussi²⁴ proceedings, the independence and impartiality of the judiciary is

²¹ "Government of Libya's Application for Leave to Appeal the "Decision on the Urgent Defence Request", 11 March 2013, ICC-01/11-01/11-297 and "for Reconsideration of "Decision on the Urgent Defence Request", 11 March 2013, ICC-01/11-01/11-298.

²² "Decision on Libya application for leave to appeal and request for reconsideration of the "Decision on the 'Urgent Defence Request'""", 24 April 2013, ICC-01/11-01/11-316-Corr.

²³ "Government of Libya Article 19 Application - Saif Al-Islam Gaddafi", Annex G.

²⁴ "Government of Libya Article 19 Application – Abdullah Al-Senussi", 2 April 2013, ICC-01/11-01/11-307-Red, para. 139 – 142.

enshrined in the Libyan Constitutional Declaration of 2011, Article 32 of which provides that:

“The Judiciary Authority shall be independent. It shall be exercised by courts of justice of different sorts and competences. They shall issue their judgments in accordance with the law. Judges shall be independent, subject to no other authority but the law and conscience.”

22. The independence of the judiciary is now not only constitutionally enshrined but also protected under several provisions of domestic Libyan law, including Article 52 of the Judicial System Law and Article 31 of the Freedoms Act.
23. In this light, the Defence submission that Libya be reported to the Security Council for having failed, within two weeks of the denial of leave to appeal, to surrender the relevant documents, is unreasonable and unrealistic. Notwithstanding the requirements imposed by national legal procedures and the complexity of the transitional context, the Gaddafi Addendum itself indicates that the proceedings are currently in abeyance, having been adjourned until September 2013. Accordingly, contrary to the Defence submissions,²⁵ neither the timing nor the existence of a court process can be a proper basis for an inference that Libya has violated the 1 March 2013 order for the surrender of privileged documents.
24. More crucially, the unrelated proceedings in Zintan cannot support an inference that “the Libyan authorities...[are not]... actively prosecuting Mr. Gaddafi for the ICC related allegations”.²⁶ There is no basis for the suggestion that such proceedings are either an impediment to or substitute for the on-going investigation and eventual prosecution of Mr. Gaddafi and other senior Gaddafi regime figures for mass-atrocities against civilians during the 2011 revolution.

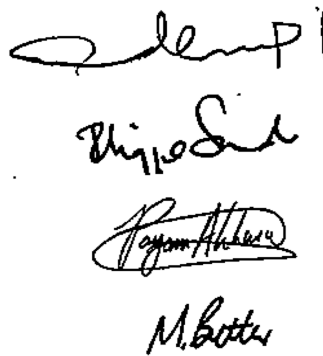
²⁵ Gaddafi Addendum, Para. 27 – 28, 45 – 47.

²⁶ Ibid, Para. 46.

IV. RELIEF SOUGHT

25. Libya therefore respectfully requests that the Pre-Trial Chamber reject Mr. Gaddafi's Addendum. The Defence cannot supplement the 21 January 2013 Urgent Defence Request, the latter having been ruled upon in the 1 March 2013 Decision. The request to revoke the decision to postpone the surrender of Mr. Gaddafi to the custody of the ICC is tantamount to an attempt to re-litigate the 1 March 2013 decision or otherwise to supplement the Defence Response to Libya's Admissibility Challenge. The request to issue a finding of non-compliance with the 1 March 2013 Decision is premature and should be dismissed.

Respectfully submitted:



Professor Ahmed El-Ghani
 Professor Philippe Sands QC
 Professor Payam Akhavan
 Ms Michelle Butler

*Libyan ICC Coordinator and
 Counsel on behalf of the Government of Libya
 in the case of Saif Al-Islam Gaddafi*

Dated this 29th day of May 2013
 At London, United Kingdom