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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

**Prosecution's Additional Observations to the "Application on behalf of the
Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19
of the ICC Statute"**

Source: Office of the Prosecutor

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Introduction

1. On 31 May 2013, Pre-Trial Chamber I (hereinafter “the PTC”) rendered a decision that the case against Saif Al-Islam is admissible before the Court.¹ The PTC found that Libya fell short of substantiating, by means of evidence of a sufficient degree of specificity and probative value, that its domestic investigation covers the same case as that which is before the Court. To assess the sameness between the Libyan and the ICC cases, the PTC indicated that Libya is not required to investigate exactly the same acts of murder and persecution described in the Article 58 Decision, and that it suffices that Libya’s investigation addresses the conduct underlying the Warrant of Arrest and the Article 58 Decision. This is defined by some confined temporal, geographical and material parameters, namely: “Mr Gaddafi’s control over relevant parts of the Libyan State apparatus and Security Forces to deter and quell, by any means, including by the use of lethal force, the demonstrations of civilians, which started in February 2011 against Muammar Gaddafi’s regime; in particular, that Mr Gaddafi activated the Security Forces under his control to kill and persecute hundreds of civilian demonstrators or alleged dissidents to Muammar Gaddafi’s regime, across Libya, in particular in Benghazi, Misrata, Tripoli and other neighbouring cities, from 15 February 2011 to at least 28 February 2011.”²

2. Although the Chamber’s interpretation appears to differ in certain aspects from the Prosecution’s understanding of “case” and “conduct”, the Prosecution reiterates that, in its view, Libya is investigating substantially the same conduct as alleged in the proceedings against Al-Senussi before the Court and that Libya has presented specific and probative evidence.

¹ ICC-01/11-01/11-344 (“Saif Admissibility Decision”).

² Saif Admissibility Decision, paras.83 and 133.

3. The PTC also found that Libya is unable, within the terms of Article 17(3), because it cannot secure the transfer of Saif Al-Islam into its custody, it cannot gather the necessary evidence and is otherwise unable to carry out the proceedings. Bearing in mind the factors considered by the Chamber, the Prosecution notes that the instant case differs from that against Saif Al-Islam in a number of respects: first, Al-Senussi is in detention and under the control of the government authorities; and second, Libya appears to have obtained the necessary evidence to conduct a genuine investigation with respect to the same case. However, it does not appear that Al-Senussi currently has a Defence lawyer within Libya, a precondition to presenting the case to the Indictment Chamber and to proceeding to trial, nor has Libya indicated adequately how such an obstacle will be overcome. Thus, notwithstanding that the proceedings against Al-Senussi are in the midst of its investigation, and that admissibility must be determined based on the facts as they exist at the time of the admissibility proceedings, it currently appears that Libya will not be able to present the case to the Indictment Chamber and thus “otherwise carry out its proceedings” within the meaning of Article 17(3) unless it sets out measures to ensure that Al-Senussi has legal representation
4. Thus, bearing in mind the factors considered by this Chamber in the Saif Al-Islam Admissibility Decision, Libya should be required to provide additional submissions on the aforementioned issue related to its ability to genuinely carry out the proceedings, either in response to the filing of the parties and participants or within such additional timeline as may be granted by the Chamber.

Procedural Background

5. On 2 April 2013, Libya filed its "Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute", challenging the admissibility of the case against Mr Al-Senussi ("Senussi Admissibility Challenge").³
6. On 24 April 2013, the Prosecution filed its response to the Senussi Admissibility Challenge ("Prosecution Response").⁴
7. On 6 May 2013, Libya sought leave to reply to the Prosecution Response and requested a delay until 30 days after 14 June to file a consolidated reply.⁵
8. On 26 April 2013, the Pre-Trial Chamber issued its decision on the conduct of the proceedings whereby it invited the Defence, OPCV and the Security Council to provide observations, and it permitted the Prosecution to supplement its response with the leave of the Chamber by 14 June 2012.⁶
9. On 31 May 2013, the Chamber rendered its decision on the admissibility of the case against Saif Al-Islam Gaddafi whereby it found the case admissible before the Court ("Saif Admissibility Decision").⁷
10. On 11 June 2013, following a request from the Prosecution,⁸ the Pre-Trial Chamber authorised the submission of additional observations.⁹

³ ICC-01/11-01/11-307-Red.

⁴ ICC-01/11-01/11-321-Red.

⁵ ICC-01/11-01/11-331.

⁶ ICC-01/11-01/11-325.

⁷ ICC-01/11-01/11-344-Red.

⁸ ICC-01/11-01/11-349.

⁹ ICC-01/11-01/11-351.

Submissions

i. On the notion of “case” and “substantially the same conduct”

11. In the Saif Admissibility Decision, this PTC endorsed the “settled jurisprudence of the Pre-Trial Chambers” and indicated that for a case to be inadmissible, national proceedings must “encompass both the person and the conduct which is the subject of the case before the Court”.¹⁰ It further noted the specific nature of the admissibility test, recalling the Appeals Chamber’s finding that “article 19 of the Statute relates to the admissibility of concrete cases”.¹¹ It also referred to the Appeals Chamber’s jurisprudence in the *Kenya* cases, which required domestic proceedings to cover “substantially the same conduct as alleged in the proceedings before the Court” for a case to be deemed inadmissible¹². It further noted that the determination of “substantially the same conduct” depends on the concrete facts and circumstances of the case and requires a case-by-case analysis.¹³ Notably, the PTC observed that although earlier Pre-Trial Chamber jurisprudence indicated that “the concept of case [includes] specific incidents during which one or more crimes within the jurisdiction of the court seem to have been committed by one or more identified suspects”,¹⁴ it stated that such jurisprudence did not clarify the notion of “incident”, nor was this notion referenced by the Appeals Chamber when it confirmed the correctness of the same person/ same conduct test in the *Kenya* cases.¹⁵

12. The PTC went on to indicate that for the purposes of the specific admissibility proceedings before the Chamber, the ICC case was to be defined in light of

¹⁰ Saif Admissibility Decision, para.74 referring to ICC-01/04-01/06-8-Corr, para.31.

¹¹ Saif Admissibility Decision, para.76 referring to ICC-01/09-02/11-274OA, para.39.

¹² Saif Admissibility Decision, para.76 referring to ICC-01/09-02/11-274OA, para.39.

¹³ Saif Admissibility Decision, para.77.

¹⁴ ICC-01/04-01/06-8-Corr, para.31.

¹⁵ Saif Admissibility Decision, paras.75-76.

the Warrant of Arrest and the Article 58 Decision.¹⁶ It noted that the Warrant of Arrest does not refer to specific instances of killings and acts of persecution,¹⁷ and that the incidents listed in the Article 58 Decision are mere samples of a course of conduct and therefore constitute a non-exhaustive list.¹⁸ Accordingly, the PTC concluded that Libya cannot be required to investigate exactly the same acts of murder and persecution as those described in the Article 58 Decision.¹⁹ Specifically, it held that the scope of the relevant conduct underlying the Warrant of Arrest and the Article 58 Decision is that “Mr Gaddafi used his control over relevant parts of the Libyan State apparatus and Security Forces to deter and quell, by any means, including by the use of lethal force, the demonstrations of civilians, which started in February 2011 against Muammar Gaddafi's regime; in particular, that Mr Gaddafi activated the Security Forces under his control to kill and persecute hundreds of civilian demonstrators or alleged dissidents to Muammar Gaddafi's regime, across Libya, in particular in Benghazi, Misrata, Tripoli and other neighbouring cities, from 15 February 2011 to at least 28 February 2011.”²⁰

13. From the foregoing, the PTC appears to have departed from prior and consistent jurisprudence of other Pre-Trial Chambers which have defined a case as being incident-specific.²¹ However, and as it will be developed below, the Chamber's notion of “conduct” can be reconciled with this earlier case-law if the Prosecution's interpretation of the Decision is correct.

14. The Prosecution understands the notion of “incidents” as criminal acts that occur in a particular location and at a specific time and in the framework of a

¹⁶ Saif Admissibility Decision, paras.78,83.

¹⁷ Saif Admissibility Decision, para.80.

¹⁸ Saif Admissibility Decision, paras.81-82.

¹⁹ Saif Admissibility Decision, para.83.

²⁰ Saif Admissibility Decision, paras.83 and 133.

²¹ See authorities cited in footnote 126 of the Saif Admissibility Decision.

course of conduct and series of events.²² This notion is implicit in the principal documents that define the various phases of the proceedings: the Article 15 Application, the Article 58 Application, and the Document Containing the Charges under Article 61. All three documents require that the Prosecution provide a “statement of facts” which are alleged to constitute the crimes, which appears to necessitate, with as much precision as is possible, the location and time of each alleged crime.²³ In this sense, the “statement of facts” includes the “incidents”.

15. Moreover, the fact that the term “incident” is not referenced by the Appeals Chamber in the *Kenya* cases is not determinative of whether the term finds or not application within the context of Article 17, since the Appeals Chamber was not seized of the issue. Accordingly, the Appeals Chamber has not yet ruled on the correctness of the inclusion of the notion of “incident” within the concept of a case.
16. The Prosecution agrees and indeed earlier submitted,²⁴ that the determination of what constitutes “substantially the same conduct” will vary according to the concrete facts and circumstances of the case at hand, and therefore requires a case-by-case analysis. Nonetheless, the case which forms the subject of an admissibility determination must be denoted by a set of clearly defined parameters that will permit ready comparison. If the given

²² “Incidents” are composed of “facts and circumstances” within the meaning of Article 74. Note that the Prosecution in its Response has indistinctively referred to incidents and facts - “facts and incidents” (para.28) – or to incidents which are composed of facts - “specific factual incidents” (para.23) or “facts occurring during specific incidents” (para.28).

²³ Regulation 49 of the Regulations of the Court specifies that the “statement of facts” in the Article 15 Application shall indicate, as a minimum, *inter alia*, “[t]he places of the alleged commission of the crimes, e.g. country, town, as precisely as possible” and “[t]he time or time period of the alleged commission of the crimes”. Regulation 52 similarly requires that the Document Containing the Charges shall include “[a] statement of facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person to trial...”. Although Article 58(2)(c) does not elaborate on the requirements of the “concise statement of facts”, the Prosecution submits that it must be at least as specific as those required at the earlier and later stages of the proceedings, namely to include reference to time and place.

²⁴ Prosecution Response, para.23.

parameters are overly broad, effective comparison is rendered meaningless. It is for this reason that the Prosecution has submitted that the Court, in considering the degree of sameness between two cases, should draw guidance from the principles and reasoning applied in national and international case law that has sought to resolve similar questions as to the effect of *res judicata*, estoppel or jurisdictional conflict arising from two sets of facts pertaining to two different cases, in particular as they arise in the context of *ne bis in idem* case law as well as admissibility proceedings before European judicial bodies.²⁵

17. If the notion of “conduct” endorsed by the PTC in the Saif Al-Islam Admissibility Decision is applied to the Al-Senussi case, the Prosecution understands that Libya would not be required to investigate exactly the same acts or incidents of murder and persecution as those described in the Article 58 Decision,²⁶ but would suffice if its case focuses on any act or incident of murder and persecution of civilians from 15 to at least 20 February 2013 in Benghazi that resulted from Al-Senussi’s exercise of “his role as the national head of the Military Intelligence [...] to implement [Gaddafi’s] plan to deter and quell civilian demonstrations against his regime in Benghazi, [...] [t]o command[...] the forces in Benghazi and directly instruct[...] the troops to attack civilians demonstrating in the city”.²⁷ The Prosecution notes that the relevant “conduct”, even by the Chamber’s own test, would have some confined parameters. The national case could not, for the purpose of rendering the case inadmissible before the Court, relate to similar acts of murder and persecution related to Senussi’s role and Gaddafi’s plan, as described above, occurring in localities, other than in Bhengazi.

²⁵ Prosecution Response, paras.59-66.

²⁶ Article 58 Decision, paras.36,43,44,49-54.

²⁷ Warrant of Arrest (ICC-01/11-15), p.5; Article 58 Decision (ICC-01/11-01/11-1), paras.84-90.

18. Thus, notwithstanding the apparent overly broad scope of the “case” in the Saif Al-Islam Admissibility Decision, in the Al-Senussi case the narrower parameters of subject-matter, place and time in the Warrant of Arrest and Article 58 Decision mean that for an act of murder or persecution to fall within the Chamber’s notion of “conduct”, it would need to be inextricably linked to those incidents that form the basis of the ICC case, namely, acts of murder and persecution perpetrated by Security Forces in Benghazi between 15 and 20 February 2011 in implementation of a State Policy to deter and quell dissidents to Gaddafi regime and against the backdrop of a widespread or systematic attack against civilian population. This material, temporal and geographic nexus between the ICC and national case would be consistent with the Prosecution’s earlier submissions in these proceedings that the term “substantially the same conduct” should be understood by reference to whether the incidents contained in the two cases (before the national level and at the ICC) are inextricably linked by time, space and subject-matter.²⁸

ii. Libya’s Ability to investigate the same case

19. The Prosecution has re-examined Libya’s ability within Article 17(3), in light of the factors considered by the PTC in the Saif Admissibility Decision. The PTC concluded that “although the authorities for the administration of justice may exist and function in Libya, a number of legal and factual issues result in the unavailability of the national judicial system for the purpose of the case against Mr Gaddafi”.²⁹ In reaching this decision, the Chamber relied on a series of findings; in particular that (1) Libya is unable to secure the transfer of Mr Gaddafi’s custody from his place of detention under the Zintan militia

²⁸ Prosecution Response, para.67. See also para.25: “in this particular case, subject to the requirements of genuineness, the case should be determined inadmissible if Libya is investigating substantially the same incidents of killings and persecution (comprising arrests and mistreatment against perceived opponents to Gaddafi’s regime) in Benghazi by members of the Security Forces from 15 until at least 20 February 2011, as described in the Article 58 Decision.”

²⁹ Saif Admissibility Decision, para. 215.

and there is no concrete evidence that this problem may be resolved in the near future;³⁰ that (2) Libya lacks capacity to obtain the necessary testimony due to the inability of judicial and governmental authorities to ascertain control and provide adequate witness protection;³¹ and that (3) Libya is unable to carry out the proceedings because Libya has not explained how it will overcome the existing difficulties in securing a lawyer for the suspect.³²

20. There are some significant differences between the case against Saif Al-Islam and the case against Abdullah Al-Senussi: first, Senussi is under custody of the Libyan central authorities,³³ and second, and notwithstanding the existence of detention centers which are not controlled by the Libyan central authorities,³⁴ it appears that Libya has had the capacity to obtain the *necessary* evidence, which is both specific and sufficiently probative, to investigate Al-Senussi for the same case as that of the ICC. This fact is evidenced by the material attached to the Challenge, in particular its 16 witness testimonies as well as medical reports, death certificates and military documents.³⁵ The Prosecution understands that the threshold under Article 17(3) is not that *any* evidence cannot be gathered, but that the *necessary* evidence and testimony cannot be obtained as a result of a total or substantial collapse or unavailability of its national judicial system.³⁶ Thus, even in the scenario that Libya is not able to gather the testimony of certain witnesses due to obstacles arising from the current situation within the country, this would not deem Libya automatically unable for the purposes of Article 17(3).³⁷

³⁰ Saif Admissibility Decision, para.215 and paras.206-208.

³¹ Saif Admissibility Decision, para.215 and paras.209-211.

³² Saif Admissibility Decision, para.215 and paras.212-214.

³³ Senussi Admissibility Challenge, paras.118,176.

³⁴ Senussi Admissibility Challenge, paras.191-193.

³⁵ Prosecution Response, para.75.

³⁶ Article 17(3). The Pre-Trial Chamber in the Saif Admissibility Decision, para.215 referred to Libya's inability to "obtain the necessary testimony".

³⁷ R.S.Lee, *The International Criminal Court: The Making of the Rome Statute* (Kluwer Law International, 1999), pp. 48-49 which refers to "key evidence or testimony".

21. However, the following concerns identified by the Chamber also apply to the Al-Senussi case: first, and with respect to the existence of available protective measures, Libya submits that the investigation case file is confidential and that at trial, witnesses' identities can be withheld from the public and that written testimony made to a notary can be tendered *in lieu* of oral evidence. Libya also noted the broad discretion of Libyan judges to dispense protective measures.³⁸ Libya put forward similar submissions in the Saif Al-Islam Admissibility Challenge,³⁹ and the PTC considered that this information was not sufficient because, *inter alia*, Libya did not present evidence with respect to specific protection programs and whether protective measures are applicable to witnesses for the defence.⁴⁰ The Chamber found that this fact impacted on Libya's ability to obtain testimony. Second, Al-Senussi does not appear to have a lawyer, which is a pre-requisite to present the charges before the Indictment Chamber and move to the prosecution of the case,⁴¹ and Libya has not clearly indicated how it intends to definitively overcome this situation.⁴²

22. The issue is therefore whether at this point in the Libyan domestic proceedings, namely, the investigation stage, Libya is deemed unable to gather the necessary evidence and to carry out its proceedings because first, Defence witnesses may be unwilling to testify at trial due to security concerns which have not at this stage been adequately addressed (and the necessary evidence might not therefore be presented) and second, Libya will be unable to move to the prosecution or trial stage of the proceedings unless Al-Senussi is provided adequate legal representation.

³⁸ Senussi Admissibility Challenge, para.177.

³⁹ ICC-01/11-01/11-258, para.95.

⁴⁰ Saif Admissibility Decision, para.211.

⁴¹ Senussi Admissibility Challenge, para.149. ICC-01/11-01/11-158-AnxB, Article 161, Libyan Criminal Procedure Code. It appears that Article 161 should be 162.

⁴² The Prosecution notes that Libya sought leave to reply to the Prosecution Response on this aspect: ICC-01/11-01/11-331, para.12.

23. The Prosecution recalls the ruling of the Appeals Chamber that the admissibility of a case must be determined on the basis of the facts as they exist at the time of the admissibility proceedings.⁴³ The Prosecution is also mindful that the Appeals Chamber, in the same decision, noted that the national activities “may change over time”; that “a case that was originally admissible may be rendered inadmissible by a change of circumstances in the concerned States and vice versa”; and that “the Statute assumes that the factual situation on the basis of which the admissibility of a case is established is not necessarily static, but ambulatory”.⁴⁴ Moreover and as this PTC has noted, the ability of a State genuinely to carry out an investigation or prosecution must be assessed in the context of the relevant national system and procedures.⁴⁵

24. The Court must thus, on the one hand, resist engaging in speculative assessments as to the outcome of possible future events at the national level;⁴⁶ and on the other, remain vigilant to obvious obstacles, established on the basis of concrete evidence, that establish a foreseeable risk that national proceedings cannot in fact be carried out. In this regard it is worth noting a discussion that arose during the negotiations of the Statute: some delegations expressed their concern that the Court was not to assume jurisdiction simply because the national authorities were proceeding more slowly (or less efficiently) than other States or the Court itself in handling similar cases. The critical factor to these delegations was whether there was a defect in the

⁴³ ICC-01/04-01/07-1497OA8, para.56. See also ICC-02/11-01/11-436-Red, para.23.

⁴⁴ ICC-01/04-01/07-1497OA8, para.56.

⁴⁵ Saif Admissibility Decision, para.200.

⁴⁶ ICC-02/04-01/05-377, para 51.

approach taken by the State which inevitably, if left to its conclusion, would result in a travesty of justice.⁴⁷

25. Notwithstanding that the case against Al-Senussi is in the midst of its investigation,⁴⁸ it is difficult to predict the impact that the current lack of clarity as to the existence and effective functioning of a witness protection program in Libya can have on the presentation of the necessary evidence in subsequent proceedings. At this stage there is no list of prospective Defence witnesses, nor is there an assessment of their need for protective measures. Nonetheless, the Prosecution would welcome submissions by Libya on the questions and concerns raised by the Chamber in the Saif Admissibility Decision insofar as they impact of the present case. With respect to the appointment of Defence counsel, while Libya is currently able to investigate Al-Senussi at this stage, unless he is appointed a lawyer, there is no prospect that proceedings can progress to the next phase. The Chamber cannot base its decision on the admissibility of the case *now* on possible future facts. However, the Chamber must be satisfied, on the basis of submissions received, that there is no impediment or defect that would render the future appointment of counsel impossible, thereby finding Libya unable to “otherwise carry out its proceedings” within the meaning of Article 17(3).

Conclusion

26. Based on the foregoing and notwithstanding the Pre-Trial Chamber’s interpretation of “case” and “conduct”, the Prosecution reiterates that Libya is investigating Al-Senussi for substantially the same conduct and that Libya has presented specific evidence with probative value to support its challenge. With respect to consideration of Libya’s ability in light of the factors

⁴⁷ A. Cassese, *The Rome Statute of the International Criminal Court, Volume I* (Oxford University Press, 2002), pp.673-4 .

⁴⁸ Senussi Admissibility Challenge, paras.136-138.

considered by the Chamber in the Saif Admissibility Decision, further information is required on how counsel will be secured for Al-Senussi for the purpose of further national proceedings.



Fatou Bensouda, Prosecutor

Dated 14 of June 2013
At The Hague, the Netherlands