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**International
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Court**

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

Date: **29 August 2013**

THE APPEALS CHAMBER

Before: Judge Anita Ušacka, Presiding Judge
Judge Sang-Hyun Song
Judge Sanji Mmasenono Monageng
Judge Akua Kuenyehia
Judge Erkki Kourula

SITUATION IN LIBYA

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

PUBLIC

**Defence Response to the “Observations on behalf of Mishana Hosseinioun
pursuant to Rule 103”**

Source: Defence for Mr. Saif Al-Islam Gaddafi

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

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I. Introduction

1. On 22 August 2013, Ms. Mishana Hosseinioun, who had been granted leave by the Appeals Chamber to participate as an *amicus curiae* in the admissibility proceedings, submitted her observations (“the Amicus Observations”).¹
2. Ms. Hosseinioun appended various decisions of the African Commission on Human and Peoples’ Rights (“the African Commission”) and the African Court of Human and Peoples’ Rights (“the African Court”), which requested Libya, *inter alia*, to allow Mr. Saif Al-Islam Gaddafi to have access to a lawyer of his choosing.
3. These decisions and the reaction (or rather, non-reaction) of the Libyan Government are relevant to the following aspects of the admissibility proceedings:
 - i. The obligation of the Pre-Trial Chamber and Appeals Chamber to interpret and apply the Rome Statute in a manner which is consistent with internationally recognised human rights, which in turn, impacts on the limits of the Pre-Trial Chamber’s discretion to determine the appropriate procedure for the admissibility proceedings; and

The ability of the Libyan authorities to carry out the domestic proceedings against Mr. Gaddafi in a manner that is consistent with their domestic legal framework- which incorporates the African Charter on Human and Peoples’ Rights (“the African Charter”), and the attendant obligation to secure effective legal representation for Mr. Gaddafi.

4. In particular, these materials demonstrate that:

¹ ICC-01/11-01/11-414.

- i. It would be have been an unreasonable exercise of discretion for the Pre-Trial Chamber to further prolong the admissibility proceedings in light of the impact of such a prolongation on the rights of Mr. Gaddafi; and
 - ii. Although ordered by both the African Commission and African Court to secure legal representation for Mr. Gaddafi from April 2012 onwards, the Libyan authorities had neither done so, nor informed the African Commission or African Court as to why it had not done so.
5. These issues fall directly within the scope of the appeal submitted by the Libyan Government against the decision of the Pre-Trial Chamber (“the Admissibility Appeal”). They are also predicated on materials which were submitted to the Pre-Trial Chamber, and to which the Libyan Government had an opportunity to respond before the Pre-Trial Chamber issued its decision on the admissibility challenge.²

II. Submissions

- i. *The obligation of the Pre-Trial Chamber and Appeals Chamber to interpret and apply the Rome Statute in a manner which is consistent with internationally recognised human rights.*
6. A common thread running through Libya’s Admissibility Appeal is the argument that the ICC should adopt a more deferential approach to transitional States, and, by utilising a more flexible interpretation of the admissibility criteria, find the case to be inadmissible, “while leaving open

² ICC-01/11-01/11-414, para. 6. *See also* ICC-01/11-01/11-308, para. 15 and Libya’s response: ICC-01/11-01/11-318-Red.

the option of exercising international jurisdiction at a later stage if domestic proceedings do not progress satisfactorily”.³

7. Concretely, the Libyan Government employed this argument in order to argue:

- i. for a more lenient definition of the same person, same conduct test;⁴
- ii. that the Chamber should have granted Libya further opportunities to submit additional evidence, and apprise the Chamber of new developments;⁵
- iii. that the Court should have deferred its assessment of Libya’s ability to implement witness protection and to secure legal representation for Mr. Gaddafi;⁶ and
- iv. that the Chamber should have taken into consideration the ‘efforts’ made by the Libyan authorities, even if those efforts had not come to fruition at the time of the admissibility proceedings.⁷

8. Points ii –iv directly concern Ground 4 of the Admissibility Appeal.

9. Apart from the fact that the Libyan Government failed to demonstrate that the Pre-Trial Chamber did not in fact tailor its approach to take into consideration the transitional circumstances in Libya, for example, by granting several extensions of time and multiple opportunities to submit evidence over a lengthy period of time, the Libyan Government also failed to submit any concrete authorities or legal arguments in support of such

³ ICC-01/11-01/11-370-Conf-Red at para. 74. *See also* paras. 166 and 172.

⁴ ICC-01/11-01/11-370-Conf-Red, paras.71-74.

⁵ ICC-01/11-01/11-370-Conf-Red, paras. 110-115, 120-128, 169.

⁶ ICC-01/11-01/11-370-Conf-Red, paras. 166, 171

⁷ ICC-01/11-01/11-370-Conf-Red at para. 172.

an approach, except for vague references to the concepts of State sovereignty and a State's right to due process.

10. In contrast, absolutely no consideration is given to the extent to which the Chamber should prioritise the rights of the challenging State over the specific statutory rights of the defendant, who is the subject of the challenge.
11. In this regard, the Appeals Chamber has held that all aspects of the Rome Statute must be interpreted and applied in a manner which is consistent with internationally recognised human rights; "first 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."⁸
12. Both the substantive and procedural law governing admissibility challenges are subject to this requirement. In terms of the latter aspect, although Rule 58 imbues the Pre-Trial Chamber with a broad discretion to organise the procedure for the admissibility challenge, this discretion is not unfettered and must be exercised within the constraints of the Pre-Trial Chamber's authority under the Statute. This necessarily includes the above constraint that the Pre-Trial Chamber must ensure that its rulings concerning the admissibility of the case are consistent with internationally recognised human rights, and the defendant's right to a fair trial under the Statute (in which the right to legal representation and expeditious proceedings are subsumed).
13. Throughout the proceedings, the Defence for Mr. Saif Al-Islam Gaddafi repeatedly raised its concern that the prolongation of the admissibility proceedings would prevent Mr. Gaddafi from being able to exercise his rights under the Rome Statute in an effective manner, in particular, his right to effective legal representation and his right to expeditious proceedings.

⁸ ICC-01/04-01/06-772 at para. 37.

14. In so doing, the Defence had cited the proceedings before the African Court and the African Commission, and the failure of the Libyan authorities to either implement these decisions or engage with the proceedings, in order to underscore that in the absence of any mechanism to enforce his rights in the domestic sphere, the further prolongation of the admissibility proceedings could have a disproportionate effect on the ability of Mr. Gaddafi to exercise his rights in an effective manner.
15. Concretely, at the October 2012 admissibility hearing, the Libyan Government “submitted that, given Libya’s transitional context, the Court should engage with Libya on a constructive and ongoing basis, receiving further reports and submissions ‘until such time as it has satisfied itself that Libya has had a reasonable opportunity to pursue a case – at which time the Chamber can then make a decision on admissibility’”.⁹
16. The Government of Libya further referred to concerns raised by the ICC Prosecutor concerning the lack of legal representation for Mr. Gaddafi and the impact that this could have on the ability of Libyan authorities to advance the case to trial, and proposed that such concerns could be addressed through other “monitoring mechanisms, such as the African Court on Human and People's Rights”.¹⁰
17. In response, the Defence contended that the proposals of the Libyan Government that the ICC should defer the admissibility decision, whilst monitoring the progress of the Libyan authorities in the interim, or declare the case inadmissible with a view to reclaiming jurisdiction if Libya failed to conduct independent and impartial proceedings, were completely unrealistic and unworkable, as demonstrated *inter alia*, by the fact that the Libyan authorities had failed to respond to orders for

⁹ ICC-01/11-01/11-370-Conf-Red, para. 26.”

¹⁰ ICC-01/11-01/11-T-2-Red-ENG at page 43 lines 2 -18.

provisional measures from the African Court, which specifically pertained to Mr. Gaddafi's right to legal representation and detention conditions.¹¹

18. Subsequently, in a request to dismiss the Libyan Government's notification of additional information concerning the appointment of a new Prosecutor-General, the Defence reiterated its request for the Pre-Trial Chamber to issue an immediate decision on the admissibility challenge, and in so doing, drew the attention of the Pre-Trial Chamber to a recent decision of the African Court on provisional measures, which found that "the alleged length of detention of the Detainee without access to a lawyer, family or friends", when considered in conjunction with the failure of the Libyan Government to respond to the African Commission's decision ordering provisional measures, had given rise to "a situation of extreme gravity and urgency, as well as a risk of irreparable harm to the Detainee [Mr. Gaddafi]".¹²
19. Although the Libyan Government responded to the Defence filing,¹³ the Government did not refer to the decision of the African Court, nor did the Government provide any information which would suggest that it had responded to this decision or in any way complied with the provisional measures requested by the African Court.
20. The respective decisions of the African Court and African Commission were predicated on Articles 6 and 7 of the African Charter, which concern the protection against arbitrary detention and the right to fair proceedings. These Articles utilise similar wording to the corresponding provisions in the International Covenant on Civil and Political Rights (Articles 9 and 14), the European Convention on Human Rights (Articles 5 and 6), and the American Convention on Human Rights (Articles 7 and

¹¹ ICC-01/11-01/11-T-3-Red-ENG p. 29 lines 2-3.

¹² ICC-01/11-01/11-308, para. 15.

¹³ ICC-01/11-01/11-318-Red.

- 8). Articles 6 and 7 of the African Charter must therefore be considered to be reflective of ‘internationally recognised human rights’.
21. Although the Pre-Trial Chamber was not bound by the decision of the African Court *per se*, it was incumbent on the Pre-Trial Chamber to ensure that the procedure that it crafted to resolve the admissibility challenge was not inconsistent with internationally recognised human rights. The African Court’s findings concerning the status of Mr. Gaddafi’s rights therefore formed a benchmark against which to judge whether the Libyan Government’s various proposals to further extend the admissibility proceedings would have had a disproportionately prejudicial impact on the internationally recognised rights of Mr. Gaddafi.
22. In deference to the transitional circumstances faced by Libya following the 2012 election, the Pre-Trial Chamber had extended the deadline for Libya to submit its reply to the admissibility challenge. However, in recognition of the impact that such an extension could have on the length of Mr. Gaddafi’s detention in Zintan,¹⁴ the Pre-Trial Chamber requested the Libyan Government to submit a report concerning *inter* whether a lawyer had been appointed to Mr. Gaddafi, and his detention conditions.¹⁵
23. Although the Libyan Government did not appeal or contest the Chamber’s finding that length of Mr. Gaddafi’s detention in Zintan and the corollary impact that it could have on Mr. Gaddafi’s rights were relevant to the Chamber’s exercise of discretion under Rule 58, the Libyan Government failed to either report on Mr. Gaddafi’s detention conditions, or explain why it had been unable to report on these specific issues.¹⁶
24. When faced with the decision as to whether the ‘transitional’ circumstances in Libya warranted further extensions of the admissibility

¹⁴ “the Chamber notes the fact that Mr. Gaddafi has been detained for almost nine months and that the Admissibility Challenge was filed more than three months ago”, ICC-01/11-01/11-200, para. 19.

¹⁵ ICC-01/11-01/11-200 at para. 20.

¹⁶ ICC-01/11-01/11-205.

proceedings in 2013, the Pre-Trial Chamber was thus aware that the ICC lacked the capacity to monitor the detention and rights of Mr. Gaddafi in an effective manner during any such prolongation, and, that contrary to the assertions of the Libyan Government at the admissibility hearing, any concerns regarding the implementation of Mr. Gaddafi's rights were unlikely to be addressed through other monitoring mechanisms such as the African Court.

25. No reasonable Pre-Trial Chamber could have deferred its decision on the merits of the admissibility challenge in such circumstances.

26. The Statute's so-called deference to State sovereignty also does not permit the Chamber to either allow political considerations to water down the admissibility criteria, or leave the defendant in a legal limbo as concerns his ability to access his rights in an effective manner. If a State has failed to fulfill the admissibility criteria within a reasonable period of time, then the Chamber cannot continue to subordinate the defendant's right to enjoy the protection of the law to a State's desire to prosecute the case.

ii. *The ability of the Libyan authorities to carry out the domestic proceedings against Mr. Gaddafi in a manner that is consistent with their domestic legal framework- which incorporates the African Charter on Human and Peoples' Rights*

27. In its Admissibility Appeal, the Libyan Government asserts, *inter alia*, that the findings of the Pre-Trial Chamber concerning the inability of the Libyan authorities to secure legal representation was "purely speculative", and that "[a]bsent a finding that the Libyan authorities cannot ensure that Mr. Gaddafi will be represented at his trial, the Chamber erred in finding that the difficulties experienced by the Libyan authorities amount to "unavailability" within the terms of the Statute."¹⁷

¹⁷ ICC-01/11-01/11-370-Conf-Red at para. 171.

28. In making the distinction between a finding that Libya had not secured legal representation and a finding that Libya cannot ensure such legal representation, the Libyan Government is seeking to impose the burden on the Chamber to prove a negative: rather than the burden falling on the Government to demonstrate that it possessed the ability to apply key aspects of its domestic legal framework to Mr. Gaddafi, the Libyan Government suggests that the Chamber should have only ruled against Libya if it had found that Libya did not possess the ability to secure legal representation for Mr. Gaddafi.

29. It was also not speculative for the Pre-Trial Chamber to find that at the time of the admissibility proceedings:

- i. Mr. Gaddafi did not have legal representation;
- ii. The Libyan Government had acknowledged that there were impediments to the appointment of counsel; and
- iii. The Libyan Government's submissions had "fall[en] short of substantiating whether and how the difficulties in securing a lawyer for the suspect may be overcome in the future".¹⁸

30. Indeed, it would have been speculative for the Chamber to have relied upon the Government's vague assurances that these impediments might be removed at some undefined point in the future.

31. The Government's argument that the Chamber should have only found against the Libyan Government on this point if it had been demonstrated that Libya cannot ensure legal representation is also predicated on the implicit premise that in order to make a finding of inability as concerns any aspect, the Chamber should have postponed its ruling indefinitely, in case at some remote juncture in the future, the Government succeeded in securing legal representation.

¹⁸ ICC-01/11-01/11-344-Red at para. 214.

32. The Chamber's assessment of 'inability' must, however, be determined on the basis of the information actually before it, and the procedural developments during the admissibility proceedings themselves.
33. During the admissibility proceedings, the Government repeatedly submitted that the proceedings would progress to the next stage in the imminent future, which would entail the appointment of counsel.¹⁹ This promise failed to crystallise over a thirteen month period.
34. Over a period of 14 months, the Government had also failed to implement orders from the African Court and African Commission to ensure that Mr. Gaddafi had access to a lawyer of his choice.
35. The Libyan Government's vague assurances that it was taking steps to secure legal representation for Mr. Gaddafi must be viewed against the fact that Libya had been either unable or unwilling to implement its obligation under the African Charter over a period of 14 months, notwithstanding several direct requests from the African Commission and African Court to do so.
36. In such circumstances, the difference in semantics between a finding that the Government had not secured legal representation and a finding that the Government could not secure legal representation, is negligible, if not non-existent.
37. The rulings of the African Court and the African Commission thus demonstrate the correctness of the Chamber's finding that the Libyan Government was unable to activate key due process rights within the domestic legal framework, such as the right to legal representation, and that this inability constituted a fundamental impediment in terms of the Government's ability to bring Mr. Gaddafi to trial.

¹⁹ ICC-01/11-01/11-130-Red, paras. 41, 61, 91; CC-01/11-01/11-T-2-Red-ENG, p. 26, ICC-01/11-01/11-T-3-Red-ENG WT, p. 52, lines 14 to 16; ICC-01/11-01/11-258-Conf-Red3, paras. 48, 60.

38. In terms of the relationship between the rights protected under the African Charter, and domestic law, as submitted by the Defence in its response to the admissibility challenge, since Libya is a monist legal system, the obligations set out in any international instruments ratified by Libya are directly incorporated into domestic law, and should be considered to form part of the domestic law, which is applicable to the domestic proceedings of Mr. Gaddafi.²⁰
39. In its admissibility challenge, the Libyan Government affirmed that Libya is a party to several human rights instruments, such as the African Charter, and that “[t]he Libyan Government is committed to meeting all the fair trial requirements set out in these instruments”.²¹ The Libyan Government therefore confirmed that it considered that the obligations set out in these instruments form part of the domestic legal framework applicable to the proceedings against Mr. Gaddafi.
40. During the October 2012 admissibility hearings, the Libyan Government submitted that:

“the GNC now, and the NTC before it, is centrally involved in the creation of the new Libya, has shown itself to be strongly committed to due process and to the rule of law. That explains the profound importance of the Gaddafi case within Libya, whilst also demonstrating that it will be conducted in full compliance with due process standards under Libyan law and under international law. To this Libya is committed, it has publicly declared that, and through me it is publicly declaring it again”.²²

²⁰ ICC-01/11-01/11-190-Conf-Corr, footnote 28.

²¹ ICC-01/11-01/11-130-Conf, para. 57.

²² ICC-01/11-01/11-T-2-Red-ENG p. 24 at lines 16-22.

41. As noted above, at the same hearing, the Libyan Government also referred to the role of the African Court in monitoring the implementation of Mr. Gaddafi's due process rights in domestic proceedings. The Libyan Government thereby indicated that it considered this oversight mechanism to be directly relevant to the ability of the Libyan authorities to conduct the proceedings against Mr. Gaddafi in a manner which respected his rights under the domestic legal framework, including Libya's obligations under the African Charter.
42. The Libyan Government further indicated that under domestic law, the trial against Mr. Gaddafi could not commence unless legal representation had been secured for Mr. Gaddafi.²³ In this regard, the Government clarified that the *pro forma* appointment of a counsel would not in itself satisfy this requirement: unless the defendant was able to adequately prepare with his Counsel in advance of the trial, the trial could be quashed as a nullity.²⁴
43. Although the Libyan Government had attempted, throughout the admissibility proceedings, to downplay the relevance of Mr. Gaddafi's due process rights to the Chamber's adjudication of the challenge, in its 3 March 2013 reply to the further submissions, the Libyan Government explicitly:

"accepted that the Trial Chamber's queries concerning Libyan domestic law and fair trial rights within the criminal process are relevant to the question of whether there is an ongoing investigation or prosecution and whether the Libyan state is able to genuinely carry out such an investigation or prosecution."²⁵

²³ ICC-01/11-01/11-T-2-Red-ENG, p. 26, lines 15-20.

²⁴ ICC-01/11-01/11-T-2-Red-ENG, p. 26, lines 19-20

²⁵ ICC-01/11-01/11-293-Conf at para. 96.

44. The Pre-Trial Chamber's queries had included a request for information
 "on concrete steps that have been taken in order to identify and secure, in Libya or elsewhere, independent legal representation for Mr. Gaddafi in domestic proceedings and to ensure that said lawyer will be able to represent his interests without fear of reprisal or intimidation."²⁶
45. Libya had, in turn, informed the Pre-Trial Chamber that although "considerable steps" had been taken by the Government to identify a suitable counsel, no counsel had been appointed either at the time of the January 2013 further submissions,²⁷ or the March 2013 reply to the further submissions.²⁸ Indeed, the particular language employed by the Government – "[t]he Libyan Government *is in the process* of approaching the Bar Associations of Tunisia and Egypt to obtain a suitably qualified and experienced counsel for Saif Al-Islam Gaddafi (emphasis added)" – underscored that the Libyan Government had not been successful in securing a Libyan lawyer for Mr. Gaddafi, and had not yet taken 'concrete steps' to obtain a foreign counsel for Mr. Gaddafi.
46. Given that it was undisputed that the trial proceedings could not commence until Mr. Gaddafi had secured effective legal representation, there can be no error in the Pre-Trial Chamber's conclusion that the absence of counsel was an impediment to the case progressing to trial, and that the Libyan Government had failed to substantiate that it possessed the ability to remove this impediment at the time of the admissibility proceedings.²⁹
47. The correctness of this conclusion is further supported by Libya's failure – over a period of 14 months - to implement requests by the African

²⁶ ICC-01/11-01/11-239

²⁷ ICC-01/11-01/11-258-Conf-Red3, para. 97.

²⁸ ICC-01/11-01/11-293-Conf, para.53.

²⁹ ICC-01/11-01/11-344-Red at para. 214.

Commission and the African Court to give effect to Mr. Gaddafi's right to effective legal representation.

48. According to Annex 1 of the Amicus Observations, on 18 April 2013, the Chairperson of the African Commission had requested the President of the National Transitional Council to take measures to ensure that Mr. Gaddafi had effective access to lawyers. The NTC failed to respond to this request.
49. As set out in Annex 3 of the Amicus Observations, the African Court ordered Libya to allow Mr. Gaddafi to have immediate access to a lawyer of his choosing, and to report to the Court within fifteen days on the measures which it had taken to implement this order.
50. As of 4 June 2013, the Libyan Government had failed to respond to either the initial fifteen day deadline for submitting the report, or the further 14 day extension granted by the Court.³⁰
51. No evidence or information was placed before the African Court, or indeed the ICC, to suggest that Mr. Gaddafi has been granted access (in the sense of being able to communicate in a confidential manner and receive legal advice) to a lawyer of his choosing in the interim. No evidence was placed before the African Court or Commission, or indeed the ICC, to indicate that Mr. Gaddafi had declined to be represented by a lawyer of his choice.
52. To the contrary, Mr. Gaddafi put in writing that he wished to receive a legal visit from the OPCD, and confirmed in writing his wish to be represented by lawyers selected through a mechanism of his choice.³¹ The Libyan authorities failed to implement the privileged meeting between the OPCD and Mr. Gaddafi, and declined to respond to multiple attempts

³⁰ Annex 4 to the Amicus Observations.

³¹ ICC-01/11-01/11-70-Red2 at paras. 37, 41 and 44.

to appoint a domestic counsel in accordance with the mechanism designated by Mr. Gaddafi.³²

53. Irrespective as to whether Libya's failure to implement the order of the African Court was due to unwillingness or inability, the fact that Mr. Gaddafi had not had access to a lawyer – let alone a lawyer of his choosing – for the purpose of preparing his defence against the ICC related allegations, rendered Libya unable to conduct its proceedings against Mr. Gaddafi in the manner required by its domestic legal framework.

III. Relief Sought

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

- i. Accept the Amicus Observations; and
- ii. Reject the Admissibility Appeal.



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

Dated this, 29th Day of August 2013

At London, United Kingdom

³² ICC-01/11-01/11-281-Conf-Exp at para. 259.