International Criminal Court

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PRE-TRIAL CHAMBER I

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

Decision on the admissibility of the case against Saif Al-Islam Gaddafi

V. WILLINGNESS OR ABILITY GENUINELY TO INVESTIGATE AND PROSECUTE

138. The Chamber received submissions related to the second limb of the admissibility analysis. In relation to the issue of "inability", in light of the initial submissions and evidence received, the Chamber raised a number of additional specific questions in order to ascertain the ability of Libya genuinely to investigate and prosecute the case at hand. Given that, as explained below, Libya is found to be unable genuinely to carry out the investigation or prosecution against Mr Gaddafi the Chamber will not address the alternative requirement of "willingness". [...]

Findings of the Chamber in relation to the inability of Libya genuinely to carry out the investigation or prosecution

199. Turning to the matter of whether Libya is able genuinely to investigate or prosecute the case against Saif Al-Islam Gaddafi, the Chamber recalls that according to article 17(3) of the Statute:

> In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise is unable to carry out its proceedings. [...]

205. Without prejudice to [several] achievements, it is apparent from the submissions that multiple challenges remain and that Libya continues to face substantial difficulties in exercising its judicial powers fully across the entire territory. Due to these difficulties, which are further explained below, the Chamber is of the view that its national system cannot yet be applied in full in areas or aspects relevant to the case, being thus "unavailable" within the terms of article 17(3) of the Statute. As a consequence, Libya is "unable to obtain the accused" and the necessary testimony and is also "otherwise unable to carry out [the] proceedings" in the case against Mr Gaddafi in compliance with its national laws, in accordance with the same provision.

(i) Inability to obtain the accused

206. The Chamber notes that Libya has not yet been able to secure the transfer of Mr Gaddafi from his place of detention under the custody of the Zintan militia into State authority.[...]

207. The Chamber has no doubt that the central Government is deploying all efforts to obtain Mr Gaddafi's transfer but, in spite of Libya's recent assurances, no concrete progress to this

effect has been shown since the date of his apprehension on 19 November 2011. The Chamber is not persuaded that this problem may be resolved in the near future and no evidence has been produced in support of that contention.

208. The Chamber notes the submissions of Libya that *in absentia* trials are not permitted under Libyan law when the accused is present on Libyan territory and his location is known to the authorities. As a result, without the transfer of Mr Gaddafi into the control of the central authorities, the trial cannot take place.

(ii) Inability to obtain testimony

209. The Chamber is also concerned about the lack of capacity to obtain the necessary testimony due to the inability of judicial and governmental authorities to ascertain control and provide adequate witness protection. [...]

211. The Chamber notes the various submissions received during the admissibility proceedings in regard to witness protection programmes under Libyan law. Libya has indicated that the measures for witness protection applicable at pre-trial can be continued at trial as it is within the discretionary powers of the trial judge to receive evidence in whatever form he or she deems appropriate. However, further to its submission that trial judges have discretionary powers to order protective measures, Libya has presented no evidence about specific protection programmes that may exist under domestic law. [...]

(iii) Otherwise unable to carry out its proceedings: appointment of defence counsel

212. The Libyan Govemment submits that the suspect has not exercised his right to appoint counsel as set out in article 106 of the Libyan Code of Criminal Procedure. The Defence cautions that significant practical impediments exist to securing any legal representation for Mr Gaddafi in view of the security situation in Libya and the risk faced by lawyers who act for associates of the former regime.

213. The Chamber notes that this position was confirmed by the Libyan Government during the Admissibility Hearing. Indeed, attempts to secure legal representation for Mr Gaddafi have seemingly failed. [...]

214. [...T]he Chamber is concerned that this important difficulty appears to be an impediment to the progress of proceedings against Mr Gaddafi. If this impediment is not removed, a trial cannot be conducted in accordance with the rights and protections of the Libyan national justice system, including those enshrined in articles 31 and 33 of its 2011 Constitutional Declaration.

VI. CONCLUSION

219. In this Admissibility Challenge, the Chamber has not been provided with enough evidence with a sufficient degree of specificity and probative value to demonstrate that the Libyan and the ICC investigations cover the same conduct and that Libya is able genuinely to carry out an investigation against Mr Gaddafi. The Chamber finds that the present case is admissible before the Court and recalls Libya's obligation to surrender the suspect.

THE APPEALS CHAMBER

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

Judgment

on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled “Decision on the admissibility of the case against Abdullah Al-Senussi”

Determination by the Appeals Chamber

215. The Appeals Chamber recalls that article 17 is designed to determine the circumstances in which a case shall be inadmissible before the Court by reference to the actions of a State which has jurisdiction over that case. In making that determination, regard is to be had to the fact that the Court is "complementary to national criminal jurisdictions" and the question to be resolved is whether the Court or the State is the proper forum to exercise jurisdiction over the case.

216. It is recalled that article 17(2) as a whole defines the circumstances in which a State is *unwilling* genuinely to carry out the investigation and/or prosecution. It makes an exception to the rule that a case is inadmissible before the Court if, as in the present case, it is being investigated or prosecuted by a State which has jurisdiction over it.

217. The purpose of this exception is to ensure that the principle of complementarity - which enables States to retain jurisdiction over cases and promotes the exercise of criminal jurisdiction domestically - is not abused, so that it would be contrary to the overall purpose of the Statute, which is to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole.

218. The concept of being "unwilling" genuinely to investigate or prosecute is therefore primarily concerned with a situation in which proceedings are conducted in a manner which would lead to a suspect evading justice as a result of a State not being willing genuinely to investigate or prosecute. This is provided for most specifically in article 17(2)(a), which expressly states that, in order to determine unwillingness, the Court shall consider whether, "[t]he proceedings were or are being undertaken or the national decision was made *for the purpose of shielding the person concerned from criminal responsibility*" (emphasis added). The fact that the other two sub-paragraphs of article 17(2) do not expressly refer to shielding or protecting the person concerned cannot detract from the fact that they are sub-paragraphs of a provision defining *unwillingness*. The primary reason for their inclusion is therefore likewise not for the purpose of guaranteeing the fair trial rights of the suspect generally.

219. Indeed, the Court was not established to be an international court of human rights, sitting in judgment over domestic legal systems to ensure that they are compliant with international standards of human rights. However, if the interpretation proposed by the Defence were adopted, the Court would come close to becoming an international court of human rights. A

case could be admissible merely because domestic proceedings do not fully respect the due process rights of a suspect. This would necessarily involve the Court passing judgment generally on the internal functioning of the domestic legal systems of States in relation to individual guarantees of due process. Had this been the intention behind article 17, the Appeals Chamber would have expected this to have been included expressly in the text of the provision. [...]

229. However, notwithstanding the above, the Appeals Chamber also observes that, while article 17 is *lex specialis* on questions of admissibility, the Statute as a whole is underpinned by the requirement in article 21 (3) that the application and interpretation of law under the Statute "must be consistent with internationally recognized human rights". The Appeals Chamber also notes the final paragraph of the Preamble, setting out that the States Parties to the Statute "Resolved to guarantee lasting respect for and the enforcement of international justice". As set out above, the Appeals Chamber considers that article 17 was not designed to make principles of human rights *per se* determinative of admissibility. Yet, at the same time, the Appeals Chamber agrees with the Prosecutor that the fact that admissibility is not an enquiry into the fairness of the national proceedings *per se* does not mean "that the Court must turn a blind eye to clear and conclusive evidence demonstrating that the national proceedings completely lack fairness".

230. At its most extreme, the Appeals Chamber would not envisage proceedings that are, in reality, little more than a predetermined prelude to an execution, and which are therefore contrary to even the most basic understanding of justice, as being sufficient to render a case inadmissible. Other less extreme instances may arise when the violations of the rights of the suspect are so egregious that it is clear that the international community would not accept that the accused was being brought to any genuine form of justice. In such circumstances, it is even arguable that a State is not genuinely investigating or prosecuting at all. Whether a case will ultimately be admissible in such circumstances will necessarily depend upon its precise facts. [...]