

ICC Case Against Spy Chief Senussi Deemed Inadmissible

By [Beth Van Schaack](#)

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An important and long-awaited ruling came down from Pre-Trial Chamber I of the International Criminal Court on Friday. In it, PTC I ruled that the case against Abdullah Al-Senussi—Libya’s former Director of Military Intelligence—is inadmissible before the ICC because there are domestic proceedings against him covering substantially the same conduct that is the subject of the ICC charges against him.

Background to the Libya cases before the Court

After the Security Council referred the situation in Libya to the Court with UNSCR 1970 in February 2011, the Pre-Trial Chamber (PTC) issued warrants of arrest in June 2011 against Muammar Gaddafi, Saif Al-Islam Gaddafi, and Al-Senussi for crimes against humanity committed during the February 2011 uprising by members of the Libyan Security Forces against protesters and political opponents. Senussi was eventually discovered in March 2012 in Mauritania, which finally agreed to extradite him to Libya after refusing to do so for months—ostensibly because authorities had commenced immigration proceedings against him in light of his use of a fraudulent passport to enter the country. In a challenge filed by the Defense to this course of action, the ICC Appeals Chamber found that Mauritania had been under no obligation to transfer him to the Court:

‘ It had no treaty obligations, because it is not a member of the Court.
‘ It had no obligations arising from Resolution 1970, because in operative paragraph (5), the Council obliged only Libya to “cooperate fully” with the Court. Other states were merely “urged” to do so.

The Libyans initiated proceedings against Senussi in April 2012 in a case that now includes 38 other captured regime figures—including Baghdadi Mahmoudi (the former Prime Minister) and Saif Gaddafi. These proceedings originally commenced before a military prosecutor, but were transferred to the Prosecutor General’s office following a July 2012 Supreme Court decision. In April 2013, a dream legal team led by James Crawford filed an admissibility challenge on behalf of the government of Libya in the Senussi case pursuant to Articles 17 and 19 of the ICC Statute. (Another legal team led by Philippe Sands filed a parallel challenge in the Gaddafi case in May 2012, discussed below).

The ICC’s Admissibility Regime

Article 17 states that a case is inadmissible where it is

being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation.

This provision embodies the bedrock principle of complementarity, which dictates that the ICC should assert go forward with a case only where there are no domestic proceedings in a state with jurisdiction. The Court has adopted a two-step test for ruling on complementarity that asks:

1. Are there national proceedings involving the same defendant for substantially the same conduct? If so,
2. Is the state unwilling or unable to genuinely proceed?

Note that complementarity was designed to deal with situations in which the domestic system fails to dispense justice, because either the authorities are shielding an accused or the system has collapsed or has been rendered otherwise unavailable. The statutory framework does not easily apply to an over-zealous national system, which might be quick to condemn an enemy of the state. Furthermore, the principle of complementarity is concerned with the charged conduct and not its legal characterization; so long as substantially the same underlying conduct (e.g., the intentional killing or mistreatment of civilians) is at issue, it is of no moment that the domestic prosecutor charged such acts as simple murder or assault rather than as crimes against humanity or war crimes.

A state is entitled to challenge admissibility once as a matter of course pursuant to Article 19 of the Statute, and it is to do so at “the earliest opportunity” per sub-paragraph (5). The Court may grant leave for a second challenge under sub-paragraph (4), but only “in exceptional circumstances.”

The Admissibility Challenge in Senussi

At issue in Senussi was the “same person/same conduct” requirement. Libya argued that a domestic prosecutor may legitimately prioritize different incidents or charges against an accused than would the ICC Prosecutor, who may be constrained by temporal and subject matter limitations on the Court’s jurisdiction. Libya urged the Chamber to adopt the notion of a “criminal transaction” that would reflect a “course of conduct” and take into account the time, place, means, and methods of commission as well as the identity of the victims and perpetrators, but not necessarily fixate on particular incidents or victims. Libya submitted court records, witness statements, evidentiary materials (including intercepts, orders, medical records, and flight documents), and other information to demonstrate that the local charges against Senussi covered a range of unlawful conduct, including crimes committed in Benghazi in February 2011. Prominent among these additional allegations include murder charges for the 1996 Abu Salim prison massacre, which resulted in the death of more than 1200 inmates. In terms of procedural progress, Libya demonstrated that local prosecutors had moved from the investigative phase into the accusation phase.

In its submissions, the Prosecutor took Libya’s side, arguing that the country had demonstrated that it had taken concrete and progressive investigative steps in with regard to the same case before the Court and that any variation in charges was not “substantial”. Chief Prosecutor Fatou Bensouda argued that:

the Statute’s complementarity provisions should not become a tool for overly harsh structural assessments of the judicial machinery in developing countries or in countries in the midst of a post-conflict democratic transition which, as Libya notes, will not possess a sophisticated or developed judicial system.

By contrast, the Defense and victims argued for a strict interpretation of “same case,” requiring proof that the state was investigating the “overwhelming majority” of incidents under consideration before the Court, and attempted to demonstrate that there was insufficient overlap between the charges. Furthermore, they argued that Libya was unwilling and unable to genuinely proceed as evidenced by the unjustifiable delay in the case, the lack of impartiality and independence with which the proceedings are being carried out, the lack of access throughout the country to witnesses and evidence, the lack of witness protection measures, and the general and persistent situation of insecurity in the country. It was also argued that the Libyan authorities are conducting the proceedings in violation of Senussi’s fundamental rights (notably the right to a speedy trial and to counsel)—a factor that the Defense argued should be central to any assessment of willingness and inability when capital crimes are at issue, even though such due process concerns are not specifically mentioned in Article 17 of the ICC Statute.

The Office of the Prosecutor’s position in this admissibility challenge is significant. The prior Prosecutor, Luis Moreno Ocampo, had from the beginning taken the position that the Libyans should be allowed to prosecute the two defendants, once stating that he was “not competing for the case.” Such remarks, coupled with statements about Gaddafi’s guilt in public appearances with members of the Libyan transitional government, prompted the Office of Public Council for the Defense (OPCD)—a sort of legal aid office that represents defendants before they appoint private counsel—to move for Ocampo’s disqualification from the Gaddafi case on grounds of partiality. Although the motion was not granted, it did earn Ocampo a public rebuke from the judges, who ruled that the prosecutor’s behavior was “clearly inappropriate in light of the presumption of innocence” and might “lead observers to question the integrity of the Court as a whole.” It is not clear if Ocampo’s and now Bensouda’s position in defense of the Libyan proceedings reflects a genuine faith in the principle of positive complementarity—the ability of the Court to catalyze national proceedings—or simply a more cynical recognition that it is unlikely Libya would transfer its prior dictator’s son to The Hague. In other cases in which there have been admissibility challenges (notably Kenya), the Prosecutor has taken the position that the cases are admissible before the ICC.

The Senussi Admissibility Ruling

In finding the Senussi case inadmissible, the Chamber determined with respect to the first prong of the complementarity doctrine that:

The Chamber considers that the evidence submitted by Libya is sufficient to conclude that concrete and progressive steps are being undertaken by the domestic authorities in the proceedings against Mr. Al-Senussi, and to identify the scope and the subject-matter of such proceedings. ... The Chamber is satisfied that the facts that have been investigated by the Libyan authorities in relation to Mr Al-Senussi ... comprise the relevant factual aspects of Mr Al-Senussi’s conduct as alleged in the proceedings before the Court.

Although none of the domestic charges directly corresponds to the persecution charge set forth in the ICC arrest warrant, the Chamber noted that the fact that the crimes targeted a particular group of individuals is an aggravating factor taken into account during the sentencing phase under the Libyan Criminal Code.

In terms of the second complementarity prong (willingness and ability), the Chamber ruled that the period of delay between the commencement of proceedings and the present is not an “unjustified delay inconsistent with an intent to bring Mr. Al-Senussi to justice,” particularly in light of the need to substantially rebuild Libya’s judicial system. Furthermore, it noted that the materials provided by the Defense regarding the presence of Gaddafi-era judges on the trials of former regime officials and the new lustration law did not indicate “a systemic lack of independence and impartiality of the judiciary”. It also found that the current security situation, the lack of control over certain other detention facilities, the threats faced by judicial authorities, and the concerns of victims and witnesses did not lead to a finding of “inability” within the meaning of Article 17. The Chamber found that potential due process infringements are at the complementarity phase, but were not dispositive, on the theory that:

certain violations of the procedural rights of the accused may be relevant to the assessment of the independence and impartiality of the national proceedings that the Chamber is required to make. ... [T]he information available to it does not indicate that the domestic proceedings against Mr Al-Senussi are tainted by departures from, or violations of, the Libyan national law such that they would support, in accordance with article 17 of the Statute, a finding of unwillingness or inability on the part of Libya to carry out the proceedings against Mr Al-Senussi.

The PTC was clearly (and appropriately) troubled by the issue of lack of counsel, but noted:

The fact that Mr Al-Senussi’s right to benefit from legal assistance at the investigation stage is yet to be implemented does not justify a finding of unwillingness under article 17(2)(c) of the Statute, in the absence of any indication that this is inconsistent with Libya’s intent to bring Mr Al-Senussi to justice. Rather, from the evidence and the submissions before the Chamber, it appears that Mr Al-Senussi’s right to legal representation has been primarily prejudiced so far by the security situation in the country.

This problem, it noted, “holds the potential to become a fatal obstacle to the progress of the case.” Although the PTC cites the “security situation” as the cause of Senussi’s lack of counsel, it gave short shrift to the fact that Senussi has apparently requested legal representation repeatedly, and the ICC defense team had not been able to visit their client despite a decision of the Chamber to this effect. Judge Christine van den Wyngaert (Belgium) submitted a declaration with the ruling, raising concerns that the recent kidnapping of Prime Minister Ali Zeidan may herald a worsening of the security situation, which could impact the legal proceedings against Senussi.

The Companion Case Against Gaddafi *Fils*

My understanding is that the joint trial of 38 Gaddafi has been adjourned because not all the defendants are in custody in Tripoli. Most notably, Gaddafi *fils* is still being held by the Zintani Brigade in western Libya, where he was captured in November 2011 trying to flee the country. It is widely assumed that once sufficient concessions are extracted from the central government, the Zintanis will consent to Gaddafi’s transfer to Tripoli. The outcome in the Senussi admissibility challenge discussed above stands in stark contrast to the admissibility ruling of the same PTC in the Gaddafi case.

In May 2013, PTC I rejected Libya’s Article 19 challenge to admissibility on the grounds that the material submitted did not allow the Chamber to discern the actual contours of the national case against Gaddafi. Although Libya made lengthy submissions, it had argued that disclosure of certain court records etc. was barred because the investigative phase proceeds confidentially under Libyan law. In any case, even if Libya could have satisfied prong 1 of the analysis with more time, PTC I found the case to be admissible under prong 2 with respect to ability (“into state custody”), primarily because Libya was not able to secure the transfer of Gaddafi “in accordance with” from Zintan or otherwise exercise full control over certain territories where witnesses might reside. It was also relevant that there were “practical impediments” to securing legal representation for Gaddafi. The inadmissibility ruling is currently on appeal.

In the lower court’s ruling, the PTC also “remind[ed] Libya” of its obligation to surrender Gaddafi to the Court, which had been suspended during the consideration of the admissibility challenge. The Appeals Chamber rejected Libya’s motion for continued suspensive effect of this obligation, even during the appeal of the admissibility challenge. In July 2013, Gaddafi asked the Appeals Chamber to find Libya non-compliant and refer the matter to the Security Council. The Chamber determined it did not have proper jurisdiction over the request.

The PTC’s ruling is a pragmatic one, likely based in part on the desperate hope that the Libyans can prosecute these cases correctly, the realistic recognition that the Libyans will not transfer either defendant to The Hague, and the acknowledgement that the Council is unlikely to back the Court up in the event that the Chamber seeks consequences for Libya’s non-cooperation. The Gaddafi rulings also contains an inherent catch-22. On the one hand, the Qaddafi case is deemed inadmissible because Libya does not have custody of the accused. On the other, it is apparently now obliged to hand him over to the Court for trial. In light of the Senussi ruling as well as developments at the domestic level, it is anticipated that Libya will file a renewed challenge to admissibility in the Gaddafi case, which it is allowed to do only under “extraordinary” circumstances. In the meantime, the Defense will no doubt appeal the Senussi ruling.

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