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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 Response to Defence Request

Source: The Government of Libya, represented by:
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Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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INTRODUCTION

1. The Government of Libya hereby files its Response to the “Defence Request with Annexes A-H”, filed by the OPCD on 18 May 2012,¹ in which it requests the Chamber, (i) to “report the non-compliance of the Libyan authorities to the Security Council”; (ii) to “stay the Chamber's consideration of the admissibility proceedings”; and (iii) to “draw adverse inferences” concerning Libya in relation to the pending admissibility challenge.²

2. The OPCD submission contains a series of flawed arguments and factual misrepresentations that are wholly disconnected from the factual circumstances in Libya at the present time. In characteristic fashion, the submission imagines that the 42 year authoritarian rule of the Gaddafi regime never existed, that the mass-murder of innocent civilians in 2011 never occurred, that the complex transition to stability and democracy is a matter that can be wholly ignored, and that any failure of the Libyan judicial system to meet the highest European standards means that the state must be declared “unwilling or unable” to bring Mr. Gaddafi to justice. Such an approach is wholly inconsistent with the requirements of the Statute and what was agreed at Rome in 1998. It removes the complementarity principle from the Statute.

3. The Libyan Government has made its intention to cooperate fully with the ICC abundantly clear. It has granted visiting access with Mr Saif Al-Islam Gaddafi *inter alia* to the ICC OPCD and Registrar, the ICRC (on two occasions)³, and Human Rights Watch, among others. It has expressed a clear intention to continue to do so. Even if there has been some delay in ensuring that access is granted it confirms that full access will indeed be granted in accordance with applicable standards. Following the baseless accusations of Mr. Gaddafi’s mistreatment, the OPCD now makes the assertion that Libya

¹ ICC-01/11-01/11-152 (hereinafter, “OPCD Request”).

² OPCD Request, paras 22, 91.

³ Once in late 2011 and once on 30 May 2012.

has responded to its requests with “stony silence and prevarication”, and raises the claim that Mr. Gaddafi is “being forced to the gallows in silence”. This kind of pleading and sensationalist argument is wholly inappropriate for a public office that forms part of the ICC. The Libyan Government invites the Chamber to examine the facts, not the wild assertions and speculations of the OPCD.

4. The submission that lack of immediate access to Mr. Gaddafi – in the OPCD view, attributable to either bad faith or lack of control over him – is a ground for declaring the case admissible is manifestly without merit. The OPCD adopts circular reasoning: because Mr. Gaddafi is in the hands of the Zintan local authorities, the Libyan Government is unable to exercise jurisdiction over him, and must therefore immediately exercise jurisdiction by surrendering him to the ICC. Such is the peculiar logic of the OPCD. There can be no doubt that the Libyan Government is concerned to finalize the early transfer of Mr. Gaddafi from Zintan to Tripoli, and that it has vigorously pursued this objective through complex negotiations and other efforts (including the construction of special prison facilities and appropriate security measures). There is no basis for asserting, as the OPCD appears to do, that because Mr. Gaddafi is still in Zintan custody, the ICC must immediately declare the case admissible on grounds of inability.

5. In brief, the Government of Libya is fully committed to finalizing the transfer of Mr. Gaddafi from Zintan to Tripoli. Pending such transfer, it will do all it can to grant access by the ICC OPCD and Registry to Mr. Gaddafi, consistent with international law. The Government of Libya makes this undertaking without hesitation or caveat.

SUBMISSIONS

a. OPCD's request for report to Security Council

i. OPCD's flawed submissions relating to Libya's alleged non-compliance with human rights standards

6. The OPCD Request maintains that the Chamber should report the Libyan Government to the Security Council on the following two grounds: (i) Libya's alleged failure to comply with its duty to co-operate with the Court;⁴ and (ii) Libya's alleged failure to comply with its duties to respect Mr. Gaddafi's procedural rights.⁵

7. The OPCD fails to indicate the legal basis for its request. Libya will proceed on the assumption that the only basis for reporting to the Security Council would be the inherent powers of the Court⁶ in conjunction with Resolution 1970 requiring the Libyan authorities to "cooperate fully with the Court". The Court's jurisdiction in reporting to the Council therefore is strictly limited to alleged non-compliance with orders for cooperation. Nothing in Resolution 1970 – or in the ICC Statute – confers jurisdiction to the Court to report non-compliance with general human rights obligations. The ICC is not a human rights court and is not considered as such by the Security Council referral. The Government of Libya submits, therefore, that to the extent that the OPCD's request is not directly related to orders for cooperation but is instead concerned strictly with the due process rights of Mr Gaddafi⁷ it must be dismissed *in limine*.

8. The OPCD's assertion that Mr. Gaddafi's rights "'cannot be made contingent on Libya's compliance with the request for arrest and surrender issued by the

⁴ See, for example, OPCD Request, paras 8, 24, 25, 40-45, 47-58, 64.

⁵ See, for example, OPCD Request, paras 18-20, 26-28, 73-76, 80-84.

⁶ *Prosecutor v Ahmad Harun and Ali Kushayb*, Pre-Trial Chamber 1, "Decision informing the United Nations Security Council about the lack of cooperation by the Republic of Sudan, Pre-Trial Chamber 1", 26 May 2010, ICC-02/05-01/07-57, pp. 7-8.

⁷ See, for example, OPCD Request, paras 1, 2, 6, 14-21, 26, 28, 30, 73-76, 80-84, 87.

Court’’⁸ reflects the false assumption that the only way to respect Mr. Gaddafi’s rights is to surrender him to the ICC. In support of this proposition, the OPCD makes a misleading reference to the Chamber’s 27 April 2012 order at paragraph 11 which is partially and selectively quoted at paragraph 89 of the Defence Request. Had the OPCD reproduced the quote in full (the quote states: “the court considers, however, that its power to issue such orders or seek such cooperation as may be necessary to protect Mr Gaddafi or assist in the preparation of his defence pursuant to articles 57(3)(b) and (c) of the Statute cannot be made contingent on Libya’s compliance with the request for arrest and surrender issued by the Court”) it would be apparent that the Pre-Trial Chamber is not referring to the rights of persons during an investigation under article 55, but rather, to the functions and powers of the Pre-Trial Chamber under article 57. Through such distortions, the OPCD is attempting to imply that this Chamber has already determined that unless Mr. Gaddafi is prosecuted before the ICC, his rights will be violated. No such determination has been made and, as set forth below, Libya takes strong exception to the OPCD’s misplaced arguments concerning alleged human rights violations.⁹

9. It is abundantly clear from the Statute, its negotiating history, and the view of the Office of the Prosecutor, that the ICC was not intended to become a human rights court.¹⁰ There is some commentary suggesting that under Article 17(3), fundamental systemic issues such a lack of substantive or procedural penal

⁸ OPCD Request, para. 89, referring to ICC-01/11-01/11-129, para. 11.

⁹ See *infra*, section II.B.5, entitled “Second alternative argument: compliance with human rights obligations”.

¹⁰ The Preamble to the ICC Statute states that “nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State”; and “the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions”. The OTP has noted that “the ICC is not an international court of appeal, nor is it a human rights monitoring body designed to monitor all the imperfections of legal systems” Office of the Prosecutor, Informal Expert Paper, “The Principle of Complementarity in Practice” (2003). See also E. Carnero Rojo, ‘The Role of Fair Trial Considerations in the Complementarity Regime of the International Criminal Court: From “No Peace without Justice” to “No Peace without Victor’s Justice”?’ 18 LJIL (2005) 829, at 840-856; Jessica Almqvist, “Complementarity and Human Rights: A Litmus Test for the International Criminal Court” 30 Loy. L.A. Int’l & Comp. L. Rev. 335 (2008).

legislation may be relevant in assessing “inability” for the purposes of admissibility.¹¹ Such findings could constitute a ground for admissibility only if it leads to the conclusion that the State is “otherwise unable to carry out its proceedings” because of “the unavailability of its national judicial system” within the meaning of Article 17(3). Commentators suggest that due process concerns as such are relevant only if they constitute a factual or legal ‘bar’ to proceedings,¹² or potentially if they are “so inadequate that they cannot be considered genuine proceedings”.¹³

10. Accordingly, the OPCD’s arbitrary expansion of the Chamber’s powers, and its desire to transform the ICC into a human rights court with oversight scrutiny over national criminal proceedings by reference to a detailed and exacting European standard is wholly inconsistent with the plain meaning of Article 17(3). The OPCD chooses to ignore the intentions of the Statute’s drafters and all the requirements of the 1969 Vienna Convention on the interpretation of treaties, as reflected in Articles 31 and 32 of that Convention.

11. Even if the ICC was a human rights court, which it is not, it would have to apply standards that are reasonable in the circumstances of each case. It cannot apply an impossible standard that could never be satisfied by a State experiencing the transitional circumstances of Libya. It is remarkable that the OPCD invokes the jurisprudence of the European Court of Human Rights and the Inter-American Court of Human Rights, applying treaties to which Libya is not a party. The OPCD’s attempt to impose European standards on African States is wholly misguided.

¹¹ ICC Informal Expert Paper, para. 50, arguing that “lack of substantive or procedural penal legislation” might render a system “unavailable”.

¹² Jann K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford University Press, 2009), p. 158.

¹³ ICC Informal Expert Paper, para. 23.

ii. The OPCD's submissions as to co-operation obligations imposed by the Court

12. Despite the lengthy list of complaints and allegations in the OPCD Request, it refers to only two requests for co-operation, which are dated 23 February 2012, and 27 April 2012.¹⁴ Both of the requests to which the OPCD refers concern visits with Mr. Gaddafi by the ICC Registrar and the OPCD. The OPCD Request contains a large volume of material referring to events which are not relevant to the possibility of a report to the Security Council because they do not concern requests for co-operation issued by the Court.¹⁵ Indeed, many of the OPCD's submissions in this respect are a repetition of previous unverified and incorrect allegations which were fully answered by the Libyan Government in its 25 April 2012 confidential filing (filed in public and redacted form on 26 April 2012).¹⁶

13. Among the two co-operation requests specified in the Defence Request, the OPCD concedes that the Libyan Government has fulfilled the first request of 23 February 2012. Moreover, despite the considerable practical difficulties in the fulfilment of such requests in Libya's transitional circumstance, the requested visit took place on 3 March 2012¹⁷ - only nine days after the request. Since this first request was promptly fulfilled, it clearly militates against the OPCD's allegations of bad faith against Libya.

14. It is remarkable that in a lengthy submission of 91 paragraphs, the only order for cooperation that the OPCD relies upon in constructing its allegations of bad faith is the second request of 27 April 2012. There is no basis however, for the conclusion that Libya has deliberately delayed compliance with this order as the OPCD suggests. The OPCD once again deploys its familiar tactic of

¹⁴ OPCD Request, paras 8, 24, 64.

¹⁵ OPCD Request, paras 25-33; 61; 74

¹⁶ ICC-01/11-01/11-128-Red

¹⁷ OPCD Request, para. 25.

making an array of harsh criticisms¹⁸ against the Libyan Government's ICC Coordinator by casting every communication with him in a sinister light. Contrary to the OPCD assertions,¹⁹ Professor Ahmed El-Gehani is working extremely hard to ensure the Libyan Government's full compliance with its obligations, in spite of difficulties such as shortages of resources, translation issues, frequent power cuts, and the poor telecommunications system in Libya (which as a matter of course result in difficulties in communicating by email, non-functioning facsimile machines and telephone calls dropping at inopportune moments). There are simple explanations for all of the minor (and trivial) incidents such as disconnected phone calls, portrayed by the OPCD as a Libyan Government conspiracy to "stonewall" requests for access to Mr. Gaddafi. Counsel for Libya have also experienced such difficulties in communicating with individuals in Libya and can verify that these issues are the result of the poor communications network in Libya.

15. As noted in its filing of 16 May 2012, it is a measure of the Libyan Government's good faith and willingness to co-operate with the Court that it:

"has expended, and continues to expend, considerable efforts in negotiating with the local authorities in Zintan to arrange for a visit by the Registrar and the OPCD in compliance with the Pre-Trial Chamber's order to do so ... Unfortunately, these efforts have not been assisted by the Zintani authorities mistrust of the OPCD, having regard to the previous false and unverified allegations regarding Mr Saif Al-Islam's treatment and conditions ... it is hoped that the situation will be resolved in the coming week and that the said visit can take place imminently after that".²⁰

16. In light of these efforts, the OPCD's characterisation of Libya's response to the request of 27 April 2012 as "a combination of stony silence and

¹⁸ ICC-01/11-01/11-69 and ICC-01/11-01/11-70.

¹⁹ See for example, OPCD Request, paras 40-45; 48-58; 67-69; 77; 80; 82; 86.

²⁰ ICC-01/11-01/11-149, para 33.

prevarication”²¹ demonstrates, once again, that the OPCD misunderstands or misrepresents the difficult circumstances with which the Libyan Government is now confronted.

iii. The difficulties currently faced by the Libyan Government which have delayed its good faith efforts to promptly comply with the Court’s 27 April 2012 request

17. The Libyan Government has clearly stated its intention to ensure that the ICC OPCD and Registry as well as the ICRC, Human Rights Watch, and other relevant institutions, are given access to Mr. Gaddafi. It has requested the assistance of the UN High Commissioner for Human Rights to ensure that investigations and prosecutions satisfy fair trial standards and has even constructed a special prison facility consistent with international standards for Mr. Gaddafi’s pre-trial detention. Since the transfer from Zintan to Tripoli has not yet taken place, however, access is not as readily available as it would otherwise be. Nonetheless, there are also other factors that explain the delay in immediate compliance with the 27 April 2012 request, notwithstanding that it will be realized in the near future.

18. The delay in securing access to Mr. Gaddafi is attributable in part to the fact that Libya is currently at an especially decisive period of its democratic transition. The far-reaching nature of this transformation is self-evident, not least in light of the 42 years of authoritarianism by the Gaddafi regime and the mass-atrocities of 2011. The OPCD may not be aware that Libya has scheduled its first national election in over 42 years on 19 June 2012 and that preparations for this historic event are occupying the interim Government’s scarce resources as each Ministry prepares itself for the eventual transition to a new Government.

19. The UN Secretary-General has observed that in order to be sustainable and

²¹ OPCD Request, para. 8.

profound, such far-reaching changes require gradual but substantial progress in institution-building. The domination of this process by international organizations in place of cooperation and assistance will undermine fragile institutions rather than empowering them. With respect to post-conflict judicial reform as part of Libya's "historic transition",²² the UN Secretary-General has stated that "[t]o succeed, Libya must be given the space required to determine its future", adding that "[i]n this context, the role of the United Nations should be to support Libyans in their efforts".²³ He has emphasized further that "the international community as a whole, will best support Libya not by being driven by the supply side of post-conflict assistance, but by being responsive to Libya's own emerging sense of its needs for international support".²⁴ A rush to judgment by external actors, combined with unreasonable or unrealistic demands against Libya, can only serve to discourage further integration into international institutions by undermining the very elements within Government that seek to bring about a more open and democratic system.

20. In this context, the interim Libyan Government is genuinely engaged in ensuring that the rights of Mr. Gaddafi, as well as other detainees, meet all regional and international standards. In this transitional period, it is still the case that despite best efforts, Mr. Gaddafi is not yet in the custody of the interim Libyan Government. As set forth in previous submissions, Mr. Gaddafi is still being held by the Zintan brigade which originally captured him in combat. These local authorities have been very diligent in ensuring that Mr. Gaddafi is treated humanely and with dignity despite the harsh circumstances of the armed conflict and its aftermath. Such is the Zintan brigades' commitment to ensuring his well-being that news reports indicate

²² United Nations Security Council, Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2011/727, 22 November 2011 ["Report of the Secretary-General, 22 November 2011"], pp. 1, 11, 12.

²³ Report of the Secretary-General, 22 November 2011, pp. 11, 12.

²⁴ Report of the Secretary-General, 22 November 2011, p. 19

that:

« ... Gadaffi, 39, is enjoying privileges in detention in the western town of Zintan that are not afforded to other Libyan prisoners.

According to the commander who captured him last November, his 20 square metre cell with private en-suite bathroom and hot and cold water has its own small courtyard where Gadaffi can walk at will. He sleeps on traditional cushions rather than a bed.

Staff cater to his culinary tastes, stocking his small refrigerator with fresh camel milk — a family favourite — and supplying him with Digla dates, translucent fruits known for their delicate taste and texture.

Gadaffi eats these dates for breakfast with bsisa, a Libyan dish made with ground chickpeas, broad beans, green lentils, dried barley, fenugreek and coriander seeds, turmeric, sugar and oil mixed into a thick paste that is said to provide high energy.

He declines bottled drinks, preferring fresh fruit juices that he makes with a blender. Special Libyan meals are provided on request at times. A television set with a 20in screen gives Gadaffi access to 24-hour satellite news, which he is said to watch avidly. He also has drawing materials and has created a portrait of an unknown subject. An offer to let him write to his family has been rejected.

His safety is guarded as a matter of honour by Zintan officials, who have given their word to protect him until he goes on trial. A committee has been set up to monitor his wellbeing. It also provides him with religious books.

He wears a tracksuit and has his own toiletries and shaving kit, alternating

between a beard and hair, and his more familiar clean-shaven look.

“He is a special prisoner and is being treated as such,” said Sheikh Al-ajmi al-Atir, the local commander, who has refused to transfer Gaddafi to Tripoli.”²⁵

21. Moreover, as set out in the Libyan Government’s challenge to the admissibility of the case and the detention records annexed thereto,²⁶ before 1 May 2012, Mr. Gaddafi had seen a judge three times during his detention as per Libyan law requirements. The presence of such judicial safeguards likewise demonstrates the Libyan Government’s commitment to due process.

iv. OPCD’s errors in failing to understand the Libyan context

22. The OPCD’s submissions completely disregard the prevailing circumstances in Libya in general, and those relevant to the case of Mr. Gaddafi in particular. While this error pervades the OPCD’s submissions, it is made explicit in the penultimate paragraph, when the OPCD denies the relevance of both prevailing security conditions in Libya and the very real and on-going legacy of the recent armed conflict.²⁷

23. The OPCD expects Libya to function normally and as if nothing unusual has happened in the past few months. In disregard of the terrible legacy of the Gaddafi era, it finds fault in every minor instance of unforeseen delay, scarce resources, technological limitations, etc., and is intent on pushing the Court into a rush to judgment that would give Libya no meaningful opportunity to achieve justice on its own. The intention of the drafters of the ICC Statute was not to require that national judicial systems emerging from mass-atrocities that are willing to investigate and prosecute must either immediately meet the highest standards or be declared unable within the meaning of Article 17(3).

²⁵ Hala Jaber, “Libya to spare Gaddafi Jr the noose”, 13 May 2012, *Sunday Times*.

²⁶ ICC-01/11-01/11-130 & Annex D (Confidential).

²⁷ OPCD Request, para. 90.

24. Despite current limitations, the Libyan Government is doing everything it can to provide expedited access to Mr. Gaddafi for both the OPCD and the Registrar and is treating this issue as a matter of the utmost national importance. The Libyan Government will ensure that such access is made available. It must be acknowledged however, that Mr Gaddafi remains in the custody of the Zintan brigade, and is accordingly being held by authorities which are concerned both with the poor post-conflict security situation, which are understandably reticent to give access to counsel who have previously made false and serious allegations concerning their treatment of Mr. Gaddafi. For the sake of clarity, it is not the position of either the Libyan Government or the Libyan ICC Coordinator that such allegations should result in restricted access by the OPCD. Indeed, such are the Libyan Government efforts in trying to resolve the issues surrounding access to Mr Gaddafi that its highest officials, including the NTC Chairman, the Minister of Justice, the Prosecutor-General and the Libyan Ambassador to the UN, have been involved in negotiations with the local authorities in Zintan.

25. Based on current negotiations with the Zintan Brigade, it is the expectation of the Libyan Government that a visit for the OPCD and the Registrar with Mr Gaddafi can be arranged in the coming days. Indeed the Libyan ICC coordinator sent the OPCD and the Registrar an email to this effect today (30 May 2012) inviting them to make arrangements to travel to Libya for a visit as soon as possible. If, in the worst case scenario, there were to be further unforeseen delays in facilitating these imminent visits by the OPCD and the Registrar, the Libyan Government would have no objection to the deadline for the OPCD's response to the admissibility challenge being extended by the Pre-Trial Chamber.

26. The Libyan Government also wishes to clarify emphatically that the OPCD suggestion that the delay in facilitating access to Mr. Gaddafi is due to some

form of racial discrimination on the part of either the Libyan Government or the Libyan ICC Coordinator against lead defence counsel is an outrageous and irresponsible allegation that has no foundation whatsoever. To the contrary, as the OPCD could have read in the Libya ICC Coordinator's witness statement (appended to the Libyan Government's 25 April 2012 response to the OPCD), the reason for excluding lead defence counsel from the March 2012 visit with Mr Gaddafi was due to concern for his own safety. Due to the widespread use of African mercenaries in murdering civilians during the 2011 revolution, male Africans in Libya are unfortunately at considerable personal risk from some former rebels who seek to be able to retaliate for atrocities committed by mercenaries hired by the Gaddafi regime. As outlined in the Libyan ICC Coordinator's witness statement, due to the limited number of persons who could fit in the convoy travelling to Zintan in March 2012, there was insufficient security personnel in place to guarantee lead defence counsel's safety. It is anticipated that this additional security issue will be factored into preparations for the next visit by the OPCD to Mr Gaddafi so that lead defence counsel can participate in a privileged visit without being put at personal risk. The safety of persons hosted by the Libyan Government is of paramount importance and it hopes that with better planning for the next visit, this problem (which has no doubt been exacerbated by translation issues leading to miscommunications) can be avoided. Once again, the OPCD must as a matter of professional conduct refrain from making such inflammatory allegations where there is clear evidence in the record that contradicts such speculation of bad faith.

27. Finally, the OPCD argues that it has been prevented from advocating for Mr. Gaddafi's interests, and from having access to Mr. Gaddafi, by "NTC law 37, which potentially imposes a life sentence on anyone who speaks in favour of Mr. Saif Al Islam Gaddafi, or who makes statements, which the government

considers to be harmful to their regime".²⁸ Given that Law No 37 was not enacted by the Libyan Government until 3 May 2012, the Libyan Government finds it hard to understand how this legislation has significantly inhibited the OPCD's activities.

28. The OPCD's attempt to portray this Law in an ominous light is unfounded. It is no different for instance than the de-Nazification policy in post-war Germany and the still applicable section 86 of the German Penal Code (*Strafgesetzbuch, StGB*) prohibiting the "means of propaganda" or even the "use of symbols" of "unconstitutional organizations." Indeed, the European Court of Human Rights has declined the admissibility of complaints challenging laws criminalizing Holocaust denial.²⁹ Furthermore, the African Charter of Human and Peoples' Rights limits "the right to express and disseminate [...] opinions within the law" (Article 9(2)) by reference to the duty "not to compromise the security of the State" (Article 29(3)) and the duty to "preserve and strengthen social and national solidarity, particularly when the latter is threatened." (Article 29(4)).

29. Under Law No. 37, speech in favour of the Gaddafi regime is only prohibited where it harms the State, a condition which therefore makes the law consistent with international human rights law and its recognition that the right to free speech may be curtailed for reasons of national security.³⁰ The OPCD clearly disregards the plain meaning of the provisions of Law No. 37 in making the dramatic claim that the threat of criminal sanctions "hang, like the sword of Damocles, over the heads of the Defence". It is a matter of common sense that any statements made by the OPCD which are made within their proper remit of defending Mr Gaddafi in criminal proceedings would not and cannot

²⁸ OPCD Request, paras 19, 20.

²⁹ See for example, *Garaudy v France*, Admissibility Decision (Application No.65831/01).

³⁰ See for example, International Covenant on Civil and Political Rights, articles 4, 18, 19, 20; African Charter, articles 27 and 29.

constitute a violation of Law No. 37. This amounts to arguing that the counsel for Nazi defendants before the Nuremberg trials were unfairly prejudiced by the anti-Nazi laws in force at the time.

30. Given the genuine and consistent efforts made to date (despite significant challenges) by the Libyan Government to comply with the Court's 27 April 2012 order to facilitate a visit by the OPCD and the Registrar, and in light of the fact that such a visit will now take place in the near future, the Libyan Government submits that there is no basis for the Court to report Libya to the Security Council for lack of cooperation.

b. Request for stay of admissibility proceedings

1. As to the OPCD's request for a stay of admissibility proceedings, the OPCD provides no legal basis for such a measure. The Libyan Government notes, further, that when seized of a challenge to the admissibility of a case, Rule 58 requires the Chamber to take "appropriate measures for the proper conduct of the proceedings".
2. Granting a stay for the reasons asserted by the OPCD would be contrary to the proper conduct of admissibility proceedings. Articles 17, 18, and 19 indicate that the Court cannot refuse to assess an admissibility challenge. Moreover, by exercising jurisdiction over a case with respect to which there is an unresolved admissibility challenge, the Court would be acting *ultra vires* insofar as it is under a duty, pursuant to article 19(1), to "satisfy itself that it has jurisdiction in any case brought before it".

c. Request for adverse inference in relation to the admissibility challenge

3. The OPCD submits that the Chamber should "draw adverse inferences concerning the implementation of Mr. Gaddafi's rights in detention and the

willingness and ability of the Libyan authorities to genuinely investigate the case in accordance with internationally recognized standards of due process”.³¹

4. The Government of Libya reiterates that the only test to be applied to a challenge to admissibility relates to the question is whether Libya is genuinely willing and able to conduct a trial of Mr. Gaddafi. In this regard, as noted above, the extent of the state’s fulfilment of its human rights obligations is relevant only in a very narrow, limited way. The OPCD’s assertion that the Chamber should draw adverse inferences from the alleged poor implementation by the Libyan Government of Mr Gaddafi’s rights in detention³² appears to be an unmeritorious argument in favour of the application of a different test as to admissibility or one of the elements thereof. It must therefore be rejected.

5. The OPCD refers to academic commentary, in particular the views of C. Hall.³³ Hall’s suggestion, however, is that if a State refused to provide information which was relevant to the admissibility inquiry, and not available from other sources, then admissibility should be presumed. The view expressed, therefore, applies to an entirely different circumstance from that to which the OPCD’s argument relates. While the latter proposes that the extent to which Libya complies with Mr. Gaddafi’s requirements should have an adverse impact upon admissibility, Hall’s suggestion actually relates to the extent to which a state (such as Libya) is willing to provide relevant information to the Court in the context of assessment of admissibility.

6. It is notable that Libya has in fact provided an array of information relevant to

³¹ OPCD Request, paras 22, 79, 91.

³² OPCD Request, paras 22, 79, 91.

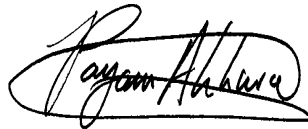
³³ OPCD Request, para. 79, referring to C. Hall, “Article 19” in O. Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court* (Hart Publishing 2008) pp. 645 and 652.

the admissibility inquiry in its 1 May 2012 admissibility challenge (and annexes thereto). There is, therefore, no proper basis for an adverse inference to be drawn against Libya in respect of its article 19 admissibility application.

CONCLUSION

7. For all of the reasons set out above, the Government of Libya respectfully requests the Pre-Trial Chamber to reject all three of the OPCD's requests.

Respectfully submitted:



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Professor Payam Akhavan

Michelle Butler

Counsel on behalf of the Government of Libya

Dated this 30th day of May 2012

At London, United Kingdom