

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 2 October 2012

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 Document

**Decision on OPCD requests in relation to the hearing on the admissibility of
the case**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Fatou Bensouda

Counsel for the Defence

Xavier-Jean Keïta

Melinda Taylor

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Paolina Massidda

**The Office of Public Counsel for the
Defence**

States Representatives

Philippe Sands

Payam Akhavan

Michelle Butler

Amicus Curiae

REGISTRY

Registrar

Silvana Arbia

Deputy Registrar

Didier Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Pre-Trial Chamber I (the “Chamber”) of the International Criminal Court issues the following decision on the “Defence Request” submitted by the Office of Public Counsel for defence (the “OPCD”).¹

1. On 1 May 2012, the Chamber received the “Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute”, challenging the admissibility of the case against Saif Al-Islam Gaddafi (the “Admissibility Challenge”).²

2. On 4 May 2012, the Chamber issued the “Decision on the Conduct of the Proceedings Following the ‘Application on behalf of the Government of Libya pursuant to Article 19 of the Statute’”,³ wherein it, *inter alia*, invited the Prosecutor, the OPCD, the Security Council and the Office of Public Counsel for victims (the “OPCV”) to submit written responses to the Admissibility Challenge and found that it would determine whether a hearing was necessary for the proper determination of the Admissibility Challenge following receipt of these written observations.⁴

3. The responses to the Admissibility Challenge by the Prosecutor⁵ and the OPCV,⁶ and by the OPCD⁷ were filed on 4 June 2012 and 24 July 2012 respectively (collectively, the “Responses”). Observations on the Admissibility Challenge were also presented by Lawyers for Justice in Libya and the Redress Trust, pursuant to rule 103 of the Rules of Procedure and Evidence (the “Rules”), on 8 June 2012.⁸

¹ ICC-01/11-01/11-209.

² ICC-01/11-01/11-130-Red.

³ ICC-01/11-01/11-134.

⁴ *Ibid.*, pp 6-7.

⁵ ICC-01/11-01/11-167-Red.

⁶ ICC-01/11-01/11-166-Red-Corr.

⁷ ICC-01/11-01/11-190-Corr-Red.

⁸ ICC-01/11-01/11-172.

4. On 14 September 2012, the Chamber issued the “Order convening a hearing on Libya’s challenge to the admissibility of the case against Saif Al-Islam Gaddafi”, in which it: (i) scheduled a hearing for Monday, 8 and Tuesday, 9 October 2012 in the presence of representatives of Libya, the Prosecutor, the OPCD and the OPCV to discuss issues related to the Admissibility Challenge; (ii) decided that at the hearing Libya will be invited to provide its reply to the Responses; (iii) decided that, at the hearing, Libya, the Prosecutor, the OPCD and the OPCV will be given the opportunity to complement their respective previous submissions and evidence relevant to the Admissibility Challenge; (iv) clarified that final written submissions after the hearing would be authorized only if necessary; and (v) established the date of Wednesday, 3 October 2012 as the final date for all parties and participants to file in the record of the case any evidence relevant to the Admissibility Challenge upon which the participants intend to rely at the hearing.⁹

5. On 19 September 2012, the OPCD filed the “Defence Request”, in which it requests the Chamber to either: (i) state that “the right to submit evidence and present submissions at the hearing is confined to matters which fall squarely within the parameters of the initial admissibility challenge”; or (ii) authorize the OPCD “to submit additional evidence, which might be relevant to any evidence filed by Counsel for Libya concerning matters falling outside the scope of the initial admissibility challenge, by 12pm, 5 October 2012”.¹⁰

6. On 25 September 2012, the Chamber informed the parties and participants that the hearing on the admissibility of the case will be held on Tuesday, 9 and Wednesday, 10 October 2012, from 9.30 to 16.00.

⁹ ICC-01/11-01/11-207.

¹⁰ ICC-01/11-01/11-209, para. 16.

7. The Chamber notes articles 17 and 19 of the Rome Statute (the “Statute”) and rule 58 of the Rules.

8. Libya has brought a challenge to the admissibility of the case against Saif Al-Islam Gaddafi under article 19(2)(b) of the Statute, on the ground that, at the time of the filing, its national judicial system was actively investigating the same allegations of murder and persecution that form the basis of the case against Saif Al-Islam Gaddafi before this Court.¹¹ Considering that in its Admissibility Challenge Libya refers to national proceedings being underway at that time, and in light of the considerable period of time which has been expended since its filing on 1 May 2012, the Chamber expects that the factual circumstances relevant to the issue of the admissibility of the case against Saif Al-Islam on the ground of an ongoing investigation might have changed to a certain extent.

9. A decision on the admissibility of the case must be based on the circumstances prevailing at the time of its issuance. The Appeals Chamber held in this regard:

Generally speaking, the admissibility of a case must be determined on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge. This is because the admissibility of a case under article 17 (1) (a), (b) and (c) of the Statute depends primarily on the investigative and prosecutorial activities of States having jurisdiction. These activities may change over time. Thus, a case that was originally admissible may be rendered inadmissible by a change of circumstances in the concerned States and *vice versa*. [...] [Article 19(10) of the Statute] is clear evidence 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. Furthermore, the *chapeau* of article 17 (1) of the Statute indicates that the admissibility of a case must be determined on the basis of the facts at the time of the proceedings on the admissibility challenge. The chapeau requires the Court to determine whether or not the case *is* inadmissible, and not whether it *was* inadmissible.¹²

¹¹ ICC-01/11-01/11-130-Red.

¹² ICC-01/04-01/07-1497, para. 56.

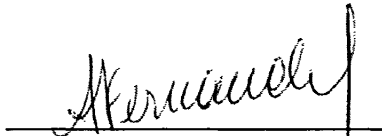
10. The Chamber is thus of the view that it would be unreasonable to disregard the circumstances currently prevailing, by preventing Libya to address, at this point in time, any changes or developments in the factual circumstances underlying its Admissibility Challenge. Accordingly, Libya must be permitted to address any facts that are of relevance to the determination of the admissibility of the case against Saif Al-Islam Gaddafi. The OPCD request to impose limits upon Libya's right to submit evidence and present evidence that is relevant to the admissibility of the case must therefore be rejected.

11. The OPCD requests, in the alternative, that, should Libya present evidence that does not fall within the scope of the initial Admissibility Challenge, the OPCD must be permitted to have a further deadline in order to present any additional evidence which might be relevant to the evidence presented by Libya concerning such new matters. The Chamber is of the view that, at this stage, the request of the OPCD is premature and based on mere speculations, given that, pending the final date for Libya's submission of evidence, it cannot be foreseen whether, and to what extent, Libya will present evidence of such a nature that it would be appropriate to grant the OPCD a further opportunity to present evidence relevant to the admissibility of the case against Saif Al-Islam Gaddafi. In this respect, it is the Chamber's view that it is impossible to define *in abstracto* which evidence, if any, Libya may present that falls within this category. A determination in this regard may only be conducted *in concreto* in relation to specific pieces of evidence once submitted. Accordingly, the OPCD alternative request must also be rejected.

FOR THESE REASONS, THE CHAMBER

REJECTS the Defence Request.

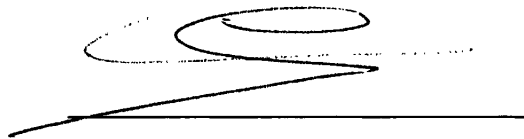
Done in both English and French, the English version being authoritative.



Judge Silvia Fernández de Gurmendi
Presiding Judge



Judge Hans-Peter Kaul



Judge Christine Van den Wyngaert

Dated this 2 October 2012

At The Hague, The Netherlands