



Original: English

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

Date: 2 October 2012

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 Request, made in the interests of judicial efficacy, to either:

- (a) treat the hearing scheduled for 9-10 October 2012 as a status conference; or**
- (b) reschedule the admissibility hearing for November 2012**

Source: The Government of Libya, represented by:
Professor Philippe Sands QC
Professor Payam Akhavan
Ms Michelle Butler

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

The Office of the Prosecutor

Ms. Fatou Bensouda, Prosecutor

Counsel for the Defence

Mr. Xavier-Jean Keita, Principal Counsel

Ms. Melinda Taylor, Counsel

Legal Representatives of the Victims

Ms. Paolina Massidda

Ms. Sarah Pellet

Mr Mohamed Abdou

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented

(Participation/Reparation)

Applicants

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

Mr. Xavier-Jean Keita, Principal Counsel

Ms. Melinda Taylor, Counsel

States' Representatives

Professor Philippe Sands QC

Professor Payam Akhavan

Ms. Michelle Butler

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia

Counsel Support Section

Deputy Registrar

Mr. Didier Daniel Preira

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section Other

I. INTRODUCTION

1. Pursuant to rule 58 of the Rules of Procedure and Evidence, and in the interests of judicial efficacy, the Libyan Government respectfully invites the Pre-Trial Chamber ("the Chamber") to either:
 - a. treat the hearing next week as a status conference (rather than as the substantive admissibility hearing) to give a general update on the case by the parties with a view to setting a timetable for the final stages of these admissibility proceedings in the near future; or
 - b. reschedule the hearing for November by which stage it is expected that the new Minister of Justice and Prosecutor-General will have been appointed and in a position to have reviewed the relevant files, so that the Chamber might benefit fully from their presence at a substantive admissibility hearing.

II. PROCEDURAL HISTORY

2. On 1 May 2012, the Government of Libya filed its "Application pursuant to Article 19 of the ICC Statute", challenging the admissibility of the case against Saif Al-Islam Gaddafi (the "Admissibility Challenge").¹ The following day, on 2 May 2012, Libya filed a motion requesting an oral hearing in respect of this Admissibility challenge.²
3. 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'", wherein it, inter alia, invited the Prosecutor, the Office of Public Counsel for defence (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

¹ ICC-01/11-01/11-130-Red.

² ICC-01/11-01/11-132.

determine whether a hearing was necessary for the proper determination of the Admissibility Challenge following receipt of these written observations.³

4. The responses to the Admissibility Challenge by the Prosecutor⁴ and the OPCV⁵, and by the OPCD⁶ were filed on 4 June 2012 and 24 July 2012 respectively. 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 ("Rules"), on 8 June 2012.⁷
5. On 30 July 2012, counsel for Libya filed the "Libyan Government Request for Status Conference and Extension of Time to file a Reply to the Responses to its Article 19 Admissibility Challenge", informing the Chamber due to the election taking place on 7 July 2012 (and the corollative change of Government in Libya) that it would not be possible to receive further instructions on the case until after the appointment of the new Libyan Minister of Justice, Attorney-General and Prosecutor-General, and requesting that a status conference be convened to discuss certain procedural matters related to the Admissibility Challenge and that an extension of time be granted for the filing of Libya's reply to the Responses.⁸
6. On 9 August 2012, the Chamber suspended the time limit of 13 August 2012 set for Libya's reply to the Responses, and requested counsel for Libya to file as soon as possible, and no later than 7 September 2012, a report providing an update as to: (i) the status of the appointment of the Minister of Justice, Attorney-General and Prosecutor-General in Libya, as well as counsel's ability to obtain instructions from them; (ii) the status of domestic proceedings against Mr Gaddafi, including whether he had been appointed a lawyer for this purpose;

³ ICC-01/11-01/11-134.

⁴ ICC-01/11-01/11-167-Red

⁵ ICC-01/11-01/11-166-Red-Corr.

⁶ ICC-01/11-01/11-190-Corr-Red.

⁷ ICC-01/11-01/11-172.

⁸ ICC-01/11-01/11-192.

and (iii) the conditions of detention of Mr Gaddafi. The Chamber also clarified that a determination on the issue of whether to set a new date for a written reply from Libya or whether to receive such a reply together with submissions from the other parties and participants at a specially convened hearing would be made only upon receipt of said report.⁹

7. On 7 September 2012, counsel for Libya filed the "Libyan Government's provisional report pursuant to the Chamber's Decision of 9 August 2012 & Request for leave to file further report by 28 September 2012", informing the Chamber that counsel expected that the appointments of the new Minister of Justice and the new Prosecutor-General would be final before 28 September 2012, but has not yet been able to obtain instructions on the other matters upon which the Chamber requested a report. Counsel for Libya, therefore, requested leave to file a further, more detailed report on the issues identified in the decision of 9 August 2012 by 28 September 2012.¹⁰

8. On 14 September 2012 the Pre-Trial Chamber issued an order in which it stated in light of the information provided in the report, the Chamber considered it appropriate to convene a hearing where Libya will be given a further opportunity to provide its reply to the Responses orally (in lieu of a written reply) together with submissions of the other parties and participants to the admissibility proceedings. The Pre-Trial Chamber clarified that at this hearing, Libya would also be given the opportunity to complement its previous submissions and evidence relevant to its Admissibility Challenge and noted that further information with respect to the investigation of Saif Al-Islam Gaddafi had not yet been provided to the Chamber (including examples of the evidence that its investigation had produced and that would be relied upon in the accusation, trial and appeal phases of the trial as well as further information as to the case against Mr Gaddafi moving from the investigative to the accusation

⁹ ICC-01/11-01/11-200.

¹⁰ ICC-01/11-01/11-205.

stage of proceedings).¹¹

9. In its 14 September 2012 Order, the Chamber envisaged that at the hearing the Prosecutor, the OPCD and the OPCV would also be given an opportunity to present further submissions and evidence relevant to the Admissibility Challenge. The Chamber will additionally make questions and seek any necessary clarifications from Libya, should the need arise. In this respect, in light of the issues to be discussed, the Chamber considered that the personal attendance of the Libyan Prosecutor-General at the hearing would be of assistance. The Chamber indicated that it would also decide, at the hearing, on the need to allow final written submissions on the Admissibility Challenge. Finally, in order to ensure the proper conduct of the hearing to be held on 9 and 10 October 2012, the Chamber considered it necessary to set Wednesday, 3 October 2012, as the time-limit for the submission of any additional evidence upon which the participants intend to rely at the hearing.¹²

III. UPDATE AS TO THE LIBYAN GOVERNMENT'S POSITION

10. As indicated in Libya's earlier filings in these proceedings, following the historic 9 July 2012 elections, a General National Congress (GNC) was convened and held its first meeting on 8 August 2012 (under the leadership of President Mr El-Magariaf). The GNC is now actively working on the array of urgent and important Government issues arising in Libya. On 12 September 2012, the GNC appointed Mr. Abu Shagur as Prime Minister with the mandate to propose a cabinet – including a Minister of Justice and Prosecutor-General – for the consideration and approval of the GNC. To date, the Prime Minister has not yet presented such a proposal, but it is expected that he will do so within 30 days of his appointment. In the absence of such appointments, which are a part of the normal process associated with the formation of a completely new Government,

¹¹ ICC-01/11-01/11-207.

¹² ICC-01/11-01/11-207.

Libya regrets that it will not be possible for a Prosecutor-General (or a Minister of Justice) to appear at the hearing in the Hague on 9-10 October 2012.

11. Libya is not yet in a position to state with absolute certainty exactly when a new Minister of Justice and Prosecutor-General will be appointed, although it is anticipated that these appointments will be made in the near future. The GNC is presently engaged in complex and delicate deliberations on forming a coalition government among different political parties. It is evident that even in advanced democracies, such negotiations may require a considerable time period. The requirement of time is even more evident in the circumstances prevailing in Libya, less than a year after the collapse of the Gaddafi regime, when the central authorities are fully engaged and making substantial progress in a process of general disarmament¹³ following the tragic attack against the United States Consulate in Benghazi on 11 September 2012, in order to establish security and confront the continued presence of armed militia, including Gaddafi loyalists, that have been responsible for various terrorist attacks.

12. Libya is available and prepared to proceed with the hearing on 9 and 10 October if it is to be regarded as a status conference (rather than a substantive admissibility hearing in which Libya is given its only chance to reply to the Responses before an admissibility decision is issued) notwithstanding the absence of the Prosecutor-General. Libya will be represented by its focal point for the ICC Professor Ahmed El-Gehani, along with counsel, and will be in a position to deal, to the extent possible, with the matters raised in the Chamber's Order of 14 September 2012. In particular, Professor El-Gehani will be able to provide the Chamber (in Arabic - if this can be accommodated by the Court) with an update as to the recent extradition of Abdullah Al-Senussi to Libya (which in view of his role as the Chief of Intelligence of Muammar Gaddafi – and depending upon the account he wish to give to prosecution officials - may

¹³ <http://www.bbc.co.uk/news/world-africa-19775740>

have far reaching impacts on the course of the investigation and trial of Saif Al-Islam Gaddafi) and as to offers by the Governments of Argentina and South Africa to render assistance to Libya in judicial capacity-building, including with respect to the trials of those accused of crimes against humanity.

13. Although Professor El-Gehani and counsel will use their best efforts to provide as much information and assistance as possible to the Chamber and the other participants in the proceedings with respect to its Admissibility Challenge, it must be recalled that in the absence of a Prosecutor-General it will not be possible to provide any further documentary evidence as to the investigation which has been conducted by that office. Likewise, as Professor El-Gehani and counsel for Libya have not been able to obtain any instructions from the Prosecutor-General's Office as to status of Saif Al-Islam Gaddafi's case, and in particular, its progression from the investigative to the accusation stage, they will not on this occasion be able to provide any further details to the Chamber as to the names of particular witnesses or the details of particular evidence from the investigation which is intended to be relied upon at trial as disclosure of such information in this context would be a breach of Article 59 of Libya's Criminal Procedure Code.

14. Libya continues to be strongly committed to bringing Saif Al-Islam Gaddafi to justice before its national courts consistent with the provisions of the Rome Statute. Due to the delays caused by the need to appoint a new Prosecutor-General, Libya has now confirmed that the trial of Saif Al-Islam Gaddafi will not take place until 2013.¹⁴ While to an outsider these delays are undoubtedly unfortunate, those familiar with the reality of Libya's transition will fully appreciate that this progress of events is understandable and reasonable. It must be recalled that it is still less than a year since the Gaddafi regime collapsed. Libya is now fully engaged in a process of disarmament,

¹⁴ <http://www.reuters.com/article/2012/09/09/us-libya-saif-trial-idUSBRE8880F720120909>

democratization, and capacity building, which has earned the praise of the United Nations and international community. Libya trusts that in giving effect to the principle of complementarity, the Chamber will interpret Libya's conduct reasonably given the inescapable realities confronted by nations across the world as they emerge from the horrors of crimes against humanity.

IV. REQUEST NOW RESPECTFULLY MADE BY THE LIBYAN GOVERNMENT

15. The present filing communicates to the Chamber the information currently available to Counsel relating to the matters outlined in the Chamber's 14 September 2012 Order. It will be apparent from the information set forth above that despite Libya's genuine wish to comply fully with the terms of the Chamber's order, regrettably, it will not be possible for the Prosecutor-General to attend next week's hearing. It will also not be possible to provide the further detailed investigative information which the Chamber has requested as to further evidence and developments in the proceedings against Mr Gaddafi at such a hearing.

16. The Libyan Government therefore respectfully requests for the Chamber to either:

- a. treat the hearing next week as a status conference (rather than as the substantive admissibility hearing) to give a general update on the case by the parties with a view to setting a timetable for the final stages of these admissibility proceedings in the near future; or
- b. reschedule the hearing for November by which stage it is expected that the new Minister of Justice and Prosecutor-General will have been appointed and in a position to have reviewed the relevant files, so that the Chamber might benefit fully from their presence at a substantive admissibility hearing.

17. Libya submits that there is good cause for granting leave for either of these

courses of action. Holding a status conference to set a shortly extended timetable for the conclusion of the admissibility proceedings or adjourning the full hearing of the admissibility challenge will:

- i. ensure that the Chamber is properly apprised of the information necessary for it to determine how to proceed with the admissibility challenge;
- ii. be consistent with the rationale of the Chamber's 9 August 2012 decision, which acknowledged the "exceptional circumstances engendered by the transition to a newly elected government in Libya and the alleged inability of counsel to obtain instructions",¹⁵ and which sought to avoid "undue delays in the resolution of the Admissibility Challenge";¹⁶
- iii. uphold the efficacy of the Chamber's 12 September 2012 decision which sought to provide Libya with an opportunity to reply orally to the written responses filed by all other parties in the case ; to provide all other parties in the case with an opportunity to make further submissions on the Admissibility Challenge; and to allow the Chamber the opportunity to ask questions of all participants in the case in order to ensure that all relevant matters are clarified fully such as to facilitate an effective decision making process.

18. In view of these circumstances, a refusal to grant leave to either treat next week's hearing as a status conference or to adjourn the hearing until November, would impose disproportionate prejudice upon the Libyan Government, and adversely impact the institutional development of the new democratic Libya. Libya is very mindful of the flexibility which the Chamber has already provided to it in recognition of its unique situation and its ongoing process of constituting a new government. A further modest delay in finalising these admissibility proceedings would uphold the rationale for the Chamber's earlier decision granting such flexibility. More importantly for Libya, such a course of action

¹⁵ Time Limit Decision, para. 18

¹⁶ Time Limit Decision, para. 20.

would support the interests of the Libyan people in establishing and consolidating national institutions that are capable of administering a proper prosecutorial process and trial, as well as ownership of a highly significant trial in their history, without unduly affecting the legitimate interest in the timely delivery of justice.

19. Furthermore, the timetable which has now been set down by the GNC for the appointment of officials to the remaining key posts means that the inconvenience of a brief delay in the conclusion of the admissibility proceedings, would be clearly outweighed by the effect that the delay would have – of permitting the Libyan state to be properly heard in relation to the assessment of how to proceed with the admissibility challenge – a matter of profound and fundamental importance to its sovereignty and democratic development.

V. OTHER MATTERS

20. In the event that a status conference proceeds next week or indeed a substantive admissibility hearing is rescheduled for November 2012, Libya wishes to notify the Chamber that there may well be matters which need to be dealt with in closed session at such a hearing. Counsel for Libya envisage that the majority of the topics to be addressed can be dealt with in open court but as matter of courtesy wishes to notify all the parties as far ahead of time as possible that a very limited number of specific matters would – for reasons which will be provided to the court in detail at the hearing – need to be dealt with in closed session.

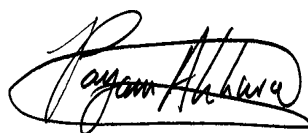
VI. CONCLUSION

21. The Pre-Trial Chamber is therefore respectfully invited to either:
 - a. treat the hearing next week as a status conference (rather than as the substantive admissibility hearing) to give a general update on the case by the parties with a view to setting a timetable for the final stages of these

admissibility proceedings in the near future; or

- b. reschedule the hearing for November by which stage it is expected that the new Minister of Justice and Prosecutor-General will have been appointed and in a position to have reviewed the relevant files, so that the Chamber might benefit fully from their presence at a substantive admissibility hearing.

Respectfully submitted:



Professor Philippe Sands QC

Professor Payam Akhavan

Michelle Butler

Counsel on behalf of the Government of Libya

Dated this 2nd day of October 2012

At London, United Kingdom