

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **14 August 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

With Public Annexes 1, 2, 3 and 4

URGENT

Urgent Request Pursuant to Regulation 35 of the Regulations of the Court

Source: Defence

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

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Detention Section

Victims Participation and Reparations Section

Other

1. Introduction

1. On 30 July 2012, Counsel for Libya filed a request for an extension of time to file their reply concerning the admissibility proceedings, on the grounds *inter alia*, that “[p]rior to the new Ministry of Justice team being appointed it will not be possible for counsel for Libya to obtain proper instructions or authorities in relation to the responses”.¹
2. On 9 August 2012, the Pre-Trial Chamber issued its decision on the Request, in which it found that

taking into account the exceptional circumstances engendered by the transition to a newly elected government in Libya and the alleged inability of counsel to obtain instructions in the absence of a Minister of Justice, the Chamber finds it necessary to suspend the time limit set for the filing of Libya’s reply to the Responses.²

3. It is clear from the above wording that the decision of the Pre-Trial Chamber was explicitly predicated on the “absence of a Minister of Justice”.
4. The Pre-Trial Chamber therefore suspended the deadline for filing the reply, and requested Counsel for Libya to file an update by 7 September 2012 concerning *inter alia*, the appointment of the Minister of Justice, and Attorney-General/Prosecutor-General (it is the same position) and Counsel’s ability to take instructions from them.
5. Subsequent to the issuance of this decision, the newly elected president of the national assembly suspending any meetings of the assembly until 23 August 2012, which will render it highly unlikely that the assembly will be in a position to compose a government by 7 September 2012.
6. Various Ministers have also subsequently issued statements which make it very clear that they continue to exercise full authority notwithstanding the transition in the government. This is consistent with Article 30 of the Constitutional Declaration, which provides that the “Provisional Government shall continue carrying on its works until an interim government is formed”.³ The current Minister of Justice and Prosecutor-General therefore have exactly the same *de jure* and *de facto* authority to provide instructions to Counsel, as they would have had in mid-June 2012.

¹ ICC-01/11-01/11-192.

² ‘Decision on the “Libyan Government Request for Status Conference and Extension of Time to file a Reply to the Responses to its Article 19 Admissibility Challenge”, ICC-01/11-01/11-200, at para. 18.

³ ICC-01/11-01/11-144-AnxG at p. 9.

7. In such circumstances, the suspension of the deadline for filing the reply is neither necessary nor proportionate.
8. Accordingly, pursuant to Regulation 35(2) of the Regulations of the Court, the Defence for Mr. Saif Al Islam Gaddafi requests the Pre-Trial Chamber to shorten the deadline for filing the reply, such that it is due four days after the Chamber issues its decision on this request, so that the ICC is in a position to render a decision on the admissibility of the case sufficiently in advance of the commencement of the domestic trial against Mr. Gaddafi.
9. Alternatively, if the suspension of the reply continues in effect, then the ability of the Pre-Trial Chamber to determine admissibility is also suspended, which in turn, suspends the application of Article 95 of the Statute. If the Pre-Trial Chamber rejects the Defence request to shorten the deadline for filing a reply in order to facilitate an expeditious resolution of the admissibility challenge, then the Defence respectfully requests the Pre-Trial Chamber to suspend the application of Article 95, and order Libya to immediately surrender Mr. Gaddafi to the ICC in accordance with Libya's pre-existing obligation under the ICC arrest warrant.

2. Submissions

2.1. Legal basis for the present request

10. Regulation 35(1) of the Regulations of the Court vests the Chamber with the discretion to lengthen or decrease a pre-existing deadline. In the present case, the Pre-Trial Chamber varied the time limit imposed on Libya for filing its reply without requiring Libya to either seek leave to appeal the decision establishing the deadline, or reconsideration of the decision itself. This is consistent with the decision of Pre-Trial Chamber in Ruto et al. to the effect that a request to vary a pre-existing deadline does not constitute a request for reconsideration, but rather a request pursuant to regulation 35(2) of the Regulations of the Court.⁴
11. There is good cause to vary the deadline in the present instance due to the fact that:

⁴ Decision on the "Prosecution's Application for Extension of Time Limit for Disclosure", ICC-01/09-01/11-82, 10 May 2012, at para. 16.

- i. it is now apparent that there is no factual or legal basis for Counsel for Libya being unable to take instructions from the current Minister of Justice or the Prosecutor-General; and
- ii. the suspension of the deadline for filing a reply until after the appointment of the new Ministry of Justice team would be disproportionately deleterious to the right of the defendant to have the proper forum for his trial decided in an expeditious manner.

2.2 There is no factual or legal basis for Counsel for Libya being unable to take instructions from the current Minister of Justice or the Prosecutor-General

12. As noted above, the decision of the Pre-Trial Chamber to suspend the deadline for the reply was expressly predicated on the “alleged inability of counsel to obtain instructions in the absence of a Minister of Justice”.⁵
13. However, it is apparent from recent statements and reported activities of various Ministers that they continue to have full authority to make decisions within their sphere of expertise.⁶ This is consistent with Article 30 of the Constitutional Declaration, which

⁵ ICC-01/11-01/11-200, at para. 18

⁶ The articles cited below are in Arabic, but it is clear from the titles to the articles (which have been translated into English, that the relevant Ministers are still performing their respective functions).

“The National Public Conference postpones its work to 23 August 2012”

Posted on ONTV news channel:

http://www.youtube.com/watch?v=mrQnHi_Akk

Published on 11 August 2012, by ONTveg

“Al-Baraasi” [Minister of Electricity]: The repairs of the power cuts in the eastern region affect the “western” region.

Al-Manara, 14 August 2012

<http://www.almanaralink.com/press/2012/08/21613/%E2%80%9C%D8%A7%D9%84%D8%A8%D8%B1%D8%B9%D8%B5%D9%8A%E2%80%9D-%D8%A5%D8%B5%D9%84%D8%A7%D8%AD-%D8%A3%D8%B9%D8%B7%D8%A7%D9%84-%D8%A7%D9%84%D9%83%D9%87%D8%B1%D8%A8%D8%A7%D8%A1-%D9%81%D9%89-%D8%A7%D9%84/>

Ben Khayal [Minister of Foreign Affairs and International Cooperation]: conformity in the points view regarding the failure of Kofi Anan’s mission in Syria.

Al-Watan Libya, 14 August 2012-08-14

<http://www.alwatan-libya.com/more-23479-1-%D8%A8%D9%86%20%D8%AE%D9%8A%D8%A7%D9%84%20:%20%20%D8%AA%D8%AA%D8%B7%D8%A7%D8%A8%D9%82%20%D9%88%D8%AC%D9%87%D8%A7%D8%AA%20%D8%A7%D9%84%D9%86%D8%B8%D8%B1%20%D8%AD%D9%88%D9%84%20%D9%81%D8%B4%D9%84%20%D8%A7%D9%84%D9%85%D9%87%D9%85%D8%A9%20%D8%A7%D9%84%D8%AA%D9%8A%20%D9%82%D8%A7%D9%85%20%D8%A8%D9%87%D8%A7%20%20%D9%83%D9%88%D9%81%D9%8A%20%D8%B>

stipulates that the Provisional Government (that is, the Ministers who were appointed by the NTC) shall continue carrying on their work until the Interim Government is formed.

14. Since the members of the Provisional Government were never appointed by a democratically elected government, the election results are also entirely irrelevant to the legal or constitutional legitimacy of such decisions. The current authority of the Provisional Government also extends beyond the domestic arena to international relations

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“Ministry of Electricity: Power cuts today in the eastern region due to high humidity”

<http://www.almanaralink.com/press/2012/08/21472/%d9%88%d8%b2%d8%a7%d8%b1%d8%a9-%d8%a7%d9%84%d9%83%d9%87%d8%b1%d8%a8%d8%a7%d8%a1-%d8%a7%d9%86%d9%82%d8%b7%d8%a7%d8%b9-%d8%a7%d9%84%d9%83%d9%87%d8%b1%d8%a8%d8%a7%d8%a1-%d8%a7%d9%84%d9%8a%d9%88%d9%85/>

Al-Manara (Libya news agency), 11 August 2012

“Deputy Minister of Interior informs the National Public Conference about the incident in Tripoli open prison and its consequences”

<http://www.almanaralink.com/press/2012/08/21468/%d9%88%d9%83%d9%8a%d9%84-%d9%88%d8%b2%d8%a7%d8%b1%d8%a9-%d8%a7%d9%84%d8%af%d8%a7%d8%ae%d9%84%d9%8a%d8%a9-%d9%8a%d8%ad%d9%8a%d8%b7-%d8%a7%d9%84%d9%85%d8%a4%d8%aa%d9%85%d8%b1-%d8%a7%d9%84%d9%88%d8%b7/>

Al-Manara, 11 August 2012

“Libyan Minister of Health: Running out of medicines is a real crisis that has been facing the ministry for 8 months”

<http://www.almanaralink.com/press/2012/08/21522/%d9%88%d8%b2%d9%8a%d8%b1%d8%a9-%d8%a7%d9%84%d8%b5%d8%ad%d8%a9-%d8%a7%d9%84%d9%84%d9%8a%d8%a8%d9%8a%d8%a9-%d9%86%d9%81%d8%a7%d8%af-%d8%a7%d9%84%d8%a3%d8%af%d9%88%d9%8a%d8%a9-%d8%a3%d8%b2%d9%85%d8%a9/>

Al-Manara, 12 August 2012

“Al-Hamroush: the ministry of health has been facing a real crisis for eight months”

<http://www.libya-alyoum.com/news/index.php?id=21&textid=11119>

Libya Al-Youm, 12 August 2012

“President of the National Public Conference participates in the fourth extraordinary session of the Islamic Summit”

Accompanied by Minister of foreign affairs and international cooperation” Ashour Bin Khayyal, arrived Sunday in Jeddah.

<http://www.lana-news.ly/ar/art.php?a=22260>

The Libyan News Agency, 12 August 2012

The same article is also reported on <http://www.libyaalmostakbal.net/news/clicked/25507>

Libya Al-Mostakbal, 12 August 2012

“Statement of the Ministry of foreign affairs and international cooperation in the occasion of the power transition from the NTC to the National Public Conference”

http://www.foreign.gov.ly/ar/news_details.php?id=7325

Ministry’s website, 12 August 2012

and requests for cooperation on criminal matters. For example, a recent article notes that the Egyptian authorities will meet with the current Prosecutor-General in late August to discuss the extradition of Libya nationals in Egypt to Libya.⁷ If the Prosecutor-General has the full authority to liaise with Egyptian authorities regarding the legal status of Libyan nationals in Egypt, then he has the full competence to provide instructions to Counsel for Libya concerning the status of Mr. Gaddafi's case, until such time that the Interim Government is formed.

15. In terms of the timing for the formation of the Interim Government, the Constitutional Declaration submitted by the Libyan authorities in connection with the admissibility challenge contains a translation error. Although the English translation of Article 30 provides that within thirty days of the first meeting of the National Public Conference (NPC), the NPC shall appoint 'ministers', the correct translation of رئيس للوزرا is Prime Minister. Accordingly, whilst there is a 30 day deadline for appointing the Prime Minister, there is no deadline for the appointment of specific Ministers.
16. Indeed, while the Prime Minister may propose the names of ministers upon his selection, their appointment is contingent on their vetting by the NPC ("provided that all such members shall have the confidence of the National Public Conference prior to carrying on their works as an Interim Government"). The framework and rules for such vetting must also be determined in advance by the NPC.
17. In terms of the likely time frame for the appointment of such ministers, in light of the fact that the President of the National Assembly suspended any hearings of the NPC until 23 August 2012,⁸ the framework for deciding upon the rules for vetting Ministers will not be discussed until at least 23 August 2012. It therefore seems highly unlikely that the NPC will be in a position to reach agreement on such matters until at least the end of September. The appointment of subsidiary positions, such as the Prosecutor-General, would then occur even later. There is therefore more than adequate time for Counsel for Libya to finalise their reply under the instructions of the current Minister of Justice and Prosecutor-General.

⁷ Egypt's Ambassador in Libya: we are coordinating with the Libyan authorities regarding Gaddafi's aides Al-Masry Al-Yousm, 4 August 2012, English translation in Annex 1.

<http://www.almasryalyoum.com/node/1030101>

⁸ The National Public Conference in Libya postpones its work to 23 August 2012", Ahram gate, 11 August 2012. English translation Annex 3.

<http://gate.ahram.org.eg/News/239814.aspx>

18. It is also possible that some of the current appointees may continue in their role as Minister, if selected by the future Prime Minister.⁹ It is therefore purely speculative as to whether there will be any changes as concerns the identity of the future Minister of Justice and Prosecutor-General.
19. In the absence of any legal or constitutional bar from obtaining instructions from the current Minister of Justice or Prosecutor-General, it would seem that Counsel for Libya's request to suspend the deadline for the reply until after the designation of the new Minister of Justice and Prosecutor-General was predicated either on the inability or unwillingness of the Libyan authorities to fulfil their commitments to the ICC in a timely manner (which is unrelated to the constitutional or legal authority of these persons), or the strategic preference of Counsel for Libya not to obtain instructions from the current appointees.
20. Such strategic preferences cannot possibly trump the underlying intent of the Statute that admissibility challenges should be resolved in an expeditious manner, and that "it is in the interests of all, and primarily the suspects who have been deprived of their liberty, that the court with jurisdiction to try the case be determined as quickly as possible".¹⁰ The Appeals Chamber has further observed that "expeditiousness is a recurrent theme in the Court's legal instruments. The Statute and the Rules of Procedure and Evidence place an onus on all those involved in the trial to act in a diligent and expeditious manner in the performance of their obligations".¹¹ For this reason,

a party to a proceeding who claims to have an enforceable right must exercise due diligence in asserting such a right. This is as it should be in order for the Trial Chamber to take account of the interests of the other parties to and participants in the proceedings and of the statutory injunction for fairness and expeditiousness. The Appeals Chamber agrees with the Trial Chamber's conclusion that parties must

⁹ "Magarief, a leader in the National Front for the Salvation of Libya, the oldest anti-Gaddafi movement, said the next cabinet might retain some ministers from the interim authorities "to benefit from any positive achievement" they had made." 'INTERVIEW-Libya assembly head calls for coalition government' *Reuters* 12 August 2012, <http://af.reuters.com/article/commoditiesNews/idAFL6E8JB10V20120812?pageNumber=2&virtualBrandChannel=0>

¹⁰ Prosecutor v. Katanga and Ngudjolo, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute) 16 June 2009, ICC-01/04-01/07-1213-tENG at para 45; Prosecutor v. Ruto et al., 'Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute, 4 April 2012, ICC-01/09-01/11-31, at paras 10 and 19.

¹¹ Prosecutor v. Katanga and Ngudjolo, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings" 19 July 2010, ICC-01/04-01/07-2259, at para. 43.

submit motions that have repercussions on the conduct of the trial in "a timely manner". The Appeals Chamber interprets "timely manner" to mean that the parties must act within a reasonable time. However, what is reasonable or unreasonable in relation to time always turns on all the circumstances of the case, including the conduct of the person seeking the Court's assistance.

[...]

Thus, while the parties are allowed some leeway in deciding how to conduct their cases, this cannot override the Trial Chamber's said obligation.¹²

21. If the overriding objective to ensure expeditious proceedings can take precedence over an 'enforceable right', then it must surely trump a procedural step (the filing of a reply), which is of a discretionary nature, and which is not a pre-requisite for the Chamber's determination of the admissibility challenge.
22. The ICC Appeals Chamber has also cautioned that "any departure from the time limits set by the Rules or Regulations of the Court must not derail the proceedings from their ordained course, requiring that they be conducted and concluded within reasonable time."¹³
23. The normal time limit for filing a reply is 10 days. Given that there is no constitutional deadline for the appointment of the new Minister of Justice, it is possible that Counsel for Libya will not be in a position to take instructions from the new Minister of Justice until at the earliest, mid until late September 2012. If the possibility of filing a reply is made contingent on the appointment of the new Minister of Justice and Prosecutor-General, then Libya will have effectively been granted well over 100 days to file their reply to the responses of the Prosecution and the OPCV, and in excess of 60 days to respond to the Defence.
24. Such a protracted deadline for filing a response is clearly disproportionate to either the utility of receiving a reply in order to dispose of the admissibility challenge, or the strategic desire of Counsel for Libya to receive instructions from the future appointees rather than the present Provisional Government. For this reason, the ECCC rejected a

¹² ICC-01/04-01/07-2259 at paras. 54 and 77.

¹³ Prosecutor v. Katanga and Ngudjolo, "Reasons for the 'Decision on the 'Application for Extension of Time Limits Pursuant to Regulation 35 of the Regulations of the Court to Allow the Defence to Submit its Observations on the Prosecutor's Appeal regarding the Decision on Evidentiary Scope of the Confirmation Hearing and Preventative Relocation'", 27 June 2008, ICC-01/04-01/07-653 (OÀ 7), para. 6.

request for extension of time on the grounds that the requested time was three times greater than the amount generally allocated for such filings.¹⁴

25. The ICTY has also held that communication or cooperation difficulties between lawyers and their client, or the lawyers themselves, do not constitute good cause for granting an extension of time.¹⁵
26. The purpose of a reply is not to raise new arguments or evidence, but to respond to or clarify issues which are already part of the record of the proceedings. Counsel for Libya have had a significant amount of time to analyse the arguments of the Prosecution, OPCV, and Defence, conduct any relevant legal research, and cross-reference the information submitted by the parties and participants with the initial instructions and information provided by the Libyan authorities. Indeed, Counsel for Libya have already used other court filings as a vehicle for replying on certain issues, such as the relevance of due process to admissibility challenges.¹⁶
27. In terms of any issues, which arose out of the detention of the ICC delegation, the Libyan Prosecutor-General actively engaged the ICC on this matter, and was therefore in a position to provide instructions to Counsel for Libya for the duration of June and July. Counsel for Libya could also be guided by the official views of the Libyan authorities, as set out in a formal letter to the Security Council. It is also apparent from the fact that the Libyan authorities only allocated 45 minutes to the Defence to obtain instructions from Mr. Gaddafi (in a non-privileged, illegally monitored context), that they do not consider it to be a necessary component of the legal relationship to provide extensive or detailed instructions to Counsel on issues concerning the admissibility of the case.
28. In line with their obligation under the Code of Conduct to act with requisite diligence, Counsel for Libya should have taken all necessary steps to ensure that they were in a position to file a reply, in the event the Pre-Trial Chamber rejected their request for an extension of time. It therefore follows that since there was and is no legal impediment as concerns their ability to obtain instructions from the current Minister of Justice and Prosecutor-General, Counsel for Libya should be in a position to file a reply within the time initially allocated by the Pre-Trial Chamber. Even if it is presumed that Counsel

¹⁴ Prosecutor v. Nuon Chea, Decision on Co-Prosecutors' Request for Extension of Time to Respond to Nuon Chea's Immediate Appeal under Internal Rule 104(4)(d), Case No. 002/19-09-2007-ECCC-TC/SC(08), 18 October 2011

¹⁵ Prosecutor v. Seselj, Trial Chamber "Decision on Request for Extension of Time (Submission number 126)", 19 October 2006, p. 2-3; Prosecutor v. Stakic, Appeal Chamber "Decision on Prosecution's Motion to Disallow a Ground of Appeal and to File a Further Response"; 20 July 2004 at para. 2.

¹⁶ ICC-01/11-01/11-160.

stopped working on the reply on the day that the Pre-Trial Chamber issued its decision (which was four days before the expiration of the deadline), they were obliged pursuant to their obligation under the Code of Conduct to have completed at least three-quarters of the reply by that stage, and such, should only require four additional days from the Chamber's decision on this request to finalise the reply.

2.3 In the absence of any legal impediment to obtaining instructions from the Provisional Government, the extension of the deadline for the reply is disproportionately prejudicial to the rights of the defendant

29. As noted by the Pre-Trial Chamber, "materials presented by the OPCD suggest that the Libyan authorities have recently announced their intention to commence the trial against Mr. Gaddafi in Zintan in September 2012".¹⁷
30. If Counsel for Libya do not file a reply until at least mid-September 2012, then it is likely that the domestic trial against Mr. Gaddafi may commence before the Pre-Trial Chamber is in a position to render a determination on the admissibility of the case.
31. This will have an extremely deleterious impact on the ability of his Defence to determine the most effective strategy as regards either a potential domestic trial, or a trial before the ICC, and could result in needless re-traumatisation of witnesses, who may be required to be called in both sets of proceedings.
32. In terms of the present case, the strategy that the defendant would mount when
 - he is facing death penalty,
 - the Defence has no effective means to obtain full instructions from the defendant in a privileged setting or conduct investigations in a secure manner, and
 - there are no effective protective measures for Defence witnesses or persons named by the Defence as having any association with the former regime,
 is not the same than as if the defendant were to be tried in a independent and impartial court, which permits the Defence to avail itself of the panoply of rights guaranteed under article 14 of the ICCPR.
33. In the challenge to admissibility, Counsel for Libya indicated that some of the witnesses, which will be relied upon by the Libyan authorities, have provided statements to the ICC

¹⁷ ICC-01/11-01/11-200 at para

Prosecutor.¹⁸ Accordingly, if these persons are called to testify in the domestic trial, the examination and questioning of these witnesses will have clear consequences for potential ICC proceedings.

34. Whilst Rule 68 permits the ICC to introduce prior recorded testimony if the Defence and the Prosecutor had the opportunity to question the witness, the jurisprudence of the ICC has made clear that the opportunity of the Defence to question the witnesses during the initial examination must be an effective opportunity.¹⁹ Any effective Defence questioning of a Prosecution witness would require the Defence to put to the witness any counter-narratives or information provided by other persons, which contradict the witness in question, or which undermine the credibility of the witness. For example, if witness X has a history of lying or making exaggerated claims for financial or political gain, the Defence may wish to refer to previous incidents, in which the witness made certain claims to either the defendant or persons associated with the defendant.
35. However, as recognised by the jurisprudence of the ICC, the mention of the names of persons – even if they are not Defence or Prosecution witnesses per se - can create risks for the persons in question, as it may be assumed that they are Defence or Prosecution witnesses or sources.²⁰ There has been a recent spate of assassinations and attacks on persons, who are or were associated to the former regime, which both illustrates the extremely virulent *animus* within Libya against anyone linked to the former regime, and the inability of the Libyan authorities to protect such persons.²¹ It is therefore

¹⁸ ICC-01/11-01/11-130-Red at para. 45.

¹⁹ Prosecutor v. Lubanga, Redacted Decision on the Prosecution's Application to Admit Rebuttal Evidence from Witness DRC-OTP-WWWW-0005, ICC-01/04-01/06-2727-RED, 28 April 2011 at para 53

²⁰ Katanga and Ngudjolo; Appeal Chamber : "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements"; 13 May 2008; ICC-01/04-01/07-475 at para. 56.

²¹ 'Terrorists in Benghazi attempt to kill General Hafter, blow up hotel', Libya Herald, 29 July 2012 <http://www.libyaherald.com/?p=11846>

'Bombing attack hits military intelligence building in Benghazi' Xinhua, 1 August 2012 <http://english.peopledaily.com.cn/90777/7895144.html>

'Libyan Army General Assassinated', The Tripoli Post, 10 August 2012, <http://www.tripolipost.com/articledetail.asp?c=1&i=8993>

Libyan General Hadia killed in Benghazi shooting, BBC, 10 August 2012, <http://www.bbc.co.uk/news/world-africa-19220027>

'Op-Ed: Assassinations in Benghazi target senior officials', Ken Hanly, Digital Journal, 11 August 2012, <http://www.digitaljournal.com/article/330613>

'Libyan general murdered in Benghazi', Al-Jazeera, 11 August 2012, <http://www.aljazeera.com/news/africa/2012/08/2012810222419754353.html>

understandable that in the absence of any protective regime for witnesses or persons at risk on account of the activities of the Defence (let alone an effective one), the Defence would be loathe to refer to persons during the questioning of witnesses, lest there be very real and irreversible consequences for such persons.

36. This therefore creates the possibility that if the Pre-Trial Chamber decides that the proceedings should be before the ICC, some of the witnesses may need to be recalled, which increases the undesirable possibility of re-traumatisation for the witnesses in question.²²
37. Even if witnesses called by the Libyan authorities are not potential ICC witnesses, and are not testifying on issues directly related to the ICC case, there may nonetheless be some overlap in terms of the allegations concerning the defendant's position or relationship with persons named in the ICC case.
38. The defendant will therefore be forced to waive his right of silence before the ICC by prematurely revealing his Defence strategy in the domestic proceedings, before he has had a real and effective opportunity to either receive advice in connection with the ambit of the ICC allegations, or give his Counsel instructions as to how to preserve the rights of the Defence before the ICC. Alternatively, in light of the fact that the defendant has clearly indicated that he wishes to be tried before the ICC, the defendant might feel compelled to sacrifice the effectiveness of his domestic defence case in order to preserve his rights and strategy before the ICC.
39. Due to the brevity of the meeting with Mr. Gaddafi and the fact that it was constantly disrupted and monitored, the Defence was unable to provide Mr. Gaddafi with any

'Assassinations continue in Benghazi', the Daily News Egypt, Luiz Sanchez, 11 August 2012, <http://thedailynewsegypt.com/2012/08/11/assassinations-continue-in-benghazi/>

"The assassination of a former assistant-officer in the internal security agency in Benghazi... following a bomb explosion in his car", Misbah Al-Awami, New Quryna 13 August 2012, <http://www.qurynanew.com/36536>, Translation Annex 2, (relevant parts translated)

Rebels attack the Libyan national team because of Gaddafi supporters

Al-Manara, 14 August 2012, Translation Annex 4

<http://www.almanaralink.com/press/2012/08/21623/%D9%88%D8%A7%D8%B1-%D9%8A%D8%B9%D8%AA%D8%AF%D9%88%D9%86-%D8%B9%D9%84%D9%89-%D8%A7%D9%84%D9%85%D9%86%D8%AA%D8%AE%D8%A8-%D8%A7%D9%84%D9%84%D9%8A%D8%A8%D9%89-%D8%A8%D8%B3%D8%A8%D8%A8-%D8%A3%D8%AA%D8%A8/>

²² Prosecutor v. Lubanga, Transcript of 30 October 2007; ICC-01/04-01/06-T-58-ENG, page 70; Prosecutor v. Banda and Jerbo, "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled 'Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation'", 17 February 2012, ICC-02/05-03/09-295 at para. 26.

effective advice in terms of his possibility of preserving his rights before the ICC in the face of pending domestic proceedings.

40. The Defence also not been advised of the identity of the defence counsel appointed to represent Mr. Gaddafi in domestic proceedings, and *per* the terms of the Pre-Trial Chamber's orders, the Libyan authorities are not obliged to disclose the name of this person until 7 September 2012. This leaves manifestly inadequate time to ensure any coordination between his domestic and ICC Defence, which renders Mr. Gaddafi vulnerable to prejudicing his rights both before the ICC, and before domestic courts.
41. The Libyan authorities have clearly demonstrated their intention to commence the trial against Mr. Gaddafi notwithstanding the pendency of the admissibility challenge, and have already announced that Mr. Gaddafi will "get his punishment for these crimes".²³ Mr. Gaddafi was also informed by the Prosecutor assigned to his case that they intend to expedite proceedings in order to forestall possible Security Council intervention, if their admissibility challenge is unsuccessful.²⁴ If the Pre-Trial Chamber issues a decision granting the admissibility challenge after the domestic proceedings have commenced, Mr. Gaddafi may have irreversibly prejudiced his rights in the interim.
42. Alternatively, even if the Pre-Trial Chamber rejects the admissibility challenge, due to the fact that Libya may appeal the decision and the time lines for ICC appeals, the proceedings against Mr. Gaddafi may have been completed, and Mr. Gaddafi executed, before the ICC is in a position to render a final judgment. This would be directly contrary to the principle that the ICC retains the ultimate *compétence de la compétence* for determining whether the case should be tried before the ICC or domestic courts.
43. Accordingly, the Pre-Trial Chamber has a duty to organise the admissibility proceedings in such a manner to both ensure the ICC's ultimate ability to determine this fundamental issue, and to mitigate any prejudice, which may be caused to the defendant, due to the uncertainty as to the ultimate forum for his trial. This will only be achieved if the Libyan authorities are ordered that they must either immediately file a reply in order to allow the ICC to resolve this issue sufficiently in advance of the commencement of the domestic trial, or waive their ability to file a reply.
44. Finally, the Defence observes that Regulation 35(2) does not require the Chamber to hear the parties or participants before reducing a time limit ("where appropriate, after having given the participants an opportunity to be heard"). Given that the underlying objective of

²³ ICC-01/11-01/11-197-Anx2.

²⁴ ICC-01/11-01/11-190-Corr-Red at footnote 49.

the present request is to expedite the admissibility proceedings, it is imperative that the Chamber rules on the present Regulation 35 request as soon as possible. The Defence therefore requests the Honourable Pre-Trial Chamber to issue an immediate decision on the Regulation 35 request, or at the very least, establish a very short time frame for responses from the participants on this issue.

2.4 In the alternative, if the Pre-Trial Chamber does not lift the suspensive effect for the deadline for filing a reply, the Pre-Trial Chamber should find that the admissibility proceedings are themselves suspended, and as such, Article 95 is no longer applicable

45. The Pre-Trial Chamber has previously found that Article 95 of the Statute is only triggered when there is an admissibility challenge actively under consideration by the Chamber.²⁵ In its decision of 9 August 2012, the Pre-Trial Chamber suspended the deadline for Counsel for Libya to file their reply. It is not at all apparent when the new deadline is, or even when it will be established. The ability of the Pre-Trial Chamber to consider the admissibility challenge has therefore effectively been suspended *sine die*. It therefore cannot be said that there is currently “an admissibility challenge under consideration by the Court”, for the purposes of Article 95.
46. In its decision of 1 June 2012, the Pre-Trial Chamber found that Article 95 applies to all forms of cooperation under Part 9 of the Statute. Accordingly, for as long as Article 95 is triggered, the Defence does not have the means to seek any relief from the Chamber pursuant to Article 57(3)(b) and (c), which depend on Part 9 of the Statute. This extends to requests for the Chamber to take measures to ensure the safety and protection of Defence witnesses, to preserve Defence evidence which might subsequently disappear, or to obtain cooperation from the Libyan authorities to enable the Defence to have access to relevant information concerning the domestic charges and evidence in order to preserve Mr. Gaddafi’s right to silence before the ICC, and ensure harmonisation in Mr. Gaddafi’s domestic and ICC strategies.
47. It should be noted in this regard that whilst the filing of an admissibility challenge suspends the Prosecution’s ability to conduct investigations, it does not suspend the

²⁵ Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi, ICC-01/11-01/11-100.

prosecution of the case before the Court,²⁶ or the Defence's ability and duty to take any necessary measures under the Statute to preserve the best interests of their client.

48. If Article 95 were to continue in effect during the current suspension of the admissibility proceedings, then it would create an unacceptable hiatus as concerns the ability of the Defence to enforce the rights of the defendant before the ICC.
49. Accordingly, the Pre-Trial Chamber's interpretation of Article 95 can only be reconciled with their duties towards the defendant under Article 57 of the Statute if either admissibility challenges are resolved in a sufficiently expeditious manner to avoid any prejudice being incurred by the defendant in the interim, or, if Article 95 is suspended in case of any suspensions in the admissibility proceedings so that the Chamber can invoke Part 9 of the Statute to prevent the defendant from suffering prejudice for the duration of the suspension in the admissibility proceedings.
50. The Pre-Trial Chamber has already recognised that

States may only temporarily suspend the execution of a request for cooperation until such time that a determination on admissibility is made by the Court. The arrest warrant remains valid in accordance with article 19(9) of the Statute, and accordingly Libya must ensure that all necessary measures are taken during the postponement in order to ensure the possibility of an immediate execution of the Surrender Request should the case be found admissible.²⁷

51. The execution of the arrest warrant against Mr. Gaddafi has now been outstanding for almost 9 months, which completely stretches the definition of a 'temporary suspension' beyond its ordinary meaning. If the domestic proceedings against Mr. Gaddafi commence in September, their possible completion and Mr. Gaddafi's execution would mean that Libya will not be in a position to "ensure the possibility of an immediate execution of the Surrender Request should the case be found admissible".
52. The only mechanism for preserving the validity of the arrest warrant against Mr. Gaddafi, and ensuring that the ICC's power to take any measures to preserve the rights of the parties and participants is not voided during the suspension of the admissibility

²⁶ Decision on the "Prosecution's application requesting disclosure after a final resolution of the Government of Kenya's admissibility challenge" and Establishing a Calendar for Disclosure Between the Parties, 20 April 2011, ICC-01/09-01/11-62, at para. 9.

²⁷ ICC-01/11-01/11-163 at para. 40.

proceedings, is to suspend the application of Article 95, and order the Libyan authorities to immediately surrender Mr. Gaddafi to the ICC.

53. In granting the Article 95 request, the Pre-Trial Chamber also underscored that “it is expected that Libya will provide all required assistance in order to facilitate an expeditious determination of the Admissibility Challenge.”²⁸ However, after the Libyan authorities were permitted to suspend their obligation to surrender Mr. Gaddafi to the ICC, the subsequent actions of the Libyan authorities did not evince an intention to assist the Court to expeditiously resolve the admissibility challenge. The refusal of the Libyan authorities to immediately release the ICC delegation significantly delayed the ability of the Defence to file their response. The claim by Counsel for Libya that they were unable to obtain instructions from the current Minister of Justice and Prosecutor-General – notwithstanding the fact that these persons had and continue to have the full legal authority to provide such instructions – has also engendered further substantial delays.
54. The Libyan authorities appear to be either unable or unwilling to facilitate the Chamber’s consideration of the admissibility challenge by taking the necessary measures to move the admissibility proceedings forward in an expeditious manner. In circumstances, in which the ability of the Chamber to consider the admissibility challenge has been fundamentally impeded by the same entity which submitted the challenge, it cannot be said that the challenge to admissibility has “been properly made pursuant to article 19(2) of the Statute and rule 58(1) of the Rules.”²⁹
55. The inevitable consequence of the fact that there has been a suspension in the Chamber’s ability to consider the admissibility challenge must therefore be that Article 95 is in turn, suspended. To hold otherwise would create a powerful incentive for States to drag out admissibility proceedings in order to avoid their cooperation obligations under Part 9 of the Statute, particularly as it cannot be presumed that Non-State parties have an intention to perform their obligations under the Statute in good faith.

²⁸ ICC-01/11-01/11-163 at para. 41.

²⁹ ICC-01/11-01/11-163 at para. 37.

3. Relief Sought

56. For the reasons set out above, the Defence for Mr. Saif Al Islam Gaddafi respectfully requests the Honourable Pre-Trial Chamber to:

- i. order Counsel for Libya to either file their reply to the admissibility challenge within four days of the issuance of the decision on this request, or waive their right to file such a reply; or,
- ii. in the alternative, declare that Article 95 is no longer in effect during the current suspension of the admissibility proceedings, and order the Libyan authorities to immediately surrender Mr. Gaddafi to the custody of the ICC.



Xavier-Jean Keïta, Counsel for Mr. Saif Al Islam Gaddafi

Dated this, 14th Day of August 2012

At The Hague, The Netherlands