

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **21 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**  
**Addendum to the 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:

**The Office of the Prosecutor**

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**Counsel for the Defence**

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Ms. Melinda Taylor, Counsel

**Legal Representatives of the Victims**

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**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

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

**States' Representatives**

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Ms. Michelle Butler

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms. Silvana Arbia, Registrar

**Deputy Registrar**

Mr. Didier Daniel Pereira, Deputy  
Registrar

**Victims and Witnesses Unit**

**Counsel Support Section**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

1. On 30 July 2012, Counsel for Libya filed a request for a Status Conference, and an extension of time to file their reply concerning the admissibility challenge.<sup>1</sup> Counsel for Libya sought to justify the latter by reference, *inter alia*, to the inability of Counsel to obtain instructions during the period of Ramadan, and pending the appointment of a new Minister of Justice, and Prosecutor-General.
2. In a request to reply to the Defence and Registry submissions on this point, Counsel for Libya once again averred to the Chamber that Counsel for Libya were unable to obtain instructions in relation to either the allegations concerning the alleged misconduct of the Defence, or the admissibility of the case.<sup>2</sup> Counsel for Libya also heavily implied that there was a lacuna concerning the existence of a prosecution team, with the authority to instruct Counsel on such matters.<sup>3</sup>
3. On 9 August 2012, the Pre-Trial Chamber suspended the deadline concerning Libya's reply to the admissibility challenge due to "the alleged inability of counsel to obtain instructions in the absence of a Minister of Justice".<sup>4</sup>
4. On 14 August 2012, the Defence for Mr. Saif Al Islam Gaddafi respectfully requested the Pre-Trial Chamber to shorten the deadline for the reply, or in the alternative, suspend the operation of Article 95 (the Request).<sup>5</sup> The Defence referred to the fact that there was no *du jure* or *de facto* impediment as concerns the ability of either the incumbent Minister of Justice, or Prosecutor-General to instruct Counsel for Libya in relation to the reply to the admissibility challenge.
5. On 18 August 2012, at a time when Counsel for Libya had informed the Pre-Trial Chamber that there were no government officials capable of providing instructions concerning the case, an official for the Prosecutor-General provided clear and detailed information concerning the intention of the Libyan authorities regarding the progress of the domestic proceedings, and the admissibility challenge before the ICC.<sup>6</sup>
6. For example, the official addressed the following issues, which are directly relevant to a putative reply to the admissibility challenge:

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<sup>1</sup> ICC-01/11-01/11-192

<sup>2</sup> ICC-01/11-01/11-199, 9 August 2012, at paras. 4 and 13.

<sup>3</sup> See for example, para 8.

<sup>4</sup> ICC-01/11-01/11-200.

<sup>5</sup> ICC-01/11-01/11-201.

<sup>6</sup> N. Meo, 'Libya: Saif Gaddafi to go on trial next month' [Telegraph](http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/9484459/Libya-Saif-Gaddafi-to-go-on-trial-next-month.html) 18 August 2012, <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/9484459/Libya-Saif-Gaddafi-to-go-on-trial-next-month.html>

- i. Whether Mr. Gaddafi will be transferred from his ‘secret location’ of detention to a prison facility in Tripoli;<sup>7</sup>
  - ii. The penalty which will be imposed on Mr. Gaddafi;<sup>8</sup>
  - iii. The status of the appointment of counsel;<sup>9</sup>
  - iv. The existence (or lack thereof) of any effective mechanisms for the protection of witnesses;<sup>10</sup>
  - v. The date sought for the commencement of the trial;<sup>11</sup> and
  - vi. The specific items of evidence, and statements, which will be relied upon by the Prosecution.<sup>12</sup>
7. The Defence therefore files this article as an addendum to its Request, insofar as it demonstrates the ability of relevant Libyan authorities to instruct Counsel for Libya on all relevant aspects concerning a reply to the admissibility of the case.
  8. The revelation in the article that

now Libya's prosecutor has made clear that the ICC will play no role in the trial. The court's relationship with Libya was poisoned after four of its personnel were detained for alleged spying during a visit to Saif

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<sup>7</sup> Counsel for Libya had asserted at paragraph 35 of the admissibility challenge that although Mr. Gaddafi was detained in what they conceded was a ‘secret location’ in Zintan, he would be transferred to a regular prison facility in Tripoli, which is where he would be tried (ICC-01/11-01/11-130). However, it would appear from the Telegraph article that due to political concessions garnered through the role of the Zintan brigade in arresting and detaining the ICC delegation, Mr. Gaddafi will continue to be detained and prosecuted in Zintan.

<sup>8</sup> Although Counsel for Libya referred at paragraph 67 of the admissibility challenge to a theoretical possibility that the death penalty could be commuted, the official confirmed that if convicted, Mr. Gaddafi will be executed by hanging. This position is in line with NTC Law 35, which excludes any members of the Gaddafi family from being eligible for leniency or forgiveness (ICC-01/11-01/11-190-Corr-Red at footnote 311).

<sup>9</sup> The official indicated that a counsel had not yet been appointed to Mr. Gaddafi.

<sup>10</sup> The official acknowledged that witness safety and protection is a real concern, but appeared to suggest that the use of secret evidence would mitigate this risk: “The prosecutor refused to name the witnesses because of fears for their security – assassinations are still commonplace in Libya – and he said that although most of the hearing will be in public, some evidence will be heard in secret.”

<sup>11</sup> “A delay could be ordered if more investigation were needed, but he was emphatic that the prosecutor wants to begin the trial at the first available session of Zintan's criminal court next month.”

<sup>12</sup> By virtue of the description provided by the official many of the evidential items can be identified through simple internet searches, or through high profile media interviews, in which Libyan officials discussed these evidential items (see for example, the Al Jazeera documentary, ‘Libya on the Line’, Annex 16, ICC-01/11-01/11-190-Corr-Red). This practice stands in stark contrast to the assertion by Counsel for Libya at paragraph 40 of the admissibility challenge that the principle of ‘confidentiality of investigations’ barred the Libyan prosecutors from providing any specific details, of the evidence which will be relied upon in domestic proceedings, to the ICC, or indeed, the public.

also casts doubt on the *bona fides* of the extension of time sought by the Libyan authorities. Rather than instructing Counsel for Libya concerning the admissibility reply, the Libyan authorities have used this period to mount a public campaign to preemptively justify their non-cooperation with any future admissibility ruling from the ICC.

9. In particular, the Interior Minister, who continues to exercise his functions and authority to speak on behalf of the Libyan government, has resorted to litigation by journalism rather than judiciary, using the press as a platform to publicly malign the credibility of the ICC Defence (and by association, the ICC).
10. Whereas two weeks ago, the Libyan authorities asserted that they had concerns that the Defence wished to assassinate or poison Mr. Gaddafi with the interpreter's swatch watch, the Interior Minister now alleges that the Defence attempted to assist Mr. Gaddafi escape by providing him with

“drawings showing places and times in Zintan”. The Interior Minister further asserted that the ICC has not “denied the spying claims”.

11. For the record, the Defence would like to categorically state that the Defence:
  - was not attempting to ‘spy’ on either their own client, or anyone or anything else;
  - was not attempting to poison/kill/or in any way harm their own client with a swatch watch or anything else; and
  - was not attempting to assist Mr. Gaddafi to escape from the Zintan brigade with drawings, ‘codes’, or any other means.
12. It is not possible to conduct proper admissibility proceedings or indeed, any judicial proceedings in a constantly shifting terrain, in which the details of the admissibility challenge and the allegations against the Defence mutate in order to meet political exigencies or hide evidential lacunae.
13. At the time of the admissibility challenge, Mr. Gaddafi was to be tried in Tripoli. This month, it is Zintan, but it is entirely probable that the details may again change once the authorities realise the challenges of hosting the trial in a remote location with no pre-existing courtroom, or impartial security mechanism for protecting participants or enforcing orders.

14. If the modalities of the trial envisaged in the admissibility challenge put before the Chamber are no longer tenable, then that is a factor which the Chamber should take into consideration when determining firstly, the ability and capacity of the Libyan authorities to conduct the trial against Mr. Gaddafi in the manner envisaged in the admissibility challenge, and secondly, the credibility and weight of the assurances provided by Counsel for Libya concerning the future conduct of the proceedings.
15. The Libyan authorities had both an obligation and an opportunity to submit a fully reasoned and justified proposal for the conduct of the domestic proceedings in the admissibility challenge. The burden fell squarely on them to do so at the time of the challenge.
16. It would be an abuse of the court proceedings to use the admissibility reply as a vehicle for mounting a distinct admissibility challenge based on new circumstances, proposals, and allegations. To do so would be contrary to the clear Statutory injunction that States may only challenge admissibility once, as of right. It would also unfairly deprive the Defence, Prosecution, and OPCV of the ability to be heard on these new details and proposals.
17. The law requires certainty and specificity, and Mr. Gaddafi has a right to know the forum of his trial as soon as possible. Accordingly, in the absence of any legal or practical impediment to the immediate filing of a reply to the admissibility challenge, the Defence respectfully reiterates its request for 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.



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

Dated this, 21<sup>st</sup> day of August 2012

At The Hague, The Netherlands