

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **19 September 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

Defence Request

Source: Defence

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

The Office of the Prosecutor

Ms. Fatou Bensouda

Counsel for the Defence

Mr. Xavier-Jean Keïta, Principal Counsel

Ms. Melinda Taylor, Counsel

Legal Representatives of the Victims

Ms. Paolina Massida

Ms. Sarah Pellet

Mr. Mohamed Abdou

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States' Representatives

Mr. Phillipe Sands

Mr. Payam Akhavan

Ms. Michelle Butler

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia, Registrar

Deputy Registrar

Mr. Didier Daniel Preira, Deputy Registrar

Victims and Witnesses Unit

Counsel Support Section

Detention Section

Victims Participation and Reparations Section

Other

Submissions

1. Article 19(4) of the Rome Statute stipulates that a State may only challenge the admissibility of the case once, as of right.
2. Libya chose to file its challenge to the admissibility of the case on 1 May 2012, at a time when none of the persons involved in formulating the admissibility challenge or instructing counsel had been democratically elected, or appointed by persons, who had been democratically elected.
3. Given that the elections were initially scheduled for 19 June 2012, Libya was also aware when it filed its admissibility challenge that there would be a political transition before the admissibility of the case was likely to be resolved.
4. Libya could have filed its challenge after the elections, but then it should have either surrendered Mr. Saif Al Islam Gaddafi to the custody of the International Criminal Court (ICC) or risked facing the consequences of a possible finding of non-compliance due to Libya's failure to surrender Mr. Gaddafi to the ICC for over five and a half months.
5. Having made the strategic choice to submit an admissibility challenge, which was predicated on instructions from non-elected officials, and having benefited from a corollary Article 95 decision not to surrender Mr. Gaddafi whilst the challenge was under consideration, it would be unfair for Libya to invoke its political transition in order to obtain a second opportunity to challenge the admissibility of the case based on new arguments, circumstances, or proposals, which were not included in its initial challenge.
6. In its decision of 17 September 2012, the Pre-Trial Chamber issued an order convening a hearing on the admissibility of the case, for the purpose of allowing Libya to submit its reply to the responses of the Prosecution, the Office of Public Counsel for victims (OPCV), and the Defence (the Order).¹
7. The Pre-Trial Chamber ruled that “[a]t the same hearing, Libya will also be given the opportunity to complement its previous submissions and evidence relevant to its Admissibility Challenge.”² As an example of the type of complementary submissions

¹ Order convening a hearing on Libya's challenge to the admissibility of the case against Saif Al-Islam Gaddafi, ICC-01/11-01/11-207.

² At para. 13.

envisaged by the Chamber, the Pre-Trial Chamber referred to specific investigative steps, which the Libyan authorities had indicated would occur immediately after the admissibility challenge had been filed.³

8. The Pre-Trial Chamber further decided that “the Prosecutor, the OPCD and the OPCV will also be given an opportunity to present further submissions and evidence relevant to the Admissibility Challenge” (emphasis added).⁴
9. All parties and participants were ordered to file such evidence by 3 October 2012.⁵
10. The Defence for Mr. Saif Al Islam Gaddafi understands from the wording of the Order and the examples given by the Pre-Trial Chamber that the right of the Libyan authorities to file additional submissions is restricted to matters, which are complementary to Libya’s initial admissibility challenge, in the sense that the possibility that such an action or event would occur had already been set out in the initial admissibility challenge.
11. The Defence is nonetheless concerned by the fact that Counsel for Libya have repeatedly referred to the existence of ‘new Government policy’ regarding the domestic case against M. Gaddafi in their recent filings, which could presage that the new Government intends to conduct the domestic proceedings in a different manner, or to vary the modalities of the admissibility challenge.⁶
12. If Counsel for Libya were to submit new evidence related to submissions, which depart from the parameters of the initial admissibility challenge, then not only would it contravene article 19(4) of the Rome Statute, it would also deprive the Defence of the right to have adequate time to effectively respond to such a variant of the initial challenge.
13. Since the deadline for filing evidence is the same for all parties and participants, the Defence will not be aware of such new information or variations in the admissibility challenge before the expiration of its deadline for filing Defence evidence. Counsel for Libya have not provided any information to the Pre-Trial Chamber concerning the current status of the proceedings against Mr. Gaddafi nor have they elaborated as to the manner in which ‘new Government policy’ might differ from the policy of the previous authorities. It is therefore not feasible for the Defence to submit evidence in

³ At para. 13.

⁴ At para 14.

⁵ At para. 15.

⁶ See for example, ICC-01/11-01/11-205 at paras. 2 and 4.

anticipation of what might be relevant to potential variations or new developments concerning the admissibility challenge.

14. Given that Counsel for Libya has not formally sought leave to submit a new or modified admissibility challenge, and there are no unforeseen or exceptional circumstances which would warrant such a possibility, the right to submit evidence and present submissions at the hearing should, in principle, be confined to matters, which fall squarely within the parameters of the initial admissibility challenge.
15. Nonetheless, should Libya be permitted to present submissions and rely upon evidence concerning issues falling outside of the scope of the initial challenge and responses, then in order to mitigate the above-mentioned prejudice, Defence requests the Pre-Trial Chamber to authorise the Defence to submit additional evidence, which might be relevant to any evidence filed by Counsel for Libya concerning such new matters, by midday, 5 October 2012. Such a modest extension of the deadline, confined as it is to evidence pertaining to new issues, will not delay the hearing or impede the ability of the participants to prepare for the hearing.

Relief Sought

16. The Defence for Mr. Saif Al Islam Gaddafi respectfully requests the Honourable Pre-Trial Chamber to either:
 - I. confirm 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. authorise the Defence 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.



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

Dated this, 19th Day of September 2012

At The Hague, The Netherlands