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Date: **3 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

**Defence Response to the "Libya Government Request, made in the interest 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: Defence

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

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Introduction

1. On the eve of a deadline for filing evidence for the admissibility hearing, the Government of Libya submitted a request to delay the admissibility hearing until November 2012 (the Request).¹
2. The decision scheduling the admissibility hearing had been issued on 14 September 2012, that is, more than two weeks earlier.²
3. In this decision, the Pre-Trial Chamber rejected the request of the Government of Libya to have further time to update the Chamber concerning the formation of the new government, and the appointment of the new Minister of Justice and Prosecutor-General. In so doing, the Chamber referred to the “need to resolve the issue of the admissibility of the case against [Mr. Gaddafi] without further delay.”³ The Government of Libya did not appeal the earlier decision.
4. This is the second occasion in the last month on which the Government of Libya has filed a request for extension of time at the very last minute. The jurisprudence of the ICC Appeals Chamber is very clear: judicial orders must be complied with unless and until the Chamber suspends the obligation to do so – a participant cannot arrogate to itself the right to decide if and when to comply with the terms of a judicial order.⁴ Filing these requests at the penultimate moment deprives the parties of the ability to have an effective right to be heard, and attempts to make the requested relief a *fait accompli*.
5. In terms of the Pre-Trial Chamber’s earlier request for a report concerning the status of the proceedings against Mr. Gaddafi and his detention conditions, the Government of Libya filed a request for further time to address these issues a mere thirty minutes before the expiration of the deadline.⁵ Filing such a request on the very day of the deadline cannot but be considered as non-compliance. The Pre-Trial Chamber had not suspended the deadline for filing the report prior to the expiration of the deadline, and the Government of Libya could not presume that it would get retrospective permission to do so. The Government of Libya also failed to provide any information or explanation as to why it was not in a position to update the Chamber in connection

¹ ICC-01/11-01/11-213.

² ICC-01/11-01/11-207.

³ At para. 10.

⁴ ICC-01/04-01/06-2582 at para.1.

⁵ ICC-01/11-01/11-205.

with the detention conditions of Mr. Gaddafi –an issue which is entirely unrelated to the political process. The Government’s provisional report completely glossed over this point.

6. On both occasions, there was also no reason why the Government of Libya was not in a position to seek relief at an earlier point in time. For example, as concerns the request to file the report concerning the status of proceedings and the detention conditions of Mr. Gaddafi, the Government of Libya informed the Pre-Trial Chamber on 7 September 2012 that it was not in a position to obtain instructions due to the fact that the Prime- Minister had not been appointed. However, the fact that the Prime Minister would not be appointed in accordance with the deadline set out in the Constitutional Declaration had been announced in English language publications on 3 September 2012.⁶
7. Similarly, in the present instance, it was reported in English language publications from at least 26 September 2012 that the Prime Minister had indicated that he would need more time to appoint his cabinet.⁷
8. Although the Pre-Trial Chamber granted Libya the putative right to file a reply, participants seeking to enforce their rights before the Court must act diligently;⁸ if the Government of Libya fails to either comply with Court orders, or seek their variance in a timely manner, then the Government of Libya waives the right to submit a reply.
9. The constant requests for further time are also completely unjustified. There is currently a Minister of Justice and Prosecutor-General in Libya. They had and continue to have full legal authority to exercise their functions, until such times as they are replaced.
10. The political affiliation of the Minister of Justice and the Prosecutor-General should have no impact on the question as to status of the proceedings against Mr. Gaddafi, or the content of the evidence against him. Either Mr. Gaddafi has been brought before an Accusation Chamber or he has not; either he has a counsel or he does not. The policy of the new Government has absolutely no impact on the ability of the Prosecutor-General to submit examples of evidence that the investigation against Mr. Gaddafi has produced, or respond to questions of the Chamber on these matters.

⁶ G Grant S Zaptia, ‘National Congress passes raft of new measures regulating selection of PM’ Libya Herald, 3 September 2012, <http://www.libyaherald.com/?p=13659>

⁷ Congress threatens to sack Abushagur if no government formed by 7 October, Libya Herald 26 September 2012, <http://www.libyaherald.com/?p=15183>.

⁸ ICC-01/04-01/07-2259, at para. 43.

11. Both the current Minister of Justice and Prosecutor-General have the capacity to instruct Counsel concerning the hearing. If they are replaced before the hearing, the persons appointed in their stead can attend the hearing. Article 30 of Libya's Constitutional Declaration envisages no 'gaps' as concerns governmental authority.
12. Ironically, in its filing, the Government of Libya also expressly relies on information, which was provided by the Prosecutor-General's office concerning the status of the proceedings against Mr. Gaddafi, in order to obtain more time due to its alleged inability to obtain information from the Prosecutor-General's office.⁹
13. The Government of Libya has also misled the Pre-Trial Chamber by suggesting that the delays in Mr. Gaddafi's trial are attributable to the "need to appoint a new Prosecutor-General."¹⁰ The article cited by the Government of Libya makes no such reference – the delays are directly attributed to the desire of the Libyan authorities to obtain information from Mr. Abdullah Al-Senussi, which might be relevant to Mr. Gaddafi's case.¹¹
14. Representatives of the Prosecutor-General have also throughout the last month given many public interviews, in which they have provided very specific information concerning the modalities of the trial, and the type of evidence which they intend to utilize.¹² Indeed, by publicly referring to the fact that Mr. Abudullah Al-Senussi is a potential witness, it is clear that this so called 'confidentiality of investigations' does not preclude the Libyan authorities from submitting more detailed information than that which was submitted in the admissibility challenge, if such information exists.
15. The position of Prosecutor-General is also not tied to the political process. There is no presumption or requirement that a newly appointed Government must consider whether the Prosecutor-General should be replaced, or whether the incumbent should continue.
16. The designation of a new President and Prime-Minister also appears to have had no practical impact on the role and functions of the current Prosecutor-General. Indeed, on the very day that the Government of Libya filed its request for an extension of time due to their inability to obtain instructions from the current Prosecutor-General, this

⁹ At para 14, citing <http://www.reuters.com/article/2012/09/09/us-libya-saif-trial-idUSBRE8880F720120909>, which is predicated on information provided by the Prosecutor-General's office.

¹⁰ At para. 14.

¹¹ <http://www.reuters.com/article/2012/09/09/us-libya-saif-trial-idUSBRE8880F720120909>

¹² N. Meo, 'Libya: Saif Gaddafi to go on trial next month' Telegraph 18 August 2012, <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/9484459/Libya-Saif-Gaddafi-to-go-on-trial-next-month.html>

very same Prosecutor-General was liaising with American authorities in order to discuss and determine the modalities for the investigation into the attack on the United States Embassy.¹³ The Deputy Foreign Minister for Libya expressly emphasized in the same news report that the current Prosecutor-General possesses the authority for making such decisions.

17. It should be noted that the Pre-Trial Chamber did not request the Prosecutor-General to attend the admissibility hearing, they invited the Prosecutor-General to attend the hearing. This was in line with an earlier request from the Government of Libya to allow the current Prosecutor-General to appear before the Court to address the Chamber on the admissibility challenge.¹⁴
18. In this earlier request, the Government underscored that the current Prosecutor-General was well placed to address the Chamber because he had “investigated the case of Saif Al-Islam Gaddafi personally”.¹⁵ The Government further posited that the current Prosecutor-General was slated to “play a central role in the development of the Libyan justice system in the immediate future (as well as in the middle and long--term)”, and was a “source[] upon which the Pre-Trial Chamber may comfortably rely in assessing the capacity of the Libyan criminal justice system”.¹⁶
19. The current Prosecutor-General presently has exactly the same legal authority as he had at the time this request for a hearing was submitted. The fact that Government of Libya may no longer wish to call him falls within their discretion, but is not in itself, justification for delaying the admissibility hearing. The positive obligation of the Chamber to expeditiously resolve the admissibility challenge should not be compromised due to the strategic choices of one of the participants.
20. It is also entirely unclear as to why Counsel for Libya are unable to obtain instructions from the current Minister of Justice or Prosecutor-General, but they are able to do so from Professor El-Gehani- whose position has also not been ratified by the new Government. Indeed, the Government of Libya proposes to call Professor El-Gehani at a Status Conference on 9 and 10 October 2012 to address the matters set out in the Pre-Trial Chamber’s order of 14 September 2012 (that is, the reply to the admissibility

¹³ Libya says FBI team heading to Benghazi [Radio Netherlands Worldwide](http://www.rnw.nl/africa/bulletin/libya-says-fbi-team-heading-benghazi) 2 October 2012, <http://www.rnw.nl/africa/bulletin/libya-says-fbi-team-heading-benghazi>

¹⁴ ICC-01/11-01/11-132

¹⁵ At para. 13.

¹⁶ At para. 14.

challenge), including proposals concerning assistance from South Africa and Argentina to address judicial capacity building.¹⁷

21. Although the Government indicates that in the absence of the Prosecutor-General, neither Counsel nor Professor El-Gehani will be able to provide further documentary evidence concerning the investigation,¹⁸ as noted above, their inability to do so is a direct product of their own strategic choice not to call either the current Prosecutor-General, or his replacement.
22. Moreover, if Professor El-Gehani has the current authority to instruct Counsel and brief the Pre-Trial Chamber on other matters concerning the admissibility of the case, then he would have had the same authority to instruct Counsel both when the initial admissibility reply was due, and when the subsequent report of 7 September 2012 was due.
23. The fact that Counsel for Libya are only now confirming that Professor El-Gehani has the capacity to instruct both Counsel and the Chamber on new developments, such as the extradition of Mr. Abdullah Al-Senussi and the proposal to obtain assistance from South Africa and Argentina, suggests that the requested delays were not attributable to the inability of Counsel for Libya to obtain instructions concerning the admissibility of the case, but the desire of the Government of Libya (and Professor El-Gehani) to have further time in order to improve their prospects of success.
24. It would appear that at the very time when Libyan authorities were purportedly unable to instruct Counsel or to respond to orders of the ICC, these same authorities were in fact liaising with other States and entities on matters which directly relate to the proceedings against Mr. Gaddafi. For example, notwithstanding the existence of an outstanding ICC arrest warrant against Mr. Abdullah Al-Senussi, the current Minister of Justice and the current Prosecutor-General's Office directly engaged in negotiating with Mauritania in order to secure Mr. Al-Senussi's extradition to Libya rather than the ICC.¹⁹
25. Professor El-Gehani also appears to have been liaising with the authorities of South African and Argentina in connection with the modalities of the proceedings against Mr. Gaddafi.

¹⁷ At para. 12.

¹⁸ At para. 13.

¹⁹ Mauritania deports Libya spy chief Abdullah al-Senussi BBC 5 September 2012, <http://www.bbc.co.uk/news/worldafrica-19487228>; M. Cousins, 'Kib insists Senussi will receive fair trial in Libya' Libya Herald 5 September 2012, <http://www.libyaherald.com/?p=13809>; ICC-01/11-01/11-206-Anx2 at pp. 2-5.

26. The reference to the proposal to obtain assistance in judicial capacity from South Africa and Argentina also constitutes an implicit recognition that Libya currently lacks the capability to investigate and prosecute the case in the manner required by Article 17 of the Statute.
27. In this connection, although the Pre-Trial Chamber has recently stated that it must decide the admissibility of the case based on the circumstances at the time of the issuance of its decision, it would be entirely inappropriate for the Chamber to accord a challenging State more time in order to improve the State's prospects in challenging the admissibility of the case.
28. As previously noted by the Defence, the Government of 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.
29. The Government of 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 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.
30. 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, the Government of Libya cannot constantly invoke its political transition in order to frustrate an expeditious resolution of the admissibility challenge.
31. The protraction of the admissibility proceedings has had the effect of suspending any ICC related investigations in the case, and further delaying the surrender of Mr. Gaddafi to the ICC. This in turn, has suspended the commencement of the confirmation phase before the ICC, delayed the ability of Mr. Gaddafi to expeditiously clear his name through the confirmation process at the ICC, and lengthened the prospective length of his overall pre-confirmation detention. To disregard such consequences in connection with the present Request would be to presume that the admissibility challenge will be successful.
32. Granting the requested adjournment would therefore be directly contrary to the Pre-Trial Chamber's duty to ensure the defendant's right to expeditious proceedings, and

its obligation to ensure that any time limits set by the Chamber are consistent with the rights of the Defence, and the need to facilitate fair and expeditious proceedings.²⁰

Relief Sought

33. For the reasons set out above, the Defence for Mr. Saif Al Islam Gaddafi respectfully requests the Honourable Pre-Trial Chamber to reject the request of the Government of Libya to adjourn the admissibility hearing.



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

Dated this, 3rd Day of October 2012

At The Hague, The Netherlands

²⁰ Rule 101 of the Rules of Procedure and Evidence.