

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 12 December 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 Annex A**

**Public Redacted Version of the "Request for Leave to Appeal the "Decision
requesting further submissions on issues related to the admissibility of the case
against Saif Al-Islam Gaddafi""**

Source: Defence

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

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Other

1. Introduction

1. Mr. Saif Al-Islam Gaddafi has been held in detention in Libya for over a year.
2. During that time, there have been no advancements as concerns the progress of his case before the International Criminal Court. The proceedings have been stalled, in order to enable the Chamber to consider a challenge to admissibility, which was filed by the Government of Libya over 7 months ago.
3. The uncertainty concerning the ultimate forum for Mr. Gaddafi's trial has been extremely deleterious in terms of his ability to formulate an effective Defence strategy, which will necessarily depend on the particularities of the Court which ultimately has jurisdiction to try him.
4. There is no evidence that Mr. Gaddafi receives any information concerning the ongoing proceedings before the ICC. He therefore would have no idea as to whether there is any likelihood or prospect that he may be transferred to the ICC, or whether his fate rests with the Libyan authorities.
5. It is therefore likely that Mr. Gaddafi fluctuates between a remote hope that the ICC will reject the challenge, and anguish concerning the more pressing possibility that he will face the death penalty if tried in Libya.
6. During the last 7 months, the Government has been accorded with multiple opportunities to submit information and evidence concerning the admissibility of the case. It has nonetheless declined to do so, for a variety of reasons which appear to have lacked foundation or logic.
7. Rather than issuing a decision on the merits of the admissibility challenge, the Pre-Trial Chamber has recently decided to accord the Government of Libya an additional opportunity to adduce information and evidence, on certain issues which the Chamber considers relevant to its determination on the merits.
8. The Government of Libya has been aware of these issues since July 2012, and has declined to avail itself of past opportunities to submit evidence or fully address these issues.
9. The Defence for Mr. Saif Al-Islam Gaddafi therefore respectfully seeks leave to appeal this decision in relation to the issue as to whether Chamber inappropriately exercised its discretion by requesting additional submissions on the admissibility of the case, rather than issuing a decision on the merits of the admissibility challenge.

2. Procedural History

10. On 19 November 2011, Mr. Saif Al-Islam Gaddafi was arrested by Libyan authorities.
11. On 22 March 2012, namely, over 4 months later, the Government of Libya announced its intention to challenge the admissibility of the case by 30 April 2012, and further averred that filing by this date would “allow for a proper submission that sets forth Libya’s arguments in full in relation to the admissibility challenge”.¹
12. At no point did the Government refer to the upcoming elections or the impact which the transition could have on the admissibility proceedings.
13. On 1 May 2012, the Government filed its challenge to the admissibility of the case.²
14. In a related filing, the Government posited that the incumbent 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”.³
15. The Prosecution and Office of Public Counsel for Victims (OPCV) filed their responses on 4 June 2012.
16. The Defence was accorded an extension of time to file its response after its return from meeting Mr. Gaddafi in Zintan. This period was substantially prolonged due to the fact that Counsel for the Defence was detained in Zintan for 26 days. The Defence response was eventually filed on 24 July 2012.
17. On 26 July 2012, the Pre-Trial Chamber granted the Government of Libya the right to file a reply, which was due on 13 August 2012.⁴
18. On 30 July 2012, the Government of Libya filed a request for an extension of time in order to file its reply “18 days after the appointment of the new Minister of Justice, Attorney-General and Prosecutor-General from whom counsel must take instructions”.⁵ It should be noted that the ‘Attorney-General’ and the ‘Prosecutor-General’ are actually the same person in Libya.

¹ ICC-01/11-01/11-82 at para. 3.

² ICC-01/11-01/11-Red-Corr.

³ ICC-01/11-01/11-132 at para. 14.

⁴ ICC-01/11-01/11-191.

⁵ ICC-01/11-01/11-192 at para. 1.

19. On 9 August 2012, the Chamber found that in light of “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 for Justice, the Chamber considers it necessary to suspend the time limit set for the filing of Libya's reply to the Responses”.⁶
20. Notably, the Chamber’s decision was not predicated on the status of the Prosecutor-General.
21. The Chamber further noted that at that juncture, Mr. Gaddafi had been detained for almost 9 months, the challenge had been filed almost three months ago,⁷ and that it was therefore necessary to prevent “undue delays in the resolution of the Admissibility Challenge”.⁸
22. The Chamber therefore suspended the deadline for the reply, on the proviso that the Government filed a report concerning *inter alia*, the status of both the formation of the Government and the domestic proceedings against Mr. Gaddafi, and his detention conditions, which would enable the Chamber to determine whether to set a new date for the reply, or whether to convene an oral hearing.⁹
23. In a later decision, the Chamber clarified that

the Chamber did not extend the time limit for Libya's reply until after the appointment of the Minister of Justice team. Rather, the Chamber postponed a decision in that respect until after receipt, no later than 7 September 2012, of an update on the appointment of the Minister of Justice team. As previously indicated, upon receipt of this report, the Chamber will determine whether to set a new time limit for a written reply, whether such reply is to be received orally during a status conference on the admissibility challenge, or whether, in such circumstances, a reply to the Responses is at all warranted.¹⁰

24. On the date that the report was due, the Government of Libya filed a ‘provisional report’, in which the Government noted that the President of the General National Congress (GNC) had been appointed on 2 September , the Government was expected

⁶ ICC-01/11-01/11-200 at para, 18.

⁷ At para. 19.

⁸ ICC-01/11-01/11-200 09 at para. 20.

⁹ At paras.20 and 21.

¹⁰ ICC-01/11-01/11-203 at para. 12.

to be composed by 20 September 2012, and the Prosecutor-General would be appointed “imminently thereafter”.¹¹

25. The Government failed to address either the status of the domestic proceedings or the detention conditions of Mr. Gaddafi, nor did it provide any explanation as to why it was not in a position to furnish objective information concerning Mr. Gaddafi’s detention conditions.
26. The Government had not sought a request for an extension of time in advance of the deadline, nor did it explain why it had been unable to seek such a request in a timely manner, as required by Regulation 35(2) of the Regulations of the Court.
27. On 14 September 2012, the Pre-Trial Chamber took note of the expected time line for the establishment of the Government, and decided to convene an oral hearing in order to provide the Government with an opportunity to both submit its reply, and to complement its previous submissions with any evidence or information which could be relevant to its challenge.¹²
28. The Chamber further presaged that it would “also decide, at the hearing, on the need to allow final written submissions on the Admissibility Challenge” (emphasis added).¹³ The Chamber indicated that it would be useful for the Libyan Prosecutor-General to attend the hearing, and set a deadline of 3 October 2012 for filing evidence.
29. In reaching this decision, the Chamber had observed that

[a]considerable period of time has been expended since the filing the response of the OPCD on 24 July 2012 in an effort to allow counsel for Libya to obtain instructions and file a reply to the Responses. Throughout this time Saif Al-Islam Gaddafi has remained in detention in Libya and the Chamber is conscious of the need to resolve the issue of the admissibility of the case against him without further delay.¹⁴

30. On 2 October 2012 – that is, just before the deadline for submitting evidence – the Government submitted a request to either treat the admissibility hearing as a Status Conference, with the objective of “setting a timetable for the final stages of these admissibility proceedings in the near future”, or delay the admissibility hearing until

¹¹ ICC-01/11-01/11-205 at para. 2.

¹² ICC-01/11-01/11-207 at para. 13.

¹³ ICC-01/11-01/11-207 at para. 14.

¹⁴ ICC-01/11-01/11-207 at para. 10.

- November 2012, by which time the Government expected that the Minister of Justice and Prosecutor-General would have been appointed, and, reviewed the files.¹⁵
31. Throughout its filing, the Government referred to the absence of a Prosecutor-General,¹⁶ and expressly attributed their inability to file any evidence to the absence of a Prosecutor-General.¹⁷
 32. The Government further asserted that the newly appointed Prime Minister would appoint both a Minister of Justice and a Prosecutor-General as part of the government cabinet.¹⁸
 33. On 3 October 2012, the Pre-Trial Chamber rejected the request on the basis that it was not necessary to distinguish between a Status Conference and an admissibility hearing, and that the convocation of the hearing was in any case without prejudice to the possibility that the Chamber might convene a second hearing if necessary, or request written submissions.¹⁹
 34. The Pre-Trial Chamber did not issue any decision at the hearing concerning the need for additional written submissions.
 35. On 7 December 2012, the Pre-Trial Chamber issued a decision, which requested the Government of Libya to submit further information and evidence on certain issues concerning the admissibility of the case by 23 January 2013, and granted the Prosecution, OPCV, and OPCD a right to file a response to such submissions by 11 February 2012 (the Impugned Decision).²⁰

3. Submissions

The issue arises from the decision

36. An issue for the purposes of an Article 82(1)(d) appeal is “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. An issue is constituted by a subject, the resolution of which is essential for the determination of matters arising in the judicial cause under examination.”²¹

¹⁵ ICC-01/11-01/11-213 at para. 1.

¹⁶ At paras. 12 and 13.

¹⁷ At para. 13.

¹⁸ At para. 10.

¹⁹ ICC-01/11-01/11-217.

²⁰ ICC-01/11-01/11-239.

²¹ ICC-01/09-02/11-88, at para 10.

37. There is no right under the Statute, Rules or Regulations to submit additional observations or evidence in the admissibility proceedings. The decision to allow the Government of Libya to submit additional observations and evidence in relation to the admissibility of the case therefore constituted an exercise of the Pre-Trial Chamber's discretion under Rule 58 of the Rules of Procedure and Evidence.
38. Although Rule 58(2) accords the Chamber with a broad degree of discretion to take "appropriate measures" to organise the proper conduct of admissibility proceedings, in exercising this discretion, the Chamber must ensure that it has sufficiently protected the interests of the defendant.²² The Chamber must also exercise its discretion within the parameters of the Statute, including the explicit Statutory regime set out in Article 19 of the Statute, and the defendant's rights under Articles 55 and 67 of the Statute.²³ In deciding whether to exercise the Chamber's discretion in a particular manner, the Chamber must also consider whether it is "appropriate in the circumstances of the case".²⁴
39. In considering the circumstances in which the Appeals Chamber may interfere with a first instance Chamber's exercise of discretion, the ICC Appeals Chamber has cited with approval the following findings from the Milosevic case:

In order to challenge a discretionary decision, appellants must demonstrate that "the Trial Chamber misdirected itself either as to the principle to be applied or as to the law which is relevant to the exercise of the discretion," or that the Trial Chamber "[gave] weight to extraneous or irrelevant considerations, ... failed to give weight or sufficient weight to relevant considerations, or ... made an error as to the facts upon which it has exercised its discretion," or that the Trial Chamber's decision was "so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion".²⁵

²² ICC-01/04-169 at para. 20.

²³ ICC-01/04-169 at para. 2. In a separate opinion, Judge Pikić has opined that discretionary powers must in general take into consideration the interests of justice and the efficacy of the proceedings - ICC-01/04-01/06-1444-Anx at para. 6. The ICTY Appeals Chamber has also found that discretionary powers must comport to the rights of the accused. For example, in the Prosecutor v. Haradinaj, the Appeals Chamber found that the Trial Chamber's discretion to evaluate credibility of witnesses must be reconciled with accused's right to a reasoned opinion, Appeals Judgment, 27 July 2010, at para 196.

²⁴ ICC-01/04-169 at para. 2.

²⁵ Slobodan Milosevic v. Prosecutor, Decision on Interlocutory Appeal of Trial Chamber's Decision on the Assignment of Counsel, Case No. IT-02-54-AR 73.3 (1 November 2004) at para. 10, cited in ICC-02/04-01/05-408 at para. 84.

40. It therefore follows that the decision of the Pre-Trial Chamber may be amenable to appellate review if the Pre-Trial Chamber failed to exercise its discretion in a manner which is consistent with the Statute, gave too much weight to Libya's request for additional time and the reasons submitted in support of such requests, and insufficient weight to Mr. Gaddafi's right to expeditious proceedings, and the impact which the prolongation of the admissibility proceedings would have on his rights under the Statute.
41. Although the Impugned decision is couched in terms that the Chamber has yet to reach a finding on the merits of the admissibility of the case, it is clear that:
- i. the Chamber deems certain issues to be of key relevance to its determination of the admissibility of the case; and
 - ii. the Government of Libya has failed at this point to adduce sufficient evidence in connection with these issues in order to satisfy the criteria under Article 17 of the Statute.
42. At paragraph 13, the Chamber finds that
- the Chamber expects Libya to substantiate with evidence, within the meaning specified in paragraphs 10 to 12 above, the assertions made in the Admissibility Challenge and reiterated at the Admissibility hearing, that it is currently conducting an investigation into the case against Mr Gaddafi. In addition, appropriate evidence needs to be provided by Libya in order to substantiate its assertions with respect to the following issues.
43. These issues include issues related to the status of domestic proceedings, the subject-matter of the domestic investigation, Libyan national law, Mr. Gaddafi's exercise of his rights under Libyan national law, and the capacity of Libyan authorities to investigate and prosecute.
44. In terms of a concrete example that the Government has failed thus far to meet the burden for establishing the inadmissibility of the case, at paragraph 14, the Pre-Trial Chamber avers that
- for Libya to discharge its burden of proof that currently there is not a situation of "inaction" at the national level, it needs to substantiate that an investigation is in

progress at this moment [...] The Chamber is of the view that further information from Libya is required on: [...]

45. As noted by Hall, in circumstances in which a Government has declined to provide key information in the admissibility proceedings, which is necessary to resolve the challenge, the admissibility of the case before the ICC should be presumed.²⁶
46. By according the Government of Libya with an additional opportunity to try to meet the Article 17 criteria, rather than rendering a decision on the merits, the Chamber is effectively giving the Government a second opportunity to challenge the admissibility of the case.
47. The Government of Libya therefore has all the advantages of a decision on the merits (in the sense that the Chamber has explicitly indicated to the Government of Libya the possible deficiencies in its former challenge, and the areas which require greater evidence), without the attendant disadvantages (in order to effectively resubmit its challenge, the Government does not need to appeal, or demonstrate the existence of exceptional circumstances which would warrant a second challenge, nor is the Government required to surrender Mr. Gaddafi to the ICC).
48. The manner in which the Chamber resolved this therefore raises the issue as to whether the procedure adopted by the Pre-Trial Chamber controverts the objectives of Articles 19 (4) and (5), which when read together, strongly militate in favour of an imposition of due diligence on the party challenging admissibility, and an expeditious resolution of admissibility proceedings.
49. The ICC Appeals Chamber has adumbrated the principle 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. The duty applies to the Chambers of the Court, the parties and participants.”²⁷
50. In reaching this conclusion, the Appeals Chamber explicitly referred to the Statutory requirement in Article 19(5) that States “shall make a challenge [to the admissibility of the case] at the earliest opportunity”.²⁸ It is been advanced by Bitti and El Zeidy that this should be interpreted as requiring a State to challenge admissibility within 6

²⁶ C. Hall, ‘ Article 19’ in in Triffterer (ed.) Commentary on the Rome Statute of the International Criminal Court (2008, 2nd ed. Hart Publishers) at p. 652.

²⁷ ICC-01/04-01/07-2259 at para. 43.

²⁸ ICC-01/04-01/07-2259 at fn 89.

months of the surrender of the defendant to the ICC.²⁹ This time period should be interpreted even more restrictively in the case of a defendant, who has not been surrendered, and who has no means to participate in or advance his case before the ICC.

51. Hall has opined that in the case of an admissibility challenge, which has the effect of suspending the investigations by the Prosecution (i.e. one which is filed by a State), the Chamber “should rule as rapidly as possible”.³⁰ Holmes has observed that the “procedures at the jurisdiction and admissibility stage are intended to be expedited ones, and this objective is reflected in the Rules”.³¹ The ICC Appeals Chamber has also explicitly referred to the imperative of resolving admissibility challenges in an expeditious manner.³²
52. In construing the appropriate time limits for resolving the admissibility of the case, the Pre-Trial Chamber must therefore be guided by the underlying Statutory objective that such challenges must be resolved expeditiously, as demonstrated by the fact that the longest period for resolving an admissibility challenge at the ICC thus far has been four months.³³
53. Allowing a State multiple opportunities to submit additional and new submissions concerning the admissibility of the case, over a time period of over 10 months, clearly contravenes this objective.
54. Although the Appeals Chamber has stated that the admissibility of the case may change throughout the proceedings, the Appeals Chamber issued this finding within the context of the legal and factual implications resulting from successive admissibility challenges filed by different participants throughout the proceedings,³⁴ or a request for review pursuant to Article 19(10) of the Statute.³⁵

²⁹ G. Bitti, M. El-Zeid, ‘The *Katanga* Trial Chamber Decision: Selected Issues’ *Leiden Journal of International Law*, 23 (2010), pp. 319–329, at p. 326.

³⁰ C. Hall ‘Article 19’, in Triffterer (ed.) *ibid* at p. 655.

³¹ J. Holmes ‘Jurisdiction and Admissibility’ in R. Lee (ed.) *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001) p. 348.

³² ICC-01/05-01/08-962 at para. 30.

³³ In the Bemba case, the Defence challenge was filed on 1 March 2010 (ICC-01/05-01/08-704-Conf-Corr), and the decision was issued on 24 June 2010 (ICC-01/05-01/08-802). In the *Katanga* case, the Defence initialled filed an *ex parte* challenge on 10 February 2009, which was reclassified on 25 February 2009. The Chamber issued its oral decision on 12 June 2009, and written decision on 16 June 2009 (ICC-01/04-01/07-1213-tENG). In the Kenya cases, the Government filed its challenge on 31 March 2011 (ICC-01/09-01/11-19), and the Chamber issued its decision on 30 May 2011 (ICC-01/09-01/11-101).

³⁴ ICC-02/04-01/05-408 at para 85.

³⁵ ICC-01/04-01/07-1497 at para. 56.

55. The Appeals Chamber was not in any way suggesting or approving the possibility that the Chamber should accord one of the participants the right to submit successive observations concerning the admissibility of the case, within the confines of one admissibility challenge, with a view to improving the position of that participant. Such an interpretation would have the effect of contravening the express stipulation in Article 19(4) that the admissibility of a case may only be challenged once as of right.
56. The Appeals Chamber's findings concerning the potentially dynamic nature of the admissibility of a case also cannot be interpreted as permitting a participant to generate delays with a view to improving their position in the admissibility proceedings. For this reason, Trial Chamber I found in the Bemba case that it was an abuse of the ICC's procedure for the Defence to request the Chamber to suspend its decision on the admissibility of the case, in order to allow domestic courts to render a decision on an issue, which had been litigated in a tardy manner.³⁶ Nor can tardily instigated proceedings be considered to constitute 'ongoing proceedings' for the purposes of Article 17.³⁷
57. In reaching its decision, the Pre-Trial Chamber did not provide any explanation as to why it considered it to be necessary or proportionate to accord the Government of Libya a third opportunity to submit observations and evidence concerning the admissibility of the case.
58. Almost all of the issues upon which the Chamber has requested additional submissions had been raised in the responses of the Defence and the OPCV to the admissibility challenge.³⁸ As such, the Government of Libya had ample notice of the potential relevance of these issues prior to the admissibility hearing on 9 and 10 October 2012. The only issue, which had not been addressed in previous filings (the issue concerning offers of capacity building from certain States) was addressed during the admissibility hearing itself, at which the Government of Libya had the last word.
59. The Government also chose not to submit any evidence at the admissibility hearing, notwithstanding the fact that Counsel for Libya confirmed during the hearing that the Government is aware of its obligation to adduce concrete and credible evidence to

³⁶ ICC-01/05-01/08-802 at paras. 231.

³⁷ ICC-01/05-01/08-802 at para. 238.

³⁸ *Defence response*

ICC-01/11-01/11-190-Conf-Corr, paras 67-88; 89-90; 98-99 ; 101-115; 122-136; 137-154; 156 ; 161-164; 167; 169-174; 176; 178; 180-187; ¶92-194; 197-209 ; 214; 220-226; 230; 234; 236-238; 246-248; 258 ; 310 i. ; 311-314 ; 356-357; 382-404 ; fn 55-56; fn 178.

OPCV's observations

ICC-01/11-01/11-166-Conf, paras 17-18; 20; 23; 26-28; 32-35; 42-49

support its admissibility challenge.³⁹ The Government of Libya was also aware of the official composition of the Defence team from June 2012, and again, chose not to seek any relief in a timely manner.⁴⁰

60. During the admissibility hearing, Counsel for Libya quite candidly conceded during the hearing that they had filed their admissibility challenge on 1 May in order to avoid their obligation to surrender Mr. Gaddafi to the ICC.⁴¹ The Appeals Chamber has nonetheless underscored that a “State cannot expect to be allowed to amend an admissibility challenge or to submit additional supporting evidence just because the State made the challenge prematurely.”⁴²
61. The Appeals Chamber also found that there was no merit to the argument that the ICC should accord States leeway in order to allow their domestic investigations to progress to the point where they would trigger the inadmissibility of the case. Again the obligation falls on the State to bring a challenge which triggers the inadmissibility of the case – not to build one during the admissibility proceedings themselves.⁴³
62. Notwithstanding the Government of Libya’s repeated references to the ‘absence’ of a Prosecutor-General, there has never been any merit to this argument. Libya had, and continues to have, a fully functioning Prosecutor-General, as demonstrated by the fact that the Prosecutor-General recently requested Interpol to issue a Red Notice against Mr. Musa Kusa for “alleged financial crimes”.⁴⁴
63. The mere possibility that the Prosecutor-General might be replaced also has no bearing on the Government’s ability to effectively participate in the admissibility proceedings. During the hearing of 10 October 2012, Counsel for Libya informed the Chamber that Dr. Gehani had been appointed by the President of the GNC as the focal point for the ICC, and thus has full authority to present the position of the Libyan Government to the ICC.⁴⁵ Counsel for Libya also made it abundantly clear during the hearings that throughout the proceedings, they have received their instructions from

³⁹ Transcript dated 10 October 2012, p. 65, lines 2-10.

⁴⁰ ICC-01/11-01/11-228-Conf-Red at paras. 5-9; ICC-01/11-01/11-235-Conf-Exp-AnxA.

⁴¹ Transcript dated 10 October 2012, p. 44, lines 17-18.

⁴² ICC-01/09-02/11-274 at para 100.

⁴³ ICC-01/09-02/11-274 at para 44.

⁴⁴ Annex A.

⁴⁵ “The new General National Congress adopted decree number 12 which provides him with full authority and powers in this matter” (emphasis added), Transcript 10 October 2012, page 48, lines 15-18. It should be noted that a link to the GNC media page refers to decree number 12 as a decree regulating the cessation of municipal elections.

<https://www.facebook.com/photo.php?fbid=388105227938420&set=a.348919661856977.83595.345294372219506&type=1&theater>

Dr. Gehani,⁴⁶ nor have they referred to any impediments as concerns Dr. Gehani's ability to obtain information from the current Prosecutor-General, his Deputy [REDACTED],⁴⁷ or the multitude of persons who are apparently investigating and prosecuting the domestic case.

64. In exercising its discretion to prolong the admissibility proceedings, and in contradistinction to earlier decisions, the Chamber also did not refer to the length of the defendant's detention, or impact which the prolongation of the admissibility proceedings could have on the defendant's right to an expeditious trial.
65. The Chamber's exercise of discretion must also take into consideration the particular circumstances of the case before it: the amount of time which might be appropriate to resolve an admissibility challenge in which the defendant is at liberty and does not oppose the challenge will obviously differ from the amount of time which should be accorded in the situation in which the defendant is incarcerated, has no domestic legal representation, has not been brought before a judge as required by Article 59 of the Statute, vigorously opposes the challenge, and is apparently scheduled to be tried in February 2013.
66. The political turmoil associated with regime change and democratic elections were also evident in the admissibility challenges resolved in a far shorter space of time in the Kenya, CAR, and DRC related cases. The absence of a functioning Government or a functioning Prosecutor's office were also objective factors which the drafters explicitly contemplated would militate against a finding that the case was inadmissible before the ICC.⁴⁸ For example, the drafters considered that Rwanda – which exemplified the situation of a Government that possessed the will to prosecute cases but lacked the means to do so – as exemplifying inability, as understood by Article 17(3) of the Statute.⁴⁹
67. It follows that in line with the Article 19 injunction that admissibility proceedings must be resolved expeditiously, in circumstances in which the State was unable to meet its burden of satisfying the article 17 criteria due to political instability or a lack of functioning judicial system, the drafters intended that the Court should render a

⁴⁶ ICC-01/11-01/11-T-3-CONF-ENG, p. 32, lines 9 to 13; p.46, lines 21 to 22; p.48, lines 15 to 17; p.52, lines 14 to 16; p. 55, lines 10 to 17.

⁴⁷ ICC-01/11-01/11-145-Conf-AnxD at pp. 3 and 4.

⁴⁸ S. Williams, W. Schabas, 'Article 17 Issues of Admissibility', in Triffterer (ed.) Commentary on the Rome Statute of the International Criminal Court (2008 2nd ed. Hart Publishers) at p. 623; J. Holmes, 'Complementarity: National Courts versus the ICC,' in Cassese, Gaeta, Jones (eds.), The Rome Statute of the International Criminal Court: A Commentary (Oxford University Press, 2002), vol. 1, p. 677.

⁴⁹ J. Holmes, 'Complementarity: National Courts versus the ICC,' *ibid.* at p.677.

finding that the case was inadmissible, rather than according the State with multiple opportunities to meet this criteria over an extended period of time.

The Issue significantly impacts on the fairness and expeditiousness of the proceedings

68. The Defence has raised the above matters in order to underscore that the Chamber's discretion under Rule 58 is not unfettered, and that to the extent the Impugned Decision fails to consider the Statutory limits to the Chamber's discretion or to balance the Chamber's interest in receiving additional submissions with the defendant's rights under the Statute, the issue as to whether the Chamber inappropriately exercised its discretion arises from the Impugned Decision.
69. In determining whether the Article 82(1)(d) criteria are met, the Chamber must refrain from determining the merits of the above arguments; the Chamber must rather assess the possible consequences for the fairness and expeditiousness of the proceedings which could arise, if the Chamber has in fact, wrongly decided this issue.⁵⁰ This necessarily entails a forecast of the possible consequences in the proceedings before the ICC.⁵¹
70. To the extent that the Impugned Decision fails to take into consideration the impact of the Chamber's exercise of discretion on the rights of the defendant, as required by the case law of the ICC, the manner in which the Chamber resolved the Decision necessarily impacts on the fairness of the proceedings.
71. The Defence has previously introduced submissions and evidence concerning the legal regime concerning Mr. Gaddafi's detention, in particular, the legal and practical impediments to his ability to receive family and legal visits or to make communications,⁵² the fact that he has not received any detention orders and has not been accorded an opportunity to challenge the legality of his detention before a Judge,⁵³ and the impact on Mr. Gaddafi's psychological welfare and ability to effectively participate in legal proceedings, which would stem from being detained in isolation.⁵⁴

⁵⁰ ICC-01/04-168, para. 13.

⁵¹ ICC-01/04-168, para. 13.

⁵² Transcript, ICC-01/11-01/11-T-3-Red-ENG WT, 10 October 2012, page 7, lines 18-20; ICC-01/11-01/11-190-Corr-Red, para. 214, 276-291.

⁵³ Transcript, ICC-01/11-01/11-T-3-Red-ENG WT, 10 October 2012, page 7, lines 15-18; ICC-01/11-01/11-190-Corr-Red, para. 178; 182, 214.

⁵⁴ Transcript, ICC-01/11-01/11-T-3-Red-ENG WT, 10 October 2012, page 12, lines 3-13 ;ICC-01/11-01/11-190-Corr-Red, paras 214, 289, 291.

72. Although the Chamber will presumably issue its determination on such matters as part of its final decision on the admissibility of the case, the Chamber cannot disregard the likelihood or possibility that such matters could be true, in assessing the impact of the protraction of the admissibility proceedings on Mr. Gaddafi's ability to effectively exercise his rights under the Statute. Such an approach would be consistent with the manner in which a Chamber must predict the possible consequences of a decision to provisionally release the defendant; that is, it is not necessary for the Chamber to conclude that the defendant would flee, obstruct the proceedings or engage in the further commission of crimes *et cetera*, it suffices for the Chamber to find on the basis of the evidence and submissions of the Prosecution that such a result is a possibility, rather than an inevitability.⁵⁵ Such findings are also without prejudice to the Chamber's ultimate findings concerning the responsibility of the defendant, and thus do not necessarily prejudice the impartiality of the Chamber.
73. A direct consequence of the protraction of the admissibility proceedings is that Libya is not obligated to surrender Mr. Gaddafi to the ICC for the duration of these proceedings. Given the legal and logistical difficulties associated with Mr. Gaddafi's continuing detention in Libya, the protraction of admissibility proceedings are thus likely to significantly impact on Mr. Gaddafi's right to effective representation under the Rome Statute (in particular, his ability to follow ICC proceedings and give ongoing instructions to his Counsel in a privileged setting), his right to receive family visits and the implementation of this right in an effective and not illusory manner, and his right to effectively participate in the proceedings, which is likely to be impeded due to the adverse psychological effects of being detained in incommunicado detention, and isolation.
74. Apart from the fact that expeditiousness is a separate criterion under Article 82(1)(d), the right to expeditious proceedings is also a fundamental component of the defendant's right to a fair trial, under Article 67(1) of the Statute. As recently emphasised by the Defence, justice delayed is justice denied. The prolongation of the admissibility proceedings is impacting, and will continue to impact on the defendant's ability to exercise his rights before the ICC in an effective manner.
75. During the admissibility hearing, the Government announced that Mr. Gaddafi's trial was scheduled to commence in February 2013 – that is, before the admissibility

⁵⁵ ICC-02/11-01/11-291 at para. 47, citing Katanga Appeals Judgment (OA 4), para. 21

proceedings will be concluded.⁵⁶ Since the Government has not been ordered to file its submissions concerning whether this date will be maintained until 23 January 2013, the Defence and defendant will face significant uncertainty regarding the possible forum for his trial, at a time when the defendant may need to be focussing on urgent preparation for an imminent domestic trial. It is inevitable that either the Defence or the Government will appeal the final decision of the Pre-Trial Chamber, which will in turn, extend this uncertainty for several more months.

76. As previously noted by the Defence, the strategy which may be adopted by a defendant who is facing the death penalty and who has no effective means to call his own witnesses, is not necessarily the same strategy as would be adopted if the case is prosecuted before the ICC under a more adversarial system. The procedure employed in Libya courts also differs vastly from that before ICC, as exemplified by the fact that it appears that under Libyan law, the Defence should disclose the identities of potential witnesses at the commencement of the trial.⁵⁷ In contrast, at the ICC, the Defence is not required to decide whether to waive its right of silence and advance a positive Defence case until it has first heard the Prosecution case. It would be impossible for Mr. Gaddafi to actively participate in the Libyan proceedings whilst fully preserving his right of silence before the ICC.
77. The possibility that Mr. Gaddafi will be charged with different crimes and different modes of liability in the domestic proceedings also opens up the possibility that he may incriminate himself or prejudice his Defence vis-à-vis the ICC proceedings,⁵⁸ particularly since he has yet to receive any disclosure concerning the ICC proceedings, and the ICC charges have not yet been finalised at this point in time.
78. Although no-one approached by the Defence has indicated that they would be willing to testify in domestic proceedings, there are several persons who have highly exculpatory evidence, who are willing to testify before the ICC. There is, however, a high possibility that the testimony of some of these persons might become unavailable with the effluxion of time. The ability to resort to Article 56 does not offer an effective remedy in circumstances in which the Defence has not yet received any disclosure, and cannot make an informed decision as to the relevance of all information that might be in the possession of the witness. The further protraction on the admissibility

⁵⁶ ICC-01/11-01/11-T-3-Red-ENG WT, p. 52, lines 14 to 16.

⁵⁷ 'Al-Mahmoudi in court again' *Libya Herald* 10 December 2012, <http://www.libyaherald.com/2012/12/11/al-mahmoudi-in-court-again/>

⁵⁸ See dissenting opinion of Judge Van den Wyngaert, ICC-01/04-01/07-3319, at paras 37-39, 45-46.

proceedings would irretrievably prejudice Mr. Gaddafi's putative right to a fair trial before the ICC.

79. In terms of the impact of the decision on the expeditiousness of ICC proceedings, for the duration of the challenge, the Prosecution is precluded from conducting any investigations for the duration of these proceedings, which inevitably significantly retards the progress of the ICC proceedings against Mr. Gaddafi. As noted above, it is for this reason that the Regulatory framework of the Court militates in favour of expeditious resolutions of admissibility challenges, particularly when filed by a State.
80. Notwithstanding the fact that Mr. Gaddafi was arrested over a year ago, there have been no procedural developments or advancements as concerns the progress of his case before the ICC. The time and resources of the Defence have also been diverted from assisting Mr. Gaddafi with the substantive aspects of his Defence, to responding to the many submissions related to the admissibility challenge. The convocation of additional submissions in January and February will continue to focus the time and resources of the Defence on the admissibility of the case, rather than the preparation of Mr. Gaddafi's Defence before the ICC. The protraction of the admissibility proceedings thus significantly impacts on the defendant's right to be tried before the ICC in an expeditious manner, and his right to not to be kept in pre-trial detention for an unreasonable length of time.

An immediate decision of the Appeals Chamber would materially advance the proceedings.

81. An immediate decision of the Appeals Chamber in relation to whether the Pre-Trial Chamber correctly exercised its discretion in requesting additional submissions will advance the proceedings by definitively ruling on the question as to whether the Chamber should, at this juncture, issue a decision on the merits of the challenge to admissibility, or whether it is permissible for a State party to submit multiple challenges within the confines of one 'admissibility proceeding'.
82. If the Chamber has erred in granting the Government of Libya an additional opportunity to submit further submissions and evidence, then this will be an error that will be impossible to correct in the final appeal of the admissibility challenge. By that stage, the Government may have remedied its judicial system in order to meet the Article 17 criteria, notwithstanding that it will have been to the detriment of the rights

- of the defendant. Even if the Appeals Chamber ultimately agrees that the Chamber should have rendered its final decision on the challenge at an earlier date, it will be difficult, if not impossible for the Appeals Chamber to disregard the new factual circumstances which were before the Pre-Trial Chamber when it eventually issued its decision on the merits of the admissibility challenge.
83. If jurisdiction is ceded back to Libya, the defendant will also have no remedy or ability to seek recourse for the fact that his rights under the ICC Statute may have been violated as a result of the protraction of the admissibility proceedings.
84. A failure to immediately remedy this issue on appeal will therefore “be a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the process”.⁵⁹
85. At this stage, it is still possible that the Government of Libya might seek additional delays as concerns its January deadline, or it may seek to file an additional reply to the February observations of the Prosecution, Defence, and OPCV. Alternatively, the Government might seek to delay its observations in order to join them to a future challenge to the admissibility of the case against Mr. Abdullah Al-Senussi.
86. An immediate decision of the Appeals Chamber will therefore advance the proceedings by providing clarity and certainty concerning the weight which should be given in Rule 58 determinations to the need to expedite the proceedings and the rights of the defendant. In this regard, the ICTR has held that the enumeration of a legal principle, which is likely to be applied throughout the proceedings, constitutes an issue the resolution of which would materially advance the proceedings.⁶⁰

4. Relief Sought

87. For the reasons set out above, the Defence for Mr. Saif Al-Islam Gaddafi respectfully requests the Honourable Pre-Trial Chamber to grant leave to appeal the Impugned Decision in relation to the issue as to whether the Chamber inappropriately exercised its discretion by requesting additional submissions on the admissibility of the case, rather than issuing a decision on the merits of the admissibility challenge.

⁵⁹ ICC-01/04-168 at para. 17.

⁶⁰ Decision on Joseph Nzirorera’s Application for Certification to Appeal Denial of Motion to Obtain Statements of Witnesses ALG and GK, Prosecutor v. Nzirorera, 9 October 2007.



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

Dated this, 12th Day of December 2012

At The Hague, The Netherlands