

**Cour
Pénale
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**International
Criminal
Court**

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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

**Decision requesting further submissions on issues related to the
admissibility of the case against Saif Al-Islam Gaddafi**

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

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Fatou Bensouda

Counsel for the Defence
Xavier-Jean Keïta
Melinda Taylor

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

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REGISTRY

Registrar
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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Pre-Trial Chamber I (the “Chamber”) of the International Criminal Court (the “Court”) issues the present decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi (“Mr Gaddafi”).

I. Procedural history

1. On 1 May 2012, the Chamber received the “Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute”, challenging the admissibility of the case against Mr Gaddafi (the “Admissibility Challenge”).¹

2. The responses to the Admissibility Challenge by the Prosecutor² and the Office of Public Counsel for victims (the “OPCV”),³ and by the Office of Public Counsel for the defence (the “OPCD”)⁴ were filed on 4 June 2012 and 24 July 2012 respectively. Observations on the Admissibility Challenge were also presented by Lawyers for Justice in Libya and the Redress Trust, pursuant to rule 103 of the Rules of Procedure and Evidence (the “Rules”), on 8 June 2012.⁵

3. On 9 and 10 October 2012, the Chamber held a hearing on the admissibility of the case against Mr Gaddafi (the “Admissibility hearing”), in the presence of representatives of Libya, the Prosecutor, the OPCD and the OPCV.⁶

¹ ICC-01/11-01/11-130-Red.

² ICC-01/11-01/11-167-Red.

³ ICC-01/11-01/11-166-Red-Corr.

⁴ ICC-01/11-01/11-190-Corr-Red.

⁵ ICC-01/11-01/11-172.

⁶ ICC-01/11-01/11-T-2-CONF-ENG and ICC-01/11-01/11-T-3-CONF-ENG, respectively.

II. Applicable law

4. The Chamber notes articles 17 and 19 of the Rome Statute (the “Statute”), rule 58 of the Rules and regulation 28 of the Regulations of the Court.

5. The Chamber further notes the relevant jurisprudence of the Appeals Chamber with respect to the test to be applied in considering an admissibility challenge and the related burden of proof.

6. The Appeals Chamber stated that article 17(1)(a) of the Statute expresses a two-step test, according to which the Chamber, in considering an admissibility challenge, shall address in turn two questions: (i) whether, at the time of the proceedings in respect of an admissibility challenge, there is an ongoing investigation or prosecution of the case at the national level; and, in case the answer to the first question is in the affirmative, (ii) whether the State is unwilling or unable to genuinely carry out such investigation or prosecution.⁷ Accordingly, the first determination to be made by the Chamber is with respect to the existence of an ongoing investigation or prosecution: as held by the Appeals Chamber, “inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court”.⁸

7. With respect to this first step of the test, in case of an admissibility challenge based on article 17(1)(a) of the Statute, the Appeals Chamber stated that “[t]he words ‘is being investigated’ in this context signify the taking of steps directed at ascertaining whether this individual is responsible for that

⁷ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case”, 25 September 2009, ICC-01/04-01/07-1497, paras 1 and 75-79.

⁸ *Ibid.*, para. 78.

conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses.”⁹

8. The Appeals Chamber further clarified that a State challenging the admissibility of a case “bears the burden of proof to show that the case is inadmissible” and that, to discharge this burden, “the State must provide the Court with evidence with a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case. It is not sufficient merely to assert that investigations are ongoing.”¹⁰

9. In light of this jurisprudence, the Chamber, during the hearing, reminded Libya of the necessity to provide concrete, tangible and pertinent evidence that proper investigations are currently ongoing, as follows:

Are the Libyan authorities - are all concerned in Tripoli - really aware that your side, the Libyan side, in these proceedings is under an obligation to provide concrete, tangible and pertinent evidence that -- to demonstrate to this Chamber that proper investigations are currently ongoing and proper and concrete preparations for the trial are ongoing? [...] I would hope that counsel would do all to ensure that the Libyan side and the authorities in Tripoli understands this necessity which is really very important for the outcome of these proceedings.¹¹

10. The Chamber is of the view that it would be of assistance for the current proceedings to clarify its understanding with respect to the kinds of evidence, which can be considered evidence demonstrating that Libya is investigating the case against Mr Gaddafi. In particular, it is worth clarifying that the concept of “evidence”, within the context of admissibility proceedings, does not refer exclusively to evidence on the merits of the national case that may have been collected as part of the purported domestic

⁹ Appeals Chamber, “Judgment on the Appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’”, ICC-01/09-02/11-274, para. 1.

¹⁰ *Ibid.*, paras 2 and 61.

¹¹ ICC-01/11-01/11-T-3-CONF-ENG, page 64, line 15, to page 65, line 1.

investigation to prove the alleged crimes. In this context, “evidence” rather means all material capable of proving that an investigation is ongoing and that appropriate measures are being envisaged to carry out the proceedings.

11. Accordingly, the Chamber is of the view that evidence for the purposes of substantiating the Admissibility Challenge may also include, depending on the circumstances, directions, orders and decisions issued by authorities in charge of the investigation as well as internal reports, updates, notifications or submissions contained in the file arising from the Libyan investigation of the case, to the extent that they demonstrate that Libyan authorities are taking concrete and progressive steps to ascertain whether Mr Gaddafi is responsible for the conduct underlying the warrant of arrest issued by the Court.

12. As for the evidence on the merits of the domestic case, provision to the Chamber of samples of such evidence is necessary, in the present case, to substantiate Libya’s claim that an investigation into the case against Mr Gaddafi is ongoing. In particular, without taking any position at this stage on its probative value, the Chamber is of the view that this evidence includes the kinds of material that Libya mentioned having collected as part of the domestic investigation, in particular: witness statements, intercept evidence, speeches of Mr Gaddafi, telephone calls of Mr Gaddafi from February 2011 onward (including those between him and other officials), photographic material, flight manifests showing transport arrangements made by Mr Gaddafi for the use of mercenaries against protesters and bank payment transaction records showing payments of funds to engage those mercenaries.¹²

¹² ICC-01/11-01/11-T-2-CONF-ENG, page 16, lines 2 to 6, and page 19, lines 1 to 14.

III. Information and clarifications requested of Libya

13. As indicated above, 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.

A. Issues related to the status of domestic proceedings

14. The Chamber notes that at several junctures during the hearing, Libya stated that the investigation in the case against Mr Gaddafi is at present ongoing and has been continuing since the filing of the Admissibility Challenge on 1 May 2012.¹³ Nevertheless, during the hearing, no reference was made by Libya to investigative steps that have allegedly been undertaken since 1 May 2012. In this respect, the Chamber has already stated that “a decision on the admissibility of the case must be based on the circumstances prevailing at the time of its issuance”.¹⁴ The Chamber is of the view 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. As clarified by the Appeals Chamber, a mere assertion by the State, in the absence of concrete evidence in support thereof,

¹³ See e.g. ICC-01/11-01/11-T-2-CONF-ENG, page 19, lines 20-21, page 20, lines 13 to 15, page 22, line 3.

¹⁴ “Decision on the OPCD requests in relation to the hearing on the admissibility of the case”, ICC-01/11-01/11-212, para. 9.

would not be sufficient.¹⁵ The Chamber is of the view that further information from Libya is required on:

- (i) what investigative steps, if any, have been taken after the filing of the Admissibility Challenge, and
- (ii) whether evidence has been collected as a result of those steps, and of what type.

15. For instance, the Chamber notes that in Annex C to the Admissibility Challenge, Libya submitted that it intended to take the statements of two individuals identified therein.¹⁶ The Chamber is of the view that further information in this respect would be of assistance, in particular as regards:

- (i) whether these testimonies have been taken; and, if so,
- (ii) on what date;
- (iii) whether they were taken by the national investigating team; and
- (iv) whether written statements have been prepared.

Should such statements have indeed been collected as planned, Libya shall provide evidence with sufficient degree of specificity and probative value – whether the statements themselves or otherwise – demonstrating that those witness statements have been obtained as part of the alleged national investigation.

16. Turning to the evidence allegedly obtained before the filing of the Admissibility Challenge, the Chamber notes that in Annex C attached thereto, Libya provided a number of summaries of witness statements allegedly heard

¹⁵ Appeals Chamber, "Judgment on the Appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'", ICC-01/09-02/11-274, paras 2 and 61.

¹⁶ Annex C to the Admissibility Challenge, page 5.

by the committee assigned to the investigation. During the hearing, the Chamber inquired about when these statements have been collected and by which authority. The representative of Libya stated:

[I]n Libya, in the eastern region, [...] for six months we were separated from the western region and the southern region. During this six-month period, Libya in the eastern part was not subject at all to the Gaddafi regime, so there were commissions or committees of volunteers, especially of lawyers, who were collecting evidence and documenting them, whether it's witness statements, or victim -- evidence related to victims, so they were orally taken, or by filling forms, or as I said evidence pertaining to victims. When Tripoli was liberated and Libya was one state again, all these documents were submitted to different offices, including the judiciary and the Prosecutor-General's office, so these documents are available in different places and many of examples were recovered, whether they were oral recordings or written forms signed, etcetera.¹⁷

17. The Chamber therefore notes that the relevant witness statements were not collected by the office of the Prosecutor-General responsible for the case against Saif Al-Islam Gaddafi, but were rather received from “committees of volunteers”. Further clarifications on the matter are required. In particular, Libya is directed to provide the following information in relation to each witness statement mentioned in Annex C to the Admissibility Challenge:

- (i) the date that the statement was recorded;
- (ii) whether the statement was signed, witnessed or sworn;
- (iii) the persons present when the statement was recorded and whether those persons were affiliated to the State authority or any other organization;
- (iv) the modalities of recording the statement;
- (v) how the statement came into the possession of the investigating authorities;
- (vi) whether any steps have been taken in order to verify the accuracy of the content of the statement, and

¹⁷ ICC-01/11-01/11-T-3-CONF-ENG, page 57, lines 6 to 17.

- (vii) whether, under Libyan procedural law, witness statements collected by entities other than the investigative authorities in charge of the case can be relied upon for the purposes of national proceedings.

18. At the hearing, Libya submitted that, following the events of February 2011, Muammar Gaddafi instructed that all phone calls be recorded, and that these recordings were thereafter made publicly available. According to the representative of Libya, many Libyans have copies on CDs and computers and “they are available to all as if they are general information”.¹⁸ Libya is directed to provide samples of specific relevant excerpts and to indicate:

- (i) how it acquired these recordings; and
- (ii) whether measures have been taken to authenticate their contents.

19. Furthermore, Libya clarified during the hearing that “[w]ith regards to intercepts and the recording method, in normal circumstances [...] Libyan law requires an authorisation by the investigating judge” and that “[e]ven the [...] Prosecutor-General cannot give such an authorisation.”¹⁹ In this respect, the Chamber wishes to know whether the intercepts and call recordings that were not authorised by an investigating judge but were collected pursuant to the instructions given by Muammar Gaddafi in February 2011, and thereafter acquired by the domestic investigating authorities, are admissible in the domestic proceedings against Mr Gaddafi.

20. The Chamber further notes that in its Admissibility Challenge, Libya referred to, and attached, a number of detention orders for Mr Gaddafi in

¹⁸ ICC-01/11-01/11-T-3-CONF-ENG, page 57, lines 1 to 2.

¹⁹ ICC-01/11-01/11-T-3-CONF-ENG, page 56, lines 12 to 15.

order to demonstrate the progress of Libyan proceedings. At the hearing, Libya stated in this regard:

Two days after Mr Gaddafi was captured, the first of several provisional detention orders were rendered in Libya on the basis of Articles 115 and 175 of the Criminal Procedure Code. The first of these orders provided for the detention of Mr Gaddafi, on the authority of the Prosecutor-General, for an initial period of 45 days; that's to say until 5 January 2012. It was then extended by a further 45 days, by a summary judge who travelled to Zintan for this purpose, in full conformity with Articles 176 and 177 of the Criminal Procedure Code, and more recently this period of pre-trial detention has been lawfully extended as necessary by the Prosecutor-General in accordance with Article 177 of the Criminal Procedure Code.²⁰

21. The Chamber notes that under articles 175 to 177 of the Libyan Criminal Procedure Code, as presented to the Chamber by Libya in the "Compilation of relevant provisions" as part of its Admissibility Challenge,²¹ the Prosecutor-General cannot extend a suspect's detention without submitting a request to the competent magistrate, and, thereafter, a detention order cannot be extended unless the same procedure is followed before a first instance court. However, the Chamber notes that the detention orders presented²² seem to have been signed only by the Prosecutor-General's office. In this respect Libya is directed to indicate which authorities have authorized the extension of the detention of Mr Gaddafi.

22. The Chamber notes that the detention orders do not provide any information as to the factual and legal basis for Mr Gaddafi's detention, and in particular fail to specify the nature of the allegations allegedly under investigation which justify Mr Gaddafi's detention. The Chamber wishes to know:

- (i) whether, under Libyan law, detention orders lacking this information are valid;

²⁰ ICC-01/11-01/11-T-2-CONF-ENG, page 14, line 20, to page 15, line 3.

²¹ ICC-01/11-01-11-158-AnxB.

²² Annex D to the Admissibility Challenge.

- (ii) whether any other documents in the record of the domestic case provide the factual and legal basis for Mr Gaddafi's detention.

23. At the hearing, the Chamber requested clarifications from Libya in relation to the assignment of a case number in the case against Mr Gaddafi. In this respect, Libya stated:

[W]ith regards to the question pertaining to the case number and how it is assigned, in accordance with the Libyan legal system the case is not considered as a final case and then assigned a number unless the charges are being confirmed by the chamber of accusation, and it is similar to the Pre-Trial Chamber which adopts the charges but in a different manner. So the case in Libya, when it is in the investigation phase, it is assigned temporary numbers that are constantly changed and the final number is not assigned until it is transferred or it passes through this gate to the trial. This is why with regards to Mr Saif Al-Islam Gaddafi it's -- his case or his file is still in the investigation phase and it is not yet in the accusation phase, so once the investigation phase is over and we get to the accusation phase this is when the case number or the final one is assigned.²³

24. The Chamber seeks clarification as to:

- (i) whether a final number has been given to the case; and, if so
- (ii) whether this means that the investigation phase has been closed and the case is now in the accusation phase.

25. In this connection, the Chamber wishes to have clarifications as to the timeline for the proceedings. More specifically, the Chamber wishes to know:

- (i) in which phase of the proceedings the case is now (investigation or accusation); and
- (ii) when and where a trial is deemed to start.

²³ ICC-01/11-01/11-T-3-CONF-ENG, page 54 lines 10 to 20.

B. Issues related to the subject-matter of the domestic investigation

26. The Chamber notes that, at the hearing, Libya stated:

Turn now to the subject matter of domestic investigation. It has already produced considerable results. It is a wide range of evidence. It constitutes the basis for an indictment with respect to the same conduct as that which would be covered by an indictment from the ICC Prosecutor. We believe - we believe - that the Libyan evidence is as comprehensive, if not more so, significantly more so, than that which has been gathered to date by the ICC Prosecutor's office. Moreover, any Libyan proceedings against Mr Gaddafi would also include other conduct which is outside the scope of the charges presently envisaged by the ICC Prosecutor.²⁴

27. Libya further asserted that the domestic investigative file "includes, but is not limited to, the incidents of murder and persecution that are listed at paragraphs 36 to 65 of the 27 June 2011 Article 58 decision" and that "considerable evidence regarding Mr Gaddafi's participation in those crimes" has also been gathered.²⁵

28. In this respect, the Chamber requests further information with regard to:

- (i) Mr Gaddafi's conduct which is allegedly being investigated by the domestic authorities; and
- (ii) the anticipated contours of the case at the national level.

In providing this information, Libya shall be mindful that a mere assurance that the national ongoing investigation covers the same conduct as the case before the Court cannot be deemed sufficient to discharge its burden of proof in this regard. Conversely, Libya shall substantiate its claim by providing evidence in support thereof, within the meaning clarified in paragraphs 10 to 12 of the present decision.

²⁴ ICC-01/11-01/11-T-2-CONF-ENG, page 21, lines 4 to 11.

²⁵ ICC-01/11-01/11-T-2-CONF-ENG, page 22, line 3 to page 24, line 4.

29. Further, the Chamber requests information from Libya with respect to:
- (i) the geographical scope of the alleged investigation; and, in particular,
 - (ii) whether investigative steps are taken throughout Libya or are limited to specific locations.

C. Issues of Libyan national law

30. During the Admissibility hearing, Libya submitted that, in view of the charges which are likely to be brought against Mr Gaddafi, the relevant case will be governed by the people's court procedures.²⁶ Although the Chamber requested further explanations as to how this procedural regime would deviate from the regular one, Libya did not provide detailed submissions in this regard.²⁷ According to the OPCD, under the people's court procedures, the prosecuting authorities can suspend key due process rights of the defendant, such as the right to counsel and access to evidence, and accordingly, the procedural guarantees and protections referred to by Libya in its Admissibility Challenge and at the hearing would not apply to Mr Gaddafi under the current legal regime.²⁸ In response to the OPCD's submission, Libya stated that these procedures are currently under scrutiny by the Libyan Supreme Court in another national case.²⁹

31. In light of these submissions advanced at the hearing, Libya is requested to clarify:

- (i) whether the people's court procedures are applicable in the case against Mr Gaddafi;

²⁶ ICC-01/11-01/11-T-2-CONF-ENG, page 72, lines 17 to 19.

²⁷ ICC-01/11-01/11-T-2-CONF-ENG, page 63, line 24 to page 64, line 12.

²⁸ ICC-01/11-01/11-T-2-CONF-ENG, page 73, lines 4 to 9.

²⁹ ICC-01/11-01/11-T-3-CONF-ENG, page 47, lines 5 to 6.

- (ii) in case the people's court procedures are indeed applicable, how these procedures would deviate from the normal criminal procedures;
- (iii) whether there have been any developments in the anticipated decision of the Supreme Court; and
- (iv) whether, and how, a decision of the Supreme Court in a different case would have an impact on the proceedings allegedly carried out against Mr Gaddafi.

32. At the hearing, Libya submitted that, although not yet ratified, the legislative committee of the transitional government was considering a law reform that would fully incorporate international crimes, as defined under the Rome Statute, into Libyan law, and that the draft bill to effect this change will become part of Libyan law once the new government has come into being and the cabinet has commenced its work.³⁰ Thereafter, in Libya's submission, in addition to other crimes under investigation, Mr Gaddafi could be charged with the same legal category of crimes set out in the warrant of arrest issued by the Court against him, namely, the crimes against humanity of murder and persecution across Libya in, *inter alia*, Tripoli, Benghazi and Misrata.³¹ Libya is requested to:

- (i) update the Chamber on the progress made in relation to this law reform; and
- (ii) whether its adoption would have an impact on the proceedings allegedly being carried out against Mr Gaddafi.

33. At the hearing, the Chamber asked a number of specific questions to the representatives of Libya as regards the potential offences with which

³⁰ ICC-01/11-01/11-T-2-CONF-ENG, page 21, lines 12 to 19.

³¹ ICC-01/11-01/11-T-2-CONF-ENG, page 21, lines 19 to 22.

Mr Gaddafi might be charged. In particular, the Chamber asked whether Mr Gaddafi would qualify as a public officer within the Libyan legal system, given that a number of crimes referred to by Libya seem to apply only to acts committed by public officers, such as torture of prisoners, abuse of power against individuals, arrest of people without cause and restraint of personal liberty without justification.

34. In this regard, the Libyan representative stated:

The offences or the charges that have been given to Mr Gaddafi can be charges against a public officer, or any other individual. The public officer is only a matter of aggravanti, as we say it in Italian, if he is a public officer, but what can be committed by a public officer is the same like any offences to be committed by any other person, but there is aggravation of the penalty if he is a public officer.³²

35. However, it emerges from the translation provided by Libya of its "Compilation of relevant provisions from Libyan Criminal Code",³³ that articles 431 (Power Abuse Against an Individual), 433 (Undue Arrest of People), 434 (Restrain of Personal Freedom Without Justification) and 435 (Prisoners Torture) of Libyan Criminal Code criminalize the relevant conduct only insofar as carried out by a public officer. Further clarifications on the matter are required in light of the statement in this regard made at the hearing by the representative of Libya. In particular, the Chamber seeks clarification as to:

- (i) whether the crimes under the above mentioned provisions only apply to acts committed by individuals other than public officers; and
- (ii) whether Mr Gaddafi would qualify as a public officer within the Libyan legal system.

³² ICC-01/11-01/11-T-3-CONF-ENG, page 61, lines 5 to 9.

³³ ICC-01/11-01/11-158-AnxA.

36. In addition, during the hearing, the Chamber made inquiries related to the provision on random killings, which excludes from its scope the acts of random killing constituting assault against State security. Notably, the Chamber asked whether the said exclusion is relevant to the case against Mr Gaddafi before the national authorities.³⁴ No answer to this question was given by Libya during the hearing. Libya is therefore directed anew to address the matter.

37. The representative of Libya submitted, with regard to the crime of persecution, that “there is no explicit text using this term” in the Libyan law, but that “there are other texts that lead to the incrimination of persecution”.³⁵ Libya is directed to clarify whether and how Libyan laws capture this crime, which is defined, under article 7(2)(g) of the Statute, as “ the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”.

*D. Issues related to Saif Al-Islam Gaddafi’s exercise of his rights under
Libyan national law*

38. In the Prosecutor-General’s report filed as Annex C to the Admissibility Challenge it is explained that, pursuant to article 105 of the Criminal Procedure Code, the interrogation of the accused is a necessary step in the criminal proceedings, by which he or she is questioned in detail about the accusation and evidence collected against him or her and that “[t]he law prohibits questioning the accused and confronting him with the witnesses and other defendants unless and until his lawyer is invited to attend if he was available during the interrogation”.³⁶ It was further asserted that the

³⁴ ICC-01/11-01/11-T-3-CONF-ENG page 57 line 22 to page 61 line 14.

³⁵ ICC-01/11-01/11-T-3-CONF-ENG, page 60, lines 5 to 6.

³⁶ Annex C to the Admissibility Challenge, pages 6 and 8.

interrogation would be conducted within two weeks following the report that was submitted to the Chamber on 1 May 2012.³⁷

39. During the Admissibility hearing, Libya indicated that Mr Gaddafi had not been interrogated yet.³⁸ Counsel for Libya is directed to inform the Chamber on:

- (i) whether the interrogation has taken place since the Admissibility hearing; and, if not,
- (ii) the reasons why this procedural step has not yet been undertaken.

40. Libya further submitted that, according to its national law, the suspect has the right to view all of the investigative materials relating to his case.³⁹ Counsel for Libya is requested to inform the Chamber as to whether Mr Gaddafi has been provided the opportunity to exercise this right.

E. Issues related to the capacity of Libyan authorities to investigate and prosecute

Investigation resources

41. During the hearing, the Chamber inquired about the resources allocated to the Libyan investigative team.⁴⁰ Libya submitted that there are four senior individuals responsible for investigating the case, and that each of those has two juniors, at least, available to assist them on a full-time basis. Thus, the team is said to comprise no less than 12 people.⁴¹ The Chamber requests more information on:

- (i) the resources allocated to the investigation;

³⁷ Annex C to the Admissibility Challenge, page 6.

³⁸ ICC-01/11-01/11-T-2-CONF-ENG, page 25, line 19.

³⁹ ICC-01/11-01/11-T-2-CONF-ENG, page 25, lines 1 to 2.

⁴⁰ ICC-01/11-01/11-T-2-CONF-ENG, page 53 lines 10 to 22.

⁴¹ ICC-01/11-01/11-T-2-CONF-ENG, page 43 line 8 to 10.

- (ii) the powers of the individuals responsible for investigating the case;
- (iii) the particular expertise of the members of the investigation team;
- (iv) whether on-site investigations of alleged crime scenes have taken place;
- (v) what steps, if any, are being taken to preserve evidence pending investigation.

Witness protection and security

42. The Chamber requests submissions from Libya as to:
- (i) whether it envisages having to implement protective measures for witnesses who agree to testify in the proceedings against Mr Gaddafi;
 - (ii) whether it has capacity to do so;
 - (iii) whether any concrete steps have already been taken in this regard; and
 - (iv) whether the security situation inhibits progress of the investigation in certain areas.

Defence of Mr Gaddafi

43. In relation to the appointment of counsel for Mr Gaddafi, Libya stated that, once the case reaches the trial stage, a lawyer will be appointed to protect his interests in any subsequent proceedings.⁴² Under Libyan law, during the investigation phase, a suspect has the right to a lawyer both in interviews with the Prosecutor-General and during the confrontation of the defendant

⁴² ICC-01/11-01/11-T-2-CONF-ENG, page 20, lines 10 to 12.

with witnesses by the Prosecutor-General,⁴³ and the trial cannot proceed without the appointment of a defence lawyer.⁴⁴

44. Libya is requested to update the Chamber on concrete steps that have been taken in order to identify and secure, in Libya or elsewhere, independent legal representation for Mr Gaddafi in domestic proceedings and to ensure that said lawyer will be able to represent his interests without fear of reprisal or intimidation.

Custody of Mr Gaddafi

45. At the hearing, following a question of the Chamber, the representative of Libya stated that “in the case of Saif Al-Islam Gaddafi we cannot have in absentia trial as long as he is present and the location of his presence is known on the Libyan territory”.⁴⁵ Furthermore, Libya stated that “[o]nce the Prosecutor-General is appointed by the new cabinet, that Prosecutor-General is expected to prioritise, working with the Zintan brigade, to effect the transfer of Mr Gaddafi from Zintan to Tripoli and, in particular, to the purpose-built trial and detention facilities there”.⁴⁶ The Chamber requests an update on:

- (i) who has custody of Mr Gaddafi at present;
- (ii) whether any agreement has been reached as to the transfer of Mr Gaddafi to Tripoli and, if so, when this transfer is expected to take place;

⁴³ Admissibility Challenge, para. 59.

⁴⁴ ICC-01/11-01/11-T-2-CONF-ENG, page 20, lines 11 to 12.

⁴⁵ ICC-01/11-01/11-T-2-CONF-ENG, page 62, lines 12 to 14.

⁴⁶ ICC-01/11-01/11-T-2-CONF-ENG, page 29, lines 16 to 20.

- (iii) any arrangements made for the building of a courtroom complex and prison facility that would be needed for the trial.⁴⁷

Capacity building

46. In its Admissibility Challenge, Libya stated that it “ha[d] communicated with the UN High Commissioner for Human Rights in Geneva, the UN Office on Drugs and Crimes in Vienna [and was] cooperating with the UN Support Mission in Libya in order to seek such support from UN bodies as may be of assistance to Libyan prosecutors and the Libyan judiciary in meeting all appropriate standards”.⁴⁸ Libya is directed to provide a detailed description of the measures of assistance, if any, received from these agencies to the extent that such measures have an impact on the specific case against Mr Gaddafi.

47. Furthermore, Libya submitted that it had received “offers by the Governments of Argentina and South Africa to render assistance to Libya in judicial capacity-building, including with respect to the trials of those accused of crimes against humanity”.⁴⁹ During the hearing, Libya reiterated that it had started contacts with some countries such as Argentina, South Africa and Colombia so as to draw from their experience in the area of proceedings with armed groups and also in South Africa with the case of national reconciliation. It was submitted that these contacts would enable Libya to achieve stability and lead to fair trials for all those figures of the Gaddafi era.⁵⁰ The Chamber requests an update on whether Libya has effectively secured

⁴⁷ ICC-01/11-01/11-T-2-CONF-ENG, page 19, lines 22 to 23.

⁴⁸ Admissibility Challenge, para. 14; See also Annex B attached thereto.

⁴⁹ ICC-01/11-01/11-213, para. 12.

⁵⁰ ICC-01/11-01/11-T-2-CONF-ENG, page 12 lines 17 to 24.

such international assistance in judicial capacity building, to the extent that such assistance will have an impact on the specific case against Mr Gaddafi.

Conclusion

48. In light of the above, the Chamber requests Libya to provide its submissions, with the appropriate evidence in their support, on the matters identified in paragraphs 14 to 47 above, by 23 January 2013. The Libyan authorities are also entitled to submit evidence on any other matters relevant to the admissibility of the case and on which they intend to rely for the purposes of the Admissibility Challenge.

IV. Responses from parties and participants

49. The Chamber finds it appropriate to establish a time limit for the provision from the parties and participants of their respective responses to the submissions of Libya pursuant to the present decision.

50. With respect to the Prosecutor's response, the Chamber observes that, without prejudice to the obligation on the challenging State to substantiate its challenge, the Prosecutor has her own obligation to assess on an ongoing basis the admissibility of the case pursuant to article 53(2)(b) of the Statute. In this regard, the Chamber notes that in her response to the Admissibility Challenge, the Prosecutor reached the conclusion that Libya had provided information to demonstrate the first limb of the complementarity test at this stage "that it is investigating substantially the same case alleged before this Court and that has taken concrete investigative steps that surpass the threshold of inactivity", while pointing to facts that suggested that Libya may be unable to move the case forward.⁵¹ It appears from the response that the

⁵¹ ICC-01-11/01-11-167-Conf, para. 8.

Prosecutor reached her conclusion regarding the first limb of the test, solely on the basis of the information provided by Libya in the Admissibility Challenge. This was confirmed at the hearing by the representative of the Prosecutor.⁵²

51. In light of the above, it is necessary that the Prosecutor's response to Libya's further submissions pursuant to the present decision include an update of her assessment on the admissibility of the present case, taking into account the additional material provided by Libya as well as the information gathered by the Prosecutor from other sources. In this submission, the Prosecutor shall also include an assessment of the relevance and probative value of the evidence that may be presented by Libya to substantiate its assertions.

FOR THESE REASONS, THE CHAMBER

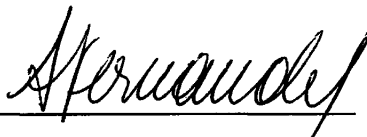
REQUESTS Libya to provide the evidence on which it intends to rely for the purposes of its Admissibility Challenge and its submissions on the issues identified in paragraphs 14 to 47 of the present decision by 23 January 2013;

ORDERS the Prosecutor to provide a response to Libya's submissions as specified in paragraphs 50 to 51 of this decision, by 11 February 2013;


ORDERS the OPCV and OPCD to provide any response to Libya's submissions by 11 February 2013.

⁵² ICC-01/11-01/11-T-2-CONF-ENG, page 55, line 22, to 56, line 1.

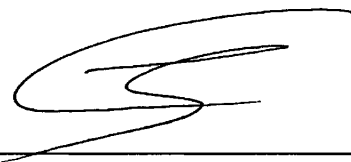
Done in both English and French, the English version being authoritative.



Judge Silvia Fernández de Gurmendi
Presiding Judge



Judge Hans-Peter Kaul



Judge Christine Van den Wyngaert

Dated this 7 December 2012

At The Hague, The Netherlands