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**PRE-TRIAL CHAMBER I**

**Before:** Judge Silvia Fernandez 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***

**Libyan Government's provisional report pursuant to the Chamber's Decision of 9  
August 2012 & Request for leave to file further report by 28 September 2012**

**Source:** The Government of Libya, represented by:  
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**Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:**

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## I. INTRODUCTION

1. In compliance with Rule 101, the Government of Libya hereby submits a Provisional Report pursuant to the Pre-Trial Chamber's "Decision on the "Libyan Government Request for Status Conference and Extension of Time to file a Reply to the Responses to its Article 19 Admissibility Challenge" of 9 August 2012.<sup>1</sup>
  
2. There has been significant progress towards the formation of a new Libyan Government in the past month following the historical elections on 7 July 2012 which were widely hailed as an "extraordinary" transition. On the same day as the Pre-Trial Chamber's Decision, on 9 August 2012, the Libyan General National Congress ("GNC") convened its first session at which it appointed Mohamed Yousef El-Magariaf as its President. Consistent with article 30 of the Constitutional Declaration of 3 August 2012, the formation of a Government is now underway and is expected to be completed by 20 September 2012. The appointment of a new Prosecutor-General will be made imminently thereafter and arrangements for the instruction of counsel on the new Government's policy concerning proceedings against Mr. Gaddafi for crimes against humanity will be commenced immediately upon the appointments of the new Minister of Justice and Prosecutor-General.
  
3. Pending conclusion of the final stages of this transitional period, Libya's ICC liaison, Professor El-Gehani, has recently (on 4 September 2012) been invited to provide a formal report on the ICC proceedings to the GNC at its session on 12 September 2012. It should also be noted that during this transitional period, GNC President Mr El-Magariaf has confirmed that speculation by the OPCD that Mr. Gaddafi's trial will be held imminently is baseless and false.<sup>2</sup>

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<sup>1</sup> ICC-01/11-01/11-200 ("Time Limit Decision").

<sup>2</sup> See <http://www.saudigazette.com.sa/index.cfm?method=home.regcon&contentid=20120827134118>.

This was also reported in The Libya Herald.

4. In view of these circumstances and pursuant to rule 58 of the Rules of Procedure and Evidence, Libya hereby respectfully requests the opportunity to submit a further progress Report within 21 days of the present Provisional Report (ie. by 28 September 2012), in order to fully apprise the Pre-Trial Chamber of developments and decisions of the new Government relevant to the continuation of admissibility proceedings. It is anticipated that by 28 September 2012 Counsel will be in a position to provide significantly more detailed information to the Court, including further information about the newly formed government; information as to Counsel's ability to take instructions from the newly appointed Government; and an accurate update as to the progress of the Libyan proceedings in relation to Saif Al-Islam Gaddafi.

## II. PROCEDURAL HISTORY

5. On 30 July 2012, the Libyan Government requested a Status Conference to clarify certain issues arising out of the admissibility proceedings, and an extension of time, until 18 days after the appointment of the new Libyan Ministry of Justice team, to submit its reply to the responses by the Prosecution, OPCV and OPCD to its article 19 admissibility challenge.<sup>3</sup>
6. On 7 August 2012, the Office of the Prosecutor and the Office of the Public Counsel for Victims submitted responses to the Libyan Government's Request of 30 July 2012, expressing no objection thereto.<sup>4</sup> On the same date, the OPCD filed its "Response to the 'Libyan Government Request for Status Conference and Extension of Time to file a Reply to the Responses to its Article 19 Admissibility

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<sup>3</sup> "Libyan Government Request for Status Conference and Extension of Time to file a Reply to the Responses to its Article 19 Admissibility Challenge" ("Libyan Government's Request of 30 July 2012"), ICC-01/11-01/11-192.

<sup>4</sup> Office of the Prosecutor, "Response to the Libyan Government Request for a Status Conference and Extension of Time to file Reply to the Responses to its Article 19 Admissibility Challenge", 7 August 2012, ICC-01/11-01/11-195; Office of Public Counsel for Victims "Response to the 'Libyan Government Request for Status Conference and Extension of Time to file a Reply to the Responses to its Article 19 Admissibility Challenge'", 7 August 2012, ICC-01/11-01/11-196.

Challenge''' ("Response to the Libyan Government's Request for Extension and Status Conference"),<sup>5</sup> objecting on several grounds.

7. On 9 August 2012, the Chamber issued its "Decision on the "Libyan Government Request for Status Conference and Extension of Time to file a Reply to the Responses to its Article 19 Admissibility Challenge" in which it, *inter alia*, suspended the deadline for Libya's reply to the Responses, and requested Counsel for Libya to submit a report by 7 September 2012 concerning *inter alia*, appointment of relevant Libyan officials; whether Counsel is able to take instructions from such officials; and the status of national proceedings against Mr. Gaddafi ("Requested Report").<sup>6</sup>
8. On 14 August 2012, the OPCD submitted its "Urgent Request Pursuant to Regulation 35 of the Regulations of the Court" requesting, *inter alia*, that the Chamber set the time limit for Libya's reply at four days after the issuance of the Chamber's decision on this request ("Request of 14 August 2012").<sup>7</sup>
9. On 21 August 2012, the Chamber rejected the OPCD Request of 14 August 2012.<sup>8</sup>

### III. REPORT AND REQUEST

#### A. *Report*

10. The historic transition from an interim Government created to ensure order in the chaos of post-Gaddafi Libya to a new democratically elected Libyan Government has undergone significant developments in the four week period which has elapsed since the Pre-Trial Chamber's Time Limit Decision of 9 August 2012.

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<sup>5</sup> ICC-01/11-01/11-197.

<sup>6</sup> Time Limit Decision, para. 20.

<sup>7</sup> ICC-01/11-01/11-201.

<sup>8</sup> Decision on the OPCD "Urgent Request Pursuant to Regulation 35 of the Regulations of the Court ICC-01/11-01/11-203.

11. On 9 August 2012, following the successful elections of 7 July 2012, which have been lauded by the international community, and on the very day of the Pre-Trial Chamber's Time Limit Decision, Libya's General National Congress (the "GNC"), convened for the first time. On that date the GNC appointed as its President Mr Mohamed Yousef El-Magariaf.<sup>9</sup> Since then, and in the interests of greater transparency, the GNC has held a further public session on 13 August 2012 (televised live across Libya).<sup>10</sup> On 1 September 2012 it was reported that the GNC would announce a new Government (ie. Prime Minister and Cabinet) within one week.<sup>11</sup> Since then, counsel has been informed by Professor Ahmed El-Gehani (the Libyan Government liaison for the ICC) that this deadline has been extended by the GNC to enable the appointment of a new Government by 20 September 2012.

12. On 5 September 2012, Counsel for Libya was also informed by Professor El-Gehani that a decision on the appointment of the new Prosecutor General will be carried out imminently following the appointment of the Prime Minister and Cabinet, and that the vast majority of the necessary preparatory work has already been completed in that direction. This information and attendant instructions, limited as they necessarily are given the present position of the Libyan Government, indicate that fuller instructions as to the new Government and as to the progress of the Libyan proceedings against Mr Gaddafi will be available to Counsel within a very short period from the present date. Counsel therefore expects that the appointments of the new Minister of Justice and the new Prosecutor-General will be final before Friday 28<sup>th</sup> September 2012. Relatedly, an invitation has been issued to Professor El-Gehani to provide a formal oral report on the ICC proceedings to the GNC at its session on

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<sup>9</sup> See <http://www.businessweek.com/news/2012-08-10/libya-national-congress-names-magariaf-interim-president>; [http://www.gnc.gov.ly/en/index.php?option=com\\_content&view=article&id=3:mohammed-magariaf-president-of-the-general-national-congress-libya&catid=1:news](http://www.gnc.gov.ly/en/index.php?option=com_content&view=article&id=3:mohammed-magariaf-president-of-the-general-national-congress-libya&catid=1:news)

<sup>10</sup> See [http://www.gnc.gov.ly/en/index.php?option=com\\_content&view=article&id=4:the-general-national-congress--the-first-public-meeting-&catid=2:news1](http://www.gnc.gov.ly/en/index.php?option=com_content&view=article&id=4:the-general-national-congress--the-first-public-meeting-&catid=2:news1)

<sup>11</sup> See [http://www.zawya.com/story/Libya\\_to\\_announce\\_new\\_government-ZAWYA20120902060748/](http://www.zawya.com/story/Libya_to_announce_new_government-ZAWYA20120902060748/); also reported in the Tripoli Post.

Wednesday 12<sup>th</sup> September.

13. When considering this interim report by the Libyan Government on the progress of the appointment of the new Government, it is also appropriate to note that on 27 August 2012 the GNC President, Mr El-Magariaf, dismissed claims that the trial of Mr. Gaddafi will begin in the next month as “rumours and lies”, stating that “this definitely will not happen”.<sup>12</sup> The objection of the OPCD to the Libyan Government’s Request of 30 July 2012 – that Libya would simply proceed with national criminal proceedings before the Chamber had made its assessment on admissibility – remains without foundation today, as it was when it was made by the OPCD. Contrary to the submissions of the OPCD, Libya is fully committed to continuing to treat Mr. Gaddafi humanely and with full respect for his right to a fair trial. Indeed, transitional Libyan Prime Minister Mr Abdurrahim el-Keib reaffirmed his country’s commitment to holding fair trials for ex-Gaddafi era officials in a press conference which took place on 5 September 2012.<sup>13</sup> In fact, Libya’s commitment to holding fair trials of persons suspected of committing crimes during the Gaddafi era is recognised by other countries, such as Mauritania, as reflected in the extradition on 5 September 2012 of Mr Abdullah Al-Senussi from Mauritania to Libya.<sup>14</sup>

14. Informed commentators have noted that Libya has to “build its institutions from scratch, as Gaddafi ruled for four decades by himself, without a legislature”,<sup>15</sup> and that “Dr El-Magariaf and his team seem to be taking steps in the right direction”.<sup>16</sup> The fact that Libya is moving to end impunity, and is ushering in a legal and political culture based upon the rule of law and tolerance has been

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<sup>12</sup> See <http://www.saudigazette.com.sa/index.cfm?method=home.regcon&contentid=20120827134118>. This was also reported in The Libya Herald.

<sup>13</sup> See <http://www.bbc.co.uk/news/world-africa-19496096>

<sup>14</sup> <http://www.bbc.co.uk/news/world-africa-19487228>

<sup>15</sup> <http://www.guardian.co.uk/world/2012/aug/09/libya-power-elected-assembly>

<sup>16</sup> <http://www.aljazeera.com/indepth/opinion/2012/09/201291125110843653.html>; also at <http://en-maktoob.news.yahoo.com/libya-testing-tolerance-053324762.html>

recognised by expert commentators.<sup>17</sup> This is confirmed by other recent developments, including the passing of a motion by the GNC barring members from running for the position of Prime Minister, as reported by the Libya Herald and others on 2 September 2012.<sup>18</sup> Such efforts reflect a commitment to progress towards the establishment of institutions based upon the rule of law.

15. In a similar vein, the past four weeks have seen a decision to create a committee to monitor the interior ministry,<sup>19</sup> evidence of parliamentary accountability of those who have held interim ministerial posts,<sup>20</sup> and the interim Government's meaningful efforts to hold accountable those responsible for attacks against mosques, for which it has received the support and encouragement of the international community.<sup>21</sup> This takes forward earlier efforts towards the protection, promotion, and entrenchment of human rights in Libya. One example among many is the judgment of the Libyan Supreme Court declaring unconstitutional a law that criminalized a variety of political speech (Law 37/2012) – hailed by Human Rights Watch and others as a landmark decision on free speech for the Libyan people.<sup>22</sup>

16. Due to the consistent law and order efforts of the Libyan Government since late 2011, the security situation in Libya is now generally stable, although the collapse of the Gaddafi regime occurred just ten months ago. However, certain security threats persist, including a recent terrorist bombing in Tripoli on 19 August 2012, resulting in the death and injury of several civilians, which is

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<sup>17</sup> “The days of impunity and the ordered chaos systematically fomented by Gaddafi's former revolutionary committees are at an end. Rule of law and tolerance, as Dr al-Magariaf has frequently explained, are more than rhetorical devices and political platitudes”, Dr. Larbi Sadiki (Senior Lecturer in Middle East Politics at the University of Exeter), “Libya: Testing tolerance”, <http://www.aljazeera.com/indepth/opinion/2012/09/201291125110843653.html>

<sup>18</sup> [http://www.zawya.com/story/Libya\\_congress\\_bars\\_members\\_from\\_PM\\_post-ZAWYA20120904050332/](http://www.zawya.com/story/Libya_congress_bars_members_from_PM_post-ZAWYA20120904050332/)

<sup>19</sup> [http://www.zawya.com/story/Libya\\_plans\\_security\\_oversight\\_body-ZAWYA20120831080526/](http://www.zawya.com/story/Libya_plans_security_oversight_body-ZAWYA20120831080526/)

<sup>20</sup> <http://www.aljazeera.com/indepth/opinion/2012/09/201291125110843653.html>

<sup>21</sup> <http://www.guardian.co.uk/world/2012/aug/20/libya-gaddafi-loyalists-arrested-bombings>

<sup>22</sup> <http://www.hrw.org/news/2012/06/14/libya-law-restricting-speech-ruled-unconstitutional>



reported to be linked to Gaddafi loyalists.<sup>23</sup>

### ***B. Request***

17. The present filing communicates to the Chamber the information currently available to Counsel as to the appointment of persons to public posts. Notwithstanding the exercise of due diligence, Counsel has not yet been able to obtain instructions on the other matters which the Pre-Trial Chamber sought the Libyan Government to report on by 7 September 2012 (i.e. counsel's ability to take instructions from the new Government and the progress of the Libyan proceedings against Mr Gaddafi). Pursuant to rule 58 of the Rules of Procedure and Evidence, leave is therefore sought to submit a further, more detailed, report on these matters to the Pre-Trial Chamber by 28 September 2012.

18. Libya submits that there is good cause for granting leave to provide a further, more detailed report on all of the matters raised in the Pre-Trial Chamber's Time Limit Decision by 28 September 2012. This modest extension of time will:

- i. ensure that the Chamber is properly apprised of the information necessary for it to determine how to proceed with the admissibility challenge;
- ii. facilitate compliance by Counsel for Libya with their professional conduct obligations; and
- iii. be consistent with the rationale of the Time Limit Decision, which acknowledged the "exceptional circumstances engendered by the transition to a newly elected government in Libya and the alleged inability of counsel to obtain instructions",<sup>24</sup> and which sought to avoid "undue delays in the resolution of the Admissibility Challenge".<sup>25</sup>

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<sup>23</sup> See <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/9485835/Muammar-Gaddafi-supporters-blamed-for-Tripoli-car-bombs.html>; <http://www.bbc.co.uk/news/world-africa-19314714>

<sup>24</sup> Time Limit Decision, para. 18

<sup>25</sup> Time Limit Decision, para. 20.

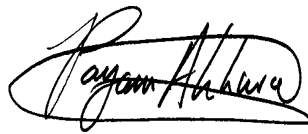
19. Against this, a refusal to grant leave to file a further report would likely impose disproportionate prejudice upon the Libyan Government, and adversely impact the institutional development of the new Libya. A modest delay would allow be supportive of the interests of the Libyan people in obtaining national institutions that are capable of administering a proper prosecutorial process and trial, as well as ownership of a key trial in the political history, without unduly affecting the legitimate interest in the timely delivery of justice.
20. The Chamber has noted that matters of far-reaching importance concerning the prosecution of Saif Al-Islam Gaddafi require proper instructions reflecting the considered policy of the newly and democratically elected government of Libya. A rush to judgment against Libya in this case would make it all but impossible for emerging democracies to exercise national jurisdiction in post-conflict scenarios, and render the complementarity principle irrelevant to the harsh reality and profound challenges facing governments in such situations.
21. Furthermore, the immediacy with which new ministers and prosecutors will be appointed in Libya means that the inconvenience of a brief delay in the admissibility proceedings, caused by provision of a further report, would be clearly outweighed by the effect that the delay would have – of permitting the Libyan state to be heard in relation to the assessment of how to proceed with the admissibility challenge – a matter of profound and fundamental importance to its sovereignty and democratic development.

#### IV. CONCLUSION

22. The Pre-Trial Chamber is therefore respectfully invited to:
  - i. treat the above submissions as an interim report made in compliance with its 9 August 2012 Time Limit Decision; and
  - ii. grant the Libyan Government leave to make a further, more detailed report on the matters outlined in that Decision by Friday 28<sup>th</sup> September

2012.

Respectfully submitted:



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Professor Philippe Sands QC

Professor Payam Akhavan

Michelle Butler

Counsel on behalf of the Government of Libya

Dated this 7<sup>th</sup> day of September 2012

At London, United Kingdom