

Summary of the Decision on the admissibility of the case against Mr Gaddafi

The Pre-Trial Chamber I of the International Criminal Court today issued its decision rejecting Libya's challenge to the admissibility of the case against Saif Al-Islam Gaddafi under article 19 of the Rome Statute.

The Chamber issued a warrant of arrest against Mr Gaddafi on 27 June 2011 for the commission of the crimes against humanity of murder and persecution, under article 7(1)(a) and (h) of the Statute, in Libya from 15 February 2011 until at least 28 February 2011.

Libya challenged the admissibility of the case against Mr Gaddafi on 1 May 2012, and the Chamber decided that Libya may postpone the surrender of Mr Gaddafi to the ICC until such time that the Chamber has ruled on the admissibility challenge. The Chamber received written and oral submissions from the parties and the participants to the admissibility proceeding, and *amici curiae*.

In its challenge, Libya submitted that an active investigation has been ongoing in Libya against Mr Gaddafi, since the date of his capture. It was contended that the investigation covered the same incidents and conduct as those contained in the ICC warrant of arrest and was, in fact, broader in terms of time and subject matter than the ICC investigation.

It was indicated that even though Libya's legislation does not provide for international crimes, such as the crimes against humanity of persecution and murder, the crimes with which Mr Gaddafi is charged are sufficient to successfully challenge the admissibility of the case. It was confirmed that some of the offences with which Mr Gaddafi will potentially be charged provide for the death penalty.

Libya's representative indicated that its investigation had produced a very wide range of significant evidence. However, pursuant to article 59 of Libya's Criminal Procedure Code, investigations are confidential during the investigative phase of proceedings and the Libyan prosecution services may only disclose summary reports.

Furthermore, Libya suggested that it is willing and able genuinely to carry out the investigation. Libya set out the progress made and the challenges faced by Libya in its post-conflict transition to democracy, focusing in particular on efforts made in judicial capacity building and in addressing the security situation. It was suggested that more time was needed to ensure that justice was achieved in the case against Mr Gaddafi.

In accordance with articles 17, 19, 21, 90 and 95 of the Statute and rules 58 and 59 of the Rules and guided by the jurisprudence of the Appeals Chamber, the Chamber concluded that, in considering an admissibility challenge, two questions must be addressed: (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 (ii) whether the State is unwilling or unable genuinely to carry out such investigation or prosecution.

The Chamber found that it is for the State challenging the admissibility of the case to demonstrate that the case is inadmissible before the Court. To that effect, domestic authorities must demonstrate that they are taking concrete and progressive steps to ascertain whether a suspect is responsible for the conduct under prosecution before the Court. This requires the submission of concrete and tangible evidence of a sufficient degree of specificity and probative value. The evidence may relate to the merits of the national case, such as interviews of witnesses or suspects, documentary evidence collected, or forensic analyses and it may also include directions, orders and decisions issued by the authorities in charge of the investigation as well as

internal reports, updates, notifications or submissions contained in the Libyan investigative file.

Pursuant to article 17 of the Statute, the Libyan investigation must cover the “same case”. The Chamber noted that the same case for the purposes of article 17(1)(a) of the Statute has been found to be characterised by two components: the same person and the same conduct, while the Appeals Chamber has interpreted the latter to mean that the investigation or prosecution must cover “substantially” the same conduct. The question of what constitutes “substantially the same conduct as alleged in the proceedings before the Court” will vary according to the concrete facts and circumstances of the case and requires, therefore, a case-by-case analysis.

The Chamber compared the conduct allegedly being investigated by Libya with the conduct attributed to Mr Gaddafi in the Warrant of Arrest, as well as in the Article 58 Decision. The conduct alleged against Mr Gaddafi in the case before the Court was found to be the use of his control over relevant parts of the Libyan State apparatus and security forces to deter and quell, by any means, including by the use of lethal force, the demonstrations of civilians, which started in February 2011 against Muammar Gaddafi’s regime. In particular, Mr Gaddafi was alleged to have activated the security forces under his control to kill and persecute hundreds of civilian demonstrators or alleged dissidents to Muammar Gaddafi’s regime, across Libya, in particular in Benghazi, Misrata, Tripoli and other neighbouring cities, from 15 February 2011 to at least 28 February 2011.

The Chamber noted that the Article 58 Decision includes a long, non-exhaustive list of alleged acts of murder and persecution committed against an identified category of people within certain temporal and geographical parameters. These events were not considered to represent unique manifestations of the form of criminality alleged against Mr Gaddafi but rather samples of a course of conduct of the Security Forces, under Mr Gaddafi’s control, that allegedly carried out an attack committed across

Libya from 15 February 2011 onwards against the civilians who were dissidents or perceived dissidents to Gaddafi's regime, which resulted in an unspecified number of killings and acts of persecution. Therefore, in the circumstances of the case at hand and bearing in mind the purpose of the complementarity principle, the Chamber considered that it would not be appropriate to expect Libya's investigation to cover exactly the same acts of murder and persecution mentioned in the Article 58 Decision as constituting instances of Mr Gaddafi's alleged course of conduct.

The Chamber noted that the draft bill incorporating international crimes had not been adopted in Libya at the time of the admissibility decision. However, it concluded that a domestic investigation or prosecution for "ordinary crimes", to the extent that the case covers the same conduct, would be sufficient. The lack of legislation criminalising crimes against humanity in Libya does not *per se* render the case admissible before the Court.

Following a careful assessment of the evidence, the Chamber concluded that some items showed that an investigation was ongoing in relation to discrete aspects of the case before the Court, for instance the mobilisation of militias, military forces and equipment, events in Benghazi on 17 February 2011, the arrest of journalists and activists and the compilation of intercepts of telephone conversations. However, taken as a whole, this evidence did not allow the Chamber to discern the actual contours of the national case against Mr Gaddafi such that Libya could be said to have substantiated, by means of evidence of a sufficient degree of specificity and probative value, the submission that the domestic investigation covers the same case that is before the Court.

Libya had offered the Chamber the possibility of a fuller inspection of the domestic case file, and the Prosecutor suggested that Libya be provided more time to submit additional evidence. However, the Chamber found that Libya had been granted several opportunities to submit evidence in support of its Admissibility Challenge,

filed on 1 May 2012. Furthermore, additional evidence in support of the first limb of the admissibility test would not be determinative at this stage because, serious concerns remained as regards the second limb of the admissibility test, namely Libya's ability genuinely to carry out the investigation or prosecution against Mr Gaddafi.

With respect to the question of "inability", the Chamber addressed the question of whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise is unable to carry out its proceedings. It was found that the ability of a State genuinely to carry out an investigation or prosecution must be assessed in light of the relevant national system and procedures, meaning the substantive and procedural law applicable in Libya. Accordingly, the Libyan Code of Criminal Procedure, articles 31 and 33 of Libya's Constitutional Declaration, and human rights instruments that had been ratified by Libya were taken into account in the Chamber's decision.

The Chamber found that Libya, assisted by national governments and regional and international organizations, had deployed significant efforts to rebuild institutions, restore the rule of law and to enhance capacity, *inter alia*, with respect to transitional justice in the face of extremely difficult circumstances. Progress had been made and a strategy to improve the effectiveness and accountability of the police service, the security for the courts and participants in the proceedings, the detention centres and to bring practices of torture to an end seemed to be under consideration.

Without prejudice to the achievements that had been made, the Chamber found that multiple challenges remained and that Libya continued to face substantial difficulties in exercising its judicial powers fully across the entire territory or in respects relevant to the case, being thus "unavailable" within the terms of article

17(3) of the Statute. The Chamber found that this unavailability impacted on Libya's ability to carry out the proceedings against Mr Gaddafi in three material ways.

First, Libya had not been able to secure the transfer of Mr Gaddafi into State custody from his place of detention in Zintan. The Chamber did not doubt that the central Government was engaging in every effort to obtain Mr Gaddafi's transfer, but found that no concrete progress to this effect had been shown since the date of his apprehension on 19 November 2011 and was not persuaded that the problem would be resolved in the near future.

Second, the Chamber was concerned about the lack of capacity to obtain the necessary testimony and the inability of judicial and governmental authorities to exercise full control over certain detention facilities and to provide adequate witness protection.

Third, the Chamber found that significant practical impediments exist to securing legal representation for Mr Gaddafi in view of the security situation in Libya and the risk faced by lawyers who act for associates of the former regime, constituting an impediment to the progress of proceedings against Mr Gaddafi in accordance with Libyan law.

As Libya was found to be unable genuinely to carry out the investigation or prosecution of Mr Gaddafi, the Chamber did not address the question of Libya's willingness genuinely to carry out the investigation or prosecution.

The Chamber recalled that a finding on admissibility is predicated on facts as they exist at the time of the proceedings concerning the admissibility challenge as the domestic activities or lack thereof may change over time. Provided the requirements of article 19(4), third sentence, of the Statute are met, Libya may subsequently bring a new challenge to the admissibility of the case against Mr Gaddafi.

The Chamber found that the case against Mr Gaddafi was admissible before the Court and reminded Libya of its obligation to surrender the suspect to the Court.