

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/11-01/11
Date: 30 January 2013

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 concerning Libya's *ex parte* submission of evidence relevant to its challenge 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:

The Office of the Prosecutor
Fatou Bensouda

Counsel for Saif Al-Islam Gaddafi
Xavier-Jean Keita
Melinda Taylor

Counsel for Abdullah Al-Senussi
Benedict Emmerson

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**
Paolina Massidda

**The Office of Public Counsel for the
Defence**

States Representatives
Philippe Sands
Payam Akhavan
Michelle Butler

Amicus Curiae

REGISTRY

Registrar
Silvana Arbia

Deputy Registrar
Didier Preira

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 concerning Libya’s *ex parte* submission of evidence relevant to the challenge to the admissibility of the case against Saif Al-Islam Gaddafi (“Mr Gaddafi”).

1. On 16 April 2012, the Chamber, pursuant to regulation 76(2) of the Regulations of the Court (the “Regulations”), appointed Xavier-Jean Keïta and Melinda Taylor from the Office of Public Counsel for the defence (the “OPCD”) as counsel for Mr Gaddafi.¹

2. 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”).²

3. The responses to the Admissibility Challenge by the Prosecutor³ and the Office of Public Counsel for victims (the “OPCV”),⁴ and by the OPCD⁵ were filed on 4 June 2012 and 24 July 2012 respectively.

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

5. On 7 December 2012, the Chamber issued the “Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi”, whereby it: (i) requested Libya to provide the evidence on which it intends to rely for the purposes of its Admissibility Challenge and its

¹ ICC-01/11-01/11-113.

² ICC-01/11-01/11-130-Red.

³ ICC-01/11-01/11-167-Red.

⁴ ICC-01/11-01/11-166-Red-Corr.

⁵ ICC-01/11-01/11-190-Corr-Red.

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

submissions on a number of issues identified in the decision, by 23 January 2013; and (ii) ordered the Prosecutor, the OPCD and the OPCV to provide their response to Libya's further submissions, by 11 February 2013.⁷

6. In compliance with the Chamber's decision, on 23 January 2013, Libya filed its further submissions ("Libya's Submissions"), together with a number of annexes attached thereto.⁸ Libya filed its submissions "confidential *ex parte*, only available to the Chamber and the Prosecutor", and assigned this same level of classification to seven out of the 23 annexes attached thereto.⁹ In this regard, in a discrete section of its Submissions, Libya requests that the Chamber accepts the provision of the concerned sample investigative material on an *ex parte* basis.¹⁰

7. On 29 January 2013, the OPCD filed the "Urgent Defence Request to Dismiss 'Libyan Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi'".¹¹ The OPCD requests the Chamber to dismiss Libya's Submissions, as Libya has failed to adduce any legal and factual grounds which would warrant filing sample of investigative materials on an *ex parte* basis. In particular, the OPCD submits that:

[Libya] can only withhold information from the Defence on the proviso that the Chamber would then be expressly precluded from relying upon it to determine whether the admissibility criteria have been met. Moreover, if the information withheld from the Defence prevents the Defence from raising key issues pertaining to the rights of the defendant, then the application should be dismissed.¹²

⁷ ICC-01/11-01/11-239.

⁸ ICC-01/11-01/11-258-Conf-Exp. A public redacted version is also available.

⁹ Annexes 4, 5, 6, 7, 15, 16 and 17 to Libya's Submissions.

¹⁰ Libya's Submissions, paras 29 to 46.

¹¹ ICC-01/11-01/11-261-Conf. A public redacted version is also available.

¹² *Ibid.*, para. 24.

8. The Chamber notes regulation 23 *bis* of the Regulations of the Court (the “Regulations”), according to which “[a]ny document filed by the Registrar or a participant and marked ‘*ex parte*’, ‘under seal’ or ‘confidential’, shall state the factual and legal basis for the chosen classification and, unless otherwise ordered by a Chamber, shall be treated according to that classification throughout the proceedings”. Sub-regulation (3) of regulation 23 *bis* of the Regulations further states that, in the absence of a basis for the chosen classification, the Chamber may reclassify a document upon request or on its own motion.

9. Libya states that the classification chosen for its Submissions and for seven of the attached annexes is justified in light of article 59 of the Libyan Code of Criminal Procedure, which mandates the confidentiality of investigative material prior to the accusatory phase of proceedings.¹³ More specifically, Libya asserts that the object and purpose of this provision is “to avoid prejudice to further or ongoing investigations”, and, “given the highly sensitive context of the case against Mr Gaddafi, the protection of national security information”.¹⁴ Nevertheless, and notwithstanding Libya’s reference to “penal sanctions under article 59” of the Libyan Code of Criminal Procedure in case of disclosure of investigative material,¹⁵ Libya asserts that submission of the material to the Chamber and the Prosecutor has been made on an exceptional basis, respectively, “as a demonstration of its genuine commitment to fully cooperate with the Court in these admissibility proceedings”¹⁶ and “to assist the expeditious resolution of the Admissibility Challenge, since the Prosecutor is in a unique position to be able to compare

¹³ *Ibid.*, para. 29.

¹⁴ *Ibid.*, para. 31, and Annex 1 thereto.

¹⁵ *Ibid.*, para 32. See also para. 30.

¹⁶ *Ibid.*, para. 29.

the evidence in the possession of her office with that gathered by the Libyan authorities in the national investigation".¹⁷

10. As regards the factual circumstances allegedly justifying Libya's submission of the concerned material only to the Chamber and the Prosecutor, Libya asserts:

[T]here is a real and substantial risk that premature or inappropriate disclosure of such confidential and sensitive information could be used by Gaddafi-regime loyalists or others to undermine national criminal proceedings. Such actions that might be taken include the destruction of evidence, threatening witnesses and their families, harming or assassinating the Prosecutor-General's professional staff, and facilitating prison escapes or carrying out terrorist bombings to foment chaos and jeopardize national security in the context of a delicate democratic transition.¹⁸

11. The Chamber accepts Libya's argument that, in the presence of the identified risk, the material can be withheld, at this point in time, from the public. Accordingly, the submission of sample investigative materials on a confidential basis is warranted.

12. However, the Chamber is not persuaded that the "real and substantial risk" identified by Libya would be caused by the provision of this material to Counsel from the OPCD, acting as the Defence of Mr Gaddafi. Indeed, Libya fails to assert to what extent and under which circumstances the OPCD (as opposed to the general public) would be the source of any of the alleged risks that the domestic investigation be prejudiced and/or Libya's national security jeopardized, should the OPCD eventually be provided with the concerned material. In this regard, the Chamber also finds of relevance Libya's statement that, under its domestic legal system, Mr Gaddafi has already the right to

¹⁷ *Ibid.*, para. 34.

¹⁸ *Ibid.*, para. 32.

view the collected investigative materials, although he has decided not to exercise this right yet.¹⁹

13. Accordingly, in the absence of a proper basis for the classification as “*ex parte*” of the concerned material, thereby precluding access thereto to the OPCD, the Chamber is of the view that both the unredacted version of Libya’s Submissions and the seven annexes currently classified as “*ex parte*” (*i.e.* Annexes 4 to 7 and 15 to 17) have to be reclassified in order to provide the OPCD with access thereto.

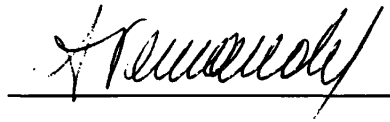
14. Nevertheless, the Chamber finds it appropriate, prior to such reclassification, to give Libya the opportunity to request discrete redactions, if any, to the concerned material, providing a justification for why each of those redactions is asserted to be necessary *vis-à-vis* the OPCD. Upon receipt of the proposed redactions, if any, together with the explanations thereof, the Chamber will determine whether these redactions *vis-à-vis* the OPCD are warranted.

FOR THESE REASONS, THE CHAMBER

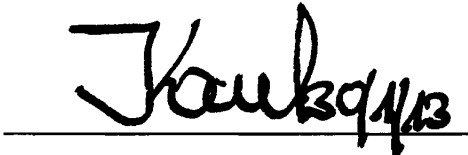
DECIDES that, in case Libya finds it necessary that redactions be applied to document ICC-01/11-01/11-258-Conf-Exp and Annexes 4, 5, 6, 7, 15, 16 and 17 before this material is made available to the OPCD, the proposal for redactions, together with an individual justification, shall be filed by 4 February 2013.

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

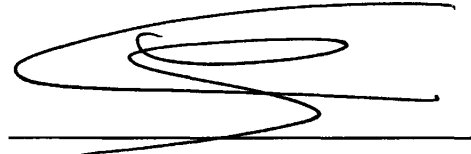
¹⁹ *Ibid.*, para. 93.



Judge Silvia Fernández de Gurmendi
Presiding Judge



Judge Hans-Peter Kaul



Judge Christine Van den Wyngaert

Dated this 30 January 2013

At The Hague, The Netherlands