

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/11-01/11

Date: 1 March 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 on the "Urgent Defence Request"**

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 Keïta  
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**

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**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 following decision on the “Urgent Defence Request”, filed by the Office of Public Counsel for the Defence (the “OPCD”).<sup>1</sup>

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 (“Admissibility Challenge”).<sup>2</sup>

2. On 27 April, the Chamber issued the “Decision on OPCD requests”, in which it, *inter alia*, “consider[ed] it appropriate [...] to request the Libyan authorities to enable the OPCD to visit Mr Gaddafi on a privileged basis”<sup>3</sup> and ordered the Registrar to make the necessary arrangements to this effect.<sup>4</sup>

3. On 6 June 2012, a delegation of four staff members of the Court, including Melinda Taylor, counsel for Mr Gaddafi, traveled to Libya in order to meet with Mr. Gaddafi in Zintan. On 7 June 2012, as previously agreed with the national authorities of Libya, the delegation traveled to Zintan and met with Mr. Gaddafi. From that day until 2 July 2012, the members of the delegation were kept in detention in Zintan. They returned to The Hague on 3 July 2012.

4. On 24 July 2012, the Chamber received the “Defence Response to the ‘Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute’”,<sup>5</sup> in which it claimed, among other things, that various privileged Defence documents were seized by the Libyan prosecution authorities during the delegation’s visit to Zintan.

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<sup>1</sup> ICC-01/11-01/11-255.

<sup>2</sup> ICC-01/11-01/11-130-Red.

<sup>3</sup> ICC-01/11-01/11-129, para. 12.

<sup>4</sup> *Ibid.*, p. 7.

<sup>5</sup> ICC-01/11-01/11-190-Corr-Red.

5. On 21 January 2013, the OPCD filed the “Urgent Defence Request”.<sup>6</sup>
6. On 11 February 2013, Libya filed the “Libyan Government’s Response to Urgent Defence Request of 21 January 2013” (Libya’s Response).<sup>7</sup>
7. On 22 February 2013, the OPCD filed the “Request for Leave to Reply to the ‘Libyan Government’s Response to the Urgent Defence Request of 21 January 2013’”.<sup>8</sup>
8. On 27 February 2013, Libya filed the “Libyan Government’s Response to OPCD Request for Leave to Reply to the ‘Libyan Government’s Response to Urgent Defence Request of 21 January 2013’”, requesting the Chamber to reject the OPCD request for leave to reply.<sup>9</sup>
9. The OPCD submits that the Libyan Prosecutor-General confirmed the occurrence of a trial hearing in Zintan on 17 January 2013 against Mr Gaddafi, on charges of “compromising national security through the exchange of documents with the ICC delegation, and insulting the State’s flag and national emblem”.<sup>10</sup> According to the OPCD submission, the Libyan Prosecutor-General also stated that “the trial had been adjourned until May to enable a counsel to be appointed to Mr. Gaddafi, the ICC delegation to be informed of the proceedings, and for arrest warrants against two other Libyan nationals to be renewed.”<sup>11</sup>
10. The OPCD submits that the legal basis for the postponement of Mr Gaddafi’s surrender is article 95 of the Statute and that this provision applies to “domestic proceedings that concern the same underlying conduct

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<sup>6</sup> ICC-01/11-01/11-255, and annexes attached thereto.

<sup>7</sup> ICC-01/11-01/11-274.

<sup>8</sup> ICC-01/11-01/11-284.

<sup>9</sup> ICC-01/11-01/11-289-Conf-Exp. A public redacted version is also available.

<sup>10</sup> *Ibid.*, para. 34.

<sup>11</sup> *Ibid.*, para 34.

ICC case".<sup>12</sup> Accordingly, the OPCD argues that the triggering of additional domestic proceedings against Mr Gaddafi for acts which are not connected to the charges before the Court is a violation of the Statute, and in particular, an abuse of article 95.<sup>13</sup>

11. The OPCD also questions the validity of the Admissibility Challenge itself based on the Libyan government's exploitation of the deferral decision "in order to try Mr. Gaddafi for trumped up charges"<sup>14</sup>, its failure, so far, to present concrete and probative evidence that it is actively investigating the case, its recognition that it "had challenged the admissibility of the case not because [it] wished to genuinely investigate him for the same conduct as the ICC, but because [it] did not wish to surrender him to the ICC" and the authorities' alleged interest "in using Mr. Gaddafi's personal presence in their territory to score political points, rather than for the purposes of conducting genuine investigations and proceedings in relation to the conduct underlining the ICC case".<sup>15</sup>

12. The OPCD also claims that the Libyan Government must have known of the 17 January 2013 hearing in Zintan,<sup>16</sup> and failure to disclose such information to the Court shows "a consistent pattern of conduct of providing false or misleading information to the Court, for the purposes of obtaining more time, and staving off an eventual decision on the admissibility of the case".<sup>17</sup>

13. Further, according to the OPCD, the triggering of these national proceedings in Libya demonstrates that the Libyan authorities will not

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<sup>12</sup> *Ibid.*, para 40.

<sup>13</sup> *Ibid.*, paras 39-41.

<sup>14</sup> *Ibid.*, para 45.

<sup>15</sup> *Ibid.*, paras 46-47.

<sup>16</sup> *Ibid.*, para. 49.

<sup>17</sup> *Ibid.*, para. 50.

surrender Mr Gaddafi, should their Admissibility Challenge be unsuccessful.<sup>18</sup> The OPCD alleges that such domestic proceedings are illegal, legally and factually unfounded, which demonstrates that there is no prospect of an independent and impartial prosecution of Mr Gaddafi in Libya.<sup>19</sup>

14. The OPCD suggests that the protracted admissibility proceedings have also permitted the Libyan authorities “to resurrect the spectre of instigating criminal proceedings against the ICC delegation, notwithstanding the fact that the ICC has not waived the privileges and immunities of the delegation”.<sup>20</sup>

15. The OPCD emphasizes the Chamber’s power and duty to “take measures to ensure that the integrity of its proceedings is not abused in a manner which contravenes the fundamental rights of a party, or the defendant”<sup>21</sup> and avers that the only effective remedy against these violations is “to issue an immediate decision on the admissibility challenge, and order that Mr. Gaddafi is immediately surrendered to the custody of the ICC”.<sup>22</sup>

16. With regard to the privileged documents seized by the Libyan authorities, the Defence submits that it never waived their privileged nature, that their seizing has never been legally or factually justified by the Libyan authorities, that they remain property of the Defence and that they are “integral to the ability of the Defence to both represent Mr. Gaddafi in the admissibility proceedings, and to respond to any false allegations which have been made by the Libyan authorities in relation to the conduct of Counsel and the defendant.”<sup>23</sup> It is submitted that the Pre-Trial Chamber “retains the

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<sup>18</sup> *Ibid.*, para. 51.

<sup>19</sup> *Ibid.*, paras 53-58 and para. 67.

<sup>20</sup> *Ibid.*, para. 65.

<sup>21</sup> *Ibid.*, para 69.

<sup>22</sup> *Ibid.*, para 73.

<sup>23</sup> *Ibid.*, para 74-78.

exclusive competence for determining whether the privileged nature of the documents should be lifted".<sup>24</sup>

17. According to the OPCD, the Chamber has the power to order that they "be immediately returned to the Defence, and all copies should be destroyed"<sup>25</sup> since this "falls squarely within the Chamber's powers under Article 57(3)(b) and (c) of the Statute" and "[t]he duty to return such documentation also inheres in Libya's obligation to respect the functional immunity of the Defence as required by Article 48 of the Statute".<sup>26</sup>

18. In conclusion, the OPCD requests the Pre-Trial Chamber to: (i) issue an immediate decision on the admissibility of the case; (ii) order the Government of Libya to immediately surrender Mr. Gaddafi to the custody of the ICC; and (iii) order that the privileged material seized from the Defence should be immediately returned to the Defence, and all copies should be destroyed.<sup>27</sup>

19. In its response to the OPCD request, Libya submits that the OPCD's allegation of abuse of process are "unsubstantiated and beyond the scope of the admissibility proceedings".<sup>28</sup> In particular, Libya indicates that, as alleged by the OPCD, the proceedings against Mr Gaddafi in relation to issues of national security are not connected with the Admissibility Challenge.<sup>29</sup> Libya argues that it is not prohibited from initiating any proceedings other than those relating to the same conduct in proceedings before the Court,<sup>30</sup> and, accordingly, that these proceedings "cannot – and do not constitute a violation of Libya's obligations to the Court".<sup>31</sup> It is suggested that such

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<sup>24</sup> ICC-01/11-01/11-255 para. 75.

<sup>25</sup> *Ibid.*, para. 77.

<sup>26</sup> *Ibid.*, para. 78.

<sup>27</sup> *Ibid.*, para. 80.

<sup>28</sup> Libya's Response, para. 4.

<sup>29</sup> *Ibid.*, para. 7.

<sup>30</sup> *Ibid.*, para. 6.

<sup>31</sup> *Ibid.*, para. 4.

proceedings, unrelated as they are to the ICC case, do not “fall within the jurisdiction of the Pre-Trial Chamber in these admissibility proceedings”.<sup>32</sup>

20. Libya contends that, as a result, these additional national proceedings cannot mean an abuse of process or a breach of its obligations under article 95 of the Statute. It is submitted that, as a well-established principle of international law, an “abuse of process” cannot be *presumed* but the alleging party bears the burden of proof and that the OPCD has advanced no more than unsubstantiated allegations to support its claim.<sup>33</sup>

21. With regard to the OPCD request to return and destroy all copies of certain privileged documents, Libya argues that, since the privileged nature of this material has not been waived, the diplomatic channel is the only appropriate one to make such a request.<sup>34</sup> In this regard, Libya submits that an order by the Court would be inappropriate, given that there are still matters of Libyan criminal law and procedure in relation to these materials to be determined by Libyan national courts.<sup>35</sup>

22. The Chamber notes articles 48, 57(3) and 67 of the Rome Statute (the “Statute”) and regulation 24(5) of the Regulations. The Chamber also takes note of the Agreement on Privileges and Immunities of the International Criminal Court.

23. As a preliminary matter, the Chamber addresses the application of the OPCD for leave to reply to Libya’s Response. The Chamber is of the view that, after receiving Libya’s Response, no further submission on the Request appears necessary. Accordingly, the application for leave to reply must be rejected, and the substantive submissions contained therein disregarded.

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<sup>32</sup> *Ibid.*, paras 5-7.

<sup>33</sup> *Ibid.*, para. 9.

<sup>34</sup> *Ibid.*, para. 10.

<sup>35</sup> *Ibid.*, para. 11.



24. The Chamber notes that the admissibility proceedings are well advanced. The Chamber has conducted a hearing on issues related to the admissibility of the case and has received the additional submissions it requested from Libya as well as responses thereto from the other parties and participants to the proceedings. The Chamber notes the concerns raised by the OPCD but considers that they can be appropriately addressed in its final decision on the Admissibility Challenge to be taken in due course.

25. In relation to the material seized from the Defence by the Libyan authorities, the Chamber notes article 48(4) of the Statute that provides that Counsel “shall be accorded such treatment as is necessary for the proper functioning of the Court”. The Chamber considers that the inviolability of documents and materials related to the exercise of the functions of the Defence constitutes an integral part of the treatment that shall be accorded to the Defence pursuant to article 48(4) of the Statute and in light of article 67(1) of the Statute. This holds true in particular considering that the materials at issue were seized from the Defence in the occasion of a privileged visit specifically authorized by the Chamber and agreed by Libya, in the context of the admissibility proceedings initiated before this Chamber.

26. At the same time, the Chamber is not in a position to determine whether an exception to the principle of inviolability of the concerned documents would be justified, and therefore whether the privilege should be lifted. Such a determination cannot be made in the abstract but would require an assessment of the particular circumstances surrounding the events in Zintan. In this regard, the Chamber reiterates that it is not the competent organ to establish such factual circumstances<sup>36</sup> and it does not have the power to seek and receive submissions of fact and law in relation to these events.

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<sup>36</sup> ICC-01/11-01/11-T-2-CONF-ENG, p. 31, line 20.

Furthermore, in accordance with article 26 of the Agreement on Privileges and Immunities of the International Criminal Court, it is not for this Chamber to determine whether there are grounds for waiving the privileged nature of the Defence documents seized in Zintan.

27. For these reasons, the Chamber is of the view that, in the absence of a waiver of privileges and immunities by the appropriate organ of the Court, the principle of inviolability of the Defence documents stands fully. Accordingly, Libya must return to Counsel the originals of the materials belonging to the Defence and seized in Zintan as well as destroy any copies thereof.

**FOR THESE REASONS, THE CHAMBER**

**INSTRUCTS** the Registrar to request Libya, through the appropriate channel in accordance with article 87(1)(a) of the Statute, to return to the Defence the originals of the materials seized in Zintan and destroy any copies thereof; and

**REJECTS** the “Request for Leave to Reply to the ‘Libyan Government’s Response to the Urgent Defence Request of 21 January 2013’”.

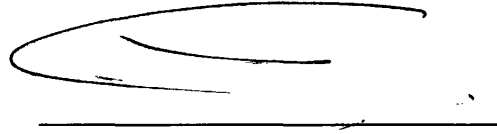
Done in both English and French, the English version being authoritative.



**Judge Silvia Fernández de Gurmendi**  
**Presiding Judge**



**Judge Hans-Peter Kaul**



**Judge Christine Van den Wyngaert**

Dated this 1 March 2013

At The Hague, The Netherlands