

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 24 April 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 Libya application for leave to appeal and request for
reconsideration of the “Decision on the ‘Urgent Defence Request’”**

Decision 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
John R.W.D. Jones

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
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Mohamed Abdou

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

States Representatives
Ahmed El-Gehani
Philippe Sands
Payam Akhavan
Michelle Butler

Others
Appeals Chamber

REGISTRY

Registrar
Herman von Hebel

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 application for leave to appeal (the “Application”)¹ and the request for reconsideration (the “Request”)² of the “Decision on the ‘Urgent Defence Request’” (“1 March 2013 Decision”),³ both filed by the Government of Libya (“Libya”) on 11 March 2013.

I. Procedural History

1. On 17 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” or the “Defence”) as counsel for Saif Al-Islam Gaddafi (“Mr Gaddafi”) and reminded them to continue to assist Mr Gaddafi in acquiring counsel consistent with his wishes.⁴

2. On 27 April 2012, the Chamber, *inter alia*, ordered the Registrar to make the necessary arrangements for the representatives of the Registry to visit Mr Gaddafi in order to discuss further with him the option to appoint counsel of his own choosing in accordance with rule 21 of the Rules of Procedure and Evidence (the “Rules”).⁵

¹ ICC-01/11-01/11-297-Conf-Exp (public redacted version filed same day as ICC-01/11-01/11-297-Red). All citations in the present decision will be to the public redacted version unless otherwise indicated.

² ICC-01/11-01/11-298-Conf-Exp (public redacted version filed same day as ICC-01/11-01/11-298-Red). All citations in the present decision will be to the public redacted version unless otherwise indicated).

³ Pre-Trial Chamber I, Decision on the “Urgent Defence Request”, 1 March 2013, ICC-01/11-01/11-291.

⁴ Pre-Trial Chamber I, Decision Appointing Counsel from the OPCD as Counsel for Saif Al-Islam Gaddafi, 17 April 2012, ICC-01/11-01/11-113.

⁵ Pre-Trial Chamber I, Decision on OPCD Requests, 27 April 2012, ICC-01/11-01/11-129, para. 12 and operative part.

3. 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.⁶

4. 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. This visit was interrupted by the Libyan authorities, who seized certain documents from Ms Taylor and from that day until 2 July 2012, kept the members of the delegation in detention in Zintan. They returned to The Hague on 3 July 2012.

5. On 21 January 2013, the Defence filed the “Urgent Defence Request”, requesting, *inter alia*, an order from the Chamber to order that all privileged material seized from the Defence should be immediately returned to them, and all copies should be destroyed.⁷

6. On 1 March 2013, the Chamber issued the 1 March 2013 Decision.⁸

7. On 11 March 2013, Libya applied for leave to appeal⁹ the 1 March 2013 Decision and requested also its reconsideration.¹⁰

8. On 14 March 2013, the Defence filed a response to the Application.¹¹

9. On 15 March 2013, the Office of Public Counsel for Victims filed responses to both the Application¹² and the Request.¹³

⁶ ICC-01/11-01/11-130-Red.

⁷ ICC-01/11-01/11-255, and annexes attached thereto.

⁸ ICC-01/11-01/11-291.

⁹ ICC-01/11-01/11-297-Conf-Exp.

¹⁰ ICC-01/11-01/11-298-Conf-Exp.

¹¹ ICC-01/11-01/11-300-Conf-Exp (public redacted version filed same day as ICC-01/11-01/11-300-Red). All citations in the present decision will be to the public redacted version unless otherwise indicated.

10. On 26 March 2013, the Defence responded to the Request.¹⁴

11. The Prosecutor did not file any response.

II. Background and submissions of the parties

A. *The 1 March 2013 Decision*

12. In the 1 March 2013 Decision, the Chamber considered that the inviolability of documents and materials related to the exercise of the functions of the Defence “constituted 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”.¹⁵ In accordance with article 26 of the Agreement on Privileges and Immunities of the International Criminal Court (“APIC”), the Chamber then noted that it was not the competent organ of the Court to determine whether there were grounds for waiving the privileged nature of the documents seized in Zintan.¹⁶ In the absence of any such waiver in the present case, the Chamber consequently held that “the principle of inviolability of the Defence documents stands fully”¹⁷ and instructed the Registrar to request Libya to return to the Defence the originals of the materials seized in Zintan and destroy any copies thereof.¹⁸

13. As to the Chamber’s power to assess the particular circumstances surrounding the events in Zintan for the purposes of the pending admissibility proceedings, the Chamber reiterated that it was “not the competent organ to establish such factual circumstances” and that “it does not

¹² ICC-01/11-01/11-302-Conf-Exp.

¹³ ICC-01/11-01/11-303-Conf-Exp.

¹⁴ ICC-01/11-01/11-305.

¹⁵ 1 March 2013 Decision, para. 25.

¹⁶ 1 March 2013 Decision, para. 26.

¹⁷ 1 March 2013 Decision, para. 27.

¹⁸ 1 March 2013 Decision, p. 10.

have the power to seek and receive submissions of fact and law in relation to these events".¹⁹

B. *The Application and the Request*

14. Libya applies for leave to appeal and requests reconsideration of the 1 March 2013 Decision.

The Application

15. Libya seeks leave to appeal the following issue:

Whether the Chamber erred and/or acted outside its proper authority when it ruled that, pursuant to article 48(4) of the Statute, the materials were inviolable as they "related to the exercise of the functions of the Defence".²⁰

16. Libya submits that this issue involves consideration of the following sub-issues (citations removed):

i. Whether, and to what extent, article 48(4) of the Statute and the privileges and immunities referred therein apply to the territory of Libya (and the activities of the OPCD) irrespective of Libya's non-ratification of the Agreement on Privileges and Immunities of the ICC ("APIC"), and in view of the current negotiation of a Memorandum of Understanding between Libya and the Registry concerning the same privileges and immunities.

ii. Whether, in making a ruling regarding the inviolability of the materials, the Pre-Trial Chamber has in effect made a determination regarding the conduct of Libya and the OPCD in the course of the OPCD's Zintan mission in June 2012 and, in doing so, has, acted contrary to the procedures relating to the interpretation and application of the privileges and immunities referred to in article 48(4) and contained in the APIC (to the extent that they apply) and thereby acted outside its lawful remit.

iii. Whether, if the Chamber has effectively made a factual determination as set out in (ii), it has thereby, for the purposes of the merits of the ongoing admissibility challenge, effectively concluded that the conduct of the OPCD counsel was beyond reproach and the seizure and retention of OPCD papers was unlawful, without providing the parties with a full opportunity to be heard on the relevant legal and factual issues, and notwithstanding that, by its own admission, it is "not the competent organ to establish such factual circumstances".

¹⁹ 1 March 2013 Decision, para. 26.

²⁰ ICC-01/11-01/11-297-Red, para. 7.

iv. Whether in exercising jurisdiction over a difference arising between Libya and the Court concerning the interpretation and application of the APIC, (to the extent that APIC applies) it has acted in contravention of article 32(1) of the APIC, providing that “all differences” concerning the interpretation and application of the APIC shall be settled based on the procedures specified therein, including in particular, the 22 June 2012 undertaking by the ICC President to Libya to investigate the allegations of abuse of privilege by OPCD.

v. Whether, by making such a ruling in disregard of the proper procedures under article 32(1) of APIC, the Chamber has further erred by effectively rendering the materials inadmissible in all proceedings against Mr Saif Gaddafi, including those before domestic courts, prior to those courts having the opportunity to consider the admissibility of the materials.²¹

17. Libya submits that the issue identified “clearly emanates” from the 1 March 2013 Decision and significantly affects the fairness and expeditiousness of the proceedings.²²

The Request

18. In a separate submission, Libya also requests the Chamber to reconsider the 1 March 2013 Decision. Libya argues that the 1 March 2013 Decision is “manifestly unsound” because the Chamber did not give full and proper consideration to the same questions which Libya identifies in its application for leave to appeal.²³ Libya argues that the 1 March 2013 Decision’s consequences are “manifestly unsatisfactory” because Libya has been “unfairly prejudiced” and “the fairness of the admissibility proceedings has been undermined”.²⁴

C. The Defence Responses

19. In response to the Application, the Defence requests the Chamber to reject it. The Defence submits that Libya does not have standing to request leave to appeal, arguing that: (i) Libya is not a “party” within the meaning of

²¹ ICC-01/11-01/11-297-Red, para. 8.

²² ICC-01/11-01/11-297-Red, paras 11, 12-25.

²³ ICC-01/11-01/11-298-Red, paras 8, 10-15.

²⁴ ICC-01/11-01/11-298-Red, paras 9, 16-22.

article 82 of the Rome Statute (“Statute”)²⁵ and (ii) even if they were, this request does not relate to the proceedings to which Libya is a party, namely the admissibility proceedings.²⁶ The Defence goes on to argue that, even if Libya has standing, the issue identified does not arise from the decision²⁷ or otherwise fulfill the criteria under article 82(1)(d) of the Statute.²⁸

20. In response to the Request, the Defence also argues for its rejection. The Defence submits that only parties may request reconsideration of a Chamber’s decisions and that Libya has no standing because they are not a party to the proceedings related to the merits of the case.²⁹ The Defence also argues that, even if Libya had standing, they have “nonetheless failed to adduce any legal or factual arguments as to why the Chamber’s finding is *manifestly* unsound, nor has it demonstrated how and why the consequences are manifestly unsatisfactory”.³⁰ In explaining why the Chamber’s approach is not manifestly unsound, the Defence also notes that Libya has not disputed the fact that the Presidency of the Court has not waived the privileges and immunities of the Defence.³¹

D. The OPCV Responses

21. The OPCV argues that the Application should be rejected. The OPCV argues that, although the term “party” in article 82 of the Statute encompasses participants beyond the Prosecutor and the Defence, Libya “is not party to the proceedings in the sense that the issue ruled [upon] by the Chamber does not fall within the ambit of the proceedings in which the Libyan Government is a

²⁵ ICC-01/11-01/11-300-Red, paras 7-15.

²⁶ ICC-01/11-01/11-300-Red, paras 16-19.

²⁷ ICC-01/11-01/11-300-Red, paras 20-40.

²⁸ ICC-01/11-01/11-300-Red, paras 41-69.

²⁹ ICC-01/11-01/11-305, paras 5-10.

³⁰ ICC-01/11-01/11-305, para. 12 (emphasis in original).

³¹ ICC-01/11-01/11-305, para. 25.

party before the Court, namely the admissibility proceedings”.³² Alternatively, the OPCV submits that the Application is unfounded, arguing in particular that “there is no doubt that the [1 March 2013] Decision solely addressed the return of seized documents, and did not constitute at all a determination of the applicability of the APIC to the Libyan Government, of the conduct of Libya and the OPCD in the course of the OPCD’s Zintan mission in June 2012, of the admissibility challenge, nor of the conduct of any national proceedings against Mr. Saif Gaddafi, as alleged by the Libyan Government in its Application”.³³

22. The OPCV also argues that the Request should be rejected. The OPCV argues that Libya’s request should be rejected *in limine* as there is no legal basis for requesting reconsideration under the legal texts governing the Court.³⁴ Even if such a request were possible, the OPCV argues that “none of the issues identified in the Request may serve as a proper basis for reconsideration” because they cannot be placed within any of the following categories for which reconsideration has been granted in the practice of the Court (citations omitted):

- (i) in cases where the applicant was able to provide compelling new information (or previous information unavailable to the Chamber) which significantly altered the basis on which the original decision was taken; (ii) in order to accommodate new circumstances that have arisen and which have rendered the original decision unfair; or (iii) in order to correct material errors committed by the Chamber.³⁵

III. The Chamber’s Analysis

A. Request for reconsideration

23. The Chamber observes that Libya seeks reconsideration of the 1 March 2013 Decision on the grounds that it is “manifestly unsound” and its

³² ICC-01/11-01/11-302-Conf-Exp, paras 7-12, esp. para. 10.

³³ ICC-01/11-01/11-302-Conf-Exp, paras 7-12, esp. para. 18. See also ICC-01/11-01/11-302-Conf-Exp, paras 13-26.

³⁴ ICC-01/11-01/11-303-Conf-Exp, paras 6-9.

³⁵ ICC-01/11-01/11-303-Conf-Exp, para. 13.

consequences are “manifestly unsatisfactory”. In the view of the Chamber, even if it were accepted, for the sake of argument, that Libya can make such a request, these allegations are entirely unsubstantiated. Libya has failed to provide any new information since the 1 March 2013 Decision which justifies reconsideration of it. Libya makes no argument that any other changed circumstances have arisen which justify reconsideration. The Chamber considers Libya’s arguments to amount to a disagreement with the 1 March 2013 Decision. However, merely disagreeing with the Chamber’s reasoning cannot justify a request for reconsideration and must therefore be rejected.

B. Leave to appeal

24. The Chamber notes article 82(1)(d) of the Rome Statute (the “Statute”), rules 155 and 156 of the Rules, and regulations 23 *bis* (3) and 65 of the Regulations of the Court.

25. The Chamber notes in particular that article 82(1)(d) of the Statute sets out the following requirements to the granting of a request for leave to appeal:

- (a) the decision involves an issue that would significantly affect (i) the fair and expeditious conduct of the proceedings, or (ii) the outcome of the trial; and
- (b) in the opinion of the Pre-Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

26. With respect to the particular question of the meaning of the term “issue” in the context of the first limb of the test under article 82(1)(d) of the Statute, the Appeals Chamber has stated:

An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. [...] An issue is constituted by a subject the resolution of

which is essential for the determination of matters arising in the judicial cause under examination.³⁶

27. As a preliminary matter, the Chamber notes that both responses of the OPCV are confidential *ex parte* solely because Libya's original filings had the same classification. It also observes the OPCV's requests for the Chamber to reclassify their submissions as public.³⁷ In view of the fact that Libya has provided public redacted versions of its submissions and the OPCV does not reveal any information which defeats the purpose of the confidential classification, the Chamber considers that their submissions should be reclassified as public pursuant to regulation 23 *bis* (3) of the Regulations.

28. With regard to the merits of Libya's application requesting leave to appeal, the Chamber considers that it must be rejected for the reasons set out below.

29. Libya presents no argument as to why it has standing to seek leave to appeal the 1 March 2013 Decision.

30. The Chamber is of the view that, regardless of whether or not Libya shall be considered a "party" for the purposes of article 82(1)(d) of the Statute, none of the matters for which Libya seeks leave to appeal are separate from the admissibility proceedings and are, therefore, not subject to an appeal under article 82(1)(d) of the Statute. As noted by Trial Chamber II, a Chamber would overstep its powers if it considered applications under article 82(1)(d) of the Statute which are "entirely discrete from the proceedings".³⁸

³⁶ Appeals Chamber, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, ICC-01/04-168, para. 9.

³⁷ ICC-01/11-01/11-302-Conf-Exp, para. 5; ICC-01/11-01/11-303-Conf-Exp, para. 4.

³⁸ Trial Chamber II, "Decision on three applications for leave to appeal Decision ICC-01/04-01/07-3003 of 9 June 2011", 27 July 2011, ICC-01/04-01/07-3073-tENG, paras 6-9 (originally filed in French on 14 July 2011).

31. In this regard, the Chamber also recalls that the 1 March 2013 Decision repeated the Chamber's position that it would not take into consideration the events surrounding the Defence's visit to Zintan in relation to the admissibility proceedings.³⁹ Since the Chamber has not made any ruling of the OPCD's conduct in Zintan, the sub-issues identified by Libya do not arise from the 1 March 2013 Decision.

32. To conclude, Libya's application falls outside the scope of article 82(1)(d) of the Statute as being entirely discrete from the relevant proceedings and must be rejected.

FOR THESE REASONS, THE CHAMBER

- a) orders** the Registrar to reclassify the following filings by the OPCV as public: ICC-01/11-01/11-302-Conf-Exp and ICC-01/11-01/11-303-Conf-Exp;
- b) rejects** the request for reconsideration;
- c) rejects** the application for leave to appeal.

³⁹ See 1 March 2013 Decision, para. 26; Pre-Trial Chamber I, Transcript of Hearing, 9 October 2012, ICC-01/11-01/11-T-2-CONF-ENG, p. 31, line 20.

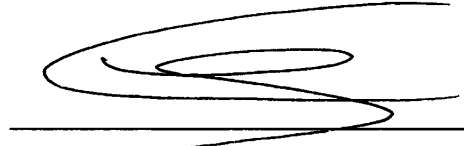
Done in both English and French, the English version being authoritative.



Judge Silvia Fernández de Gurmendi
Presiding Judge



Judge Hans-Peter Kaul



Judge Christine Van den Wyngaert

Dated this Wednesday, 24 April 2013

At The Hague, The Netherlands