

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 27 May 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 request of Abdullah Al-Senussi for access to all
confidential filings in the record of the case**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor
Fatou Bensouda
James Stewart

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

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

States Representatives
Ahmed El-Gehani
James Crawford
Wayne Jordash
Michelle Butler

Amicus Curiae

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 “Defence Request on behalf of Abdullah Al-Senussi for Access to All Confidential Filings, Decisions and Documents in Case ICC-01/11-01/11 prior to the Appointment of Counsel for Mr. Al-Senussi” (the “Request”).¹

1. On 9 January 2013, the Registrar provisionally appointed Ben Emmerson as counsel for Abdullah Al-Senussi (“Mr Al-Senussi”) in the proceedings before the Court.²

2. On 31 January 2013, by way of email communication, the Chamber requested the Registry to inform the parties and participants that, as of the appointment of counsel for Mr Al-Senussi, all filings classified as “confidential” would be notified also to the Defence of Mr Al-Senussi, unless marked as “confidential *ex parte*”. The Chamber further determined that, with a number of exceptions for certain filings that were deemed relevant to Mr Al-Senussi’s case,³ access to other confidential filings submitted prior to the date of the appointment of counsel for Mr Al-Senussi would be provided to Mr Al-Senussi upon request.

3. On 25 April 2013, the Defence of Mr Al-Senussi filed the Request, whereby it requests access to “all confidential filings, decisions and documents prior to 9 January 2013 in the case ICC-01/11-01-11”, unless marked as “*ex parte*”, in order to enable the Defence “to review these materials for the preparation of its submissions on behalf of Mr. Al-Senussi in the present proceedings,

¹ ICC-01/11-01/11-322.

² ICC-01/11-01/11-253 and its annex.

³ Filings ICC-01/11-01/11-130-Conf-AnxE, ICC-01/11-01/11-130-Conf-AnxF, ICC-01/11-01/11-145-Conf-AnxE and ICC-01/11-01/11-145-Conf-AnxF.

including so that it can respond to the arguments and allegations relied on by Libya in its admissibility application in Mr. Al-Senussi's case".⁴

4. Upon the Chamber's request, Libya,⁵ the Prosecutor,⁶ the Office of Public Counsel for Victims (the "OPCV")⁷ and the Registrar⁸ responded to the Request. They all stated not to have objections to the Defence of Mr Al-Senussi being provided with access to their respective confidential filings insofar as not classified as "confidential *ex parte*".

5. The Chamber notes articles 57(3)(c) and 68(1) of the Rome Statute and regulation 23 *bis* of the Regulations of the Court.

6. The Chamber considers that Mr Al-Senussi, as a party to the present case, must, in principle, be given access to the confidential (not *ex parte*) filings in the record of the case, unless there exists a factual or legal reason preventing said access in relation to one or more individual documents.

7. Bearing in mind this general principle, and in light of the observations received by the other parties and participants in the case, the Chamber has conducted a review of all confidential filings in the record of the case in order to determine whether there is any reason warranting discrete exceptions to the principle of Mr Al-Senussi's full access to the confidential filings submitted before appointment of his counsel.

8. On this basis, the Chamber considers that for a limited number of filings, which address issues that are separate from, and not relevant to, the proceedings to which Mr Al-Senussi is a party, there are overriding reasons of protection and privacy of certain individuals precluding his Defence from

⁴ Request, para. 9.

⁵ ICC-01/11-01/11-326 of 3 May 2013.

⁶ ICC-01/11-01/11-334 of 10 May 2013.

⁷ ICC-01/11-01/11-337 of 13 May 2013.

⁸ ICC-01/11-01-338 of 15 May 2013.

access thereto.⁹ These filings, which were originally classified as “confidential” without the explicit exclusion of notification to Mr Al-Senussi as they were submitted at a time when he was not yet represented before the Court, should thus be reclassified as confidential *ex parte*, only available to the parties and participants to which they were initially notified.

9. Further, the Chamber notes that, after filing of his response to the Request, the Registrar, by way of email communication, requested that two of his filings, which were at first erroneously marked as “confidential”, be reclassified as “confidential *ex parte*, Prosecutor only”,¹⁰ prior to the Chamber providing access to the Defence of Mr Al-Senussi to the confidential filings in the record of the case. The Chamber notes that the two filings referred to by the Registrar relate to certain matters of international cooperation, which, in light of their nature, must be reclassified as requested by the Registrar. In addition, the Chamber also notes that one of the two filings refers to documents that are classified as “*ex parte* Prosecutor only”. Accordingly, the Chamber is satisfied that documents ICC-01/11-01/11-12-Conf and ICC-01/11-01/11-25-Conf, as well as their respective annexes, must be reclassified as “confidential *ex parte*, only available to the Prosecutor”.

10. In principle, Mr Al-Senussi’s access to all confidential filings excludes access to the confidential *ex parte* documents filed in the record of the case prior to his counsel’s appointment, including those that were provided by or

⁹ Filings ICC-01/11-01/11-120-Conf-Anx1; ICC-01/11-01/11-181-Conf, and its annex 1; ICC-01/11-01/11-182; ICC-01/11-01/11-194-Conf, and its annexes; ICC-01/11-01/11-218-Conf, and its annex A; ICC-01/11-01/11-T-2-CONF-ENG and ICC-01/11-01/11-T-2-CONF-FRA; ICC-01/11-01/11-T-3-CONF-ENG and ICC-01/11-01/11-T-3-CONF-FRA; ICC-01/11-01/11-221-Conf; ICC-01/11-01/11-222-Conf; ICC-01/11-01/11-223-Conf, and its annexes A and B; ICC-01/11-01/11-224-Conf; ICC-01/11-01/11-225-Conf; ICC-01/11-01/11-227-Conf-Red; ICC-01/11-01/11-228-Conf-Red, and its annexes 5, 7 and 9; ICC-01/11-01/11-229-Conf; ICC-01/11-01/11-230-Conf; ICC-01/11-01/11-233-Conf.

¹⁰ The two filings are ICC-01/11-01/11-12-Conf and its annexes; and ICC-01/11-01/11-25-Conf and its annexes.

to the Defence of Saif Al-Islam Gaddafi on an *ex parte* basis. However, in its response to the Request, the Defence of Saif Al-Islam Gaddafi states that two of its filings currently marked as “confidential *ex parte*” could be provided to the Defence of Mr Al-Senussi, in case the Chamber grants Mr Al-Senussi’s request for access to all confidential filings.¹¹ In this regard, the Defence of Saif Al-Islam Gaddafi submits that these two filings, which were submitted after the appointment of counsel for Mr Al-Senussi, were classified as “confidential *ex parte*” and not shared with the Defence of Mr Al-Senussi merely because “they referenced confidential filings, which had been submitted prior to 9 January 2013, and which had not at that stage been provided to the Defence of Mr. Al-Senussi”.¹² In light of the present decision, the Chamber is of the view that filing ICC-01/11-01/11-281-Conf-Exp and its annexes 6 and 11 can be reclassified as “confidential” and, accordingly, that the Defence of Mr Al-Senussi can be provided with access thereto. Conversely, filing ICC-01/11-01/11-300-Conf-Exp must retain its current classification as it refers to documents in the record of the case which were *ab initio* marked, or are hereby reclassified, as “confidential *ex parte*”, and for which there exist reasons warranting that Mr Al-Senussi be precluded from access thereto.

11. The Chamber further notes that in his response to the Request, the Registrar also informs the Chamber that he has no objection to the Defence of Mr Al-Senussi being provided with access to two of his filings despite being currently marked as “confidential *ex parte*”.¹³ In light of this, the Chamber considers that the current level of classification as “confidential *ex parte*” is no longer warranted with respect to these filings. As far as filing ICC-01/11-

¹¹ ICC-01/11-01/11-334, para. 4. The filings referred to by the Defence of Saif Al-Islam Gaddafi are: ICC-01/11-01/11-01/11-281-Conf-Exp, and its annexes 6 and 11; and ICC-01/11-01/11-300-Conf-Exp.

¹² *Ibid.*, para. 3.

¹³ ICC-01/11-01/11-338, paras 3 to 5. The filings referred to by the Registrar are: ICC-01/11-01/11-80-Conf-Exp, and its annex 1; and ICC-01/11-01/11-236-Conf-Exp, and its annexes 1 and 2.

01/11-80-Conf-Exp and its annex are concerned, the Chamber notes that, after the provision of his response, the Registrar clarified by email that access thereto should be provided only to the Defence of Mr Al-Senussi. In this regard, the Chamber is of the view that, given the sensitivity of the information contained in the concerned documents, which address matters of international cooperation, as well as the fact that they only relate to Mr Al-Senussi's position before the Court, it is warranted that filing ICC-01/11-01/11-80-Conf-Exp, and its annex, be reclassified as "confidential *ex parte*, only available to the Defence of Mr Al-Senussi". In relation to filing ICC-01/11-01/11-236, and its annexes, the Chamber considers that, while there still exist reasons warranting that they not be made public, these documents must be reclassified as "confidential", and, as such, provided to the Prosecutor and both Defence teams in the present case.

FOR THESE REASONS, THE CHAMBER

ORDERS the Registrar to:

(a) reclassify the following filings as "confidential *ex parte*, only available to the Prosecutor, the Defence of Saif Al-Islam Gaddafi, Libya and the OPCV":

- i. ICC-01/11-01/11-194-Conf;
- ii. ICC-01/11-01/11-194-Conf-Anx1;
- iii. ICC-01/11-01/11-194-Conf-Anx2;
- iv. ICC-01/11-01/11-194-Conf-Anx3;
- v. ICC-01/11-01/11-218-Conf;
- vi. ICC-01/11-01/11-218-Conf-AnxA;
- vii. ICC-01/11-01/11-T-2-CONF-ENG;
- viii. ICC-01/11-01/11-T-2-CONF-FRA;
- ix. ICC-01/11-01/11-T-3-CONF-ENG;

- x. ICC-01/11-01/11-T-3-CONF-FRA;
- xi. ICC-01/11-01/11-221-Conf;
- xii. ICC-01/11-01/11-222-Conf;
- xiii. ICC-01/11-01/11-223-Conf;
- xiv. ICC-01/11-01/11-223-Conf-AnxA;
- xv. ICC-01/11-01/11-223-Conf-AnxB;
- xvi. ICC-01/11-01/11-224-Conf;
- xvii. ICC-01/11-01/11-225-Conf;
- xviii. ICC-01/11-01/11-227-Conf-Red;
- xix. ICC-01/11-01/11-228-Conf-Red;
- xx. ICC-01/11-01/11-228-Conf-Anx5;
- xxi. ICC-01/11-01/11-228-Conf-Anx7;
- xxii. ICC-01/11-01/11-228-Conf-Anx9;
- xxiii. ICC-01/11-01/11-229-Conf;
- xxiv. ICC-01/11-01/11-230-Conf; and
- xxv. ICC-01/11-01/11-233-Conf;

(b) reclassify the following filings as “confidential *ex parte*, only available to the Prosecutor and the Defence of Saif Al-Islam Gaddafi”:

- i. ICC-01/11-01/11-120-Conf-Anx1;
- ii. ICC-01/11-01/11-181-Conf;
- iii. ICC-01/11-01/11-181-Conf-Anx1; and
- iv. ICC-01/11-01/11-182-Conf;

(c) reclassify the following filings as “confidential *ex parte*, only available to the Prosecutor”:

- i. ICC-01/11-01/11-12-Conf;
- ii. ICC-01/11-01/11-12-Conf-Anx1;
- iii. ICC-01/11-01/11-12-Conf-Anx2;
- iv. ICC-01/11-01/11-12-Conf-Anx3;
- v. ICC-01/11-01/11-12-Conf-Anx4;

- vi. ICC-01/11-01/11-25-Conf-Anx1;
- vii. ICC-01/11-01/11-25-Conf-Anx2;
- viii. ICC-01/11-01/11-25-Conf-Anx3; and
- ix. ICC-01/11-01/11-25-Conf-Anx4;

(d) reclassify as “confidential *ex parte*, only available to the Defence of Abdullah Al-Senussi” filings:

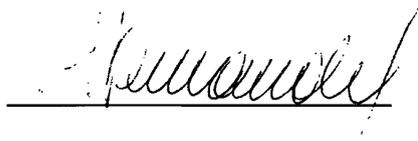
- i. ICC-01/11-01/11-80-Conf-Exp; and
- ii. ICC-01/11-01/11-80-Conf-Exp-Anx1;

(e) reclassify the following filings as “confidential”:

- i. ICC-01/11-01/11-236-Conf-Exp;
- ii. ICC-01/11-01/11-236-Conf-Exp-Anx1;
- iii. ICC-01/11-01/11-236-Conf-Exp-Anx2;
- iv. ICC-01/11-01/11-281-Conf-Exp;
- v. ICC-01/11-01/11-281-Conf-Exp-Anx6; and
- vi. ICC-01/11-01/11-281-Conf-Exp-Anx11;

(f) provide the Defence of Mr Al-Senussi with access to all filings in the record of the case classified as “confidential” which have been submitted before 9 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 Monday, 27 May 2013

At The Hague, The Netherlands