



Original: English

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

Date: 7 May 2012

PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernandez 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

**Request to access documents in relation to the Challenge to the Jurisdiction of the
Court by the Government of Libya**

Source: Office of Public Counsel for Victims

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Mr. Luis Moreno-Ocampo
Ms. Fatou Bensouda

Counsel for the Defence

Mr. Xavier-Jean Keita, Principal Counsel
Ms. Melinda Taylor, Counsel

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms. Paolina Massidda

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

States Representative

Professor Philippe Sands QC
Professor Payam Akhavan
Ms. Michelle Butler

Amicus Curiae

REGISTRY

Registrar & Deputy Registrar

Ms. Silvana Arbia & Mr. Didier Preira

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Procedural background

1. On 1 May 2012, the Government of Libya filed an Application pursuant to article 19 of the Rome Statute (the “Admissibility Challenge”), wherein it requested the Chamber to: (i) postpone execution of the Surrender Request pursuant to article 95 of the Rome Statute and (ii) declare the case inadmissible and quash the Surrender Request.¹

2. On 4 May 2012, the Chamber issued the “Decision on the Conduct of the Proceedings Following the ‘Application on behalf of the Government of Libya pursuant to Article 19 of the Statute’” whereby the Chamber decided, *inter alia*, to : (i) appoint, for the purpose of the admissibility proceedings, Paolina Massidda from the Office of Public Counsel for Victims (the “OPCV”) as legal representative of victims who have already communicated with the Court in relation to the case, (ii) instruct the Registrar to provide the OPCV with information about victims who have communicated with the Court, as well as with any necessary assistance to contact the victim applicants as soon as possible and (iii) instruct the Registrar to notify document ICC-01/11-01/11-130-Red, together with its public annexes, to the Security Council and the OPCV.²

¹ See the “Application on behalf of the Government of Libya pursuant to Article 19 of the Statute”, No. ICC-01/11-01/11-130-Red, 1 May 2012, paras. 107 and 108.

² See the “Decision on the Conduct of the Proceedings Following the ‘Application on behalf of the Government of Libya pursuant to Article 19 of the Statute’”, No. ICC-01/11-01/11-134, 4 May 2012, par. 13.

II. The redacted version of the Application under article 19 of the Rome Statute does not enable victims to identify the grounds justifying the Admissibility Challenge

3. The Principal Counsel notes that she has been only notified of the redacted version of the Admissibility Challenge and its public annexes. Said documents, however, do not enable her to fully understand the grounds on which the Admissibility Challenge is brought before the Chamber.

4. Rule 59(1) and (3) of the Rules of Procedure and Evidence (the “Rules”) allows victims who have already communicated with the Court or their legal representatives to be notified of the “summary of the grounds” on which the admissibility of the case is being challenged. The redacted parts of the Admissibility Challenge concern essentially the description of the subject-matters and the scope of the investigations conducted by the Prosecutor-General in Libya. Without having access to such critical information, the Principal Counsel contends that victims cannot be said to have been notified of the “summary of the grounds” upon which the Admissibility Challenge is being made, as required under rule 59 of the Rules. The Principal Counsel’s capacity to properly prepare for the proceedings is therefore significantly impaired and victims will not be able to enjoy fully their rights provided for in article 19 of the Rome Statute and rule 59 of the Rules.

5. Moreover, victims have a vital interest in ensuring that those responsible for the crimes are put on trial and ultimately convicted. Victims’ views on whether the present case could be tried effectively in Libya will largely depend on whether genuine investigations at the national level are feasible or underway. The genuineness of national judicial proceedings and the actual motives of a State can only be assessed in light of the specific steps and actions taken by the decision-making authorities in the course of the ongoing investigations, if any.

6. On the other hand, victims' specific concerns regarding their safety and security may be more appropriately addressed if the Principal Counsel is fully acquainted with the exact nature of the crimes allegedly charged, as well as the date and location in which each of the crimes is alleged to have been committed. Furthermore, there is a need for the victims to be able to discern the actual scope of national investigations and to understand what types of material have been collected or adduced in order for them to form their own opinion.

7. The Principal Counsel emphasises that the present request does not aim at collecting, indiscriminately, all material on which the parties or participants intend to rely for the purposes of admissibility proceedings. Rather, the individual items requested relate to issues specific to the interests and rights of victims and thus, access to this material is necessary to ensure the effective and meaningful participation of victims in article 19 proceedings.

8. In this regard, the Principal Counsel notes the jurisprudence of the various Chambers of the Court, which have systematically granted access to the OPCV – in its capacity of legal representative of victims for the purposes of article 19 proceedings – to documents pertaining to admissibility challenges, including documents classified confidential, when relevant.³

9. The Principal Counsel understands that, at the time when the Admissibility Challenge was filed, the Representatives of the Government of Libya were not able to anticipate the Chamber's decision to appoint her as the legal representative of victims for the purpose of the admissibility proceedings. This is the reason why the Principal Counsel submits that it is necessary, at this important stage of the

³ See, *inter alia*, Trial Chamber III's Oral Decision, No. ICC-01/05-01/08-T-20-Red-ENG WT2, 8 March 2010, pp. 5-6, as well as the "Decision Prescribing the Procedure to be Followed Under Article 19 of the Statute (Rule 58 of the Rules of Procedure and Evidence)" (Trial Chamber II), No. ICC-01/04-01/07-943-Conf-tENG, 5 March 2009.

proceedings, for the Chamber to strike a reasonable balance between the rights of victims and the protection of witnesses and other security interests of a State.

10. In the present case, communication of the unredacted version of the Admissibility Challenge and of some of the confidential annexes attached thereto to the Principal Counsel does not present any tangible risk or threat to individuals since the Applicant has chosen to withhold the most sensitive information, *i.e.* identifying details of witnesses.

11. In light of the Chamber's determination that the submissions by the Government of Libya with regard to admissibility must to be understood to only concern the case against Mr. Saif-Al Islam Al Gaddafi, the Principal Counsel does not intend to seek access to confidential material concerning Mr. Abdullah Al-Senussi, unless, in the Chamber's determination, said material is also relevant for the Admissibility Challenge. On the contrary, information relating to the scope of the investigations and the possible charges under Libyan Criminal Code against Mr. Gaddafi has a direct impact on the core interests of victims, as discussed above, and the Principal Counsel should therefore be granted access to them.

12. Finally, due to the fact that the Office has had, to date, no access to an index of the record of the case, the Principal Counsel is not in a position to identify all documents which may be of interest for the fulfilment of her mandate on behalf of victims in relation to article 19 proceedings. The Principal Counsel, therefore, leaves it to the determination of the Chamber to appreciate whether other documents in the record of the case might affect the interests of victims for the purpose of article 19 proceedings.

FOR THE FOREGOING REASONS, the Principal Counsel respectfully requests the Pre-Trial Chamber

- a) To order the notification to the OPCV of the unredacted version of the Application under article 19 of the Rome Statute filed by the Government of Libya;
- b) To order the notification to the OPCV of the following Annexes attached to the Application under article 19 of the Rome Statute:
 - a. The Report by Prosecutor General as to Scope of Investigation of Saif Al-Islam Gaddafi and Libyan Criminal Procedure (Annex C);
 - b. The Provisional Detention Orders relating to Saif Al-Islam Gaddafi (Annex D);
 - c. The Report of Prosecutor General regarding possible charges under Libyan Criminal Code (Annex I);
- c) To order the notification to the OPCV of any other document filed confidential in the record of the case which the Chamber might identified as relevant to article 19 proceedings;
- d) To order to systematically notify the OPCV with any document submitted by the parties, participants, the Government of Libya and the Security Council related to Admissibility Challenge and which might be classified confidential – on the same basis as the other parties and participants in the article 19 proceedings.

The Principal Counsel respectfully asks the Chamber to treat this request on an urgent basis considering that the latter requested the observations of the victims having communicated with the Chamber to be submitted no later than 4 June 2012.⁴

A handwritten signature in black ink, reading "Paolina Massidda", with a horizontal line drawn underneath the name.

Paolina Massidda

Principal Counsel

Dated this 7th day of May 2012

At The Hague, The Netherlands

⁴ See *supra* note 1, p. 7.