



Original: English

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

Date: 4 February 2013

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 and Redacted

Public and redacted version of “Libyan Government’s proposed redactions to ICC-01/11-01/11-258-Conf-Exp and Annexes 4, 5, 6, 7, 15, 16 and 17”

Source: The Government of Libya, represented by:
Professor Ahmed El-Ghani
Professor Philippe Sands QC
Professor Payam Akhavan
Ms Michelle Butler

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

The Office of the Prosecutor

Ms. Fatou Bensouda

Counsel for the Defence

Counsel for Abdullah Al-Senussi:

Mr. Ben Emmerson QC

Mr. Rodney Dixon

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms. Paolina Massidda

Ms. Sarah Pellet

Mr. Mohamed Abdou

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

Counsel for Saif Al-Islam Gaddafi:

Mr. Xavier-Jean Keita

Ms. Melinda Taylor

State's Representatives

Professor Ahmed El-Gehani

Professor Philippe Sands QC

Professor Payam Akhavan

Ms. Michelle Butler

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia

Counsel Support Section

Deputy Registrar

Mr. Didier Daniel Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section Other**

I. INTRODUCTION

1. A Confidential and *Ex Parte* (Pre-Trial Chamber and Prosecution) request for proposed redactions was filed pursuant to the Pre-Trial Chamber's Decision of 30 January 2012 concerning Libya's ex parte submission of evidence relevant to its challenge to the admissibility of the case against Saif Al-Islam Gaddafi on 4 February 2012.¹ A further Confidential and *Ex Parte* (OPCD and OPCV) version of the request was also submitted to the Court on 4 February 2012. This Public version is filed as a matter of courtesy.

II. PROCEDURAL HISTORY

2. 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"² in which it requested Libya to provide further submissions and evidence in support of its admissibility challenge by 23 January 2013.
3. On 23 January 2013 the Libyan Government filed its further submissions ("Libya's Submissions") together with 23 annexes. These submissions and 7 of its annexes were filed Confidential and Ex Parte (Pre-Trial Chamber and Prosecution only). A public redacted version of the submissions and 16 public annexes was also filed the same day. In a discrete section of its submissions, Libya requested that the Chamber accept the provision of the concerned sample investigative material on an ex parte basis.³
4. On 29 January 2013, the OPCD filed the "Urgent Defence request to dismiss Libya's Submissions". The OPCD request was based on Libya's alleged failure to adduce legal and factual grounds which would warrant filing sample investigative materials on an ex parte basis. The OPCD submitted 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

¹ ICC-01/11-01/11-262.

² ICC-01/11-01/11-239.

³ ICC-01/11-01/11-258-Red, para 29-46.

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”.

5. The Pre-Trial Chamber, in its 30 January 2012 “Decision concerning Libya’s ex parte submission of evidence relevant to its challenge to admissibility of the case against Saif Al-Islam Gaddafi”⁴ found that in light of the risk of disclosure of the sample evidence undermining national criminal proceedings, leading to witness intimidation and risks to national security, it was appropriate to withhold the materials from the public and therefore confidential filing remained warranted. However, the Chamber was not persuaded that the real and substantial risk identified by Libya would be caused by the provision of this material to Counsel for the OPCD, acting as the Defence of Mr Gaddafi. In its Decision the Pre-Trial Chamber held:

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

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’ (ie. Annexes 4 to 7 and 15 to 17) have to be reclassified in order to provide the OPCD with access thereto.

Nevertheless the Chamber finds it appropriate, prior to such reclassification, to

⁴ ICC-01/11-01/11-262.

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."

III. SUBMISSIONS REGARDING RELIANCE UPON EX PARTE MATERIALS

6. Libya continues to rely upon the submissions made in its 23 January 2013 filing (at paragraphs 29 to 46) justifying the need for utmost confidentiality with respect to its submission of sample investigative materials to the Court. It will be recalled from that filing that provision of sample investigative materials to any of the organs of the ICC during the investigative phase of national proceedings constitutes a breach of article 59 of the Libyan Criminal Procedure Code. Libya is confident that it need not remind the Court of the considerable reticence it has had to overcome to make any of these materials available to the Court. It has done so, despite entirely understandable resistance to breaching national laws, as an exceptional measure justified only by the wish to cooperate fully with the Court and to demonstrate to the Court that it is willing and able to prosecute the case of Saif Al-Islam Gaddafi in Libya.
7. In Libya's view, the exceptionality of the disclosure of sample investigative materials during the investigative phase, coupled with the risks summarised above, justifies their provision to the Court on a Confidential and *Ex Parte* basis (Pre-Trial Chamber and Prosecution only). This is because contrary to the submissions of the OPCD,⁵ withholding of these materials from the Defence does not – in a civil proceeding relating only to jurisdiction – prevent the Defence from raising key issues pertaining to the rights of the Defendant. Libya accepts that in the case law of the ICC the Prosecution have on occasion been required to withdraw allegations or charges if they were not in a position to disclose the information to the Defence due to legal obligations to

⁵ ICC-01/11-01/11-261-Red, paras 20-24.

information providers.⁶ However, those rulings apply to disclosure within the context of a criminal trial. The ICC Rules of Procedure and Evidence themselves makes clear that very different considerations apply to the rules of evidence in admissibility assessments (which are in essence civil rather than criminal proceedings) “since the dispute does not pertain to the guilt or innocence of the person, but simply to deciding the appropriate forum”.⁷

8. Indeed, it is notable that despite the OPCD’s repeated reference to the purportedly analogous right to equality in extradition proceedings, the authorities cited for its assertion - that in extradition proceedings a defendant is entitled to disclosure of underlying investigative materials - do not establish this proposition at all.⁸ As the Pre-Trial Chamber will be aware, extradition proceedings are not to be equated with criminal proceedings for the purposes of disclosure to the defence. In extradition proceedings it is for the requesting state to decide what material it chooses to place before the court in support of its application. The right of the defence to contest the underlying factual basis of an extradition request and thus to comment upon the material upon which the Court will be basing its decision (ie. the narrative account of the factual basis for the extradition request provided by the requesting state), does not extend to the right to disclosure of the investigative materials underpinning that request. A cursory study of a European Arrest Warrant establishes this proposition.
9. The OPCD also claims that without sight of the samples of investigative materials, the Defence is “completely deprived of the ability to verify whether the Government is actively investigating the Defendant and whether such investigations encompass the same conduct as the ICC case”.⁹ This submission is misconceived. The fact that the Government is actively investigating the case and that the investigation encompasses the same conduct as the ICC case are demonstrated in the *inter partes* elements of Libya’s 1 May 2012 and 23 January

⁶ ICC-01/04-01/06-1019, at para 28; ICC-01/04-01/06-1401, at para 6.

⁷ Rule 81(2).

⁸ ICC-01/11-01/11-261-Red.

⁹ ICC-01/11-01/11-261-Red, paras 45-49.

2013 submission. The provision of several pieces of sample investigative materials do not materially assist in demonstrating either aspect and are provided only in order to comply with the Court's direct request to see these documents. Examination of underlying investigative evidence would only materially assist in demonstrating that the investigations cover all of the same conduct as the ICC case in the event that an examiner had the opportunity to view the entirety of the ICC case file together with the entirety of the Libyan case file. Although Libya has expressed willingness to invite a delegation to Libya in order to conduct this kind of examination, that kind of full examination is not presently possible on the evidence submitted to the Court to date and the Defence thus suffers no material prejudice by not having sight of the samples of evidence which have been provided *ex parte* to the Court and the Prosecution.

10. The mere fact that the Court has asked for sample pieces of evidence does not mean the Defence is excluded from participating in the essential elements of the Chamber's admissibility determination by virtue of such samples being provided on an *ex parte* basis. With or without such samples it remains the case that all of the essential elements of Libya's admissibility challenge are set out in the *inter partes* materials submitted to date to the Court.
11. For all these reasons, Libya submits that there is no lawful impediment to *ex parte* submission of sample pieces of investigative evidence such that they are not accessible by the Defence. However, in the event that the Pre-Trial Chamber continues to reject this submission, Libya suggests the following redactions prior to making any disclosure to the Defence.

IV. PROPOSED REDACTIONS APPLICABLE TO THE DEFENCE

12. If Libya's principal request for *ex parte* submission is rejected again by the Pre-Trial Chamber, in the spirit of cooperation and in order to provide maximum possible information available to the OPCD, Libya is willing to provide to the

OPCD a Confidential version of its submission from the 23rd January 2013 which provides access to all details within it except for the names of the witnesses whose statements are annexed to the submission. The proposed version of this submission which may be made available to the OPCD is at Annex A to this filing. The only difference between this Confidential version and the Confidential and Ex Parte version filed on 23 January 2013 is that names of the persons whose witness statements have been annexed to the submission are redacted from paragraph 49 and footnotes 55, 81, 87 to 96 and the list of annexes at pages 51 to 52 of the submission.

13. Likewise, Libya is willing, should the Court order that reliance upon *ex parte* materials is not possible, to provide unredacted versions of the aircraft information and transcripts of intercepts to the OPCD. These documents were originally filed as Confidential and Ex Parte Annexes 5, 6, 7 and 17 to Libya's 23 January 2013 submission.
14. However, due to concerns for the safety of witnesses, it is of vital importance for Libya to continue to adopt a precautionary approach to the disclosure of the sample witness statements which were originally filed as Confidential and *Ex Parte* Annexes 4, 15 and 16 to Libya's 23 January 2013 submission. Libya's concern with providing unredacted witness statements to the OPCD stems from the continuing extensive influence and resources of former Gaddafi era high level officials [REDACTED]. [REDACTED].
15. [REDACTED]. [REDACTED].
16. [REDACTED]. [REDACTED]. [REDACTED].
17. [REDACTED]. The redaction of such information – even from the OPCD – is necessary because confidentiality of vulnerable witnesses is the main protective measure relied upon in the Libyan criminal justice system during the investigative phase of proceedings. The same heightened concern for confidentiality does not apply to witnesses who are presently in custody in Libya (eg. [REDACTED]) as the safety of such witnesses can be assured through their secure incarceration. Likewise, the fact that Mr Gaddafi is only

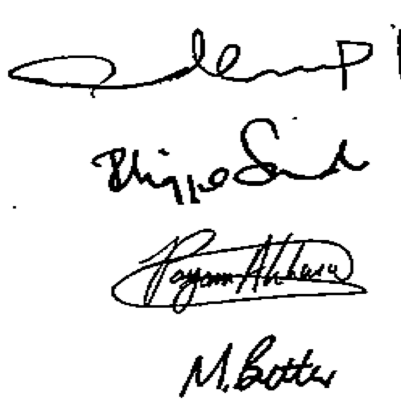
able, during the investigative phase of proceedings, to view the investigative file in a restricted manner (ie. with all witness identifying information being withheld from him) while in custody provides a means of protecting its confidentiality during this phase. Unless redactions are applied to identifying information the confidentiality of witness statements cannot be fully protected when such materials are provided to the OPCD.

18. [REDACTED]. [REDACTED]. [REDACTED].
19. [REDACTED]. [REDACTED]. Annexes 2, 3 and 4 to this filing respectively contain the English language Confidential and *Ex Parte* versions of Annexes 4, 15 and 16 to Libya's 23 January 2013 submission. These Annexes highlight in grey shading the text which either could be used to identify the witnesses [REDACTED] and which it is proposed should be redacted from any Confidential version to be provided to the OPCD.
20. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]. As soon as the Pre-Trial Chamber is able to provide this guidance as to the appropriate levels of redactions which should be made to these Annexes [REDACTED] Libya undertakes to provide redacted English and Arabic versions to the OPCD as soon as possible.
21. Finally, Libya also notes that the redactions set out above are proposed only in relation to the OPCD. It remains Libya's position that due to the exceptionality of the provision of underlying investigative materials to the Court and the need to restrict disclosure of such materials as much as possible in order to uphold the confidentiality protections of Libyan law, that it is not appropriate for such materials to be provided in any form to either the OPCV or the Defence for Mr Al-Senussi. If however, the Pre-Trial Chamber were to take a different view on this matter, then Libya's position is that for the reasons outlined above the same redacted versions to be provided to the OPCD should be made available to the OPCV and the Defence for Mr Al-Senussi.

V. CONCLUSION

22. The Libyan Government respectfully requests that the Pre-Trial Chamber accept its proposal for redactions prior to making the Confidential and *Ex Parte* materials filed on 23 January 2013 available to the OPCD.

Respectfully submitted:



Professor Ahmed El-Ghani
 Professor Philippe Sands QC
 Professor Payam Akhavan
 Ms Michelle Butler
*Libyan ICC Coordinator and
 Counsel on behalf of the Government of Libya*

Dated this 4th day of February 2013
 At London, United Kingdom