

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/11-01/11
Date: 7 February 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 Redacted

URGENT

Decision on the “Libyan Government’s proposed redactions to ICC-01/01-01/11-258-Conf-Exp and Annexes 4, 5, 6, 7, 15, 16 and 17”

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
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States Representatives
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Amicus Curiae

REGISTRY

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 present decision on the “Libyan Government’s proposed redactions to ICC-01/01-01/11-258-Conf-Exp and Annexes 4, 5, 6, 7, 15, 16 and 17.”¹

1. On 16 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”) as counsel for Mr Gaddafi.²

2. 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 (the “Admissibility Challenge”).³

3. The responses to the Admissibility Challenge by the Prosecutor⁴ and the Office of Public Counsel for victims (the “OPCV”),⁵ and by the OPCD⁶ were filed on 4 June 2012 and 24 July 2012 respectively.

4. On 9 and 10 October 2012, the Chamber held a hearing on the admissibility of the case against Mr Gaddafi, in the presence of representatives of Libya, the Prosecutor, the OPCD and the OPCV.⁷

5. 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”, whereby it: (i) requested Libya to provide the evidence on which it intends to rely for the purposes of its Admissibility Challenge and its

¹ ICC-01/11-01/11-265-Conf-Exp and annexes thereto.

² ICC-01/11-01/11-113.

³ ICC-01/11-01/11-130-Red.

⁴ ICC-01/11-01/11-167-Red.

⁵ ICC-01/11-01/11-166-Red-Corr.

⁶ ICC-01/11-01/11-190-Corr-Red.

⁷ ICC-01/11-01/11-T-2-CONF-ENG and ICC-01/11-01/11-T-3-CONF-ENG, respectively.

submissions on a number of issues identified in the decision, by 23 January 2013; and (ii) ordered the Prosecutor, the OPCD and the OPCV to provide their response to Libya's further submissions, by 11 February 2013.⁸

6. In compliance with the Chamber's decision, on 23 January 2013, Libya filed its further submissions ("Libya's Submissions"), together with a number of annexes attached thereto.⁹ Libya filed its submissions "confidential *ex parte*, only available to the Chamber and the Prosecutor", and assigned this same level of classification to seven out of the 23 annexes attached thereto.¹⁰ In this regard, in a discrete section of its Submissions, Libya requests that the Chamber accepts the provision of the concerned sample investigative material on an *ex parte* basis.¹¹

7. On 30 January 2013, the Chamber issued the "Decision concerning Libya's *ex parte* submission of evidence relevant to its challenge to the admissibility of the case against Saif Al-Islam Gaddafi",¹² whereby the Chamber: (i) determined that, given the risk identified by Libya, the *ex parte* material filed by Libya can be withheld from the public, and, accordingly, that the submission of sample investigative materials on a confidential basis is warranted;¹³ (ii) decided that Libya had not provided a proper legal and factual basis for the classification as "*ex parte*" of the concerned material, thereby precluding access thereto to the OPCD and, therefore, that such material has to be reclassified;¹⁴ and (iii) granted Libya an opportunity to request discrete redactions to the material prior to its reclassification.¹⁵

⁸ ICC-01/11-01/11-239.

⁹ ICC-01/11-01/11-258-Conf-Exp. A public redacted version is also available.

¹⁰ Annexes 4, 5, 6, 7, 15, 16 and 17 to Libya's Submissions.

¹¹ Libya's Submissions, paras 29 to 46.

¹² ICC-01/11-01/11-262.

¹³ *Ibid.*, para. 11.

¹⁴ *Ibid.*, para. 13.

¹⁵ *Ibid.*, para. 14 and p. 7.

8. On 4 February 2013, Libya filed its proposed redactions to the concerned *ex parte* material (i.e. ICC-01/11-01/11-258-Conf-Exp and its *ex parte* Annexes).¹⁶

9. The Chamber notes article 57(3)(c) and 68(1) of the Rome Statute and regulation 23 *bis* of the Regulations of the Court (the “Regulations”).

10. Libya submits that Annexes 5, 6, 7 and 17 to its Submissions do not need any redactions prior to being shared with the OPCD.¹⁷ Therefore this material can be reclassified as such.

11. As concerns the sample of witness statements which were originally filed as confidential *ex parte* Annexes 4, 15 and 16 to Libya Submissions, Libya submits that the redaction of all identifying information of the witnesses 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”¹⁸ and that “[u]nless redactions are applied to identifying information the confidentiality of witness statements cannot be fully protected when such material are provided to the OPCD”.¹⁹

12. The Chamber takes note of Libya’s submission in relation to the need to keep the witnesses’ identity confidential as a protective measure in the context of its domestic procedure. In this regard, the Chamber recognizes that the national authorities are best placed to assess whether and what type of protective measures are required in the context of their own domestic investigations. The Chamber notes that, similarly, maintaining the confidentiality of certain information is one of the protective measures

¹⁶ ICC-01/11-01/11-265-Conf-Exp. A confidential *ex parte* version also available to the OPCD and the OPCV as well as a public redacted version have also been filed in the record of the case.

¹⁷ ICC-01/11-01/11-265-Conf-Exp, para. 13.

¹⁸ *Ibid.*, para. 17.

¹⁹ *Ibid.*, para. 17.

regularly taken within the criminal proceedings before this Court with a view to protecting, *inter alia*, the safety of witnesses. In the present circumstances, and considering the submissions made by Libya, the Chamber is of the view that the redactions of the identities of the concerned witnesses is the least intrusive measure that can be taken to mitigate the risk identified by Libya. Taking into account the limited scope and purpose of the present admissibility proceedings, the Chamber also considers that the discrete redactions to the identity of the witnesses do not affect the comprehension of the concerned material and, therefore, the ability of the OPCD to provide a meaningful response to Libya's Submissions. Accordingly, the redactions proposed by Libya of the names and the identifying information of the concerned witnesses may be granted.

13. Libya further submits that, while the redaction of the witnesses' identifying details constitutes the minimum redaction possible, it may be necessary that more information be redacted before the material is shared with the OPCD. To this effect, Libya states that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]²⁰ and [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].²¹ "However, according to Libya, [REDACTED]

[REDACTED]

[REDACTED].²² Therefore Libya seeks the guidance of the Chamber to determine, [REDACTED]

²⁰ *Ibid*, para. 20.

²¹ *Ibid*, para. 19.

²² *Ibid*, para. 20.

[REDACTED], the appropriate levels of redactions which should be made to Annexes 4, 15 and 16 to Libya's Submissions.²³

14. The Chamber [REDACTED]
[REDACTED]
[REDACTED]. On this basis, the Chamber [REDACTED]
[REDACTED]. Accordingly, in the present circumstances, and in light of Libya's submission, it is unnecessary for the Chamber to assess whether the additional redactions proposed are justified. Libya is accordingly authorised to redact from the sample witness statements attached as Annexes 4, 15 and 16 to Libya's Submissions only the minimum redactions as referred to above, i.e. the identifying information of the witnesses (their names, date and place of birth, profession, address, telephone number, and discrete information, which by itself or in combination, would lead to the clear identification of the witnesses).

15. Libya further requests that its Submissions be given to the OPCD with a number of redactions only limited to the names of the witnesses whose statements are attached as Annexes 4, 15 and 16.²⁴ A proposed redacted version which may be made available to the OPCD is attached as Annex A to Libya's request for redactions. The Chamber observes that redaction of the identifying details of the three concerned witnesses is authorised in the present decision. Accordingly, the same redactions of the witnesses' names may be applied to Libya's Submissions. The redactions proposed in Annex A to Libya's request for redactions are therefore granted.

²³ *Ibid*, para. 20.

²⁴ *Ibid*, para. 12.

16. Finally, the Chamber notes that Libya submits that, while, in principle, “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 the 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”.²⁵

17. In this regard, the Chamber recalls that it has previously determined that the reasons provided by Libya to maintain the confidentiality of the concerned material only warranted that said material be withheld from the public at large, rather than from the parties and participants in the present case.²⁶ Furthermore, the Chamber observes that, in accordance with rule 59 of the Rules and as determined by the Chamber, the OPCV, acting on behalf of the victims having communicated with the Court in relation to the case, is entitled to make observations on the Admissibility Challenge. Therefore, in the absence of a proper reason justifying the contrary, the OPCV should in principle be given access to the relevant material. The same applies to the Defence for Mr Al-Senussi considering the repeated references from Libya to a prospective joint trial of Mr Gaddafi and Mr Al-Senussi at the national level in view of the close relationship between the allegations against senior Gaddafi regime officials.²⁷ In these circumstances, the concerned material is indeed of relevance for the Defence for Mr Al-Senussi – despite not being a party to the specific admissibility proceedings with respect to the case against Mr Gaddafi – in relation to the proceedings before the Court concerning Mr Al-Senussi.

²⁵ *Ibid*, para. 21.

²⁶ ICC-01/11-01/11-262, para. 11.

²⁷ E.g. Libya’s Submissions, para. 59; ICC-01/11-01/11-260, para. 12; ICC-01/11-01/11-264, para. 24.

18. In this respect, the Chamber considers necessary and proportionate the redactions of the witnesses' identifying information as proposed by Libya. Accordingly, upon consideration of Libya's submissions, the Chamber grants Libya's alternative request that the OPCV and the Defence of Mr Al-Senussi be given access to the concerned material with the same redactions hereby authorised by the Chamber *vis-à-vis* the OPCD.

19. Finally, in light of the fact that the concerned material has not yet been provided to the OPCD and the OPCV, the Chamber finds it appropriate to extend the time limit for their responses to Libya's Submissions, currently due for Monday, 11 February 2013. In this regard, the Chamber considers appropriate to extend the time limit to Monday, 18 February 2013.

FOR THESE REASONS, THE CHAMBER

ORDERS the Registrar to reclassify as "confidential" Annexes 5, 6, 7 and 17 to ICC-01/11-01/11-258-Conf-Exp;

ORDERS Libya to file in the record of the case, as a confidential document, the version of its Submissions filed as Annex 1 to ICC-01/11-01/11-265-Conf-Exp, by 8 February 2013;

ORDERS Libya to file in the record of the case, as confidential documents, a version of Annexes 4, 15 and 16 wherein only the identifying information of the concerned witnesses are redacted, by 8 February 2013; and

ORDERS the OPCD and the OPCV to provide any response to Libya's Submission by 18 February 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 7 February 2013

At The Hague, The Netherlands