

**Cour
Pénale
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**International
Criminal
Court**

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Date: 11 March 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 & Redacted

Government of Libya's Application for Leave to Appeal the "Decision on the Urgent Defence Request"

Source: The Government of Libya, represented by:
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Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. INTRODUCTION

1. The Government of Libya files this application before Pre-Trial Chamber I (“the Chamber”) for leave to appeal its “Decision on the ‘Urgent Defence Application’”, dated 1 March 2013 (“the Impugned Decision”).¹ It does so pursuant to article 82(1)(d) of the ICC Statute, Rule 155 of the Rules of Procedure and Evidence, and Regulation 65 of the Regulations of the Court.
2. In the Impugned Decision, the Chamber instructed the Registrar to request Libya, through the appropriate channel in accordance with article 87(1)(a) of the Statute, to return to the Defence the originals of the materials seized in Zintan (“the materials”) and destroy any copies thereof. It did so on the following basis:

In relation to the material seized from the Defence by the Libyan authorities, the Chamber notes article 48(4) of the Statute that provides that Counsel “shall be accorded such treatment as is necessary for the proper functioning of the Court”. The Chamber considers that the inviolability of documents and materials related to the exercise of the functions of the Defence constitutes 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. This holds true in particular considering that the materials at issue were seized from the Defence in the occasion of a privileged visit specifically authorized by the Chamber and agreed by Libya, in the context of the admissibility proceedings initiated before the this Chamber.² (emphasis added)

3. With reference to the scope of its authority, the Chamber held that:

The Chamber is not in a position to determine whether an exception to the principle of inviolability of the concerned documents would be justified, and therefore whether the privilege should be lifted. Such a

¹ ICC-01/11-01/11-291. The parties were notified of this decision on 1 March 2013.

² ICC-01/11-01/11-291, para 25.

determination cannot be made in the abstract but would require an assessment of the particular circumstances surrounding the events in Zintan. In this regard, the Chamber reiterates that it is not the competent organ to establish such factual circumstances and it does not have the power to seek and receive submissions of fact and law in relation to these events.³

4. The Chamber ordered that:

In the absence of a waiver of privileges and immunities by the appropriate organ of the Court, the principle of inviolability of the Defence documents stands fully. Accordingly, Libya must return to Counsel the originals of the materials belonging to the Defence and seized in Zintan as well as destroy any copies thereof.⁴

5. Article 48(4) of the Statute provides that:

Counsel, experts, witnesses or any other person required to be present at the seat of the Court shall be accorded such treatment as is necessary for the proper functioning of the Court in accordance with the agreement on the privileges and immunities of the Court.

6. Article 67(1) sets out the accused's right to a fair trial and the applicable minimum guarantees.

II. BASIS FOR THE APPLICATION FOR LEAVE TO APPEAL

7. The Government of Libya seeks leave to appeal the Impugned Decision on the basis that it gives rise to the following issue, which significantly affects the fair and expeditious conduct of the proceedings, and for which an immediate resolution by the Appeal Chamber may materially advance the proceedings, namely:

³ Ibid., para. 26.

⁴ Ibid., para. 27.

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.”

8. Without seeking to limit the parameters of any review by the Appeals Chamber, it is submitted that this issue requires consideration of the following important questions:

- 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”.⁵

- 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.
9. It is submitted on behalf of the Government of Libya that the cumulative requirements of article 82(1)(d) for leave to appeal are satisfied. Specifically, the identified issue significantly affects the fair and expeditious conduct of the admissibility proceedings, and its immediate resolution by the Appeals Chamber may materially advance the proceedings.

III. SATISFACTION OF THE REQUIREMENTS OF ARTICLE 82(1)(d)

10. When determining whether this issue is appealable pursuant to article 82(1)(d), the underlying correctness of the decision is irrelevant. The sole question before the Chamber is whether the issue satisfies the cumulative criteria for leave to appeal.⁶ Accordingly, any reference by the Government to any errors contained

⁵ ICC-01/11-01/11-T-2-CONF-ENG, p.31, line 20, as cited in the Impugned Decision at para. 26.

⁶ ICC-02/04-01/05-20, para 20.

within the decision is only made to demonstrate, where necessary, satisfaction of those criteria.

i. *An "issue"*

11. It is submitted by the Government of Libya that the issue identified at paragraph 7 is an "issue" within the requisite meaning of article 82(1)(d). That is, it is "an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion."⁷ It also clearly emanates from the impugned decision and is not merely an abstract question or a hypothetical concern.⁸

ii. *The issue significantly affects the fairness of the proceedings*

12. The issue affects the fairness of the proceedings vis-à-vis the Government of Libya. Fairness is preserved when a party is provided with the genuine opportunity to present its submissions and to be appraised of, and comment on, the observations and evidence submitted to the Court that might influence its decision. The ruling of the Pre-Trial Chamber that the materials were inviolable as they "related to the exercise of the functions of the Defence" effectively stripped the Government of the opportunity to present submissions and observations regarding the circumstances of their seizure, the status of the documents and their relevance to the consideration of the Libyan Government's conduct for the purposes of the admissibility determination.

13. The OPCD has on many occasions in both written and oral submissions ventilated its view of such matters before the Pre-trial Chamber in the context of the substantive admissibility challenge.⁹ Although the Pre-Trial Chamber made

⁷Situation in the Democratic Republic of the Congo, ICC-01/04-168, 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, para. 9 ("Lubanga Extraordinary Review Decision").

⁸ Pre-Trial Chamber II, Bemba Leave to Appeal Confirmation Decision, para 17. See also, Prosecutor v. Bemba, ICC-01/05-01/08-75, Pre-Trial Chamber III, Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure, 25 August 2008, para. 11.

⁹ Examples include: "Defence Response to the "Application on behalf of the Government of Libya pursuant to Article 19 of the Statute" (ICC-01/11-01-190-Corr-Red) (31 July 2012), para 275: "The fact that the Prosecuting

clear at the hearing that it was not the proper forum for such submissions,¹⁰ the OPCD has repeatedly ignored this directive and has continued to refer to these issues on many occasions in order to undermine Libya's admissibility challenge.

14. The circumstances of the seizure of the material and the conduct of those representing Mr Gaddafi are matters that are disputed by both parties. The Chamber's ruling regarding the status of the material amounts to a pre-emptive and *ultra vires* determination of the propriety of the behaviour of the OPCD. That determination is unfairly prejudicial to the Government and has a deleterious impact on the fairness of the admissibility proceedings as a whole.

15. In reaching this determination, the Chamber applied article 48 of the Statute and made reference to the privileges and immunities in the APIC without giving proper consideration to the applicability of article 48 of the Statute or the APIC to Libya and without proper regard to Libya's non ratification of the APIC or seeking the submissions or observations of the parties. It also failed to give any regard to the current negotiation of a bilateral Memorandum of Understanding with the Registrar regarding issues of cooperation, privileges and immunities, which suggests that article 48 and the APIC may not apply *simpliciter*, or possibly at all. This is notwithstanding that the "materials at issue were seized from the Defence in the occasion of a privileged visit specifically authorized by

authorities blatantly disregarded the possible existence of legal procedures – which are designed to protect the rights of the defendant and due process – by subsequently ordering that all the Defence documents should be seized and reviewed by persons armed to the teeth with AK47s is certainly not consistent with an intention to respect the rights of the Defence in an independent and impartial manner.”; “Urgent Defence Request” (ICC-01/11-01/11-255) (21 January 2013), paras 5-6: “the [domestic] allegations are predicated on privileged Defence materials, which were illegally seized from the Defence and the defendant, an information garnered from a privileged meeting, which was illegally and deceptively monitored...the mere existence of such a trial therefore exhibits the Government of Libya's complete disregard for its obligations under the Rome Statute, and the vacuity of its promises to the Court.”. In the course of the admissibility hearing, numerous references were made to the Zintan visit, including: “The seizure of confidential Defence documents and information will also act as a deterrent against any person volunteering to assist or testify for the defence of Mr Gaddafi Article 17(2) does not require the Court to definitively assess that it is impossible for Mr Gaddafi to have a fair trial; it only requires the Court to determine that the proceedings lack both independence and impartiality and are not being conducted in a manner which is consistent with an attempt to ensure his fair trial rights...the aforementioned violations of Mr Gaddafi's right to a fair, independent and impartial trial are still relevant to the admissibility of the case.” (ICC-01/11-01/11-T-3-CONF-ENG ET (Open Session) 10-10-2012 at pages 12-13.

¹⁰ Prior to the hearing, the Chamber had circulated an email setting out guidance for the substance of the proceedings, which made no reference at all to the events in Zintan (Email from Silvestro Stazzone (ICC) to legal representatives of Libyan Government (03 October 2012), Subject: List of issues to be included in Libya's oral submissions). In the course of the hearing, Presiding Judge Fernandez de Gurmendi commented that “REDACTED.” (ICC-01/11-01/11-T-2-CONF-ENG (Closed Session) 09-10-2012, page 31 lines-16-21).

the Chamber and agreed by Libya, in the context of the admissibility proceedings initiated before this Chamber.”¹¹

16. It is submitted that the fact of that privileged visit does not, of itself, determine the question of the proper applicability of article 48 or the APIC nor can it, of itself, determine the question of whether the “documents and materials relate to the exercise of the functions of the Defence” (emphasis added). Nevertheless, the Chamber made this determination, which may, in its final adjudication, be weighed against the merits of the Government’s admissibility challenge, without full ventilation of the contentious issues by the parties and, accordingly, in a manner which significantly impacts upon the fairness of the proceedings.
17. To the extent that article 48 and the APIC may apply to Libya, any dispute regarding the applicable scope of the functional immunities enjoyed by counsel for Mr Gaddafi, including the initial determination that the materials “relate to the exercise of the functions of the defence” may also be questions to be considered by the Presidency, not by the Pre-Trial Chamber in the course of the admissibility proceedings. This is the view thus far taken by the Pre-Trial Chamber, which, in the absence of a ruling that none of the disputed circumstances surrounding the OPCD’s Zintan mission in June-July 2012 are relevant to the merits of the admissibility hearing, amounts to a presumptive determination that the government acted improperly.
18. Pursuant to the Chamber’s approach to this question, the entirely unsatisfactory position inures that a State is precluded from taking action to protect its national security at a time of heightened risk even if there might be a reasonable apprehension of a security risk arising from: (i) the OPCD REDACTED (ii) the transmission of information contained within the papers seized (which on the OPCD’s own account included a letter from REDACTED to Mr Gaddafi).
19. Furthermore, in determining that there must be an express waiver of privilege,

¹¹ Impugned Decision, para 25.

the Chamber failed to give reference to, or seek and consider the parties' submissions and observations in relation to, the applicability of article 24(1) of APIC, which provides that:

The Court shall cooperate at all times with the appropriate authorities of States Parties to facilitate the enforcement of their laws and to prevent the occurrence of any abuse in connection with the privileges, immunities and facilities referred to in the present Agreement" and Article 26(1) further provides with respect to waiver of privileges and immunities that "there is a duty to do so in any particular case where they would impede the course of justice.

20. This apparent failure impacts further upon the fairness of the proceedings as, again, the Libyan Government has been stripped of an opportunity to address matters that may be weighed against the merits of the Government's admissibility challenge.
21. In summary, it is submitted that the Chamber's ruling will significantly impact upon the fairness of the admissibility proceedings because the OPCD has, throughout the proceedings, sought to impeach the good faith of the Libyan Government by invoking the alleged violation of the privileged status of these documents. The OPCD has, in turn, sought to use this specific allegation to substantiate its broader allegation that the Libyan Government is not conducting its domestic proceedings against Mr Gaddafi with the requisite genuineness.¹² By determining that the material is inviolable, the Chamber is effectively acceding to these allegations, but without giving the Government the opportunity to challenge them fully before the Chamber and in spite of it, by its own admission, not being "the competent organ to establish such factual

¹² For example: Defence Response to the "Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute", ICC-01/11-01/11-190-Corr-Redw, 24 July 2012, paras 270-275; Response to the "Submission of the Libyan Government with respect to the matters raised in a private session during the hearing on 9-10 October 2012 " and "Order regarding the "Submission of the Libyan Government with respect to the matters raised in private session during the hearing on 9-10 October 2012", ICC-01/11-01/11-228-Conf-Red, 10 October 2012, at paragraphs 90-98; see also footnote 9 above.

circumstances". This acceptance of the OPCD's case, without applying the proper procedure, significantly undermines the fairness of these proceedings.

iii. The issue significantly affects the expeditiousness of the proceedings

22. It is submitted that the issue concerned is also of such a nature as to significantly affect the expeditiousness of the proceedings, namely the speedy conduct of proceedings without prejudice to the rights of the parties concerned. A failure to properly deal with this important issue now, at such an advanced stage in the admissibility proceedings, will mean that it will undoubtedly form the basis of an appeal by either Libya or the OPCD, whatever the outcome of the admissibility determination. This will lead to an avoidable extenuation of the proceedings.

23. Further, and more specifically, if the issue is not reviewed, and APIC is deemed to apply in these circumstances, it will be necessary for the admissibility proceedings to be adjourned in order for:

- i. The dispute regarding the interpretation and application of the APIC between the Government and the Court to be decided according to the proper procedures as set out in article 32(1), thereby causing delay; and/or
- ii. The Presidency to conduct the proper enquiry as to whether the purported privileged nature of the material should be waived by reason of any alleged wrongdoing on the part of OPCD counsel, or for any other reasons arising from a comprehensive examination of the factual and legal circumstances, thereby ensuring the full and proper consideration of the merits of the admissibility challenge.

24. Both procedures will require consideration of the meaning and application of articles 24 and 26 of the APIC. The latter procedure would be assisted by submissions on the applicability/waiver of privilege by special counsel who is / are not instructed in the admissibility proceedings. It would not be efficacious

or proper for counsel for the Libyan Government in the admissibility proceedings to make submissions as to the content of purportedly privileged OPCD documents which relate to those proceedings in order to determine whether they are in fact privileged materials.

25. To require counsel for Libya in the admissibility proceedings to make such submissions would necessitate a breach of their professional conduct duties. It is for this reason that, in the absence of a ruling on the applicability / waiver of privilege from the President, Libya has been unable to make submissions on events taking place in Zintan in the main admissibility proceedings.

iv. Review of this issue will materially advance the proceedings

26. Permitting a review of this issue by the Appeals Chamber at this juncture will, it is submitted, advance the proceedings by “removing doubts about the correctness of [the] decision or mapping a course of action along the right lines.”¹³ In the face of submissions regarding the OPCD visit to Zintan, the Pre-Trial Chamber has commented previously that any determination of the factual and legal questions surrounding the circumstances of that visit is not within its remit.¹⁴ Despite this, the OPCD have continued to level allegations about the conduct of the Libyan authorities in the course of that visit to bolster its arguments on the admissibility of the case against Mr Gaddafi. By now making a ruling as to the status of those documents, the Chamber has taken the admissibility proceedings off course by making a determination on the very factual matters it had stated were outside its remit. It is appropriate that leave be granted for the Appeals Chamber to review that decision and, it is submitted, “map a course of action along the right lines” and “ensure that the

¹³*Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor’s Appeal against the Decision of the Pre-Trial Chamber I’s Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58”, 13 July 2006 , paras 14-19.

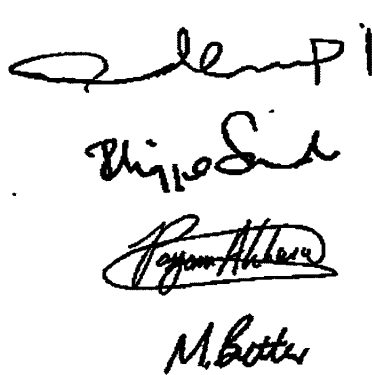
¹⁴ Impugned decision, para 26: “the Chamber reiterates that it is not the competent organ to establish such factual circumstances and it does not have the power to seek and receive submissions of fact and law in relation to these events.” See also comment of Presiding Judge Fernandez de Gurmendi on day 1 of the Admissibility hearing, ICC-01/11-01/11-T-2-CONF-ENG (Closed Session) 09-10-2012, page 31, lines-16-21 (footnote 10, above).

[admissibility] proceedings follow the right course.”¹⁵

IV. CONCLUSION

27. For these reasons, the Government of Libya respectfully requests the Chamber to grant it leave to appeal the Impugned decision.

Respectfully submitted:



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 Ms Michelle Butler
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 Counsel on behalf of the Government of Libya*

Dated this 11th day of March 2013
 At London, United Kingdom

¹⁵ *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor’s Appeal against the Decision of the Pre-Trial Chamber I’s Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58”, 13 July 2006, para 15.