

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 14 March 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

**Public Redacted Version of the “Response to the “Government of Libya’s
Application for Leave to Appeal the “Decision on the Urgent Defence Request””**

Source: Defence

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

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1. Introduction

1. On 1 March 2013, the Honourable Pre-Trial Chamber issued a decision, instructing 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 and destroy any copies thereof” (the Impugned Decision).¹
2. The Government of Libya (the Government) has subsequently requested leave to appeal the Impugned Decision in connection with the issue as to:

[w]hether 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 ” (the Request).²

3. The Government is not a party to the proceedings before the ICC, and therefore has no general standing to invoke Article 82(1)(d) of the Statute, which restricts the right to seek interlocutory appellate review to the Prosecution and the Defence.
4. In its Request, the Government has sought to subvert the purpose of interlocutory appellate review by raising several arguments for the first time, notwithstanding the fact that several of these arguments – such as its current position concerning the applicability of the Rome Statute to the territory of Libya – are at complete odds with the positions adopted by the Government earlier in the proceedings.
5. The Request is also entirely predicated on arguments which are both irrelevant to the criteria set out in Article 82(1)(d) of the Statute, and the legal and factual bases of the Pre-Trial Chamber’s decision.
6. The Defence for Mr. Saif Al-Islam Gaddafi therefore respectfully requests the Honourable Pre-Trial Chamber to dismiss the Request.

2. The Government of Libya has no standing to file an appeal under article 82(1)(d)

7. The possibility to request authorisation to file an interlocutory appeal under Article 82(1)(d) is subject to two important restrictions: firstly, it may only be invoked by a party to the proceedings, and secondly, its operation is confined to issues, which impact on the merits of the proceedings before the ICC. The Request is therefore

¹ ICC-01/11-01/11-291 at p. 10.

² ICC-01/11-01/11-297-Red at para. 7.

irreceivable because the Government of Libya cannot be considered to be a party in relation to the present proceedings, and the issue, upon which leave to appeal is sought, does not relate to the conduct of the proceedings before the ICC.

8. Article 82(1)(d) provides that:

“[e]ither party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence: [...] (d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”.

9. The introductory component of Article 82(1)(d) is even clearer in French: “L’une ou l’autre partie peut faire appel [...]”. The disjunctive reference to ‘one or the other party’ underscores the intention of the drafters that the operation of Article 82 is, in general, confined to the two parties to the proceedings, which are the Prosecution or the Defence. As found by Trial Chamber I in the Lubanga case:³

Although the Statute does not define the term “party” to the proceedings, the fact that certain provisions in the Statute specifically enable a State to appeal particular decisions strongly suggests that the term “party to the proceedings” does not encompass a State Party. In addition, when dealing with an appeal concerning the participation of victims during the proceedings, the Appeals Chamber decided that the term “parties” in Article 69 of the Statute refers to the defence and the prosecution only [...].

10. This finding is consistent with the fact that according to the jurisprudence of the Court, victims, who are participants rather than parties, may not invoke the provisions of Article 82(1)(d) of the Statute, notwithstanding the fact that decisions concerning their status and modalities of participation might directly impact on their rights.⁴ There is thus a clear distinction between the appellate rights of parties, and participants.

11. In a separate appellate decision, Judge Nserecko also underscored this difference:

[a]s the Appeals Chamber has previously indicated, the term “party” refers in its ordinary sense to the Prosecutor and the Defence. There is no reason to give it a different interpretation in the context of article 82 (1) of the Statute. To the contrary, this interpretation is confirmed by the fact that article 82 (1) of the

³ ICC-01/04-01/06-2779, at para. 11.

⁴ ICC-01/04-437, at p. 3; ICC-01/04-418, at para. 16.

Statute refers to "either party" and not to "any party", thereby indicating that the right to appeal is limited to the two parties in the narrow sense, namely the Prosecutor and the Defence.⁵

12. It is also apparent from a contextual reading of the Statute and Rules that the term 'party' in Article 82(1)(d) should be confined to the Prosecution and Defence. For example, Article 81(1) provides that a final appeal may only be appealed by the Prosecutor or the convicted person. Rule 150, which addresses the procedure for final appeals, uses the term 'party' to refer to the entities, which are entitled to file such an appeal.
13. Moreover, as noted by Trial Chamber I, where the drafters intended States to be able to appeal a decision, they expressly so provided. For example, Article 82(2) of the Statute provides that "[a] decision of the Pre-Trial Chamber under article 57, paragraph 3(d), may be appealed against by the State concerned or by the Prosecutor, with the leave of the Pre-Trial Chamber". In accordance with the maxim of *ubi lex voluit dixit, ubi noluit tacuit*,⁶ it can be inferred from the explicit reference to States in article 82(2) that had the State parties wished to extend the general parameters of Article 82(1) to States, then they would have explicitly so stated.
14. The Statute also clearly enumerates instances in which States can invoke the provisions of Article 82, as is the case with Article 18(4) of the Statute, and Article 19(6) of the Statute. If Article 82(1) should be implicitly interpreted to encompass States, then it would not have been necessary to include such explicit provisions; the existence of express exceptions excludes any unwritten exceptions (*expressio unius est exclusio alterius*).⁷
15. Similarly, the Appeals Chamber has noted that "[t]he decisions that are subject to appeal are enumerated in article 81 and 82 of the Statute. There is nothing in Part 8 to suggest that a right to appeal arises except as provided thereunder".⁸ The explicit reference in Article 82(2) to one specific type of issue concerning cooperation thus underscores the fact that the drafters did not consider that all cooperation issues or requests should be subject to appellate review. To the contrary, the Statute includes specific mechanisms, such as the complex interplay of consultation proceedings set out in Part 9, which obviate the need for potentially time consuming appellate review.

⁵ Separate Opinion, ICC-01/11-01/11-74 at para. 2.

⁶ ICC-01/09-42, para.18.

⁷ Prosecutor v. Delalic, Trial Judgment, 16 November 1998, at para. 166.

⁸ ICC-01/04-168, at para. 35.

According States an ability to seek leave to appeal decisions concerning Article 94 and 95 would also frustrate the purpose of these articles, which is to regulate and restrict the instances in which States may postpone time sensitive cooperation requests.

16. Even if the Government of Libya could be likened to party as concerns the admissibility proceedings before the Court, as observed by Judge Nsereko, their corresponding right to appeal the admissibility decision stems from an explicit provision in the Statute enabling such an appeal (i.e. Article 19(6)), and not *via* the general reference to a ‘party’ in Article 82(1) of the Statute.⁹
17. In any case, the Impugned Decision did not relate to the admissibility of the proceedings, but rather to the obligation of Libya to implement a judicial order of the Chamber, as required by Article 67(1)(b) and Part 9 of the Statute. The scenario fell squarely within the type of circumstances addressed by Trial Chamber I in the aforementioned Lubanga decision: that is, the obligation of a State to comply with judicial orders, which are ancillary to the functioning of the proceedings before the Court, but not part of these proceedings.
18. Article 82(1)(d) is also confined to issues, which impact on the conduct of the proceedings before the ICC. Trial Chamber II has observed as follows:¹⁰

[t]he Chamber emphasises that the article deals with what is termed “interlocutory appeals”, that is, appeals against decisions termed “intermediate” that may, in any event, generally be contested in an appeal on the merits. Recalling that “the object of paragraph (d) of article 82 (1) of the Statute is to pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial”, the Chamber considers that appeals against such decisions are subject to the leave of the Trial Chamber because only the Trial Chamber is in a position to determine whether an immediate resolution of an issue by the Appeals Chamber is necessary to advance the proceedings. This mechanism ensures that appeals on issues that could be addressed, where necessary, only in an appeal against a final judgment, do not unduly delay the proceedings. Hence, this article unequivocally concerns decisions falling within the ambit of the conduct of the trial. [...] Finally, it must indeed be acknowledged that individuals or organs and institutions on which this decision has a direct impact may not appeal against it when appeals against the final judgment are lodged. The Prosecutor rightly emphasises, in fact, that there is no realistic likelihood that the Decision can be reviewed within the framework of an appeal against a final judgment. This is therefore a decision that seems entirely discrete from the proceedings.

⁹ ICC-01/11-01/11-74 at para. 3.

¹⁰ ICC-01/04-01/07-3073, at paras. 6 and 8.

19. These findings are equally applicable to the present situation. During the confirmation hearing or subsequent trial proceedings, the Pre-Trial Chamber and Trial Chamber will not be called upon to determine whether the Impugned Decision had any impact on the rights of the Government of Libya. The Government of Libya will also have no right to appeal the confirmation decision, or if the charges are confirmed, the trial judgment. The instigation of interlocutory review at this stage of the proceedings will therefore not serve to economise or facilitate the work of the Appeals Chamber if and when it is seized of a final appeal on the merits of this case.

3. In any case, the Government has failed to comply with the cumulative admissibility criteria under Article 82(1)(d) of the Statute.

The issue does not arise from the decision

20. The Government has sought leave to appeal in relation to the issue as to:

[w]hether 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”.¹¹

21. The formulation of the issue in such vague terms (whether the Chamber erred and/or acted outside its proper authority) is too imprecise to enable appellate intervention. The Single Judge in the Gbagbo case has stressed that it is insufficient for a party to simply assert that the Chamber erred; it is necessary to indicate a specific factual and/or legal error.¹²
22. Moreover, as recently stated by Trial Chamber V, the identification of an appealable issue “requires the parties to articulate discrete issues for Appeals Chamber resolution [...] it is generally insufficient to argue that the entirety of the Chamber's reasoning is erroneous when requesting leave to appeal.”¹³
23. By seeking leave to appeal on the issue as to whether the Chamber erred or acted outside of its proper authority in reaching its ultimate disposition, the Government is merely expressing a disagreement with the disposition itself. As such, the “issue is formulated too generally to be described as a discrete issue which could be the subject of an appeal to the Appeals Chamber”.¹⁴

¹¹ ICC-01/11-01/11-297-Red at para. 7.

¹² ICC-02/11-01/11-307 at para. 70.

¹³ ICC-01/09-01/11-596 at para. 11.

¹⁴ ICC-01/09-01/11-596 at para. 12.

24. Although the Government has sought to further elaborate on the parameters of its ‘issue’ with a series of sub-issues or questions, these sub-issues demonstrate that firstly, the Government has fundamentally misconstrued the Chamber’s Decision, and secondly, that the underlying basis of the Government’s issue actually rests on prior judicial decisions, and not the Impugned decision, and the Government’s own failure to request the Presidency to waive the privileges and immunities of the Defence.
25. In terms of the first ‘sub-issue’ identified by the Government, namely, whether and to what extent, Article 48(4) of the Statute applies to the territory of Libya, the ‘sub-issue’ does not arise from the Impugned decision, but simply constitutes an application of prior judicial findings. As found by Trial Chamber II on several occasions, a party cannot resort to Article 82(1)(d) to “re-open a question that has already been decided”.¹⁵
26. The Pre-Trial Chamber had quite clearly stated on prior occasions that the provisions of the Rome Statute apply to the territory of Libya by virtue of Security Council Resolution 1970.¹⁶ Rather than objecting to or seeking leave to appeal such a finding, the Government actively relied upon this legal approach in its respective applications to defer the surrender of Mr. Gaddafi pursuant to Articles 94 and 95 of the Statute.¹⁷
27. Moreover, in its challenge to the admissibility of the case, the Government explicitly endorsed the findings of Pre-Trial Chamber I that:

the Security Council of the United Nations has also accepted that the investigation into the said situation, as well as any prosecution arising therefrom, will take place within the statutory framework provided for in the Statute, the Elements of Crimes and the Rules as a whole [emphasis added].¹⁸

¹⁵ ICC-01/04-01/07-1088 at para. 24; See also ICC-01/04-01/07-538 at pp. 5-6.

¹⁶ ICC-01/11-01/11-72 at para. 12; ICC-01/11-01/11-163 at para. 28.

¹⁷ Notably, in requesting the deferral of Mr. Gaddafi’s surrender pursuant to Article 95, the Government expressly relied upon an article by D. Akande, which posits the following view:

since Article 1 of ICC Statute provides that “[t]he jurisdiction and functioning of the Court shall be governed by the provisions of this Statute”, the Court can only act in accordance with its Statute. Thus, conferring jurisdiction on the Court by means of a Security Council referral is to give operative effect to the Statute with regard to that situation. Furthermore, by requiring Sudan and Libya to cooperate fully with the Court, the Security Council is subjecting Sudan and Libya to the requests and decisions of the Court. As the Court must, under Article 1 of the Statute, act in accordance with its own Statute, the Council by making requests and decisions of the Court binding on those countries is in effect subjecting to those States, indirectly, to the provisions of the Statute.

D. Akande, ‘The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC’ *JICJ* 2012 Vol. 10 (2) at p.13, cited in ICC-01/11-01/11-130-Red at footnote 133. See also ICC-01/11-01/11-72 at para. 12

¹⁸ ICC-01/11-1/11-130-Red at para. 76, citing ICC-02/05-01/09-3 at para. 45.

28. The Government benefited from these findings in order to advance its admissibility challenge and surrender requests. The fact that the Government is now seeking to denounce the very same findings, to the detriment of the Defence, thus demonstrates the general inability of the Government of Libya to understand and apply concepts of law in an impartial manner to issues related to the Defence of Mr. Gaddafi.
29. Of further note is that in its Response, the Government did not dispute the application of Article 48(4) of the Statute or indeed APIC to the territory of Libya. To the contrary, the Government explicitly relied upon Article 24 of APIC in its Response.¹⁹
30. Given the Government's longstanding acquiescence and indeed, endorsement of the application of the Rome Statute to this case, the Government is effectively estopped from seeking to raise this issue for the first time before the Appeals Chamber:²⁰ as the Government has itself iterated, interlocutory appeal cannot be used to "to allow the participants to have a "second bite at the cherry" or to correct any deficiencies in previous pleadings".²¹
31. The Government's positive endorsement of both the application of the Statute to the case and provisions of APIC also means that there was no dispute on this matter before the Pre-Trial Chamber, and as such, this aspect of the issue cannot be considered to constitute "a subject the resolution of which is essential for the determination of the matter arising in the judicial cause under examination".²²
32. In terms of the Government's second proffered sub-issue as to "whether the Pre-Trial Chamber has in effect made a determination regarding the conduct of Libya and the OPCD" as concerns the 7 June 2012 mission,²³ the Government has either misconstrued or ignored the plain wording of the Chamber's findings.
33. The Pre-Trial Chamber's ultimate findings were predicated on the fact that firstly, the Presidency had not waived the privileges and immunities of the Defence, and secondly, the Pre-Trial Chamber did not have any inherent power itself to make an exception to the privileges and immunities of the Defence.²⁴ As such, in the absence of any waiver by the Presidency, the Chamber was bound to recognise and give effect to the privileges and immunities of the Defence.

¹⁹ ICC-01/11-01/11-274 at para. 13.

²⁰ Prosecutor v. Haradinaj et al, Appeal Judgment, 19 July 2010, paras. 111-112; Prosecutor v. Delalic et al (Celebici case), Appeal Judgment, 20 February 2001, para 640; Prosecutor v. Furundzija, Appeal Judgment, 21 July 2000 at para. 174.

²¹ ICC-01/11-01/11-246 at para. 5.

²² ICC-01/04-168 at para. 9.

²³ ICC-01/11-01/11-297 at para. 8.

²⁴ ICC-01/11-01/11-291 at paras. 26-27.

34. It is thus abundantly clear that in reaching its Decision, the Chamber expressly refrained from making any findings concerning the conduct of either Libya or the OPCD, and moreover, recognised that it was not the competent body to do so. The sub-issue therefore completely fails to arise from the Impugned Decision.
35. The third sub-issue relied upon by the Government is intrinsically related to the second, and as such, does not arise from the Impugned Decision.
36. In positing the fourth and fifth sub-issues, the Government has completely contradicted its position in its first sub-issue. In particular, in the fourth and fifth sub-issues, the Government has queried whether the Impugned Decision contravened Article 32(1) of APIC.²⁵ In so doing, the Government has explicitly recognised the applicability of APIC to the territory of Libya.
37. Article 32(1) of APIC would also only be of relevance if there is a difference arising between the Government of Libya and the Court concerning the interpretation and application of APIC. However, as noted above, in its Response, the Government did not dispute the applicability of Article 48(4) of the Statute or APIC to its territory. Moreover, in light of the fact that the Government has not requested the Presidency to waive the privileges and immunities of the Defence, there cannot be said to be a ‘difference’ between the Government and the Court concerning the scope of Defence privileges and immunities.
38. In this connection, the President statement of 22 June 2012, which contained an undertaking to investigate information in accordance with ICC procedures,²⁶ is completely irrelevant to the matter at hand. The President never undertook to “investigate the allegations of abuse of privilege by OPCD”.²⁷ It is completely incorrect and misleading for the Government to assert as such in a public filing, and once again, demonstrates the Government’s disregard as concerns the accuracy of its submissions, and Counsel’s obligations under Article 24(3) of the Code of Professional Conduct.
39. Moreover, in asserting that the Chamber ‘erred’ by rendering the illegally seized material inadmissible for the purposes of domestic proceedings, the Government has attempted to subvert the privileges and immunities scheme such that it implies that there should be a presumption that the seized documents can be reviewed and utilised

²⁵ ICC-01/11-01/11-297 at para. 8.

²⁶ ICC-CPI-20120622-PR815.

²⁷ Cf ICC-01/11-01/11-297 at para. 8.

by domestic courts until such time that the ICC rules otherwise. Such a position finds absolutely no support in the Statute, APIC, or relevant judicial precedents.²⁸

40. The sub-issue in question thus does not derive from the manner in which the Chamber resolved the Decision, but rather the failure of the Government to firstly, request the Presidency to waive the privileges and immunities of the Defence, and secondly, request the Chamber to lift the legally privileged nature of the documents, so that the Libyan authorities could potentially utilise the seized Defence documents in domestic proceedings.

The issue does not significantly impact on the fairness of the proceedings

41. A decision cannot be termed unfair simply because a participant disagrees with its outcome. In order to satisfy Article 82(1)(d), it is also not sufficient to make general allegations of unfairness: the appealing party must demonstrate that the issue in question significantly impacts on the fairness of the proceedings before the Court. Although the Government has cited a series of complaints and disagreements with the Decision, it has nonetheless completely failed to draw any nexus between the appealable issue, and any real or putative impact on the fairness of the proceedings before the ICC.
42. The Government has also raised several matters, which are either illogical and inaccurate, or which fail to relate to the Impugned decision itself. For example, the Government has claimed that the Pre-Trial Chamber's ruling "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".²⁹
43. The Government has fundamentally contradicted itself: in delineating the sub-issues related to its 'appealable issue', the Government asserted that the Chamber has no competence to render factual findings on the events in Zintan (a position adopted by the Chamber itself), whereas it subsequently attempts to argue that the Chamber erred

²⁸ Prosecutor v. Gotovina 'Decision On Gotovina Defence Appeal Against 12 March 2010 Decision On Requests For Permanent Restraining Orders Directed To The Republic Of Croatia', 14 February 2011. See also relevant jurisprudence in the Mbarushimana case, in which the Chamber ordered that any documents/files, which potentially could be subject to legal professional privilege, should be quarantined from the Prosecution until such time that the Defence had sufficient opportunity to review the documents/files and assert its privilege. ICC-01/04-01/10-105

²⁹ ICC-01/11-01/11-297 at para. 12.

by failing to accord the Government with a proper opportunity to address factual matters concerning the events in Zintan. If the Chamber had no competence to address factual matters concerning the events in Zintan, then there can be no unfairness arising from the Government's alleged lack of opportunity to address such matters.

44. In any case, it is utterly false that the Government did not have an opportunity to address the factual matters concerning the events in Zintan, the scope of Article 48(4) of the Statute, and the potential applicability of Articles 24(1) and 26(1) of APIC, or that it has been deprived of an opportunity to take action to protect its national security. The Government was accorded with multiple opportunities to address these matters, but completely failed to avail itself of such opportunities.
45. The detained ICC delegation was released from Zintan on 2 July 2012. The Government has had over eight months to file a request for the waiver of their privileges and immunities, but failed to do so.
46. In terms of the potential applicability of Articles 24(1) and 26 of APIC, such matters would fall within the remit of the Presidency and not the Pre-Trial Chamber, and as such, no unfairness can ensue from the fact that the Chamber purportedly "failed to give reference to, or seek and consider the parties' submissions and observations in relation to" the applicability of these articles.³⁰
47. In any case, Article 24(1) and the waiver provisions in Article 26 would only be triggered in the event that there is credible evidence before the Court that the Defence has abused its privileges and immunities. Accordingly, in the absence of any decision by the ICC Presidency to invoke Article 24(1) of APIC or to waive the privileges and immunities of the Defence under Article 26, the Pre-Trial Chamber has no alternative but to conclude that no credible evidence has been put before the Court, which would warrant a finding that the Defence has abused its privileges and immunities.
48. The Defence also set out its position concerning the circumstances under which the Defence documents were seized in its Request. The Government was accorded a full 21 days to respond to this Request, but nonetheless declined to make any submissions, which would contradict the Chamber's conclusion that the seized documents related to the exercise and functions of the Defence, or that the documents emanated from the Defence or the defendant. Indeed, the Government expressly recognized that at this

³⁰ ICC-01/11-01/11-297 at para. 19.

point in time, the “purportedly privileged nature of any such materials has not been waived”.³¹

49. Similarly, any admissibility related matters raising from the prosecution of Mr. Gaddafi in Zintan in connection with alleged violations of ‘national security’ were explicitly set out in the Defence ‘Response to the “Libyan Government’s further submissions on issues related to admissibility of the case against Saif Al-Islam Gaddafi”’.³² The Government was granted leave to reply to this filing.
50. The Government cannot claim that the Chamber’s decision has impacted on the fairness of the proceedings, when any prejudice which has been suffered by the Government is directly attributable to the particular strategy, which the Government deliberately chose to adopt.
51. Paragraphs 13 to 21 of the Government’s submissions also have no relevance to the Chamber’s findings in the Impugned Decision. The Government has claimed that the Chamber’s findings will impact on the fairness of the merits of the admissibility proceedings, but such an assertion is purely speculative, and is largely predicated on filings and submissions, which fall outwith the scope of the Impugned Decision.³³ In this regard, although the Pre-Trial Chamber noted the concerns raised by the OPCD, it explicitly declined to rule on such matters in the Impugned Decision, finding instead that these concerns “can be appropriately addressed in its final decision on the Admissibility Challenge to be taken in due course”.³⁴ The necessity of appellate review cannot be triggered by speculative events which have not, and which may not come to pass.³⁵
52. Moreover, given that it is not possible to predict how the Chamber will rule, it is completely hypothetical for the Government to assert that the fairness of the admissibility proceedings has been significantly affected, or that the Chamber’s findings on admissibility will have any nexus to its specific determination that in the absence of waiver from the Presidency, the documents seized by the Libyan authorities are covered by the privileges and immunities of the Defence. To the contrary, by explicitly deferring its consideration of the concerns of the OPCD, the

³¹ ICC-01/11-01/11-274 at para. 10. It should also be noted that the jurisprudence of the ICC has recognized that legal professional privilege will attach to documents, which the Defence asserts are privileged, based on the documents’ contents, and the circumstances, context and purpose of their creation. ICC-01/04-01/10-237 at p. 7 and ICC-01/04-01/10-105.

³² ICC-01/11-01/11-281-Red2.

³³ See for example, ICC-01/11-01/11-297 at paras. 13 and 21.

³⁴ ICC-01/11-01/11-201 at para. 24.

³⁵ ICC-01/04-01/06-2109 at para. 19.

Chamber underscored that the specific findings set out in the Impugned decision (i.e. as concerns the inviolability of Defence documents) were separate to the issues, which could potentially impact on the admissibility challenge.

53. The Government has also failed to give consideration to the fact that the potential ramifications of both the illegal detention of all four members of the ICC delegation in Zintan, and the current prosecution of Mr. Gaddafi for alleged violations of national security on the admissibility proceedings are far broader than any issues tied to Counsel's own conduct in Zintan. Indeed, the fact that the Libyan authorities are actively prosecuting Mr. Gaddafi for allegedly fiddling with a Libyan flag during a privileged meeting (which the authorities decided in advance to covertly record), and for attempting to communicate his concerns regarding violations of his rights, is completely independent of Counsel's conduct, and any corollary question as to whether the privileges and immunities of Counsel should be waived.

The issue does not significantly impact on the expeditiousness of the proceedings

54. The Government has completely failed to adduce any logical arguments as to how the appealable issue significantly impacts on the expeditiousness of the proceedings. This failure is exacerbated by the fact that the Government has failed to tie its arguments to the specific issue, for which leave to appeal is being sort, but has rather incorporated a motley array of arguments on different matters and issues, many of which have absolutely no nexus to the findings in the Impugned Decision.
55. For example, the Government asserts that a "failure to properly deal with this important issue now, at such an advanced stage of the admissibility proceedings, will mean that it will undoubtedly form the basis of an appeal by either Libya or the OPCD".³⁶ It is completely unclear as to how a discrete issue concerning whether the Chamber erred or acted outside of its authority in finding that the seized documents related to Defence functions could inevitably trigger an appeal of the admissibility decision.
56. The Government has also once again, completely contradicted itself. The fact that the admissibility proceedings are at an advanced stage militates in favour of deferring any issues, which might be related to the admissibility challenge, to the final admissibility decision itself, and any subsequent appeal of the decision. The commencement of an interlocutory appeal at this stage of the admissibility proceedings would simply

³⁶ ICC-01/11-01/11-297 at para. 22.

impede the ability of the Chamber to render an expeditious decision on the challenge. Moreover, since it cannot be presumed that the Appeals Chamber will grant suspensive effect as concerns the continuation of the admissibility proceedings, any nexus between the Impugned decision and the final decision on the admissibility challenge is still likely to form the basis of an appeal by Libya or the OPCD against the admissibility decision itself.

57. Similarly, in asserting that unless the issue is reviewed, the procedure set out in Article 32(1) of APIC would be invoked, and/or the Presidency would be required to conduct an enquiry as to whether the privileges and immunities of the Defence should be waived,³⁷ the Government has invoked entirely hypothetical consequences to demonstrate a delay, rather than demonstrating that the appealable issue itself impacts on the expeditiousness of the proceedings.
58. It is also contradictory, illogical and potentially coercive for the Government to assert that unless the issue is reviewed (and by implication, reversed on appeal), the Government would trigger the application of Article 32(1) of APIC and thereby delay the proceedings.³⁸ Throughout its Request, the Government has asserted that the Pre-Trial Chamber has no competence to determine issues falling within the remit of APIC. If the Pre-Trial Chamber has no such competence, then it follows that neither does the Appeals Chamber. Appellate review will therefore neither advance nor expedite the proceedings by avoiding the need for the Government to resort to the procedures set out in Articles 26 or 32(1) of APIC.
59. Moreover, if there is indeed a basis to invoke Article 32(1) of APIC in this case, then any delays are directly attributable to the Government's failure to do so in a diligent manner, rather than the appealable issue itself. APIC also provides no grounds for suspending the proceedings before the Court pending either Article 32(1) arbitration or the resolution of a request for waiver submitted pursuant to Article 26 of APIC. The possibility (and indeed threat) that the Government might resort to these provisions therefore has no impact on the expeditiousness of the proceedings in the present case.
60. Finally on this point, the Defence notes with interest that the Government has asserted that it would not be "proper for counsel [...] 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 documents" and that to "require counsel

³⁷ ICC-01/11-01/11-297 at para. 23.

³⁸ ICC-01/11-01/11-297 at para. 23.

for Libya in the admissibility proceedings to make such submissions would necessitate a breach of their professional conduct duties”.³⁹

61. Counsel for Libya have in fact made submissions based on the content of illegally seized Defence documents in order to impugn the credibility of the Defence, and in so doing, to advance their own challenge before the Court. For example, during the October admissibility hearings, Mr. Sands Q.C. asserted, on the basis of information provided to him by Dr. Gehani, that a privileged Defence document contained the phrase: [REDACTED].⁴⁰ [REDACTED].⁴¹

62. Dr. Gehani has also revealed information from seized Defence documents, with absolutely no regard to the potentially privileged or confidential nature of the documents in question.⁴² At the time, Dr. Gehani explicitly acknowledged in a video interview, which could not have been wrongly transcribed or interpreted, that he intended to “use this incident to prove to the Court, before which the Libyan challenge is brought, that our adversary is not properly conducting its case”.⁴³

63. Dr. Gehani further compounded this offence by claiming familiarity with the contents in order to put forward patently false information concerning the contents of these documents (such as the phrase cited by Mr. Sands Q.C), again, with a view to impugning the credibility of the Defence.

64. Having deliberately breached both the inviolability and legally privileged nature of Defence documents in order to advance their case before the ICC and attack the credibility of the Defence, it is now completely disingenuous for Counsel to now claim that they have in any way been disadvantaged in terms of their ability to make submissions on the events in Zintan in the context of admissibility proceedings.⁴⁴

65. Moreover, by acknowledging that it would be improper and unethical for Counsel to view Defence documents, which are purportedly privileged, Counsel have therefore conceded that it was improper and unethical for national authorities (including Dr. Gehani and representatives of the Prosecutor-General) to actively review the contents of Defence documents. In so doing, they have effectively conceded that the Defence application for the return of the privileged originals and destruction of any copies, was justified.

³⁹ ICC-01/11-01/11-297 at paras. 24 and 25.

⁴⁰ Transcript 10 October 2012, ICC-01/11-01/11-T-3-CONF-ENG at p. 32.

⁴¹ ICC-01/11-01/11-T-3-CONF-ENG at p. 32.

⁴² ICC-01/11-01/11-228-Conf-Anx5.

⁴³ Matruh Lel Nekash” Programme, Libya Channel TV, 11 June 2012, ICC-01/11-01/11-228-Conf-Anx5 at p. 9.

⁴⁴ ICC-01/11-01/11-207 at para. 24.

66. If Counsel should have refrained from making any submissions concerning the potential contents of such documents pending a waiver of privilege from the President,⁴⁵ then the Government was also similarly constrained, and should neither have seized the documents, nor used them as the basis for initiating an abusive prosecution against Mr. Gaddafi *et alia*.

An immediate decision of the Appeals Chamber would not materially advance the proceedings

67. Again, the arguments employed by the Government to satisfy this criterion bear absolutely no relationship to the appealable issue, or the actual findings of the Pre-Trial Chamber. The Pre-Trial Chamber has made no factual findings at this point of the proceedings concerning the events in Zintan, but has simply recognised that in the absence of a waiver of the privileges and immunities of the Defence, these privileges and immunities continue to apply, and encompass the inviolability of Defence documents. It would not advance the proceedings before the Court to require the Appeals Chamber to address an empty question.

68. When stripped of its indignation and rhetoric, it is quite clear that the current Request actually bears no relation to the Impugned Decision, but is simply a last ditch stalling tactic by the Government in order to obtain more time for its admissibility challenge. However, in light of the fact that the Impugned Decision only concerns the discrete question as to the Government's obligation to return these documents and destroy any copies, even if the Appeals Chamber were to grant suspensive effect of the Impugned Decision, this would have absolutely no impact on the pending admissibility proceedings. Appellate review would therefore fail to advance admissibility proceedings, which are already at a very advanced stage.

69. In construing the impact on the proceedings, the Chamber must also take into account the proceedings in their entirety, including Mr. Gaddafi's right to a fair and expeditious trial before the ICC, and not just the isolated process concerning the admissibility proceedings. The prejudice to the Defence or defendant through the continued use of privileged documents is significant, and fundamentally jeopardises the protection of the defendant's Statutory rights. In contrast, since the Government retains the right to request the President to waive the privileges and immunities of the

⁴⁵ ICC-01/11-01/11-297 at para. 25.

Defence, should there be any credible cause to do so, the execution of the Impugned Decision causes no prejudice to the Government. The Government has thus failed to demonstrate how appellate review of the discrete findings in the Impugned decision would advance the proceedings before the ICC.

4. Relief Sought

70. For the reason set out above, the Defence for Mr. Saif Al-Islam Gaddafi respectfully requests the Honourable Pre-Trial Chamber to reject the ‘Government of Libya’s Application for Leave to Appeal the “Decision on the Urgent Defence Request”’.



Xavier-Jean Keïta, Counsel for Mr. Saif Al-Islam Gaddafi

Dated this, 14th Day of March 2013

At The Hague, The Netherlands