

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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

Date: 15 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**

Confidential Ex parte
Government of Libya, OTP, OPCD and OPCV only

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

Source: Office of Public Counsel for Victims

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

The Office of the Prosecutor

Ms. Fatou Bensouda

Counsel for the Defence

Mr. Xavier-Jean Keïta

Ms. Melinda Taylor

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

Ms. Paolina Massidda

Ms. Sarah Pellet

Mr. Mohamed Abdou

The Office of Public Counsel for the Defence

States Representative

Amicus Curiae

Professor Ahmed El-Ghani

Professor Philippe Sands QC

Professor Payam Akhavan

Ms. Michelle Butler

REGISTRY

Registrar & Deputy Registrar

Defence Support Section

Ms. Silvana Arbia & Mr. Didier Preira

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I. PROCEDURAL HISTORY

1. On 1st March 2013, the Pre-Trial Chamber ("the Chamber") issued the "Decision on the "Urgent Defence Request""¹ (the "Decision"), instructing the Registrar *"to request Libya [...] to return to the Defence the originals of the materials seized in Zintan and destroy any copies thereof"*.

2. On 11 March 2013, the Libyan Government filed the "Government of Libya's Application for Leave to Appeal the "Decision on the Urgent Defence Request""² ("the Application for Leave to Appeal" or "the Application").

3. The same day, simultaneously, the Libyan Government filed the "Government of Libya's Request for Reconsideration of "Decision on the Urgent Defence Request""³, *"on the basis that the findings contained within it are manifestly unsound, or its consequences are manifestly unsatisfactory"* ("the Request for Reconsideration").

4. On 14 March 2013, the Defence filed its Response to the Application for Leave to Appeal⁴.

5. In accordance with regulation 23bis(2) of the Regulations of the Court, the Principal Counsel of the Office of Public Counsel for Victims (the "OPCV" or the "Office") files this submission as "Confidential *Ex parte*" following the original classification chosen by the Libyan Government. However, the Principal Counsel

¹ See the "Decision on the "Urgent Defence Request"" (Pre-Trial Chamber I), No. ICC-01/11-01/11-291, 1st March 2013.

² See the "Government of Libya's Application for Leave to Appeal the "Decision on the Urgent Defence Request"", No. ICC-01/11-01/11-297-Conf-Exp and No. ICC-01/11-01/11-297-Red, 11 March 2013.

³ See the "Government of Libya's Request for Reconsideration of "Decision on the Urgent Defence Request"", No. ICC-01/11-01/11-298-Conf-Exp and No. ICC-01/11-01/11-298-Red, 11 March 2013.

⁴ See the "Response to the "Government of Libya's Application for Leave to Appeal the "Decision on the Urgent Defence Request"" ("the Defence's Response"), No. ICC-01/11-01/11-300-Conf-Exp and No. ICC-01/11-01/11-300-Red, 14 March 2013.

considers that the present submission does not contain any information which should be kept confidential and therefore respectfully requests the Pre-Trial Chamber to authorise its re-classification as “public”.

II. SUBMISSIONS

6. The Principal Counsel submits that the Government of Libya is not party to the proceedings in the sense of article 82 of the Rome Statute and, therefore, that its Application for Leave to Appeal should be dismissed *in limine*. In the alternative, the Principal Counsel submits that the Application for Leave to Appeal does not meet the requirements identified in article 82(1)(d) of the Rome Statute and should therefore be rejected.

A. The request should be dismissed *in limine*

7. Article 82(1)(d) of the Rome Statute provides that “*either party may appeal any of the [decisions mentioned in said article]*”. In this regard, the Principal Counsel primarily notes that the Government of Libya cannot be considered as a party to the proceedings. In accordance with Trial Chamber I’s Decision dated 4 August 2011, “[a]lthough 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 suggest that the term “party to the proceedings” does not encompass a State Party.”⁵ The Trial Chamber concluded that in the matter at stake, the States concerned were “not ‘parties’ to the proceedings for the purposes of article 82(1)(d) of the Statute”⁶, and that “this provision [was] therefore unavailable to [them]”⁷.

⁵ See the “Decision on two requests for leave to appeal the “Decision on the request by DRC-D01-WWWW-0019 for special protective measures relating to his asylum application”” (Trial Chamber I), No. ICC-01/04-01/06-2779, 4 August 2011, par. 11 (reclassified as public pursuant to the Chamber’s instruction dated 25 October 2011).

⁶ *Idem*, par. 12.

⁷ *Ibidem*.

8. Despite this finding, Trial Chamber I noted that in order to discharge its responsibility – referring then to the protection of witnesses whose life may have been at risk – it should be able to grant permission to appeal “*when the matter at hand is of sufficient seriousness*” that a review by the Appeals Chamber is “*necessary*”⁸. However, the Principal Counsel contends that the current proceedings do not raise comparable issues and that the matter at hand, as presented by the Libyan Government, does not warrant such exceptional interpretation by the Chamber “*outside the framework of article 82*”⁹ of the Rome Statute.

9. Incidentally, the Principal Counsel notes the arguments developed by the Defence in its response to the Libyan Government on the same issue and contends that the Defence’s interpretation of the word ‘*party*’ in article 82 of the Rome Statute is incorrect¹⁰. Indeed, the jurisprudence of the Court does not state that victims may not invoke article 82, but rather that “*applicants do not have procedural standing to seek leave to appeal*”. In fact in the decisions quoted by the Defence the Pre-Trial Chamber was ruling on a request for leave to appeal introduced before a decision on the status of victims was taken¹¹.

10. The Principal Counsel argues that in this specific instance, the Libyan Government is not party to the proceedings in the sense that the issue ruled by the Chamber does not fall within the ambit of the proceedings in which the Libyan Government is a party before the Court, namely the admissibility proceedings. This issue will be entertained in further details *infra*.

11. Furthermore, the Principal Counsel underlines that the Decision of the Chamber did not amount to a direct order issued to the Government of Libya but

⁸ *Ibid.*, par. 20.

⁹ *Ibid.*, par. 23.

¹⁰ See the Defence’s Response *supra* footnote 4, paras. 7 *et seq.*

¹¹ With regard to the separate opinion of Judge Daniel David Ntanda Nsereko referred to by the Defence, the Principal Counsel wishes also to underline that the Honorable Judge’s comments were given in the context of a request submitted by Ms. Hosseinioun who was an “applicant” in the proceedings of rule 103 of the RPE and was, moreover, completely unrelated to the proceedings at hand. See the Defence’s Response *supra* footnote 4, par. 11.

rather corresponded to an order addressed to the Registry of the Court, for the latter to activate the appropriate diplomatic channel to extend the request to the Libyan Government. It therefore appears logical that should the Government of Libya wishes to raise any question or issue in relation to the Chamber's order, it will have to do so using the same appropriate diplomatic channel.

12. Consequently, the Principal Counsel submits that in the circumstances of this case, article 82(1)(d) of the Rome Statute is not available to the Libyan Government and that because the Libyan Government has no procedural standing to seek leave to appeal, its Application shall be rejected *in limine*.

B. In the alternative, the request shall be dismissed as unfounded

13. In accordance with the jurisprudence of the Appeals Chamber, leave to appeal pursuant to article 82(1)(d) of the Rome Statute may only be granted if the *party* seeking leave to appeal establishes the existence of an *issue* arising from the relevant decision, fulfilling the following cumulative requirements:

- (a) The decision involves an "issue" that would significantly affect
 - (i) the fair and expeditious conduct of the proceedings, or;
 - (ii) the outcome of the trial; and
- (b) In the opinion of the Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings¹².

14. The Principal Counsel submits that the Libyan Government has, however that may be, failed in demonstrating that the criteria mentioned in article 82(1)(d)

¹² See the "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" (Appeals Chambers), 13 July 2006, No. ICC-01/04-168 OA 3, 13 July 2006, paras. 8 to 19.

of the Rome Statute are fulfilled and contends that none of these criteria are in fact met by its Application.

(i) The Libyan Government has not identified an appealable issue within the meaning of article 82(1)(d) of the Rome Statute

15. The Principal Counsel submits that the issue identified in the Application does not constitute an appealable issue. Indeed, the Appeals Chamber has defined the term “issue” as “*an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or a conflicting opinion. [...] An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. It may be legal or factual or a mixed one*”¹³.

16. Rather, the Libyan Government’s submissions appear to constitute a mere difference of opinion as to the ruling of the Chamber addressing the sole issue of the return of the seized documents. In this regard, the Principal Counsel notes that the Chamber, after having entertained both the Defence’s written original request¹⁴ and the Libyan Government’s response¹⁵, issued the Decision isolating the sole matter of the return of the seized documents, consequently detaching it from any other proceedings referred to by either the Defence or the Libyan Government.

17. The Principal Counsel submits that the conflicting opinion with the Decision laying behind the Libyan Government’s Application appears all the more clear that simultaneously, the latter filed a Request for Reconsideration of the same Decision in which it characterised the Chamber’s findings as “*manifestly unsound*” or having “*consequences [...] manifestly unsatisfactory*”¹⁶.

¹³ *Idem*, paras. 9 *et seq.*

¹⁴ See the “Urgent Defence Request”, No. ICC-01/11-01/11-255, 21 January 2013.

¹⁵ See the “Libyan Government’s Response to Urgent Defence Request of 21 January 2013”, No. ICC-01/11-01/11-274, 11 February 2013.

¹⁶ See *supra* footnote 3, par. 1.

18. In addition, despite the efforts deployed by the Libyan Government to characterize the issue that would form the basis of the appeal, the Principal Counsel underlines, as further developed *infra*, that the questions allegedly requiring a determination by the Appeals Chamber as submitted by the Libyan Government¹⁷ fall outside of the scope of the Decision, and as such, cannot together constitute an appealable issue arising from it¹⁸. Indeed, there is no doubt that the Decision solely addressed the return of the seized documents, and did not constitute at all a determination of the applicability of the APIC to the Libyan Government, of the conduct of Libya and the OPCD in the course of the OPCD's Zintan mission in June 2012, of the admissibility challenge, nor of the conduct of any national proceedings against Mr. Saif Gaddafi, as alleged by the Libyan Government in its Application¹⁹.

¹⁷ See *supra* footnote 2, par. 8.

¹⁸ See *inter alia* the "Decision on Second Defence Motion for Leave to Appeal" (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-489, 28 September 2006, p. 4: "Considering that [...] in order to grant leave to appeal under article 82 (1) (d) of the Statute, the issue identified by the appellant must: (i) have been dealt with in the relevant decision; and (ii) meet the following two cumulative criteria [...]" [we underline]. See also the "Decision on the Prosecution, OPCD and OPCV Requests for Leave to Appeal the Decision on the Applications for Participation of Victims in the Proceedings in the Situation" (Pre-Trial Chamber I, Single Judge), No. 01/04-444, 6 February 2008, pp. 4-5.

¹⁹ See *supra* footnote 2, par. 8. In this regard, see the Appeals Chambers' Judgment, *supra* footnote 12, par. 20: "Article 82(1)(d) of the Statute does not confer a right to appeal interlocutory or intermediate decisions of either the Pre-Trial or the Trial Chamber. A right to appeal arises only if the Pre-Trial or Trial Chamber is of the opinion that any such decision must receive the immediate attention of the Appeals Chamber. This opinion constitutes the definitive element for the genesis of a right to appeal. In essence, the Pre-Trial or Trial Chamber is vested with power to state, or more accurately still, to certify the existence of an appealable issue." See also the "Decision on three applications for leave to appeal Decision ICC-01/04-01/07-3003 of 9 June 2011" (Trial Chamber II), No. ICC-01/04-01/07-3073-tENG, 14 July 2011, paras. 1 and 4 to 9, in particular par. 9: "The Chamber therefore considers that it would overstep its vested powers in agreeing to examine applications for leave to appeal submitted in respect of decisions which, by their nature, do not fall under article 82(1)(d) of the Statute." See further *supra* footnote 15, par. 19.

(ii) The Libyan Government has not demonstrated that the identified issue would significantly affect the fairness of the proceedings under article 82(1)(d) of the Rome Statute

19. The Principal Counsel reiterates that the Decision solely addressed the return of the seized documents and did not assess, nor further pre-determined, any of the pending issues in the proceedings against Mr. Saif Gaddafi of which, the Libyan Government contended, a pre-determination would affect the fairness. The Chamber itself carefully circumscribed the scope of its Decision and expressly underlined that said issues are separate ones²⁰.

20. Firstly, the Principal Counsel underlines that the Decision did not seek to establish nor assess the factual circumstances pertaining to the seizure itself of the requested documents²¹. In this regard, the Chamber expressly reiterated "*that it is not the competent organ to establish such factual circumstances* [i.e. "the particular circumstances surrounding the events in Zintan"] *and it does not have the power to seek and receive submissions of fact and law in relation to these events.*"²² It follows that the Chamber's ruling did not amount to a determination of the correctness of the seizure of the privileged documents concerned. In this regard, since the Chamber did not rule on the seizure itself, the Decision cannot constitute a hindrance to a State possibility to take action to protect its national security as contented by the Libyan Government²³. Moreover, it stems directly from the Application that the Libyan Government agreed itself with the Chamber not being the appropriate *forum* to address these factual elements²⁴.

21. It rather appears to the Principal Counsel that the Chamber, in accordance with article 57(3) of the Rome Statute, resorted only to the inherent privileged

²⁰ See *supra* footnote 1, paras. 24 and 26 in particular.

²¹ See *supra* footnote 2, paras. 14 and 17.

²² See *supra* footnote 1, par. 26.

²³ See *supra* footnote 2, par. 18.

²⁴ *Idem*, paras. 21 and 25.

nature of the concerned documents to instruct the Registry, through the appropriate channel in accordance with the regulated cooperation scheme of the Court, to request the Libyan Government to return the originals of said documents and destroy any copies thereof. Without even opening the question of the applicability of the Rome Statute and of the APIC to the current situation, it is contended that the inherent privileged nature of the concerned documents flows from the international legal personality of the Court and the related functional immunity of the Court's staffs or associated personnel, of which the Libyan Government was at all-time aware²⁵. Moreover, the Principal Counsel observes that the instructions given by the Chamber to the Registry in the Decision seem to conform to the approach suggested by the Libyan Government itself when stating that *"the only proper channel for such a request would be the diplomatic one (ie. Channelling such a request through the Libyan Embassy in the Hague)."*²⁶

22. Secondly, the Principal Counsel stresses that the determination of the status of the concerned material alone does not constitute a determination of the correctness of the Defence staffs' behaviour²⁷ and certainly does not constitute an

²⁵ The privileged nature of the concerned documents as flowing from the ICC legal personality and the related functional immunity of the Court's staffs and associated personnel corresponds to a general principle of international public law and international customary law. See the « Commentaire article par article du Statut de Rome de la Cour pénale Internationale », Editions A. Pedone, Paris, 2012, Tome I, Article 48, especially pp. 1106, 1107 and 1110. It is further deducted from the official diplomatic functions held by the members of the Libyan Government that these general principles were known to them at all time. Moreover, this deduction is also corroborated by the vocabulary used by the Government of Libya when referring to the nature of the visit planned in June 2012. See the « Libyan Government Response to Defence Request », 30 May 2012, No. ICC-01/11-010/11-160, paras. 3, 5 and 26: *"The Libyan Government has made its intention to cooperate fully with the ICC abundantly clear. [...] Even if there has been some delay in ensuring that access is granted it confirms that full access will indeed be granted in accordance with applicable standards."*; *"Pending such transfer, it will do all it can to grant access by the ICC OPCD and Registry to Mr. Gaddafi, consistent with international law. The Government of Libya makes this undertaking without hesitation or caveat."*; *"It is anticipated that this additional security issue will be factored into preparations for the next visit by the OPCD to Mr Gaddafi so that lead defence counsel can participate in a privileged visit without being put at personal risk."* [we underline]. See also the Libyan Government's Response, *supra* note 15, paras. 11, 12, 14, 15 and 16. Furthermore, the current process of agreeing a protocol for future privileged visits that Libya is involved in with the ICC Registry seems also to support such approach. See *supra* footnote 15, par. 14 and *supra* footnote 2, par. 8(i).

²⁶ See *supra* footnote 15, par. 10.

²⁷ See *supra* footnote 2, par. 14.

acknowledgement or an agreement of the Chamber with the Defence strategy or arguments in relation to detached issues and procedures²⁸.

23. Thirdly, the Principal Counsel emphasises that the Decision does not constitute a ruling on the admissibility²⁹ and it appears, to the contrary, that the Chamber specifically distinguished the admissibility proceedings from the subject matter of its ruling³⁰. In this regard, it appears additionally that the line followed by the Chamber in issuing the Decision confirms as well that the admissibility proceedings would not be the proper *forum* to deal with the separate issue of the seized documents³¹. Therefore, the Decision being unrelated to the admissibility proceedings, the *“Libyan Government has [not] been stripped of an opportunity to address matters that may be weighed against the merits of [its] admissibility challenge”* as contended³².

24. The Principal Counsel reiterates that it stems clearly from the Decision that the latter does not contain nor constitute a determination of the arguments submitted by the Libyan Government and by the Defence in other proceedings nor of the weight to be given to them³³. It also seems important to underline that nowhere in the Decision did the Chamber assess or even question the good faith of the Government of Libya³⁴.

²⁸ *Idem*, par. 21.

²⁹ *Ibidem*, paras. 13, 16, 20, 22 and 23.

³⁰ See *supra* footnote 1, par. 24.

³¹ See *supra* footnote 2, paras. 24-25.

³² *Idem*, paras. 16 and 20.

³³ See *supra* footnote 1, par. 24: *“The Chamber notes the concerns raised by the OPCD but considers that they can be appropriately addressed in its final decision on the Admissibility Challenge to be taken in due course”* [we underline].

³⁴ *Ibidem*, par. 21.

(iii) The Libyan Government has not demonstrated that the identified issue would significantly affect the expeditious conduct of the proceedings under article 82(1)(d) of the Rome Statute nor that an immediate resolution by the Appeals Chamber may materially advance the proceedings

25. The Principal Counsel submits that the arguments presented by the Government of Libya as constituting the issue forming the basis of the Application cannot have the effect of affecting the expeditious conduct of the proceedings since they appear to be manifestly unfounded.

26. To the contrary, the Principal Counsel emphasises that should such an appeal be granted and the Appeals Chamber be compelled to address the non-issue submitted, such course of action would clearly affect the expeditiousness of the proceedings. Moreover, in light of the broad scope of the issue identified by Libyan Government as forming the basis of its appeal, it would in turn delay not only the procedure attached to the return of the seized documents, but every other proceedings referred to by the latter in its Application, including the admissibility proceedings.

FOR THE FOREGOING REASONS, the Principal Counsel respectfully requests the Pre-Trial Chamber to dismiss *in limine* the Libyan Government's Application for Leave to Appeal. In the alternative, to reject said Application as it does not meet the requirements for leave to appeal under article 82(1)(d) of the Rome Statute.



Paolina Massidda
Principal Counsel

Dated this 15th day of March 2013

At The Hague, The Netherlands