

**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, OPCV only

**Response to the
“Libyan Government’s Request for Reconsideration of “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:

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Ms. Silvana Arbia & Mr. Didier Preira

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Detention Section

Victims Participation and Reparations Section

Other

I. PROCEDURAL HISTORY

1. On 1st March 2013, the Pre-Trial Chamber I ("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.

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. 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 the present submission as "Confidential *Ex parte*" following the original classification chosen by the Libyan Government. However, the Principal Counsel considers that the present submission does not contain any information which should be kept confidential and therefore requests the Pre-Trial Chamber to authorise its re-classification as "public".

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.

II. SUBMISSIONS

5. The Principal Counsel opposes the Request for Reconsideration and submits that it should be dismissed *in limine* because there is no legal basis for such request in the Court's statutory framework. In the alternative, the Principal Counsel submits that none of the grounds advanced by Libya constitutes exceptional circumstances similar to those in respect of which extraordinary requests for consideration has been granted by the Court. In this regard, the Government has failed to demonstrate that the Decision is "*manifestly unsound and that its consequences are manifestly unsatisfactory*".

A. The Government request should be dismissed *in limine*

6. The Principal Counsel recalls that different Chambers of the Court have consistently rejected requests aiming at reconsidering previous decisions, arguing that there is no legal basis for such requests in the Court's statutory framework.⁴ In particular, it was held that "[t]he instruments governing the Court's procedure make no provision for such a broad remedy as an unqualified "motion for reconsideration". *Review of decisions by the Court is only allowed under specific circumstances, explicitly provided in the Statute and the Rules*".⁵ This position is based on the need to maintain

⁴ See, *inter alia*, the "Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from Warrants of Arrest, Motion for Reconsideration and Motion for Clarification" (Pre-Trial Chamber II), 28 October 2005, No. ICC-02/04-01/05-60, par. 18; "Decision on the Defence for Mathieu Ngudjolo Chui's Request concerning translation of documents", (Pre-Trial Chamber I), No. ICC-01/04-01/07-477, 15 May 2008, p. 5; "Decision on the Prosecution motion for reconsideration" (Pre-Trial Chamber I), No. ICC-01/04-01/06-123, 23 May 2006, p. 3; "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute" (Pre-Trial Chamber II), No. ICC-01/09-02/11-96, 30 May 2011, par. 38; la "Decision on the 'Prosecution's Application for Extension of Time Limit for Disclosure" (Pre-Trial Chamber II), No. ICC-01/09-01/11-82, 10 May 2011, par. 11.

⁵ See the "Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from Warrants of Arrest, Motion for Reconsideration and Motion for Clarification" (Pre-Trial Chamber II), 28 October 2005, No. ICC-02/04-01/05-60, par. 18; "Decision on the Prosecution motion for reconsideration" (Pre-Trial Chamber I), No. ICC-01/04-01/06-123, 23 May 2006, p. 3.

*“legal certainty and finality in judicial decisions [which] serve important purposes in achieving the orderly administration of justice”.*⁶

7. On the other hand, Trial Chamber I accepted the possibility of reconsidering decisions in exceptional circumstances. In that specific case, the Trial Chamber held that *“it is well established that a court can depart from earlier decisions that would usually be binding if they are manifestly unsound and their consequences are manifestly unsatisfactory, because, for instance, a decision was made in ignorance of relevant information.”*⁷ In the same decision, the Chamber recognized the *“limits of this approach - most particularly given the need to achieve certainty in the proceedings - and the strong presumption is that a Chamber is bound by its own decisions”*⁸ and concluded that it must be applied in the strictest sense.

8. Therefore, the Principal Counsel submits that the Request for Reconsideration should be rejected *in limine* insofar it aims at reconsidering a previous decision issued by the Chamber and no legal basis permits said request under the legal texts governing the Court.

9. In the event that the Chamber decides to depart from its established jurisprudence and entertain the Request for Reconsideration, the Principal Counsel submits that the Libyan Government has failed to satisfy the requirements for reconsideration as established by the limited practice of the Court.

⁶ See the “Decision on ‘Second Defence request for interim release’”, (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/10-319, 28 July 2011, p. 6.

⁷ See the “Decision on the defence request to reconsider the “Order on numbering of evidence” of 12 May 2010” (Trial Chamber I), No. ICC-01/04-01/06-2705, 30 mars 2011, para. 18.

⁸ *Ibid.*

B. The Request has failed to satisfy the requirements for reconsideration

10. The Government of Libya only refers to the Decision by Trial Chamber I as a basis for its Request for Reconsideration,⁹ implying therefore that the Chamber should depart from the consistent previous jurisprudence in the matter. While the Principal Counsel recognises that Chambers have discretion to reconsider their decisions, she notes, however, that the Libyan Government has misstated the test for exceptional reconsideration as applied by Trial Chamber I.

11. In its Request for Reconsideration, the Libyan Government suggests, on numerous occasions, that a decision may be reconsidered *“if manifestly unsound, or its consequences are manifestly unsatisfactory”*¹⁰ (emphasis added). These submissions fail to properly reflect the Trial Chamber I’s ruling which leaves no doubt as to the fact that these two elements must be satisfied cumulatively. Indeed, Trial Chamber I made it clear that *“irregular decisions can be varied if they are manifestly unsound and their consequences are manifestly unsatisfactory”*¹¹ (emphasis added). Applying a loose interpretation of the test for reconsideration, such as the one suggested by the Libyan Government, is also inconsistent with the exceptional and extraordinary nature of the remedy.

12. Moreover, in complaining that the Decision is manifestly unsound, the Libyan Government asserts that the Chamber did not give full consideration to a number of issues relating to the applicability and implementation of article 48(4) of the Rome Statute, as well as to the Agreement on Privileges and Immunities of the ICC (“APIC”).¹²

⁹ See the Request for Reconsideration, para. 1.

¹⁰ *Idem*. See also, para. 7: “finding [is] manifestly unsound and/or that the consequence of that finding [...] is manifestly unsatisfactory”.

¹¹ See *supra* note 7, para. 18.

¹² See the Request for Reconsideration, para. 8.

13. The Principal Counsel submits that none of the issues identified in the Request may serve as a proper basis for reconsideration. The practice of the Court shows that requests for reconsideration could be granted (i) in cases where the applicant was able to provide compelling new information (or previous information unavailable to the Chamber) which significantly altered the basis on which the original decision was taken;¹³ (ii) in order to accommodate new circumstances that have arisen and which have rendered the original decision unfair;¹⁴ or (iii) in order to correct material errors committed by the Chamber.¹⁵

14. Nowhere in the Request does the Libyan Government suggest or even imply that the issues identified therein fall under any of these categories. Rather, Libya presents a litany of legal arguments through which it seeks to reinforce its allegations that the Decision is vitiated in law. The Libyan Government's main contention that the Chamber "*did not give full and proper consideration*"¹⁶ to selected issues of law is a clear indication that what is proposed for reconsideration amounts to a mere disagreement with the Chamber's interpretation of articles 48(4) and 67 of the Rome Statute.

15. As a consequence, even assuming that exceptional requests for reconsideration in relation to substantive legal matters can be admissible before the Court, the Libyan Government's Request should be dismissed on the merits.

16. Moreover, the issues set out in the Request for Reconsideration do not arise from the Decision. First the Libyan Government contention that the Chamber should have considered the extent to which article 48(4) of the Rome Statute and

¹³ See the "Decision on prosecution's 'Urgent request for reconsideration pursuant to Trial Chamber V's 'Decision on the second and third Prosecution requests for delayed disclosure of witness identities'", No. ICC-01/09-01/11-578-Red, 30 January 2013, para. 8.

¹⁴ See the Transcript of hearing held on 2 December 2010, ICC-01/05-01/08-T-42-Red-ENG WT, page 2, line 2 - page 4, line 13.

¹⁵ See *supra* note 7, para. 20.

¹⁶ See the Request for Reconsideration, para. 8.

the APIC apply to the Libyan territory.¹⁷ In this respect, the interpretation and the application (or even applicability) of the APIC to Libya are matters which go beyond the functions and powers of the Pre-Trial Chamber as set out in article 57 of the Rome Statute.

17. Moreover, the Government's contention that the Chamber "*effectively concluded that the conduct of the OPCD counsel was beyond reproach and the seizure and retention of papers was unlawful*" is simply wrong.¹⁸ The Chamber made it plainly clear that it is "*not in a position to determine whether an exception to the principle of inviolability of the concerned documents would be justified*" and that such "*determination cannot be made in the abstract*".¹⁹ In the absence of any such determination, the Libyan Government cannot legitimately claim that the Chamber's order to return the materials in question to the Defence would have any bearing on the on-going admissibility challenge,²⁰ as the question related to the lawfulness of the seizure was not addressed by the Chamber.

18. Furthermore, the Chamber has not made any legal determination on the applicability of the privileges and immunities, contrary to the Libyan Government's assertions.²¹ The Chamber only ruled 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.*"²² The Chamber's obligation to ensure that the rights of the suspect are respected in accordance with article 67 of the Rome Statute is a necessary element for a fair, expeditious and orderly administration of justice. Therefore, the above mentioned determination of the Chamber is entirely correct. It also follows that the Libyan Government assertion that the "*Pre-Trial Chamber has in effect made a determination regarding the conduct of*

¹⁷ *Idem*, para. 8 (i).

¹⁸ *Ibidem*, para. 8 (iii).

¹⁹ See *supra* note 1, para. 26.

²⁰ See *supra* note 18.

²¹ See the Request for Reconsideration, para. 8 (ii), (iii) and (iv).

²² See *supra* note 1, para. 27.

*Libya and the OPCD in the course of the OPCD's Zintan mission in June 2012"*²³ is unfounded.

19. Finally, the Principal Counsel submits that the Libyan Government has failed to identify manifestly unsatisfactory consequences arising from the Decision. The Libyan Government's allegations that the Decision would have an adverse effect on the on-going admissibility challenge are incorrect,²⁴ as well as the Libyan Government's assertion that the Decision has rendered the materials in question "*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*".²⁵ Indeed, the inadmissibility of the documents before courts on the ground that the seizure was unlawful is a matter which has not been ruled upon by the Chamber and therefore, in the absence of any such determination, the Libyan Government's argument remains speculative and, in any event, does not constitute an issue which arises from the Decision.

FOR THE FOREGOING REASONS the Principal Counsel respectfully requests the Pre-Trial Chamber to dismiss the Request for Reconsideration *in limine*. In the alternative, the Request for Reconsideration should be dismissed as unfounded.



Paolina Massidda
Principal Counsel

Dated this 15th day of March 2013

At The Hague, The Netherlands

²³ See the Request for Reconsideration, para. 8 (ii).

²⁴ *Idem*, para. 8 (iii).

²⁵ *Ibidem*, para. 8 (v).