



Original: **English**

No.: **ICC-01/11-01/11**
Date: **4 February 2015**

PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernández de Gurmendi, Single Judge

SITUATION IN LIBYA
IN THE CASE OF *THE PROSECUTOR* v. *SAIF AL-ISLAM GADDAFI*

Public

**Decision on the “Request for Disclosure of Memorandum on Burden
Sharing between the ICC Office of the Prosecutor and the Government of
Libya”**

Decision to be notified, in accordance with Regulation 31 of the Regulations of the Court, to:

The Office of the Prosecutor

Fatou Bensouda

James Stewart

Counsel for Saif Al-Islam Gaddafi

John R.W.D. Jones

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Others

REGISTRY

Registrar

Herman von Hebel

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Counsel Support Section

Judge Silvia Fernández de Gurmendi, Single Judge responsible for carrying out the functions of Pre-Trial Chamber I (the “Chamber”) of the International Criminal Court (the “Court”) in relation to the present case,¹ issues the following decision on the “Request for Disclosure of Memorandum on Burden Sharing between the ICC Office of the Prosecutor and the Government of Libya” (the “Request”) filed by the Defence on 27 March 2014.²

1. The Defence requests that the Chamber orders the Prosecutor to disclose the Memorandum of Understanding on burden sharing between the Prosecutor and Libya (the “Memorandum”). The Defence argues that it “has concerns that the implementation of [the Memorandum] could have a deleterious impact on key Defence rights, the integrity of the Defence evidence, and the security of Defence witnesses”.³ According to the Defence, the implementation of the Memorandum “will either intentionally or inadvertently capture information pertaining to Defence witnesses or sources, or information, which is either exculpatory or material to the preparation of the Defence”.⁴ The Defence submits that “[t]he terms under which the Prosecutor cooperates with Libya and exchanges information is therefore irrefutably material to the preparation of the Defence, as it impacts directly on the confidentiality, protection, and security of the Defence and Defence evidence” and, as such, “falls within the scope of the Prosecution’s Rule 77 disclosure obligations”.⁵

¹ ICC-01/11-01/11-511.

² ICC-01/11-01/11-533-Conf. A public redacted version is also available (ICC01/11-01/11-533-Conf).

³ Request, para. 5.

⁴ *Ibid.*, para. 70.

⁵ *Ibid.*, para. 71.

2. In her response to the Request, the Prosecutor objects to the disclosure of the Memorandum to the Defence.⁶ In her view, disclosure is not warranted “primarily because it expressly excludes the case against Gaddafi and Al-Senussi from its applicability. As such, even under the broadest reading of [her] disclosure obligations, the [Memorandum] is not exculpatory or material for the preparation of the defence in the case against Gaddafi and Al-Senussi”.⁷ The Prosecutor also submits that the Request should fail as it is “abstract, hypothetical and not strictly related to the concrete circumstances of the case, where the commencement of the proceedings before this Court remains uncertain”.⁸

3. The matter *sub judice* is whether the Memorandum is “material to the preparation of the defence” within the meaning of rule 77 of the Rules of Procedure and Evidence (the “Rules”), and, as such, must be disclosed to the Defence.

4. The Single Judge recalls the Appeals Chamber’s holding to the effect that “the term ‘material to the preparation of the defence’ must be interpreted broadly” and must “be understood as referring to all objects that that are relevant for the preparation of the defence”.⁹ In the present case, and observing that Saif Al-Islam Gaddafi’s initial appearance before the Court had yet to take place, the Chamber already clarified that the Prosecutor’s disclosure obligations under rule 77 of the Rules must be understood as instrumental to place the Defence in a position to “exercise its functions in an effective manner and reasonably pursue its legitimate interests in the context of the proceedings

⁶ ICC-01/11-01/11-536-Conf (hereinafter, the “Response”).

⁷ *Ibid.*, para. 7.

⁸ *Ibid.*, para. 4.

⁹ Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, “Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008”, 11 July 2008, ICC-01/04-01/06-1433, paras 77 and 78.

before the Court”¹⁰ and, therefore, “cannot but be strictly informed by the extent of [the Defence] procedural rights in the concrete circumstances of the case”.¹¹

5. The Single Judge observes that the Memorandum is not “evidence”, and is not otherwise related to the substantive case against Saif Al-Islam Gaddafi. It is only intended as a basis for the sharing of information between the Prosecutor and the Libyan authorities related to their respective investigations into crimes committed on the Libyan territory. Importantly, as clarified by the Prosecutor, the Memorandum expressly excludes the case against Saif Al-Islam Gaddafi from its applicability.¹²

6. In light of its limited purpose and the express exclusion of the case at hand, the Single Judge fails to see how the mere access to the Memorandum may facilitate the exercise of the procedural rights of the Defence in this case. The Single Judge is also not persuaded that access to the text of the Memorandum may assist the Defence in preventing hypothetical risks in its actual implementation. In this regard, the Single Judge notes that the submissions by the Defence to the effect that there exists a risk that the implementation of the Memorandum may violate the rights of the Defence (in particular, the confidentiality and security of its investigations or communications and the safety of its witnesses and sources¹³) appear to rest on speculations and hypothetical concerns, as does the argument that any such risk would be

¹⁰ Pre-Trial Chamber I, “Corrigendum to Decision on the “Defence request for an order of disclosure”, ICC-01/11-01/11-392-Red-Corr, 5 August 2013, para. 36.

¹¹ *Ibid.*, para. 38.

¹² Response, para. 7.

¹³ See Request, para. 50.

avoided if the Defence could “verify” that “adequate safeguards” are provided for in the Memorandum.¹⁴

7. For the forgoing reasons, the Single Judge is not satisfied that the Memorandum can be considered material to the preparation of the Defence within the meaning of rule 77 of the Rules.

8. The Single Judge notes that the Prosecutor’s Response is currently classified as confidential. The Prosecutor submits that this classification is warranted, under regulation 23*bis*(2) of the Regulations of the Court, “because the Request to which it responds is subject to the same classification”.¹⁵ However, the Single Judge observes that there exists a public redacted version of the Request, wherefrom limited information was expunged. In the Single Judge’s view, the Response may also be classified as public subject to the appropriate redactions, including, in particular, of certain confidential information on the content of the decision issued by the Chamber on 1 August 2013.¹⁶ The Prosecutor is therefore instructed to file a public version of her Response, taking into account the redactions that were applied by the Chamber to the public version of its decision of 1 August 2013.¹⁷

¹⁴ Request, para. 91. See also para. 79.

¹⁵ Response, para. 3.

¹⁶ Compare paragraph 5 of the Response with the public redacted version of this decision (ICC-01/11-01/11-392-Red-Corr).

¹⁷ See, in particular, the redactions at paras 40 and 41 of that decision.

FOR THESE REASONS, THE SINGLE JUDGE

REJECTS the Request; and

INSTRUCTS the Prosecutor to file a public redacted version of the Response, in accordance with paragraph 8 of the present decision.

Done in both English and French, the English version being authoritative.


Judge Silvia Fernández de Gurmendi
Single Judge

Dated this 4 February 2015

At The Hague, The Netherlands