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International Criminal Court

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No.: **ICC-01/11-01/11**
Date: **26 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

Response to the "Government of Libya's Request for Reconsideration of the "Decision on the Urgent Defence Request""

Source: **Defence for Mr. Saif Al-Islam Gaddafi**

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 its 'Decision on the "Urgent Defence Request"' (the Decision), in which the Chamber instructed the Registrar to request Libya to return to the Defence of Mr. Saif Al-Islam Gaddafi (the Defence) the originals of materials seized in Zintan, and to destroy any copies.[1]
2. On 11 March 2013, the Government of Libya filed both a request for leave to appeal the Decision,[2] and a request for reconsideration of the Decision.[3]
3. The Defence filed its response to the request for leave to appeal on 14 March 2013,[4] in accordance with the deadline set out in Regulation 65(2) of the Regulations of the Court.
4. Pursuant to Regulations 24(1) and 34(b) of the Regulations of the Court, the Defence hereby files its response to the request for reconsideration (the Request).

2. Submissions

The Government of Libya has no standing to request the remedy of reconsideration

5. As will be elaborated below, there is divergent jurisprudence at the ICC as to whether a Chamber possesses the inherent power to reconsider decisions touching on substantive issues of fact or law, as opposed to case management decisions.
6. Although some Chambers have, in strictly defined circumstances, recognised an inherent power to reconsider the former type of decisions, they have also only exercised this power at the behest of a party to the proceedings before the Court.
7. For example, in the Lubanga case, in rejecting the request of the OPCV to reconsider elements of its Article 74 judgment, the Trial Chamber noted that the OPCV was "not entitled to appeal the Judgment under Article 81(1) of the Rome Statute".[5] It would therefore appear that the Trial Chamber implicitly linked the right to request reconsideration to the right to appeal the decision in question: as the OPCV did not possess the right of a party to appeal the decision in question, it also did not possess the corollary ability to seek reconsideration, in lieu of an appeal.

[1] ICC-01/11-01/11-291.
[2] ICC-01/11-01/11-297-Red.
[3] ICC-01/11-01/11-298-Red.
[4] ICC-01/11-01/11-300-Red.
[5] ICC-01/04-01/06-2846 at para. 3.

8. The rationale for exercising this power thus does not apply to the situation of ancillary proceedings, which are not related to the merits of the case before the ICC, nor should this power be invoked by an entity, which is neither a party, nor a participant in the substantive proceedings before the Court. To invest such a right in States would be extremely deleterious to the efficacious implementation of the Court's Part 9 cooperation regime, and would invite the possibility of delays and protracted litigation, which would obstruct the timely implementation of Court orders.
9. Of further import is the fact that Part 9 of the Statute includes specific procedures, such as the consultation process set out in Article 97, which enable States to draw the attention of the Court to relevant issues, which could impact on the ability of the State to implement the order in question. The existence of such explicit provisions obviates and indeed militates against the need for the Court to invoke inherent powers to accord a remedy to States in relation to cooperation issues.
10. The Request should thus be dismissed *in limine* due to the Government's lack of standing to request such a remedy.

In any case, the criteria for granting reconsideration are not met in the current circumstances

11. The Government of Libya has requested the Honourable Pre-Trial Chamber to reconsider its finding that the materials seized by the Libyan authorities were inviolable as they related to the exercise of the functions of the Defence, on the basis that the finding is manifestly unsound, and/or its consequence (the return of the seized materials) is manifestly unsatisfactory.[6]
12. The Government has, nonetheless, failed to adduce any legal or factual arguments as to why the Chamber's finding is manifestly unsound, nor has it demonstrated how and why the consequences are manifestly unsatisfactory. Indeed, as observed by the OPCV,[7] the Government has simply rehearsed the issues set out in its request for leave to appeal, and has made no effort to adduce any compelling factual issues or legal argumentation capable of sustaining a remedy of reconsideration.
13. In terms of the specific threshold for triggering a remedy of reconsideration, the Appeals Chamber has declined to rule on the issue as to whether the remedy of

[6] ICC-01/11-01/11-298 at para. 7.
[7] ICC-01/11-01/11-302-Conf-Exp at para. 17.

reconsideration exists under the ICC,[8] although it has implicitly recognised the power of the Court to vary trial management decisions, such as deadlines and administrative findings regulating the modalities of the proceedings, in order to address new facts and circumstances, or information the Chamber was not aware of when it rendered its initial decision.[9]

14. In terms of the latter aspect, Trial Chamber III refused to grant the remedy of reconsideration where a party failed to adduce any new information or considerations, which were not before the Chamber when the first decision was issued, and which would have been capable of s*ignificantly* altering the basis for the first decision.[10]
15. Some Pre-Trial Chambers and Trial Chambers have also recognised an inherent power to reconsider substantive decisions on fact or law, although such a power is subject to strict caveats.
16. For example, Pre-Trial Chamber I has held that

> such requests are to be confined to exceptional circumstances because "in principle, the statutory framework set out by the Statute and the Rules do not provide for a motion of reconsideration as a procedural remedy against any decision taken by the Pre-Trial Chamber or the single judge".[11]

17. Trial Chamber I has also enunciated the test as: "irregular decisions can be varied if they are manifestly unsound and their consequences are manifestly unsatisfactory" (emphasis added).[12] As observed by the OPCV, by positing the criteria in the alternative, the Government of Libya has misstated the test.[13]
18. The impugned decision is not a trial or case management decision, nor is the Government of Libya requesting the Court to vary the modalities of the implementation of the decision, based on new facts or circumstances, which would be capable of significantly altering the foundation of the Pre-Trial Chamber's Decision.
19. In terms of the possibility that this Pre-Trial Chamber might adopt the approach advanced by the majority of Trial Chamber I in the Lubanga case, the Government has completely failed to satisfy the test: the Request is simply predicated on a

[8] ICC-01/04-01/10-505.
[9] ICC-01/04-01/10-505 at para. 11. This is consistent with the approach of Judge Blattman in the Lubanga case: ICC-01/04-01/06-2707, 30 March 2011, paras. 9-15. See also ICC-01/09-01/11-578-Red, and ICC-01/09-01/11-301, paras. 17-20;
[10] Prosecutor v. Bemba, Transcript of 2 December 2010; ICC-01/05-01/08-T-42-Red-ENG WT; pages. 1-4:
[11] ICC-01/04-01/06-123, page 3, and ICC-01/04-01/06-166, para. 10, cited in ICC-01/04-01/07-259 at p. 5.
[12] Trial Chamber I, Prosecutor v. Lubanga, Decision on the defence request to reconsider the "Order on numbering of evidence" of 12 May 2010, ICC-01/04-01/06-2705, 30 March 2011, para.18.
[13] ICC-01/11-01/11-303-Conf-Exp at para. 11.

disagreement with the outcome, and a rehearsal of a range of matters, which fall completely outside the scope of the Pre-Trial Chamber's Decision.

20. The Pre-Trial Chamber's ultimate disposition, in which it requested the Government to return the seized documents to the Registry, and to destroy any copies, rested on the following findings- that:
    i. " 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";[14]
    ii. "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 this Chamber"; [15]
    iii. "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";[16] and,
    iv. "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".[17]
21. The Government of Libya has failed to adduce any legal or factual argumentation as to how and why these findings are manifestly unsound.
22. The Government has not submitted any legal argumentation as to why inviolability of Defence documents should not be considered to comprise part of the treatment, which is necessary for the proper functioning of the Court, pursuant to Article 48(4) of the Statute. Moreover, although the Government has – for the first time – disputed the application of the Statute to Libya, it has failed to adduce any legal argumentation in support of such a position, nor has it provided any explanation as to why it was not in a position to raise such matters and argumentation before the Chamber issued its Decision.
23. The Government has not disputed that the documents were seized during the course of a Defence mission, which was convened for the purpose of advising the defendant on

[14] ICC-01/11-01/11-291 at para. 25.
[15] ICC-01/11-01/11-291 at para. 25.
[16] ICC-01/11-01/11-291 at para. 26.
[17] ICC-01/11-01/11-291 at para. 27.

issues related to the admissibility of the case, and which the Government had agreed in advance should be privileged.

24. The Government has also not disputed that the Presidency of the ICC has not waived the privileges and immunities of the Defence, and has furthermore endorsed the finding of the Pre-Trial Chamber that the Pre-Trial Chamber does not possess any independent power to make factual determinations concerning whether the privileges and immunities of the Defence should be lifted.[18]

25. In such circumstances, given that the Government has itself failed to request the Presidency to lift the privileges and immunities of the Defence (and by extension, the inviolability of Defence documents), there does not appear to be any foundation to the Government's assertion that it was manifestly unsound for the Pre-Trial Chamber to conclude that in the absence of any such a waiver from the Presidency or an independent power to make factual determinations on such matters, the documents seized from the Defence should be considered to be inviolable.

26. With respect to the consequences of the Pre-Trial Chamber's decision, in the absence of any argumentation as to why domestic courts, and not the Presidency, should be the arbiter as to whether the privilege should be lifted, the Government has completely failed to satisfy its burden of demonstrating that it would be a manifestly unsatisfactory consequence to require the Government to return the material in question, in the absence of any decision of the Presidency lifting the privileges and immunities of the Defence, and the related inviolability of Defence documents.

27. Counsel for Libya have also expressly recognised that it would be improper, and a necessary breach of their professional duties for them to view potentially privileged materials prior to any determination lifting the privilege of such materials.[19] There does not appear to be any basis for distinguishing between Counsel and the Government in such matters: if it is unethical or improper for Counsel to view such materials, then it must also be unethical or improper for national authorities to view, and utilise such materials in domestic proceedings, without having first obtained a waiver of the inviolability of such documents from the ICC.

28. The Government has had ample time and opportunity to argue its case before the Presidency for lifting the privileges and immunities of the Defence. The Government has also never requested the assistance of the Court pursuant to Article 93(10) to

[18] ICC-01/11-01/11-298 at para. 15.
[19] ICC-01/11-01/11-298 at paras. 21-22.

obtain lawful access to information or documentation, which might be relevant to its investigation of alleged domestic crimes.

29. Any impact on domestic proceedings is thus directly attributable to the failure of the Government to act in a diligent manner, and the likely absence of any legal or factual justification for lifting the privileges and immunities of the Defence. There is no basis for invoking the remedy of reconsideration in the absence of any causal nexus between the consequences complained of, and the Pre-Trial Chamber's Decision.

3. Relief Requested

30. For the reasons set out above, the Defence for Mr. Saif Al-Islam Gaddafi respectfully requests the Honourable Pre-Trial Chamber to dismiss the Government of Libya's Request for Reconsideration of "Decision on the Urgent Defence Request".

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

Dated this, 26th Day of March 2013

At The Hague, The Netherlands