

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **28 March 2014**

**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 Redacted  
With Public Annex A and  
Confidential Annex B to F**

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

**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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**Detention Section**

**Victims Participation and Reparations Section**

**Other**

## **I. Introduction**

1. The primary mandate of the International Criminal Court (“the ICC”) is to ensure the effective adjudication of serious international crimes before the ICC. It is axiomatic that the ICC’s duty to ensure justice cannot be achieved if the rights of the Defence are compromised or prejudiced.
2. Although the ICC can assist States in connection with national investigations, such assistance must not be such as to vitiate the ICC’s ability to fulfill its primary mandate in a manner which fully respects the rights of the Defence.
3. Any engagement with States should also be consistent with the emphasis in the Preamble on “lasting respect for and the enforcement of international justice”.
4. The Defence for Mr. Saif Al-Islam Gaddafi hereby seizes the Single Judge with a request for access to information concerning a Memorandum of Understanding on burden sharing, which was concluded between the ICC Prosecution and Libya (“the MoU”).
5. Whereas constructive engagement with States can, in principle, be consistent with the role of the ICC in complementing national jurisdictions, in light of the prevailing security situation in Libya, the Defence has concerns that the implementation of such an MoU could have a deleterious impact on key Defence rights, the integrity of Defence evidence, and the security of Defence witnesses, as set out further below.
6. These concerns are all the more urgent in light of reports that firstly, the Libyan authorities have announced that the trial of Mr. Saif Al-Islam Gaddafi will commence on 14 April 2014 (without his physical presence), and secondly, that his brother, Mr. Saadi Gaddafi, has apparently been mistreated by prison guards in Tripoli.
7. There is thus an appearance that rather than promoting effective prosecution and respect for due process in Libya, the ICC’s engagement with the Libyan authorities to date appears to have had the unintended consequence of emboldening those authorities, and Libyan militia, to lower due process standards and to place ever greater reliance on ‘confession’ evidence, with the attendant risks of mistreatment of detainees.
8. The Defence has full confidence in the ICC Prosecutor’s integrity and commitment to her duties as an independent Minister of Justice. Nothing in this application should be taken in any way as connoting any doubts in that regard. Disclosure of the MoU to the Defence would, however ensure that the Prosecution is in a better position to make

informed decisions concerning the impact of such cooperation on the rights of the Defence and of Mr. Gaddafi, by receiving informed Defence input on the possible impact of the MOU in concrete cases, and thereby to ensure that adequate safeguards are in place to protect the integrity and primary mandate of the ICC.

9. The Defence has therefore set out the factual concerns regarding the conclusion of the MoU in the absence of cooperation with the Defence followed by its legal submissions as to why disclosure of the terms of the MoU to the Defence is warranted.
10. For the reasons set out below, therefore, the Defence respectfully requests the Chamber to order the disclosure of the MOU.

## II. Factual Background

### a. Conclusion of MoU

11. During a briefing to the Security Council on 14 November 2013, the Prosecutor announced that she had concluded a memorandum on burden sharing with Libya.
12. According to this MoU, the ICC Prosecution had agreed to:
 

“prioritise its investigation and prosecution of those who are outside the territory of Libya and who are thus largely inaccessible to the Libyan authorities, [whereas] the Government of Libya will prioritise investigations of those suspects who are within Libyan territory.”<sup>1</sup>
13. The Prosecutor described the persons outside of Libya as persons who “continue to use their influence to destabilise the country and pose a security threat to civilians.”<sup>2</sup>
14. In an accompanying report to the Security Council, the Prosecutor confirmed that the targets of the ICC Prosecution’s efforts under the MoU were “pro- Gaddafi officials outside of Libya”.<sup>3</sup>
15. The Prosecutor further confirmed that the ICC Prosecution and the Government of Libya had “committed to supporting each other’s investigations and prosecutions

<sup>1</sup> Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, to the United Nations Security Council on the situation in Libya, pursuant to UNSCR 1970 (2011), 14 November 2013,

[http://www.iccpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/Statement-UNSC-Nov2013.aspx](http://www.iccpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/Statement-UNSC-Nov2013.aspx)

<sup>2</sup> *Ibid.*

<sup>3</sup> Sixth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970 (2011), para. 12. [http://www.iccpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Documents/Report%20to%20UNSC%20Nov2013EN.pdf](http://www.iccpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Documents/Report%20to%20UNSC%20Nov2013EN.pdf)

through the exchange of information, subject to confidentiality and protection obligations.”<sup>4</sup>

16. Within the context of the MoU, the Prosecutor also called on all United Nations States to assist with “telephone intercepts, and sustained follow-up on transfers of funds to establish the whereabouts and movements of persons under investigation.”<sup>5</sup>
17. Finally, the Prosecution asserted that the MoU does not “affect the ongoing judicial proceedings in either the Saif Al-Islam Gaddafi or the Al Senussi cases”.<sup>6</sup>
18. Against that background, the Libyan authorities have announced their intention to commence the trial of Mr. Gaddafi on 14 April 2014, along with thirty-six other defendants, including Mr. Abdullah Al-Senussi, and Mr. Saadi Gaddafi.<sup>7</sup> It may reasonably be inferred from the fact that the Libyan authorities have joined Mr. Saadi Gaddafi to this trial, that any former Gaddafi official subsequently transferred to Libya will also be joined to Mr. Saif Al-Islam Gaddafi’s case.

*b. Abuse of due process in case against Mr. Gaddafi*

19. It has been confirmed that several of the defendants to be tried with Mr. Gaddafi still do not have legal representation, and only twenty-three of them were present during the hearing at which the trial date was announced.<sup>8</sup>
20. Only one media outlet was invited to attend the hearing. From visual extracts of the hearing, it would appear that Mr. Al-Senussi attempted to address the judges or to raise a complaint, but his submissions have not been broadcast or reported.<sup>9</sup> It is reasonable to assume that since Mr. Al-Senussi addressed the Judges directly, he is not

<sup>4</sup> Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, to the United Nations Security Council on the situation in Libya, pursuant to UNSCR 1970 (2011), 14 November 2013

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> Ahramonline, Trial of Gaddafi sons, aides to open April 14:Libya, 24 March 2014, <http://english.ahram.org.eg/News/97475.aspx>

<sup>8</sup> “According to sources from the Ministry of Justice, the decision of the Trial judge to postpone the hearing to 14 April was to allow all accused to be present, from whom 23 attended today’s session. Sources added to the Libyan news agencies, that the decision to postpone was also to provide an opportunity to assign lawyers to all the defendants, whom the public prosecutor was unable to secure a lawyer to represent”

Al-Awsat, Postponement of trial of 37 agents of Gaddafi to next 14 April, 24 March 2014, <http://alwasat.ly/ar/news/libya/10073/%D8%AA%D8%A3%D8%AC%D9%8A%D9%84-%D9%85%D9%8F%D8%AD%D8%A7%D9%83%D9%85%D8%A9-37-%D9%85%D9%86-%D8%A3%D8%B9%D9%88%D8%A7%D9%86-%D8%A7%D9%84%D9%82%D8%B0%D8%A7%D9%81%D9%8A-%D8%A5%D9%84%D9%89-14-%D8%A3%D8%A8%D8%B1%D9%8A%D9%84-%D8%A7%D9%84%D9%82%D8%A7%D8%AF%D9%85.htm#UzH60a1dX-D>

<sup>9</sup> Debate on Al-Ahrar, broadcast 24 March 2014, <http://www.youtube.com/watch?v=STkPz1uEKBo&feature=youtu.be> (“Al-Ahrar Debate”) see 3.30 minute mark

represented by Counsel.<sup>10</sup> From video stills of the hearing, it would seem that only four, or at most five, lawyers were present.<sup>11</sup>

21. It would appear that the Libyan authorities are attempting to gloss over these fundamental problems by amending the Criminal Procedure Code to eliminate the defendants' right to be tried in their physical presence.<sup>12</sup> Defendants who are outside the effective custody of the Government (i.e. Mr. Saif Al-Islam Gaddafi) will be required to 'participate' in a capital criminal case *via* a closed circuit video.
22. The spokesperson for the Prosecutor-General has indicated that this amendment was proposed by the Prosecutor-General, and the Head of the General National Congress (GNC).<sup>13</sup> As a result this amendment has been described as a political solution,<sup>14</sup> which is designed to bolster Libya's case before the ICC.<sup>15</sup>
23. There are also concerns regarding Libya's capacity to implement such a technological solution, particularly in light of Libya's assertion before the ICC that its communication infrastructure is extremely unreliable.<sup>16</sup>
24. If Mr. Gaddafi is not physically present in the courtroom, it will also be technically impossible for lawyers to consult with him or receive instructions throughout the proceedings in any manner that would guarantee confidentiality and respect for legal privilege, or for external media or monitors to verify his physical or mental condition,

<sup>10</sup> Al-Ahrar Debate, "Sami Al-Atrash (experienced lawyer): the accused does not defend himself inside the courtroom in any circumstances except to enter plea. The person who defends is the lawyer and it cannot be that an accused is tried in the absence of the lawyer" [28:02 to 28:27]

<sup>11</sup> Al-Ahrar Debate, see 3.13 minute mark

<sup>12</sup> "The Prosecutor-General's office states it will make amendments to the Libyan Criminal Code so that Saif Gaddafi can be prosecuted via closed circuit whilst he remains in prison in Zintan."

Al-Awsat, Amendment to criminal code to try Saif in closed circuit, 24 March 2014, <http://alwasat.ly/ar/news/libya/10075/%D8%AA%D8%B9%D8%AF%D9%8A%D9%84-%D8%A7%D9%84%D9%82%D8%A7%D9%86%D9%88%D9%86-%D8%A7%D9%84%D8%AC%D9%86%D8%A7%D8%A6%D9%8A-%D9%84%D9%85%D8%AD%D8%A7%D9%83%D9%85%D8%A9-%D8%B3%D9%8A%D9%81-%D8%A7%D9%84%D9%82%D8%B0%D8%A7%D9%81%D9%8A-%D8%A8%D8%A7%D9%84%D8%AF%D8%A7%D8%A6%D8%B1%D8%A9-%D8%A7%D9%84%D9%85%D8%BA%D9%84%D9%82%D8%A9.htm#.UzBPgvSwIlo>

<sup>13</sup> Al-Ahrar Debate,

"Presenter: Whose idea was it to introduce these amendments?"

Siddique Srour (Spokesperson for Office of Prosecutor General): The Office of the Prosecutor-General who consulted with the President of the GNC" [12:39 to 12:50]

<sup>14</sup> Al-Ahrar Debate,

"Faraj Zeidan (expert in constitutional law): the amendments go beyond what is legal. This amendment that has been introduced by the GNC in an attempt to alter code 243 of the criminal law which guarantees and provides the presence of the accused in person during court sitting during trial phase to hear the case. An accused can only hear the case during the sitting and can prepare the defence of himself in person. However, at the moment if we do not speak up now we are seeing is the GNC being a political, law-making body concerning criminal code" [19:47 to 22:30]

<sup>15</sup> Al-Ahrar Debate, "Siddique Srour: we consulted with legal experts and experts in human rights as well as our team before the International Criminal Court and concluded that this amendment strengthens the Libyan position before the International Criminal Court" [17:30 to 17:44].

<sup>16</sup> ICC-01/11-01/11-160, para. 14.

or whether he is in fact able to participate in the proceedings in an effective manner, for example, by viewing the evidence.<sup>17</sup>

25. Libya cites legitimate security concerns regarding the risk to Mr. Gaddafi's life if he were to be transferred to Tripoli as the justification for this unfair and discriminatory measure.<sup>18</sup> However this cannot operate as a genuine waiver of Mr. Gaddafi's right to be present at his trial, where it is a "Hobson's choice" between either being transferred to Tripoli at the possible cost of his life, or facing an unfair trial which could result in the death penalty.<sup>19</sup>
26. Concerns that Mr. Saif Al-Islam Gaddafi would be mistreated in Tripoli are not 'speculative'. The former Prime Minister recently stated in an interview that he had heard that Mr. Saadi Gaddafi was mistreated and possibly tortured by his prison guards over the weekend.<sup>20</sup> He attributed this mistreatment to the fact that Saadi is a 'Gaddafi',<sup>21</sup> and that "prison guards [...] were prisoners during Gaddafi's era and now they are trying to take revenge."<sup>22</sup>
27. Notably, although the authorities announced that Mr. Saadi Gaddafi will be tried on 14 April 2014, he was absent from Monday's hearing –thus illustrating the very real possibility that capital trial by 'closed circuit video' will be used to prevent the media or public from ascertaining the physical health and well-being of the defendants.
28. The reported mistreatment of Mr. Saadi Gaddafi by his prison guards at Al-Hadba also raises concerns in relation to the announcement of the Prosecutor-General that the Prosecution will rely mainly on 'confessions' in the trial,<sup>23</sup> which appear to have been obtained from unrepresented defendants, many of whom are detained in the same

<sup>17</sup> To date Mr. Gaddafi has had no opportunity to review any of the evidence against him. See Human Rights Watch, Libya: Gaddafi Son, Ex Officials, Held Without Due Process, 13 February 2014, <http://www.hrw.org/news/2014/02/13/libya-gaddafi-son-ex-officials-held-without-due-process>

<sup>18</sup> Libya Herald, Saif Al Islam to make virtual appearance in Tripoli court after Congress amends civil code, 25 March 2014, <http://www.libyaherald.com/2014/03/25/saif-al-islam-to-make-virtual-appearance-in-tripoli-court-after-congress-amends-civil-code/#axzz2x0uRs35H>

<sup>19</sup> See also Opinion 41/2013 (Libya) A/HRC/WGAD/2013/ at para. 32

"Indeed, as it was emphasised by the Human Rights Committee, in cases involving capital punishment, it is axiomatic that the accused must be effectively assisted by a lawyer at all stages of the proceedings.10 Counsel provided by the competent authorities on the basis of this provision must be effective in the representation of the accused"

<sup>20</sup> "We heard that he was mistreated. He was beaten up and maybe tortured. I just heard yesterday [Sunday]." Former Prime Minister Zeidan, quoted in D. Haynes, 'Broken Libya is Now a Crucible of Terror', *The Times* 26 March 2014, <http://www.thetimes.co.uk/tto/news/world/middleeast/article4044715.ece>. See Annex A.

<sup>21</sup> "I feel that I was probably partially responsible about this because we are against Gaddafi .against all that he did but when anyone is in prison he should be treated as a prisoner" Former Prime Minister Zeidan, quoted in D. Haynes, 'Broken Libya is Now a Crucible of Terror', *The Times* 26 March 2014. See Annex A.

<sup>22</sup> Former Prime Minister Zeidan, quoted in D. Haynes, 'Broken Libya is Now a Crucible of Terror', *The Times* 26 March 2014. See Annex A.

<sup>23</sup> Al-Ahrar Debate, "Siddique Srour: The majority of the accused have confessed to the crimes and I can tell you in full confidence that there is a lot documenting proof, statements and specific confessions including from Saif Al-Islam, Abdullah Senussi, Baghdadi Mahmoudi, Mansour Doua- confessions concerning themselves and against other accused- we can not disseminate the documents to news agencies but the court will review it" [52:00 to 52:42]

facility as Mr. Saadi Gaddafi. The risks that evidence will be obtained by torture are only too real in these circumstances, particularly considering the many credible reports that the use of torture is widespread in Libya's detention facilities.

29. In naming the particular defendants from whom confessions have been elicited against themselves and their co-defendants, the Libyan authorities have demonstrated their disregard both for the so-called "principle of confidentiality of investigations", and for the security and protection of witnesses in the proceedings.
30. It is foreseeable that any assistance or information provided by the ICC Prosecution to the Libyan authorities pursuant to the MOU in relation to former Gaddafi officials will be used in the domestic case against Mr. Saif Al-Islam Gaddafi. Whether any such assistance may appropriately be rendered in the context of fundamentally unfair proceedings, in a capital case, is very much a live question. And it is one over which the Court must exercise its supervisory jurisdiction, not least where the defendant should not even be in Libya, but should have been delivered to The Hague a great many months ago.

*c. Impact on proceedings before ICC*

31. It is also self-evident that any agreement, which focusses on former Gaddafi officials residing outside of Libya, will impact on the case against Mr. Gaddafi.
32. The ICC allegations against Mr. Gaddafi are predicated on his alleged 'control' over the apparatus of power in Libya at the time of the uprising. Any person who played a political, financial, or military role in the former regime is an obvious source of information for the Defence for Mr. Gaddafi, and/or a potential witness.
33. In a more recent Security Council meeting on Libya, the Libyan Ambassador to the United Nations requested the United Nations and international community to take measures such as travel bans and asset freezes against any "individuals, business people and entities who cooperated with the family of Al-Qadhafi and his senior officials".<sup>24</sup>
34. In short, most Defence witnesses and contacts in this particular case are being targeted by the Libyan Government, irrespective as to whether they had any involvement in crimes during or after 2011.
35. If the Libyan authorities are requesting the United Nations and international community to take measures against such persons, then it follows that they would

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<sup>24</sup> S/PV.7130, p. 8, [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/PV.7130](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.7130)



have also seized the ICC Prosecution with requests for assistance as concerns these persons.

36. In the absence of appropriate safeguards, the monitoring of communications with such persons is likely to capture confidential Defence communications with these persons and/or confidential discussions concerning the Defence strategy and/or travel plans, in violation of well-established and sacrosanct principles of Defence confidentiality.
37. While the Defence fully accepts that the Prosecution would not intentionally be a party to any measures impacting on Defence confidentiality, it is nonetheless submitted that it would be an abuse of the Prosecution's powers under Part 9 of the Statute if the Prosecution were to obtain confidential Defence information by any form of monitoring conducted at Libya's request. It would also vitiate the Chamber's power to regulate and monitor the parameters of the ICC disclosure regime.
38. In the absence of appropriate safeguards, for example to prevent information about Libyan asylum-seekers being transmitted to Libya (in relation to which, see further below), the provision of information concerning persons who are of particular adverse interest to the Libyan authorities, could also endanger their security and/or that of their families and associates in Libya.
39. Even if the ICC Prosecution is not itself aware of any link between the targets of investigative efforts or monitoring pursuant to the MOU, and Defence witnesses, it cannot be excluded that the Libyan authorities may request the Prosecution to monitor specific persons whom the Libyan authorities suspect of being potential or actual Defence witnesses, without the Prosecutor knowing it.<sup>25</sup>
40. Since the Prosecution might be unaware of the person's actual or suspected association with the Defence, she will not be in a position to conduct an accurate risk assessment concerning the consequences of disclosing information to Libya.

*d. Political motivations*

41. The extradition of such persons to Libya, or more commonly, their illegal rendition to Libya, could also render them unavailable to assist the Defence in the proceedings before the ICC.
42. Both the ICC Prosecution and the Libyan authorities have emphasised that they are directing their efforts against persons, whom they believe to have 'destabilised

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<sup>25</sup> ICC-01/11-01/11-323-Conf-Exp-Anx1.

Libya’.<sup>26</sup> The accusation of ‘destabilising’ a country is, arguably, a political offence, which could engender a right to seek asylum. It also bears noting that it is clearly not an offence within the ICC’s jurisdiction; so it is questionable why it is a term of reference apparently used in the MOU.

43. The possibility that the targets of requests from Libya may be the victims of a politically motivated investigation is strongly reinforced by the fact that:

- i. Under the terms of the MoU, the OTP is focusing its efforts only on former Gaddafi officials;
- ii. The former Prime Minister for Libya has publicly stated that the current Prosecutor-General has abused his powers for political motivations, and that the issuance of red notices by INTERPOL at the request of the Libyan authorities is reminiscent of the ‘Gaddafi regime’;<sup>27</sup>
- iii. INTERPOL has already, in at least one case (and possibly others), removed red notices issued at Libya’s request against Defence witnesses, on the basis that the request for the notice was politically motivated;
- iv. The Libyan authorities appear to have used the amended version of Article 195 of the Libyan Criminal Code in order to arrest the former acting Chief of Staff, the Air-Force Brigadier-General and the former Commander of Benina airbase for the ‘crime’ of criticising the performance of the General National Congress and/ of illegal political activities;<sup>28</sup> and
- v. Libyan authorities have also invoked Article 195 to prosecute a journalist for the ‘crime’ of criticising the Libyan judiciary.<sup>29</sup>

<sup>26</sup> Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, to the United Nations Security Council on the situation in Libya, pursuant to UNSCR 1970 (2011), 14 November 2013; S/PV.7130, p. 8,

<sup>27</sup> Interview with former Prime Minister Zeidan broadcast on Al-Arabiya on 15 March 2014 at [http://www.youtube.com/watch?v=bUpY\\_pHpSCU&feature=youtu.be](http://www.youtube.com/watch?v=bUpY_pHpSCU&feature=youtu.be)

[04:43 to 05:37]

“I have not been charged, this is only in the media and from particular individuals, it is not a judicial order or the Attorney-General. At the moment the judiciary is in a state that is not conducive to work and the conduct of the Prosecutor-General after the vote of confidence gives the impression that at the moment there is politicization of the judiciary or attempts to politicize the judiciary and the Prosecutor-General himself, I know him well and he was the first person I dealt with and met in office but since he has pushed for this order at this time and I request that he withdraws this order the travel ban as it is covered in political motive” and does not require judicial intervention either the travel ban or the red notice that goes with it, these are matters that remind me of the Gaddafi regime” [unofficial translation]

<sup>28</sup> A. Abdul-Wahab ‘ The former Chief of Staff Arrested and then Released’, Libya Herald 22 March 2014, <http://www.libyaherald.com/2014/03/22/former-chief-of-staff-arrested-then-released/#axzz2wrvidwog>

<sup>29</sup> ‘Libya: Three years on, Gaddafi-era laws used to clamp down on free expression’, Amnesty International 12 February 2014, <https://www.amnesty.org/en/news/libya-three-years-gaddafi-era-laws-used-clamp-down-free-expression-2014-02-13>

44. There is thus a distinct likelihood that any information collected, pursuant to the MOU, through telephone monitoring could capture confidential and sensitive communication pertaining to asylum applications (including privileged communications with domestic lawyers).
45. There is an absolute prohibition under internationally recognised human rights law as concerns the provision of any information which could alert the State of nationality to the fact that a national has filed a claim for asylum, or the country where asylum has been sought.<sup>30</sup>
46. It follows that it would be impermissible for the Prosecution to alert Libya directly or indirectly to the location of an asylum seeker, or to transmit any information, which could encompass details or communications linked to the person's asylum claim.
47. This prohibition applies irrespective as to whether the State of asylum or the ICC Prosecution are of the view that the transmission of information to Libya would not occasion any risk to the asylum seeker.<sup>31</sup>
48. There is also a concern that even in the event that the ICC Prosecution does not convey its intercepts or investigative findings to Libya, pursuant to the MOU, in the absence of clear and stringent safeguards, it cannot be excluded that the State, which conducted the monitoring, might convey intercepts or information to Libya independently of the ICC.
49. The Defence for Mr. Saif Al-Islam Gaddafi has a duty to take such steps as may be necessary to preserve evidence for the trial, and to ensure the safety of potential Defence witnesses.
50. It therefore has a direct interest in verifying that any assistance provided by the Prosecution to Libya, or any cooperation requested from State parties:
- a. does not infringe legal professional privilege or the privileges and immunities of the Defence;
  - b. does not violate the confidentiality of Defence investigations or communications with potential witnesses and sources, or compromise the security of Defence investigations or communications;

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<sup>30</sup> "The right to privacy and its confidentiality requirements are especially important for an asylum-seeker, whose claim inherently supposes a fear of persecution by the authorities of the country of origin and whose situation can be jeopardized if protection of information is not ensured. It would be against the spirit of the 1951 Convention to share personal data or any other information relating to asylum-seekers with the authorities of the country of origin until a final rejection of the asylum claim." UNHCR Advisory opinion on the rules of confidentiality regarding asylum information, para. 4, <http://www.refworld.org/pdfid/42b9190e4.pdf>

<sup>31</sup> UNHCR Advisory opinion on the rules of confidentiality regarding asylum information, para. 5.

- c. does not impact on the security and protection of Defence witnesses and sources, or negatively affect their availability to testify for the Defence; and
- d. does not violate the rights of the Defence under the Statute in any other manner.

51. The specific terms of the MoU are thus directly relevant to the preparation of the Defence and the ability of the Defence to exercise its rights under the Statute in an effective manner. The MoU could also be of relevance to either the admissibility appeal and/or a future abuse of process motion. It therefore falls squarely within the Prosecution's disclosure obligations.

52. The Defence therefore respectfully requests the Honourable Pre-Trial Chamber to order the Prosecution to disclose the MoU to the Defence.

### III. Procedural History

53. As part of its representation of Mr. Gaddafi, the Office of Public Counsel for the Defence (OPCD) requested the Prosecution to inform the Defence as to,

“whether the Prosecution intends to provide assistance or cooperation to the Libyan Authorities in connection with the domestic proceedings, and if so, what safeguards does it have in place to ensure that such cooperation or assistance will not be used by the Libyan authorities in connection with violations of the rights of the Mr. Saif Al- Islam Gaddafi, his family, and acquaintances, who may be potential Defence witnesses”.<sup>32</sup>

54. In a subsequent letter dated 3 April 2012, the OPCD requested the Prosecution to disclose:

‘i. whether the Prosecution has provided any cooperation to the Libyan authorities; ii. if so, the number of instances and general content of the cooperation provided to the Libyan authorities; and iii. whether the cooperation has focussed on assistance involving incriminating evidence, or whether the Libyan authorities have ever requested, or been provided, exculpatory evidence or information, which may be material to the preparation of the defence.’<sup>33</sup>

55. In a letter dated 10 May 2012, the Prosecutor stated that it had never provided any information or evidence to the Libyan authorities<sup>34</sup>. Notwithstanding the fact that the

<sup>32</sup> Correspondence dated 7 March 2012, ICC-01/11-01/11-81-AnxA-Red.

<sup>33</sup> Annex B.

<sup>34</sup> Annex C.

Defence submitted later disclosure requests (including on 14 January 2013),<sup>35</sup> the Prosecution never reversed or updated its position of 10 May 2012.

56. In its decision on disclosure dated 2 August 2013, the Pre-Trial Chamber ordered the Prosecution to:

“[Redacted]”<sup>36</sup>

57. The Pre-Trial Chamber further confirmed that if the Prosecution were of the view that the requested information fell under Rule 81(2), then the Prosecution should submit a request for non-disclosure to the Chamber (as opposed to unilaterally refusing to implement disclosure).<sup>37</sup>

58. Following the Prosecutor’s briefing to the Security Council in November 2013, the Defence wrote to the Prosecution in order to express its concerns in relation to the impact which such an MoU could have on:

- i. The confidentiality of Defence communications and investigations;
- ii. The security and protection of Defence witnesses and sources;
- iii. The right of the Defence to receive disclosure from the OTP in relation to crimes committed by *thumar* during 2011; and
- iv. The ability of the Chamber to make an objective assessment as concerns Libya’s actual capacity to try Mr. Gaddafi.<sup>38</sup>

59. The Defence therefore requested the Prosecution to disclose a copy of the MOU, and:

- i. the criteria used by the Prosecution to request telephone monitoring and financial monitoring against persons, and the linkage between such criteria and the Prosecutor’s mandate to investigate crimes set out under the Statute;
- ii. the procedures used by Prosecution to request telephone monitoring and financial monitoring;
- iii. whether and how the Prosecution has implemented any safeguards to ensure that such monitoring and requests do not infringe on:
  - a. client-counsel privilege either as concerns the Gaddafi defence or domestic counsel;
  - b. the protection and safety of the persons concerned;

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<sup>35</sup> Annex D.

<sup>36</sup> ICC-01/11-01/11-392-Conf, p. 19.

<sup>37</sup> Para. 45.

<sup>38</sup> Annex E.

- c. confidential communications between the Defence and potential witnesses and sources;
  - d. confidential communications between such persons which have been made for the purposes of asylum applications or protection requests (*via* the ICC or other international organizations and NGOs).
- iv. the extent to which such information may be disclosed to the Libyan authorities and the criteria which is used by your office to determine:
- a. what information should be disclosed;
  - b. under what conditions it should be disclosed; and
  - c. whether the Libyan Government has the capacity to abide by these conditions.
60. In its response, the Prosecution simply denied that disclosure of the MoU fell within its disclosure obligations, or that it any impact on the proceedings against Mr. Gaddafi.<sup>39</sup> In particular, the Prosecution asserted that information concerning the criteria for monitoring or requesting assistance was not relevant to Mr. Gaddafi's rights as concerns the admissibility proceedings, and any concerns regarding the protection and security of Defence witnesses was 'speculative'.

#### IV. Legal Submissions

##### *a) The Chamber can authorise disclosure of the MoU to the Defence*

61. Notwithstanding the independence of the Prosecutor, the Chamber has both the power and the duty to exercise oversight over the activities of the Prosecution in order to ensure that they do not prejudice the rights of the Defence or the overall fairness of the proceedings.<sup>40</sup>
62. This includes the power to police the validity and enforcement of agreements concluded by the Prosecution with external entities.<sup>41</sup>

<sup>39</sup> Annex F.

<sup>40</sup> "[i]n the view of the Single Judge, the competent Chamber, as the organ of the Court which has ultimate responsibility for interpreting and applying the different provisions of the Statute and the Rules, has always the competence to determine whether the Prosecution's practices, as well as agreements concluded by the Prosecution pursuant to article 54 (3) (e) of the Statute, are consistent with the Statute and the Rules" ICC-01/04-01/07-621, para. 55. See also ICC-01/04-01/06-2582, paras. 47-48.

<sup>41</sup> ICC-01/04-01/06-1486, paras. 2-3.

63. The power to take such measures presupposes the power to order the disclosure of any information which might be relevant to the modalities of such agreements, if the agreements impact on the ability of the Defence to exercise its rights under the Statute.
64. The Prosecution's ability to enter into agreements with States concerning both the receipt and provision of cooperation is constrained by its obligation to execute its duties within the legal framework set out in the Rome Statute.
65. This framework imposes express obligations to:
- i. Fully respect the rights of the Defence;<sup>42</sup>
  - ii. Respect the interests and personal circumstances of victims and witnesses;<sup>43</sup>
  - iii. Take necessary measures to ensure the protection of any person and the preservation of evidence;<sup>44</sup>
  - iv. Interpret and apply the Prosecution's powers and obligations in a manner which is consistent with internationally recognised human rights, and without any adverse distinction based on political opinion, *inter alia*.<sup>45</sup>
66. Given that the Prosecution has an explicit obligation to establish the truth, and to investigate incriminating and exculpatory circumstances equally, it follows that the Prosecution cannot discriminate in any way between witnesses, whom have been identified as supporting the Prosecution case, and those persons who could be potential Defence witnesses.
67. The drafting history of Article 56 makes clear that the Prosecution is under an equal duty to take steps to ensure the preservation of evidence, which potentially could be exculpatory or material to the preparation of the Defence.<sup>46</sup>
68. The Prosecutor's power to elicit cooperation or assist States with their domestic investigations or prosecutions is necessarily subject to the above safeguards and obligations.

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<sup>42</sup> Article 54(1)(c) of the Statute: "As the title of article 54 of the Statute expressly states, investigative powers are concomitant with investigative duties and, as the organ primarily in charge of the investigation, the Prosecution is bound to act with due care to ensure that investigative techniques will by no means affect at a later stage the right of accused persons to a fair trial": ICC-01/04-01/07-621, para. 39. See also ICC-01/04-01/06-2582,

<sup>43</sup> Article 54(1)(b).

<sup>44</sup> Article 54(3)(f).

<sup>45</sup> Article 21(3) of the Statute.

<sup>46</sup> F. Guariglia, 'Article 56: the Role of the Pre-Trial Chamber in relation to an unique investigative opportunity', in Triffterer (ed.) *Commentary on the Rome Statute* (Hart Publishing, 1999 (1<sup>st</sup> ed.)), p. 736.

*b) Disclosure is warranted in accordance with Rule 77*

69. As noted above, the MoU focuses on former Gaddafi official, who have fled Libya - for potentially well-founded fears of persecution. The Libyan authorities have also specifically announced their desire to receive cooperation and assistance in relation to any persons who are linked to the Gaddafi family, which necessarily encompasses friends and associates of Mr. Saif Al-Islam Gaddafi.<sup>47</sup>
70. There are thus concrete, as opposed to speculative, grounds for believing that by MoU 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.
71. The terms under which the Prosecution 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. It therefore falls within the scope of the Prosecution's Rule 77 disclosure obligations.
72. The Pre-Trial Chamber has confirmed that the Prosecution's disclosure obligations may be triggered prior to the surrender of Mr. Gaddafi, if the information in question is relevant to the ability of the Defence to exercise its procedural rights at this stage of the proceedings.<sup>48</sup>
73. [Redacted].<sup>49</sup>
74. The jurisprudence of the ICC also confirms that requests for assistance between the ICC Prosecution and States fall within the scope of the Prosecution's Rule 77 disclosure obligations.<sup>50</sup> Since there is an overriding principle in favour of full-disclosure, the Prosecution cannot simply assert that disclosure might endanger its investigations, it must demonstrate how and why disclosure of the information –even in redacted form - would prejudice its investigations.<sup>51</sup>
75. The Prosecution has disclosed agreements with States in the past in connection with admissibility proceedings, potential abuse of process applications, or Rule 77 in general.<sup>52</sup>

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<sup>47</sup> S/PV.7130, p. 8.

<sup>48</sup> ICC-01/11-01/11-392-Red, para. 38.

<sup>49</sup> ICC-01/11-01/11-392-Conf.

<sup>50</sup> ICC-01/04-01/06-3017.

<sup>51</sup> ICC-01/04-01/06-3031.

<sup>52</sup> ICC-01/04-01/10-47, para. 14; ICC-01/04-01/10-275; ICC-01/04-01/06-39-AnxB9. In the Katanga case, pursuant to Rule 77, the Prosecution disclosed correspondence between OTP and DRC concerning the provision of evidence and assistance to the DRC: ICC-01/04-01/07-949, footnote 41.





information with an external party should not jeopardize the safety of the individual concerned or lead to the violation of his or her human rights.”<sup>56</sup>

81. The Prosecution’s attempt to downplay the relevance of the MoU to this case, and to construe the Defence concerns as ‘speculative’ fails either to grasp or address the key issue underlying the Defence request: the Prosecution might not always be aware of the impact of the MoU on the rights of Mr Gaddafi because the Prosecution does not and should not know the identity of Defence witnesses at this stage.
82. The Prosecution is therefore not in a position to verify whether its assistance to Libya could endanger these persons, nor will the Prosecution be aware if the information could be covered by other forms of confidentiality under the Statute.
83. At the same time, the Defence should not be required at this early stage of the proceedings to notify the Prosecution of the identity of potential/actual witnesses in order to protect them from adverse measures being taken against them.
84. There is concrete and reliable evidence concerning massive human rights violations in Libya, such as arbitrary detention, torture, extrajudicial killings, abductions and threats.<sup>57</sup>
85. The former Prime Minister has acknowledged that the human rights situation is dire, the judiciary ineffective and politicised, the Government does not appear to control anything, and there is a risk to the life of anyone present on Libyan territory.<sup>58</sup>
86. In such an environment, the Defence should not be compelled to wait until it collects evidence that its rights actually have been violated before it can seize either the Prosecution or the Chamber with a request to take measures in order to prevent such violations occurring in the first place.
87. For the Defence – or, for that matter, the Court – to adopt a ‘wait and see’ approach risks irreparably damaging the Defence case and endangering the lives of Defence witnesses, and is thus incompatible with the standard of diligence and protection imposed by Articles 54 and 68 of the Statute.
88. An effective Court should be geared towards avoiding prejudice – not litigating it on a *post facto* basis. The role of the Chamber is also to ensure fairness. This necessarily

<sup>56</sup> UNHCR Advisory opinion on the rules of confidentiality regarding asylum information, paras. 2- 3.

<sup>57</sup> Security Council Resolution 2144, issued on 14 March 2014; Email Interview with Hanan Salah, Libyan researcher for HRW in ‘Global Insider: Justice System on the Brink of Collapse in Libya’s Security Vacuum’, 20 March 2014, <http://www.worldpoliticsreview.com/trend-lines/13642/global-insider-justice-system-on-the-brink-of-collapse-in-libya-s-security-vacuum>

<sup>58</sup> ICC-01/11-01/11-531, para 40; ICC-01/11-01/11-531-AnxA.

implies that the Pre-Trial Chamber has both the power and the duty to take preventative measures in order to forestall future violations or harm.

89. This duty is particularly important as concerns issues impacting on Defence confidentiality and witness security.
90. There is no legal remedy which can adequately compensate or eliminate the prejudice that would arise if a Defence witness is threatened, tortured, attacked or executed.
91. It is therefore imperative that the text of the MoU be disclosed to the Defence so that it can verify if there are adequate safeguards in place in order to preempt the occurrence of such incidents.
92. If such safeguards are not in place, then disclosure would also facilitate the ability of the Defence to propose such safeguards.
93. For example, the Prosecution should vet any information to ensure that it does not fall within Article 67(2) or Rule 77, since the provision of such information to Libya could impact on the security and protection of persons named therein, or otherwise render it unavailable for the Defence to utilise it at trial.
94. Similarly, if *per* the terms of the MoU, the Prosecution becomes aware that there is a likelihood that a former Gaddafi official will be transferred to Libya, an appropriate safeguard would be to alert the Defence so that it can consider taking a statement, or requesting the Chamber to authorise a 'unique investigative opportunity'.
95. Although the timing and date of the transfer of the person might be confidential, the fact that Country A has decided to extradite a person to Country B should be disclosed to the affected person in advance, so that they can contest the impending extradition before the appropriate authorities.
96. State secrecy or confidentiality of investigations should not, therefore, prevent the Prosecution from alerting the Defence that if it is aware that a country has decided to extradite a former Gaddafi official to Libya.
97. If there are any confidentiality concerns, then the Prosecution could at the very least, seize the Chamber on an *ex parte* basis with a view to considering whether it would be appropriate to invoke Article 56 of the Statute.

## **V. Relief Sought**

98. For the reason set out above, the Defence for Mr. Saif Al-Islam Gaddafi respectfully requests the Honourable Pre-Trial Chamber to:

- i. Order the Prosecution to disclose the Memorandum on Burden Sharing between the ICC Office of the Prosecutor and Libya; and
- ii. Remain seized of the issue as to whether it may be necessary to order the Prosecution to implement specific safeguards to:
  - a. Protect the rights of the Defence (including Defence privilege and confidentiality);
  - b. Ensure the protection and security of actual and potential Defence witnesses and sources; and
  - c. Ensure the availability exculpatory evidence and testimony that might otherwise be unavailable at the trial stage.



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John R.W.D. Jones QC, Counsel for Mr. Saif Al-Islam Gaddafi

Dated this, 28<sup>th</sup> Day of March 2014

At London, United Kingdom