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**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 and ABDULLAH AL-SENUSSI**

**Public**

**Public redacted version of “Prosecution’s Response to ‘Request for Disclosure of Memorandum on Burden Sharing between the ICC Office of the Prosecutor and the Government of Libya’”, 17 April 2014, ICC-01/11-01/11-536-Conf**

**Source: Office of the Prosecutor**



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

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## Introduction

1. The Prosecution opposes the Gaddafi Defence's request ("Request") for disclosure of the Memorandum of Understanding ("MoU") on burden sharing between the Office of the Prosecutor ("Prosecution") and the Government of Libya.<sup>1</sup> The Pre-Trial Chamber has previously found in this case that the Prosecution's disclosure obligations are limited at the present stage of the proceedings. Moreover, the MoU does not fall within the scope of Article 67(2) or Rule 77.

2. The Prosecution also notes that its exchanges and agreements with States for the purposes of cooperation are not intended as evidence and are protected by a presumption of confidentiality, which can only be overcome if the Defence is able to demonstrate a precise legitimate forensic purpose that would justify disclosure.<sup>2</sup> In this case, the Defence has failed to do so and its Request engages in a mere "fishing expedition". As a result, the Request should be rejected.

## Confidentiality

3. Pursuant to Regulation 23bis(2) of the Regulations of the Court, the Prosecution files this response confidentially, because the Request to which it responds is subject to the same classification.

## Submissions

### **I. The Prosecution's disclosure obligations are limited at the present stage of the proceedings**

4. In assessing the disclosure obligations at this stage of the proceedings, the Chamber has observed that "the decision determining that the case is admissible, although in full force, is currently under review of the Appeals Chamber" and that

<sup>1</sup> [REDACTED] ICC-01/11-01/11-533-Red.

<sup>2</sup> ICC-01/04-01/06-103, pp.2-3. *See also, Prosecutor v. Dragomir Milosevic*, Case No. IT-98-29/1-A, Decision on Radovan Karadzic's Motion for Access to Confidential Material in the *Dragomir Milosevic* case, 19 May 2009, para. 7; *Prosecutor v. Milan Martić*, Case No. IT-95-11-A, Decision on Motion by Jovica Stanisic for Access to Confidential Testimony and Exhibits in the Martić Case Pursuant to Rule 75(G)(i), 22 February 2008, para. 9.



“the prospect of surrender of the suspect to the Court appears uncertain, also in light of the Chamber’s finding that the Libyan authorities lack custody of Mr Gaddafi”.<sup>3</sup> The Chamber has further noted that “those circumstances remain in place, such that the Chamber cannot predict with any degree of certainty if and when Mr Gaddafi will be surrendered, and by extension, proceedings before this Court may commence.”<sup>4</sup> Against this backdrop, the Chamber declined to initiate a full disclosure process in preparation for a confirmation hearing,<sup>5</sup> even though it recalled that the Prosecutor’s disclosure obligations under Rule 77 must be interpreted broadly and that the Defence “has the right and the duty to exercise its functions in an effective manner and reasonably pursue its legitimate interests within the context of proceedings before the Court”.<sup>6</sup> The Chamber found that at this stage of the proceedings, the Defence does not have an “unfettered right to full disclosure in the abstract” and its exercise of rights must “be strictly informed by the extent of such procedural rights in the concrete circumstances of the case”.<sup>7</sup> As such, requests for disclosure should not be granted if they are - as in the present case - abstract, hypothetical and not strictly related to the concrete circumstances of the case, where the commencement of the proceedings before this Court remains uncertain.

5. The Prosecution is mindful that the Chamber has previously granted a disclosure request by the Defence [REDACTED].<sup>8</sup> The Chamber found that the request was justified because, *inter alia*: (1) it was “specific enough both in terms of what is sought by the Defence and the reasons why disclosure of the relevant material appears necessary”;<sup>9</sup> (2) the requested material falls within the scope of

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<sup>3</sup> ICC-01/11-01/11-392-Red-Corr, para. 34.

<sup>4</sup> ICC-01/11-01/11-440, para. 29.

<sup>5</sup> ICC-01/11-01/11-440, paras. 30-32.

<sup>6</sup> ICC-01/11-01/11-392-Red-Corr, paras. 36, 39.

<sup>7</sup> ICC-01/11-01/11-392-Red-Corr, para.38.

<sup>8</sup> ICC-01/11-01/11-392-Red-Corr.

<sup>9</sup> ICC-01/11-01/11-392-Red-Corr, para. 40.



Article 67(2) and Rule 77 (including in relation to the admissibility proceedings);<sup>10</sup> and (3) the requested material is relevant to [REDACTED].<sup>11</sup>

6. As set forth below, the Request fails the test for disclosure because none of the applicable grounds for disclosure applies.

## **II. The MoU does not fall within the scope of Article 67(2) or Rule 77**

7. Disclosure of the MoU is not warranted pursuant to Article 67(2) or Rule 77 primarily because it expressly excludes the case against Gaddafi and Al-Senussi from its applicability. As such, even under the broadest reading of the Prosecution's disclosure obligations,<sup>12</sup> the MoU is not exculpatory or material for the preparation of the defence in the case against Gaddafi and Al-Senussi.

8. The Defence nevertheless argues that implementation of the MoU, including in particular the potential interception of communications, may (1) violate the confidentiality of the Defence communications;<sup>13</sup> (2) endanger the security of witnesses<sup>14</sup> and (3) render potential witnesses unavailable to the Defence should they be extradited to Libya.<sup>15</sup> In so doing, the Defence speculates that: (1) the Prosecution may monitor telephone conversations upon Libya's request;<sup>16</sup> (2) the persons targeted may be witnesses for the Defence;<sup>17</sup> (3) said communications may involve confidential information which the Prosecution may transmit to Libya in violation of its confidentiality and protection obligations;<sup>18</sup> and (4) individuals who may be extradited to Libya as a result of the MoU may be rendered unavailable to the Defence for the purpose of the proceedings before the Court.<sup>19</sup>

<sup>10</sup> ICC-01/11-01/11-392-Red-Corr, para. 41.

<sup>11</sup> ICC-01/11-01/11-392-Red-Corr, para. 41.

<sup>12</sup> See ICC-01/04-01/06-1433 OA 11, paras. 77-78.

<sup>13</sup> Request, para. 36.

<sup>14</sup> Request, paras. 5, 38, 49.

<sup>15</sup> Request, paras. 41, 50(c).

<sup>16</sup> Request, para. 37.

<sup>17</sup> Request, paras. 39, 70.

<sup>18</sup> Request, paras. 30, 46.

<sup>19</sup> Request, para. 41.



9. These arguments lack specificity as to why disclosure appears necessary,<sup>20</sup> and are founded on hypothetical actions and presumptive consequences concerning unidentified persons. The Defence suggests that the Prosecution may be unaware of the impact of disclosure on the rights of the Suspect as the Prosecution does not and should not know the identity of Defence witnesses at this stage.<sup>21</sup> It is incumbent on the Defence, however, to demonstrate how its potential witnesses are actually affected by the MoU so as to establish that the document is material to the preparation of the defence, rather than refer to abstract threats to hypothetical witnesses. The Appeals Chamber has ruled that it is the burden of an applicant seeking disclosure pursuant to Rule 77 (in this case the Defence) to demonstrate that the information is *prima facie* material to the preparation of the defence.<sup>22</sup> The Defence has failed to meet this burden.

10. The Defence admits the hypothetical nature of its Request when it submits that it “should not be compelled to wait until it collects evidence that its rights actually have been violated” (emphasis added).<sup>23</sup> In this regard, the present Request should be differentiated from a previous Defence request,<sup>24</sup> and was granted by the Chamber.<sup>25</sup>

11. The Defence argument that extradition to Libya of potential Defence witnesses pursuant to the MoU would render their evidence unavailable to the Defence,<sup>26</sup> lacks merit. Extradition does not render evidence of potential witnesses unavailable, but only subjects it to national proceedings. Moreover, the Defence could interview these individuals prior to any potential extradition proceedings, for which disclosure of the MoU is not required.

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<sup>20</sup> ICC-01/11-01/11-392-Red-Corr, para. 40.

<sup>21</sup> Request, para. 81.

<sup>22</sup> ICC-02/05-03/09-501 OA4, para.42.

<sup>23</sup> Request, para. 86.

<sup>24</sup> ICC-01/11-01/11-340-Conf.

<sup>25</sup> ICC-01/11-01/11-392-Red-Corr, para. 40.

<sup>26</sup> Request, para. 41.



12. Further, the Defence seems to suggest that prior to any exchange of information between the Prosecution and Libya regarding the implementation of the MoU, the Defence should be in a position to provide its input, and in certain instances *veto*, such exchange for reasons that should not be made known to the Prosecution because it pertains to Defence strategies or potential witnesses.<sup>27</sup> This argument does not demonstrate that the MoU is disclosable pursuant to Article 67(2) or Rule 77.

13. Similarly, the Defence argues that the Court has the power to “police the validity and enforcement of agreements concluded by the Prosecution with external entities”.<sup>28</sup> The authority relied on by the Defence,<sup>29</sup> does not support its argument. While the Chamber is the ultimate guardian of the fairness of proceedings, it cannot derogate from an agreement entered between the Prosecution and an information provider.<sup>30</sup> However, even if, *arguendo*, the Chamber had such powers, this would still not render the MoU disclosable. The Defence has not advanced any argument why the exercise of such powers by the Chamber would make the MoU fall within the scope of Article 67(2) or Rule 77.

14. The Defence further asserts that the jurisprudence of the Court confirms that requests for assistance (RFA) between the Prosecution and States are disclosable under Rule 77. The Defence cites a decision of the Appeals Chamber ordering the disclosure of an RFA between the Prosecution and a State.<sup>31</sup> No analogy can be drawn from this jurisprudence. Unlike the instant case, the Appeals Chamber found that the subject RFA was relevant to a “key issue in dispute in the pending appeal”.<sup>32</sup> The MoU does not contain any issues in dispute in the present proceedings. Furthermore, the Appeals Chamber in that decision found that portions of the RFA

<sup>27</sup> Request, paras. 36-40 and 50, 92, 94-95.

<sup>28</sup> Request, para. 62.

<sup>29</sup> The Defence relies on a ruling by the Appeals Chamber in the *Lubanga* case: *see* Request, footnote 41, citing ICC-01/04-01/06-1486, paras. 2-3.

<sup>30</sup> ICC-01/04-01/06-1486, paras. 3, 48.

<sup>31</sup> Request, para. 74, footnote 50 citing ICC-01/04-01/06-3017 OA5 OA6.

<sup>32</sup> ICC-01/04-01/06-3017 OA5 OA6, para.11.



that related to “pending investigative matters” were not subject to disclosure.<sup>33</sup> Similarly, the MoU in its entirety should not be disclosable.

### **Conclusion**

15. For the reasons stated above, the Single Judge should reject the Defence Request.



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Fatou Bensouda, Prosecutor

Dated this 11<sup>th</sup> day of February 2015

At The Hague, The Netherlands

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<sup>33</sup> ICC-01/04-01/06-3017 OA5 OA6, para.12.