

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 1 August 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 redacted

Decision on the “Defence request for an order of disclosure”

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

The Office of the Prosecutor
Fatou Bensouda, Prosecutor

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

Counsel for Abdullah Al-Senussi
Ben Emmerson

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

Amicus Curiae

REGISTRY

Registrar
Herman von Hebel

Deputy Registrar
Didier Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Counsel Support Section

Pre-Trial Chamber I (the “Chamber”) of the International Criminal Court (the “Court”) issues the following decision on the “Defence’s request for an order of disclosure” (the “Defence Request”) submitted by the Defence of Saif Al-Islam Gaddafi (“Mr Gaddafi”).¹

I. Background

1. On 17 April 2013, the Chamber authorised the Office of Public Counsel for the defence (the “OPCD”) to withdraw as counsel from the representation of Mr Gaddafi and appointed John R. W. D. Jones, pursuant to regulation 76(1) of the Regulations of the Court (the “Regulations”), as a provisional measure, until Mr Gaddafi exercises his right to freely choose counsel under article 67(1)(d) of the Rome Statute (the “Statute”), or until the definitive disposal of proceedings related to Libya’s admissibility challenge, at which point the question of Mr Gaddafi’s legal representation will be revisited by the Chamber.²

2. On 8 May 2013, the Defence sent a letter to the Prosecutor requesting:

(i) disclosure of [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]; and (ii) disclosure of [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED].³

¹ ICC-01/11-01/11-340-Conf, and annexes attached thereto.

² Pre-Trial Chamber I, “Decision on the ‘Request to Withdraw’”, 17 March 2013, ICC-01/11-01/11-311-Conf-Exp. A public redacted version is also available (ICC-01/11-01/11-311-Red).

³ ICC-01/11-01/11-340-Conf-AnxA.

3. On 17 May 2013, the Prosecutor responded to the Defence letter stating that: (i) [REDACTED], “is internal work product and material not subject to disclosure pursuant to Rule 81, with the exception of Rule 77 (or material relevant to the preparation of the defence with respect to the admissibility proceedings) which might be contained in those documents”, but that “following a review of the information in its possession, the Prosecut[or] [...] has no disclosable information”;⁴ and (ii) as regards disclosure [REDACTED], “the Prosecut[or] [...] at this stage [...] has no disclosure obligations with respect to the substantive case”.⁵

4. On 20 May 2013, the Defence responded to the Prosecutor citing the fact that: (i) in light of the consistent jurisprudence of the Court, the [REDACTED] [REDACTED] [REDACTED] are not exempt as a category from disclosure, given that they constitute [REDACTED];⁶ and (ii) the disclosure obligations under article 67(2) of the Statute and rule 77 of the Rules of Procedure and Evidence (the “Rules”) are not limited to any particular stage of proceedings.⁷

5. On 21 May 2013, the Prosecutor further reiterated: (i) that “there is no rule 77 information relevant to the admissibility proceedings of Mr. Gaddafi’s case in the [...] [REDACTED] [REDACTED];⁸ and (ii) that she “has no obligation to disclose material related to the substantive case”.⁹

⁴ ICC-01/11-01/11-340-Conf-Exp-AnxB, p. 3.

⁵ *Ibid.*, p. 2.

⁶ ICC-01/11-01/11-340-Conf-Exp-AncC, pp. 3-4.

⁷ *Ibid.*, p. 1-2.

⁸ ICC-01/11-01/11-340-Conf-Exp-AnxD, p. 3.

⁹ *Ibid.*, p. 2.

II. Submissions

A. *The Defence Request*

10. The Defence requests the Chamber to issue a specific order to the Prosecutor for disclosure of: (i) [REDACTED]; and (ii) [REDACTED]

[REDACTED]

[REDACTED].

Timing of disclosure

11. As a preliminary matter, the Defence challenges the Prosecutor's assertion that no disclosure obligations concerning the "substantive case" arise at the present stage of the proceedings. In particular, the Defence asserts that article 67(2) of the Statute states that the disclosure obligation with regard to exculpatory material is triggered "as soon as practicable" and that no language suggests that said obligation necessarily follows the suspect's initial appearance before the Court.¹⁶

12. With respect to the disclosure obligations under rule 77 of the Rules, the Defence submits that nothing indicates that the Prosecutor must only disclose those documents that are material to the preparation of the defence for the purposes of the confirmation hearing or the trial and, therefore, "[t]he obligation within rule 77 is [...] not restricted to any one particular stage of proceedings and is not precluded by the fact that Mr. Gaddafi has yet to appear before the ICC".¹⁷

13. Finally, the Defence avers that "the nature of the cases before the Court do not exist in a vacuum that can be easily delineated into sections" and that

¹⁶ Defence Request, paras 12-13.

¹⁷ *Ibid*, para. 15.

“[t]he preservation of evidence and the protection of witness is an on going effort”.¹⁸ Indeed, the Defence refers to its “duty to protect the full interests and rights of Mr. Gaddafi, which includes steps to protect his right to adduce evidence in the future, either before this Court or a domestic court”.¹⁹

14. It is for these reasons that the Defence concludes that it has “full access to the disclosure regime provided for in the Statute and Rules of Procedure [and] Evidence, which is not, by any terms, contingent to the ‘substantive case’”.²⁰

15. The Defence requests the Chamber to order the Prosecutor to disclose to the Defence [REDACTED]

[REDACTED].²¹ In the Request, the Defence “highlights the urgency of its disclosure requests and its importance not only to the admissibility proceedings but also to [REDACTED]

[REDACTED]”.²² In particular, according to the Defence, there are at least three different grounds on the basis of which [REDACTED] should be disclosed to the Defence.

16. First, the Defence, recalling having previously brought to the Chamber’s attention “[r]easons asserting [REDACTED]”, avers that [REDACTED] would fall within her disclosure obligations provided for in rule 77 of the Rules, and, potentially, may also contain information affecting the credibility of the Prosecutor’s evidence against Mr Gaddafi, and thus be subject to disclosure under article

¹⁸ *Ibid*, para. 18.

¹⁹ *Id.*

²⁰ *Ibid*, para. 21.

²¹ *Ibid*, paras 28-35.

²² *Ibid*, para. 35.

evidence against Mr Gaddafi, and thus be subject to disclosure under article 67(2) of the Statute.²³ The Defence provides no additional information on the matter, asserting, on the basis of the Appeals Chamber's jurisprudence, that "it is under no obligation to reveal further detail as regards its strategy in order to compel the Prosecution to fulfil its disclosure obligations pursuant to article 67(2) of the Statute or rule 77".²⁴

17. Second, the Defence asserts that receiving disclosure of the requested material is of particular importance given "[REDACTED]

[REDACTED]".²⁵ The Defence contends that the disclosure of [REDACTED] [REDACTED].²⁶ In this regard, the

Defence states that [REDACTED] [REDACTED] [REDACTED] [REDACTED].²⁷ The

Defence also stresses that the request for disclosure involves "time sensitive matters" and cannot be qualified as a "general fishing expedition" as made clear by the fact that this request is confined to the disclosure of a specific [REDACTED].²⁸

18. Third, considering that it appears that [REDACTED] [REDACTED],²⁹ the Defence states that "[REDACTED]

²³ *Ibid*, para. 28.

²⁴ *Ibid*.

²⁵ Request, para. 30.

²⁶ *Ibid*.

²⁷ *Ibid*.

²⁸ *Ibid*.

²⁹ *Ibid*.

[REDACTED]
[REDACTED] are all central to live issues concerning [...] the admissibility of the case against Mr. Gaddafi and therefore disclosable pursuant to rule 77".³⁰ In this sense, the Defence contends that "[REDACTED]

[REDACTED]"³¹

19. The Defence also requests the Chamber to order the Prosecutor to disclose to the Defence [REDACTED]

[REDACTED].³²

20. As a first point, the Defence takes issue with the Prosecutor's previously expressed position that [REDACTED] [REDACTED] qualify in principle as "internal work product" within the meaning of rule 81(1) of the Rules, and contends that the Prosecutor ultimately misunderstands the relationship between rule 77 and 81(1) of the Rules.³³ According to the Defence, the Prosecutor "must begin from the starting point that the material as a whole is disclosable under rule 77 except so far as a section concerns internal work product and redact accordingly".³⁴

21. The Defence notes that, [REDACTED]

³⁰ *Ibid*, para. 33.

³¹ *Ibid*, para. 34.

³² *Ibid*, para. 48(iii)(b).

³³ *Ibid*, paras 36 to 40.

³⁴ *Ibid*, para. 40.

[REDACTED]

[REDACTED].³⁵ The Defence further notes that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].³⁶

22. On this basis, the Defence submits that, as [REDACTED]

[REDACTED]

[REDACTED].³⁷ In particular, the Defence contends that the requested [REDACTED] is relevant on several issues of concern of the Defence which were also previously raised by the OPCD, namely: (i) [REDACTED]

[REDACTED]

[REDACTED]; (ii)

[REDACTED]

[REDACTED]; and (iii) [REDACTED]

[REDACTED]

[REDACTED].³⁸ Further, in light of [REDACTED], the Defence assumes that it is likely that [REDACTED], also considering

³⁵ *Ibid*, para. 41.

³⁶ *Ibid*, para. 42, with reference to ICC-01/11-01/11-339.

³⁷ Request, para. 42.

³⁸ *Ibid*, para. 43.

that the Prosecutor, although requested by the Defence, has failed to confirm this fact either way.³⁹

23. On this basis, the Defence submits that “[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] is material to the preparation of the Defence and relevant to current proceedings before this Chamber, and do not fall within the restrictions provided for under rule 81(1)”.⁴⁰

B. The Prosecutor’s Response

[REDACTED]

24. The Prosecutor confirms that [REDACTED]
[REDACTED]
[REDACTED].⁴²

25. The Prosecutor opposes the Defence request for disclosure of [REDACTED]
[REDACTED] averring that she has “no obligation at this stage to disclose material that relates only to the merits of the case and has no relevance to the admissibility issues”.⁴³ In this sense, according to the Prosecutor, the requested disclosure “is unwarranted at this stage, and could pose risks to witnesses that the Court is presently unable to manage”.⁴⁴

26. Furthermore, the Prosecutor asserts that, [REDACTED]
[REDACTED]
[REDACTED]

³⁹ *Ibid*, para. 44.

⁴⁰ *Ibid*, para. 46.

⁴¹ Prosecutor’s Response, para. 22.

⁴² *Ibid*, para. 23.

⁴³ *Ibid*, para. 17.

⁴⁴ *Id*.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

27. In her Response, the Prosecutor does not maintain that [REDACTED] [REDACTED] are to be considered “internal work product” and as such are not subject to disclosure pursuant to rule 81(1). In fact, she asserts that the Defence misrepresents her position as expressed in the recent *inter partes* communications addressing the matter eventually brought before the Chamber. In particular, the Prosecutor states that, while she “does not have the obligation to disclose wholesale to the Defence [REDACTED] [REDACTED]”, she acknowledges having the duty to disclose any information falling within rule 77 of the Rules relevant to the preparation of the Defence in the admissibility proceedings that may arise [REDACTED].⁴⁶

28. However, the Prosecutor avers that, contrary to the Defence submission, [REDACTED] do not contain information relevant to the admissibility of the proceedings, and that, should any such information [REDACTED] [REDACTED], she “will endeavour to disclose it”.⁴⁷

III. Analysis

29. The Chamber notes articles 57(3)(b) and (c) and 67(2) of the Statute, and rules 77 and 81 of the Rules.

⁴⁵ *Ibid*, para. 24.

⁴⁶ *Ibid*, para. 3.

⁴⁷ *Ibid*, para. 13.

[REDACTED] and of [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]. Mindful of the positions expressed by the parties both in their correspondence and in their submissions before the Chamber, the Chamber finds it necessary to set out its understanding of the Prosecutor's disclosure obligations at this stage of the proceedings. After having addressed the arguments of the parties in relation to the Prosecutor's disclosure obligations in the present case, the Chamber will turn to the merits of the Defence Request.

31. As a preliminary point, the Chamber notes that one of the reasons cited by the Prosecutor to deny disclosure to the Defence of the requested material is that Mr Jones is "an ad hoc counsel with a confined legal mandate" and that by his request, "counsel is effectively extending the terms of his mandate – to represent [Mr Gaddafi] in the on-going admissibility proceedings – without any mandate from the Chamber or authorization from the person".⁴⁸ In this regard, the Chamber recalls, as recently clarified, that "no limit in relation to the scope of counsel's mandate has been set out by the Chamber, which rather stressed the provisional nature of the appointment under regulation 76(1) of the Regulations".⁴⁹

32. The Chamber also notes that the Prosecutor argues that Mr Gaddafi "was not arrested in execution of the ICC arrest warrant".⁵⁰ However, as previously held by the Chamber, the exercise of the Defence rights (provided that they indeed exist in the Court's legal framework) cannot be made contingent upon Libya's failure to comply with the Court's request for arrest and surrender.

⁴⁸ *Ibid*, para. 18.

⁴⁹ "Decision on Decision on "Request for Review of Registrar's Decision" by the Defence of Saif Al-Islam Gaddafi legal aid", 30 July 2013, ICC-01/11-01/11-390-Red, para. 35.

⁵⁰ Prosecutor's Response, para. 2.

indeed exist in the Court's legal framework) cannot be made contingent upon Libya's failure to comply with the Court's request for arrest and surrender. The question is therefore whether, and, if so, to what extent, the Defence enjoys the right to receive disclosure prior to the suspect's initial appearance before the Court.

33. The Chamber is not persuaded that, as a matter of law, the disclosure obligations in relation to the "substantive case" only arise following the suspect's initial appearance, in situations in which the suspect is not at large, is not trying to evade justice and manifests his or her readiness to submit himself to the authority of the Court. Nothing in the applicable law suggests that this is the case in principle, despite there may be reasons which would justify a delay of disclosure in particular cases. Indeed, in several situations the applicability of the disclosure regime prior to the Court obtaining custody of the suspect may appear, as submitted by the Prosecutor, "unwarranted" or "could pose risks to witnesses that the Court is [...] unable to manage".⁵¹

34. The Chamber observes that, in the present case, Mr Gaddafi's initial appearance indeed has not yet taken place; that the decision determining that the case is admissible, although in full force, is currently under review of the Appeals Chamber; that Libya has long refused to comply with its obligation to afford Mr Gaddafi with the procedure described in article 59 of the Statute; and that 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.

35. The combination of these factual circumstances provides sufficient justification to the Prosecutor's position that at this stage full disclosure in relation to the substantive case against Mr Gaddafi appears unwarranted.

⁵¹ *Ibid.*, para. 17.

Nevertheless, the Chamber observes that it is not the Defence request that the Prosecutor be ordered to disclose all the exculpatory evidence in her possession, but exclusively [REDACTED], and on several grounds beyond the fact that those statements may fall within the scope of article 67(2) of the Statute. In this context, the Chamber considers that the Prosecutor's objection that this material is "part of the substantive case" and, therefore, cannot be disclosed prior to the initial appearance, is unjustified.

36. The Chamber is equally unpersuaded by the Prosecutor's argument that disclosure obligations in relation to "material for the preparation of the Defence" within the meaning of rule 77 of the Rules only arise in respect of material that is "relevant to the admissibility proceedings before the Court",⁵² or more generally to "live issues", *i.e.* issues already raised and being litigated within the context of the ongoing judicial proceedings.⁵³ 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 the proceedings before the Court. This is dependent upon being placed in a position to do so by being provided with the necessary information that is of relevance for its preparation.

37. Along the same line, the Chamber, in the *Mbarushimana* case, ordered the Prosecutor to disclose to the Defence certain kinds of material before the suspect's initial appearance. This order was not made on the grounds that such material related to "live issues", but rather rested on the fact that this material was considered essential in order to give effect to the rights of the Defence to raise those issues before the Chamber.⁵⁴

⁵² *Ibid*, para. 2, 3, 14, 16 and 17

⁵³ ICC-01/11-01/11-340-Conf-Exp-AnxD, p. 2.

⁵⁴ Pre-Trial Chamber I, *The Prosecutor v. Mbarushimana*, "Decision on the Defence Request for Disclosure", ICC-01/04-01/10-47, 27 January 2011.

38. This is not to say that the Defence has an unfettered right to full disclosure in the abstract. Rather, the principle that the Defence must be in a position to exercise its rights cannot but be strictly informed by the extent of such procedural rights in the concrete circumstances of the case.

39. The Chamber further recalls that the Prosecutor's disclosure obligations under rule 77 of the Rules must be interpreted broadly. The Appeals Chamber determined that the term "material for the preparation of the defence" should be understood as "referring to all objects that are relevant for the preparation of the defence".⁵⁵

40. Turning to the merits of the Request, the Chamber notes that the Defence seeks to obtain from the Prosecutor the [REDACTED], and acknowledges, as asserted by the Defence, that "the fact that [the request] is confined to the disclosure of a specific [REDACTED]" illustrates that "[it] cannot be considered as a general fishing expedition".⁵⁶ The Chamber indeed observes that the Defence request in relation to [REDACTED] is specific enough both in terms of what is sought by the Defence and the reasons why disclosure of the relevant material appears necessary.

41. Furthermore, as recalled above, the Defence highlights the necessity to receive [REDACTED] not only because they fall within the scope of article 67(2) of the Statute and rule 77 of the Rules (including in relation to the admissibility proceedings⁵⁷), but also because this is relevant to [REDACTED]

[REDACTED].⁵⁸ In this regard, the Chamber observes that,

⁵⁵ 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, para. 77.

⁵⁶ Defence Request, para. 30.

⁵⁷ *Ibid*, paras 33-34.

⁵⁸ *Ibid*, para. 35.

for instance, [REDACTED]
[REDACTED] is, in principle, an activity falling within the Defence statutory rights at the present stage of the proceedings. The same holds true in relation to [REDACTED]
[REDACTED]. In order for the Defence to request appropriate measures in this regard, if any, it appears necessary that it receives disclosure of [REDACTED]
[REDACTED]. Accordingly, the Chamber is of the view that this part of the Defence request may be granted. The Prosecutor is thus instructed to disclose to the Defence [REDACTED] as soon as practicable, subject to the redactions under rule 81(2) and/or (4) for which she may apply to the Chamber.

42. The Chamber now turns to the Defence request to obtain disclosure of [REDACTED]
[REDACTED]
[REDACTED].

43. The Chamber takes note that, in her submissions before the Chamber, the Prosecutor does not insist that [REDACTED]
[REDACTED] are exempt from disclosure by rule 81(1) of the Rules. Accordingly, there is no need to address the issue any further. It is sufficient to recall that, should the Prosecutor be of the view that certain information [REDACTED] (which otherwise fall within the scope of rule 77) must remain confidential, she may request non-disclosure of this discrete information in accordance with rule 81(2) or (4) of the Rules.

44. As noted above, the Prosecutor's denial of this disclosure request, at the time of the *inter partes* exchange of correspondence, was primarily founded on the fact that this material was not considered relevant to the Defence

preparation in relation to the admissibility proceedings. As highlighted above, the Chamber recalls that the procedural rights of the Defence within the context of the proceedings before the Court are not limited to matters relating to the admissibility proceedings, and takes note that the Defence indicates that the requested material might be relevant to issues beyond the mere admissibility proceedings.

45. Nevertheless, the Chamber is of the view that [REDACTED]
[REDACTED]
[REDACTED] are not necessarily relevant to the Defence exercise of its procedural right within the context of the proceedings before the Court. Therefore, and considering that the Defence right to receive disclosure is shaped by, and limited to, the meaningful exercise of its procedural rights in the present proceedings, the Chamber is of the view that it is appropriate to instruct the Prosecutor to determine anew whether the requested [REDACTED] in her possession contain information that would make them material for the preparation of the Defence in relation not only to the admissibility proceedings, but, more broadly, to the proceedings against Mr Gaddafi before this Court. This is without prejudice to the Prosecutor's right to bring before the Chamber, under rule 81(2) of the Rules, any concerns she may have in relation to protection of further or ongoing investigation.

FOR THESE REASONS, THE CHAMBER

ORDERS the Prosecutor to disclose to Defence [REDACTED] or request any redaction under rule 81(2) or (4) of the Rules that she may consider necessary prior to the disclosure of [REDACTED], as soon as practicable;

INSTRUCTS the Prosecutor to address anew, in light of the clarifications provided in the present decision, the Defence request to disclose [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

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

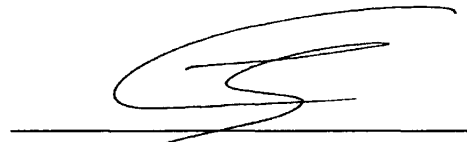


Judge Silvia Fernández de Gurmendi

Presiding Judge



Judge Hans-Peter Kaul



Judge Christine Van den Wyngaert

Dated this 1 August 2013

At The Hague, The Netherlands