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

Decision on the “Request for an order for the commencement of the pre-confirmation phase” by the Defence of Saif Al-Islam Gaddafi

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

The Office of the Prosecutor
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Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
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 Section**

Pre-Trial Chamber I (the “Chamber”) of the International Criminal Court (the “Court” or the “ICC”) issues the following decision on the “Request for an order for the commencement of the pre-confirmation phase” (the “Defence Request”) submitted by the Defence of Saif Al-Islam Gaddafi (“Mr Gaddafi”).¹

I. Procedural history

1. On 31 May 2013, the Chamber determined that the case against Mr Gaddafi is admissible before the Court.² The Government of Libya appealed this decision and, on 24 June 2013, submitted its document in support of the appeal.³
2. On 18 July 2013, the Appeals Chamber rejected Libya’s request for suspensive effect to the appeal against the decision on the admissibility of the case, and recalled Libya’s obligation to surrender Mr Gaddafi to the Court.⁴
3. On 7 August 2013, the Defence filed the Request, in which it requests the Chamber to: “[o]rder the commencement of the pre-confirmation process before the ICC”, and “[t]ake all reasonable measures to ensure the immediate surrender of Mr. Gaddafi to the ICC”.⁵
4. On 29 August 2013, the Prosecutor filed the “Prosecution’s Response to the Defence ‘Request for an order for the commencement of the pre-confirmation phase’” (the “Prosecutor’s Response”).⁶

¹ ICC-01/11-01/11-397.

² Pre-Trial Chamber I, Decision on the admissibility of the case against Saif Al-Islam Gaddafi, 30 May 2013, ICC-01/11-01/11-344-Red.

³ ICC-01/11-01/11-370-Conf-Exp. A public redacted version is also available (ICC-01/11-01/11-370-Red2).

⁴ Appeals Chamber, Decision on the request for suspensive effect and related issues, 18 July 2013, ICC-01/11-01/11-387.

⁵ Defence Request, para. 33.

⁶ ICC-01/11-01/11-425-Conf, with annex containing a list of authorities. A public redacted version is also available (ICC-01/11-01/11-425-Red). References to the Prosecutor’s Response in this decision are taken from the public redacted version.

5. On 4 September 2013, the Defence filed the “Defence Request for Leave to Reply to ‘Prosecution’s Response to the Defence ‘Request for an order for an order for the commencement of the pre-confirmation phase’” (the “Application for Leave to Reply”).⁷

6. On 6 September 2013, the Prosecutor filed a response to the Application for Leave to Reply,⁸ requesting the Chamber to dismiss such application on the grounds that the Defence advances the merits of its reply without prior leave from the Chamber,⁹ or, alternatively, to reject it on the basis that the Defence fails to show good cause to obtain leave to reply.¹⁰

II. Submissions of the parties

A. *The Defence Request*

7. The Defence recalls that the Chamber has repeatedly held that Mr Gaddafi’s ability to exercise his rights under the Rome Statute (the “Statute”) cannot be made contingent on Libya’s compliance with its obligation to surrender him to the Court.¹¹

8. The Defence submits that, given that the Appeals Chamber rejected Libya’s request to give suspensive effect to the appeal of the Admissibility Decision, “the admissibility proceedings are no longer an impediment as concerns the progression of the merits of the case”.¹² Hence, according to the Defence, “[t]he only remaining impediment is the fact that Mr. Gaddafi has not been surrendered to the ICC, and is therefore unable to exercise his right to personally participate in the case”.¹³ Accordingly, and with a view to

⁷ ICC-01/11-01/11-430.

⁸ ICC-01/11-01/11-433.

⁹ *Ibid.*, para. 6.

¹⁰ *Ibid.*, paras 7 to 12.

¹¹ Defence Request, para. 1.

¹² *Ibid.*, para. 4.

¹³ *Ibid.*, para. 5.

"ensur[ing] that the gravity of the existing violations of Mr. Gaddafi's rights is not compounded by further delays in the proceedings", the Defence requests the Chamber "to commence those aspects of the pre-confirmation phase, which are not dependent on the personal participation of the defendant".¹⁴

9. The Defence draws the Chamber's attention to rule 125 of the Rules of Procedure and Evidence (the "Rules"), which permits the Chamber to convene the confirmation of charges hearing in the absence of the suspect.¹⁵ According to the Defence, it follows from this power "that the Pre-Trial Chamber must also possess the power to commence the preliminary preparations for the confirmation hearing, notwithstanding the fact that the defendant has not yet been surrendered to the ICC".¹⁶

10. The Defence makes reference also to the fact that a decision to hold the confirmation hearing in the absence of the defence shall be taken after holding consultations, pursuant to rule 123(2) of the Rules, with the Prosecutor and counsel for the Defence, when the latter is known to the Court and unless the Chamber decides otherwise.¹⁷ According to the Defence, in the absence of any further elaboration on the nature of such "consultations", the term "consultations" must be understood to be "broad enough to encompass judicial litigation and directions concerning the procedures for the confirmation hearing, in preparation for the eventuality that the Pre-Trial Chamber could issue a decision under Rule 125".¹⁸

11. Accordingly, the Defence submits that "[a] preliminary decision to commence the preparation for pre-confirmation proceedings does not [...] commit the Chamber to conducting the hearing *in absentia* – it merely lays the

¹⁴ *Ibid.*, para. 7.

¹⁵ *Ibid.*, paras 10 to 12.

¹⁶ *Ibid.*, para. 12.

¹⁷ *Ibid.*, paras 13 to 15.

¹⁸ *Ibid.*, para. 15.

groundwork to ensure that both the Chamber and the parties are in a position to participate in a confirmation hearing *in absentia*, should it later be deemed appropriate to convene such a hearing".¹⁹ Therefore, in the Defence submission, "[i]t is [...] preeminently in the interests of judicial economy and the good administration of justice to commence these proceedings in an appropriate case".²⁰

12. In the view of the Defence, the "commencement of the pre-confirmation process",²¹ in particular in terms of establishing a timetable for disclosure of evidence, submission of redaction and protection requests for the evidence in the Prosecutor's possession²² would, in this case: (i) "ensur[e] an expeditious confirmation process, upon Mr. Gaddafi's surrender, once Libya decides to comply with the ICC's orders";²³ (ii) "be consistent with the directive of the Appeals Chamber that the [Prosecutor] should apply for protective measures concerning the material supporting the arrest warrant against the defendant as soon as possible, in order to ensure that the [Prosecutor] is in a position to disclose these materials to the defendant upon his surrender to the Court";²⁴ (iii) permit the Defence to "commence its review and analysis of these [disclosed] materials"²⁵, placing counsel "in a position to draw the attention of the defendant to the most important documentation, which would expedite the ability of Counsel to take instructions and conduct effective and expeditious Defence investigations";²⁶ and (iv) "facilitate the ability of the Defence to identify potential witnesses, who may require immediate protection, and relevant evidence, which could otherwise disappear or be destroyed if the

¹⁹ *Ibid.*, para. 16.

²⁰ *Ibid.*, para. 16.

²¹ *Ibid.*, para. 33.

²² *Ibid.*, paras 19 and 24.

²³ *Ibid.*, para. 17.

²⁴ *Ibid.*, para. 20, with reference to Appeals Chamber, ICC-01/05-01/08-323, paras 1 and 12.

²⁵ *Ibid.*, para. 24.

²⁶ *Ibid.*, para. 24.

Defence were forced to wait for the surrender of Mr. Gaddafi before conducting any investigations".²⁷

13. Accordingly, the Defence proposes to commence the "pre-confirmation phase" and to "conduct 'consultations' on a periodic basis with a view to determining what further steps could be taken to advance the proceedings, without prejudicing Mr. Gaddafi's right personally to participate in the proceedings".²⁸

14. The Defence further submits that rule 123(3) of the Rules "requires the Chamber to ensure that 'all reasonable measures have been taken to locate and arrest the person'".²⁹ According to the Defence, "[i]n the present case, the location of Mr. Gaddafi is known [and] [h]is non-surrender to the Court is due solely to the contumacious refusal of the Libyan authorities to comply with their obligation to immediately surrender him to the custody of the ICC".³⁰ Finally, it is the Defence submission that "Rule 123(3), when read together with Rule 123(2), also translates into a clear obligation on the Chamber to take all necessary and appropriate measures to move the ICC proceedings forward in an expeditious manner".³¹

B. The Prosecutor's Response

15. The Prosecutor submits that the Defence Request should be dismissed on several different grounds.

16. Firstly, the Prosecutor argues that the Defence is "effectively asking for full disclosure of Article 67(2) and Rules 76 and 77 material"³² and recalls that

²⁷ *Ibid.*, para. 25.

²⁸ *Ibid.*, para. 26.

²⁹ *Ibid.*, para. 27.

³⁰ *Ibid.*, para. 28.

³¹ *Ibid.*, para. 31.

³² Prosecutor's Response, paras 9 and 21.

the Chamber “already rejected”³³ an equivalent request in its previous ruling that full disclosure in relation to the substantive case appears unwarranted at this stage.³⁴

17. Second, the Prosecutor submits that full disclosure at this stage would be premature and is not needed for the exercise of the procedural rights of the Defence at this stage.³⁵ The Prosecutor argues that the Defence should be “facilitated to exercise the relevant and necessary rights corresponding to the concrete stage of the proceedings and in light of the facts of this case.”³⁶ According to the Prosecutor, at the pre-trial stage, her disclosure obligation under article 61(3) of the Statute is “clearly linked to the confirmation hearing”,³⁷ yet the Defence Request relates to an “artificial phase which has no basis in the statutory framework.”³⁸ The Prosecutor submits that the Defence’s right to be informed of the charges under article 67(1)(a) of the Statute is satisfied at this stage and that full disclosure pursuant to article 67(2) of the Statute and rules 76 and 77 of the Rules is not necessary for the Defence³⁹ to “meaningfully exercise its rights at this concrete stage of the proceedings”.⁴⁰ Further, the Prosecutor submits that the Defence Request lacks specificity in terms of what is sought and for what reasons, such that it constitutes a speculative “fishing expedition”.⁴¹

18. The Prosecutor also argues that the consequences entailed by full disclosure of the Prosecution evidence include a “large amount of work and

³³ Prosecutor’s Response, para. 2, with reference to Pre-Trial Chamber I, Corrigendum to Decision on the “Defence request for an order of disclosure”, 1 August 2013, ICC-01/11-392-Red-Corr.

³⁴ Prosecutor’s Response, para. 9.

³⁵ *Ibid.*, paras 2 and 13.

³⁶ *Ibid.*, para. 14.

³⁷ *Ibid.*, para. 16.

³⁸ *Ibid.*, para. 17.

³⁹ *Ibid.*, paras 18 and 19.

⁴⁰ *Ibid.*, para. 19.

⁴¹ *Ibid.*, para. 12.

use of resources”,⁴² as well as the possibility of “serious consequence for the safety and well-being of witnesses and their families”,⁴³ which will most likely require the adoption of protective measures. The Prosecutor also recalls that “at this stage there may be no real prospect of having a confirmation hearing”.⁴⁴

19. Third, the Prosecutor argues that the Defence Request is not supported by rule 123(2) of the Rules or any other provision of the Statute or the Rules.⁴⁵ The Prosecutor submits that rule 123(2) of the Rules, read together with article 61(2) of the Statute, “makes it clear that the purpose of the consultations between the Chamber and the Prosecution under Rule 123(2) is to decide whether there is cause to hold a confirmation hearing *in absentia* of the suspect under the specific conditions set forth in Article 61(2)(b), namely, when the suspect has fled or cannot be found.”⁴⁶ Only when the decision to convene the hearing has been made, will disclosure and further preparations be instructed by the Chamber. According to the Prosecutor, the Chamber has no obligation to “commence proceedings leading to the confirmation of charges in contravention of the regime envisaged by the statutory framework.”⁴⁷

20. Finally, the Prosecutor submits that “a confirmation hearing *in absentia* is not possible in the instant case because the location of Mr. Gaddafi is known”⁴⁸ to the Court. The Prosecutor submits that Mr Gaddafi has at no stage been “available to the Court”⁴⁹, within the meaning of rule 124(1) of the Rules, and therefore it is not possible for him to waive his right to be present at the confirmation hearing pursuant to article 61(2)(a) of the Statute. Neither is it

⁴² *Ibid.*, para. 20.

⁴³ *Ibid.*, para. 20.

⁴⁴ *Ibid.*, para. 20. See also para. 29.

⁴⁵ *Ibid.*, paras 2 and 22.

⁴⁶ *Ibid.*, para. 24.

⁴⁷ *Ibid.*, para. 27. See also paras 21 to 27.

⁴⁸ *Ibid.*, para. 2.

⁴⁹ *Ibid.*, para. 29.

possible to say that Mr Gaddafi has “fled” within the meaning of article 61(2)(b) of the Statute, nor that he “cannot be found” since he remains in detention in Zintan.⁵⁰ Finally, the Prosecutor submits that the Statute’s provision for confirmation hearings *in absentia* should be applied only in exceptional circumstances.⁵¹

III. Analysis

21. The Chamber notes articles 57(3)(b) and 61 of the Statute, rules 121, 123 and 125 of the Rules and regulation 24(5) of the Regulations of the Court (the “Regulations”).

22. At the outset, the Chamber addresses the Defence Application for Leave to Reply to the Prosecutor’s Response. The Chamber considers that the arguments and submissions advanced by the parties in the Defence Request and in the Prosecutor’s Response, respectively, are sufficient for the Chamber’s disposal of the matter *sub judice*, without the need that further submissions on the part of the Defence be authorized under regulation 24(5) of the Regulations. The Application for Leave to Reply is therefore rejected.

23. According to article 61(2) of the Statute, the confirmation of charges hearing may be held in the absence of the suspect when the person has “waived his or her right to be present” or has “fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court”. Pursuant to rules 123(2) and 125 of the Rules, prior to a decision being taken by the Chamber on “whether there is cause” to hold the confirmation of charges *in absentia*, the Chamber may hold “consultations” with the Prosecutor and counsel for the Defence if known to the Court.

⁵⁰ *Ibid.*, paras 30 to 31.

⁵¹ *Ibid.*, para. 32.

24. The Defence Request appears not to be a request for holding the confirmation of charges hearing *in absentia* in conformity with article 61(2) of the Statute – thereby seeking to trigger the consultation proceedings leading to a determination pursuant to rule 125 of the Rules – but a request for the immediate “commencement of the pre-confirmation phase”, essentially premised on “the interests of judicial economy and the good administration of justice”.⁵² The request therefore does not entail consideration of whether or not the confirmation of charges hearing may be held in the absence of Mr Gaddafi, and, as submitted by the Defence,⁵³ is without prejudice thereto.

25. In the view of the Chamber, there are only two options for pre-trial proceedings to unfold before this Court: pre-trial proceedings leading to the confirmation of charges *in absentia* pursuant to article 61(2) of the Statute, and pre-trial proceedings in the presence of the suspect pursuant to article 61(7) of the Statute. The Defence suggests that for the sake of judicial economy, certain preparatory work, for which the “input” of Mr Gaddafi is not needed,⁵⁴ may be commenced given an eventuality that Mr Gaddafi is surrendered to the Court in the future. However, it falls short of requesting the Chamber to hold a confirmation of charges hearing *in absentia*. Consequently, the Defence Request cannot be assessed against article 61(2) of the Statute in conjunction with rules 123-125 of the Rules.

26. The Chamber understands that with the expression “commencement of the pre-confirmation process”⁵⁵ the Defence seeks the issuance of the necessary decisions for “the immediate disclosure of Rule 76 and 77 and Article 67(2)

⁵² Defence Request, para. 16.

⁵³ *Ibid.*

⁵⁴ *Ibid.*, para. 21.

⁵⁵ *Ibid.*, para. 33.

materials to Counsel”,⁵⁶ and “the establishment of a timetable for the submission of redaction and protection requests for Prosecution evidence”⁵⁷.

27. The Chamber notes that pursuant to rule 121(1) of the Rules, it is during the suspect’s initial appearance before the Court that the Chamber shall set the date on which it intends to hold the confirmation of charges hearing. Rule 121(2) of the Rules further mandates that the Chamber “shall” then take the necessary decision regarding the disclosure that is to take place, according to article 61(3) of the Statute, “[w]ithin a reasonable time before the [confirmation of charges] hearing”. No provision of the Statute or the Rules would therefore compel the Chamber to organise the disclosure of materials related to the merits of the case when the suspect has not yet appeared before the Court and no date for the commencement of the confirmation of charges hearing has been set.

28. This does not mean, however, that there may not be specific circumstances in a given case warranting the taking of decisions regarding the disclosure of materials related to the merits of the case even before the suspect’s initial appearance before the Court, as indeed recently done in the present case.⁵⁸

29. It is of import to note that in that particular instance, the Chamber observed, *inter alia*, that “the decision determining that the case is admissible, although in full force, is currently under review of the Appeals Chamber” 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”.⁵⁹ At present, those circumstances remain in place, such that

⁵⁶ *Ibid.*, para. 24.

⁵⁷ *Ibid.*, para. 19.

⁵⁸ Pre-Trial Chamber I, Corrigendum to Decision on the “Defence request for an order of disclosure”, 1 August 2013, ICC-01/11-01/11-392-Red-Corr.

⁵⁹ *Ibid.*, para. 34.

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.

30. It is against this backdrop that the Chamber must assess whether the requested commencement of the “disclosure proceedings” (including by establishing a timetable for requests for redaction and protective measures) is, as submitted by the Defence, “in the interests of judicial economy and the good administration of justice”.⁶⁰ The Chamber observes in this regard, that full disclosure proceedings leading to the confirmation of charges hearing may involve a considerable risk to victims and witnesses in the case, which may prove impossible to overcome without intrusive protective measures, which appear unwarranted in the absence of a reasonable prospect that Mr Gaddafi’s initial appearance would be imminent.

31. Moreover, decisions on non-disclosure of information or evidence under rules 81(2) and (4) of the Rules, or more generally on protective measures, are inherently premised upon the existence of an actual risk to certain individuals or to the Prosecutor’s investigation. Any decision that the Chamber may take in this regard would need to be reviewed upon Mr Gaddafi’s surrender, in light of the factual circumstances prevailing at that time. Rather than being “in the interest of judicial economy and good administration of justice”⁶¹, this would lead to a duplication of the activities of all the actors involved in the proceedings. Furthermore, in balancing the competing interests at stake, the Chamber cannot ignore that meaningful disclosure proceedings require a considerable amount of resources on the part of the Prosecutor and the Court in general.

⁶⁰ Defence Request, para. 16.

⁶¹ *Ibid.*

32. In these circumstances, the Chamber considers that, due to the absence of any reasonable expectation that Mr Gaddafi will shortly be surrendered to the Court, an order for the "commencement of the pre-confirmation process" as requested by the Defence appears not to be "in the interest of judicial economy and the good administration of justice".

FOR THESE REASONS, THE CHAMBER

REJECTS the Defence application for leave to reply to the Prosecutor's Response; and

REJECTS the Defence request for an order for the commencement of the "pre-confirmation phase".

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 Tuesday, 10 September 2013

At The Hague, The Netherlands