

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **7 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

Request for an order for the commencement of the pre-confirmation phase

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 Pre-Trial Chamber has repeatedly confirmed that Mr. Saif Al-Islam Gaddafi's ability to exercise his rights under the Statute cannot be made contingent on Libya's compliance with its obligation to surrender him to the International Criminal Court (ICC).¹
2. One of the most important of Mr. Gaddafi's rights is his right to expeditious proceedings before the ICC. This right is of heightened importance in light of the significant length of Mr. Gaddafi's pre-trial detention.²
3. Due to both Libya's refusal to surrender Mr. Gaddafi to the ICC, and the pendency of the admissibility proceedings, the substantive proceedings against Mr. Gaddafi have stagnated for over 21 months.
4. Given that the Appeals Chamber rejected Libya's request for suspensive effect of the admissibility decision,³ the admissibility proceedings are no longer an impediment as concerns the progression of the merits of the case.
5. The 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.
6. Libya's failure to immediately surrender Mr. Gaddafi constitutes an egregious violation of both Libya's obligation to cooperate with the ICC, and Mr. Gaddafi's right to be brought within the immediate protection of the law before the ICC.
7. In order to ensure that the gravity of the existing violations of Mr. Gaddafi's rights is not compounded by further delays in the proceedings, the Defence hereby requests the Pre-Trial Chamber to commence those aspects of the pre-confirmation phase, which are not dependent on the personal participation of the defendant.

¹ See ICC-01/11-01/11-392-Red-Corr at para. 32.

² *Assenov and others v. Bulgaria*, Judgement of 28 October 1998, Report 1998-VIII, p. 3300 para 154.

³ ICC-01/11-01/11-387.

8. An order to commence discrete aspects of the confirmation phase should nonetheless be considered as complimentary, rather than alternative to the Chamber's duty to take all measures to ensure that Libya surrenders Mr. Gaddafi to the ICC as soon as possible, including issuing a finding of non-compliance, and reporting this non-compliance to the Security Council.

II. Submissions

9. Although Article 67(1) sets out the right of the defendant to be present before the Court, there are exceptions to this right.
10. In particular, Rule 124 enables the defendant to waive the right to be present at the confirmation hearing, and Rule 125 permits the Pre-Trial Chamber to convene the confirmation hearing in the absence of the defendant, if there is 'cause' to do so.
11. In light of the preeminent legal and practical importance of the right to be present – the Chamber should only resort to a confirmation hearing *in absentia* in exceptional circumstances, particularly if the Defence opposes such a course of action, and the defendant's presence before the Court has been obstructed due to reasons outside of the defendant's control.
12. If Rule 125 invests the Pre-Trial Chamber with the power to hold the confirmation hearing, which is the most important procedural step during the pre-confirmation phase, in the absence of the defendant, then it follows 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.
13. In this regard, Rule 123(2) stipulates that before issuing a decision to convene the confirmation hearing in the absence of the defendant, the Pre-Trial Chamber must first conduct consultations with the Prosecutor, and the Counsel for the defendant, if the latter is known to the Court.

14. Although Rule 123(2) does not explicitly vest the Defence with the right to request the Pre-Trial Chamber to conduct ‘consultations’ concerning the convocation of an *in absentia* confirmation hearing, “[i]t may be regarded as axiomatic that, if any power is conferred upon a court to make an order or issue a decision, the parties have an implicit right to move the Chamber to exercise it”.⁴
15. Rule 123(2) does not elaborate upon the nature of such ‘consultations’, but the term is 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.
16. A preliminary decision to commence the preparation for pre-confirmation proceedings does not, therefore, commit the Chamber to conducting the hearing *in absentia* – it merely lays the 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. It is, therefore, preeminently in the interests of judicial economy and the good administration of justice to commence these proceedings in an appropriate case.
17. The commencement of the preliminary preparation for the confirmation hearing would in this case have the advantage of ensuring an expeditious confirmation process, upon Mr. Gaddafi’s surrender, once Libya decides to comply with the ICC’s orders.
18. In particular, it would seem that the confirmation hearings in some of the earlier cases before the ICC may have been postponed on several occasions due to delays occasioned by the time involved in processing redaction and

⁴ ICC-01/04-01/06-168 OA3, para. 20.

protection requests concerning Prosecution witnesses and evidence, which in turn, delayed the disclosure process.⁵

19. The establishment of a timetable for the submission of redaction and protection requests for Prosecution evidence would therefore ensure that such matters can be processed and resolved in a timely manner.
20. It would also be consistent with the directive of the Appeals Chamber that the Prosecution 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 Prosecution is in a position to disclose these materials to the defendant upon his surrender to the Court.⁶
21. Since many aspects of the confirmation phase are conducted on almost an entirely *ex parte* basis (such as redaction requests), or concern technical issues, which do not require input from the defendant (such as the finalisation of the E-Court protocol for this case), it will not be necessary to re-litigate these matters upon Mr. Gaddafi's surrender.
22. The immediate disclosure of Prosecution evidence would also be consistent with the right of the Defence to be informed promptly and in detail of the nature, cause and content of the charges, as enshrined in Article 67(1)(a) of the Statute. This right extends to a right to be provided with the documents

⁵ In *Lubanga*, a first postponement of the confirmation hearing date was caused by the Office of the Prosecutor's inability to implement protective measures in a timely manner: Decision on the postponement of the confirmation hearing and the adjustment of the timetable set in the Decision on the final system of disclosure, 24 May 2006, ICC-01/04-01/06-126; The date of confirmation was postponed on a second occasion due to the fact that the Prosecution had not provided the Defence with timely disclosure: Decision on the date of confirmation hearing, 5 October 2006; ICC-01/04-01/06-521. The confirmation hearing took place from 9 November 2006 – 28 November 2006. In *Katanga and Ngudjolo*, the Prosecution failed to comply with its obligations concerning the filing of electronic copies of the evidence contained in the charging document and list of evidence with the data required by the e-court protocol: Decision on the Defence Request for Postponement of the Confirmation Hearing, 25 April 2008; ICC-01/04-01/07-446. The confirmation hearing took place from 27 June 2008 – 16 July 2008. In *Bemba*, the Pre-Trial Chamber postponed the initial date for the confirmation hearing because part of the evidence on which the Prosecutor intended to rely at the confirmation hearing was not yet accessible to the defence: Decision on the Postponement of the Confirmation Hearing; 17 October 2008; ICC-01/05-01/08-170-tENG. The confirmation hearing took place from 12 January 2009 to 15 January 2009. In *Abu Garda*, the confirmation proceedings had to be postponed as an extension of time was required by the Prosecution to file an Arabic translation of the list of evidence and revised summaries of transcripts: Decision on the Confirmation of Charges; 8 February 2010; ICC-02/05-02/09-243-Red; referring to Decision on the Prosecutor's requests for extension of time limit"; ICC-02/05-02/09-98; 11 November 2009. The confirmation hearing took place between 19 October and 30 October 2009.

⁶ ICC-01/05-01/08-323, paras. 1 and 2.

underpinning the allegations against Mr. Gaddafi, and not just the allegations themselves.⁷

23. The prompt disclosure of Prosecution evidence is also intrinsically linked to the Defence right to have adequate time and facilities to prepare for trial, as set out in Article 67(1)(b) – that is, unless the Defence receives early notice as to the substance and contours of the Prosecution case, it will have insufficient time to prepare its own case.
24. Concretely, the immediate disclosure of Rule 76 and 77 and Article 67(2) materials to Counsel would mean that the Defence could commence its review and analysis of these materials. Upon the surrender of the defendant to the ICC, Counsel would then be 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.
25. The commencement of the disclosure of Rule 76 and 77 and Article 67(2) materials would also 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 Defence were forced to wait for the surrender of Mr. Gaddafi before conducting any investigations.
26. The Pre-Trial Chamber could thus commence the pre-confirmation phase with these types of procedures, and conduct ‘consultations’ on a periodic basis with a view to determining what further steps could be taken to advance the

⁷ “The preparation of his defence by the accused assumes a more detailed level of information which may not be available at the time the indictment is framed. Article 21(4)(a) of the Statute moreover explicitly provides that this take place promptly, even if the time period must be as short as possible. The text speaks of the “nature and cause” of the indictment, a concept which includes not only the acts but also the evidence in support of the indictment. Article 21(4)(a) - a general principle of the accused’s right to receive the most complete information regarding the charges against him in order for him to prepare his defence under the best conditions - establishes the context for the accused’s exercising his right to disclosure of evidence collected against him by the Prosecutor.” *Prosecutor v. Blaskic*, ‘Decision on the Defence Motion to Dismiss the Indictment Based Upon Defects in the Form Thereof (Vagueness/Lack of Adequate Notice of Charges)’, 4 April 1997, <http://www.icty.org/x/cases/blaskic/tdec/en/70404DC113291.htm>

proceedings, without prejudicing Mr. Gaddafi's right personally to participate in the proceedings.

27. In addition to imposing an obligation on the Chamber to conduct such 'consultations' as a condition precedent to a Rule 125 *in absentia* confirmation hearing, Rule 123(3) also requires the Pre-Trial Chamber to ensure that "all reasonable measures have been taken to locate and arrest the person".
28. In the present case, the location of Mr. Gaddafi is known. His 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.
29. The mandatory nature of Rule 123(3) ("shall ensure") imposes a positive obligation on the Chamber to exhaust all reasonable measures at their disposal to ensure the arrest of Mr. Gaddafi within a reasonable period of time.
30. In this connection, the Defence observes that the Pre-Trial Chamber has also yet to rule on the Defence request for a finding of non-compliance concerning Libya's failure to surrender Mr. Gaddafi,⁸ which was filed over two months ago.
31. 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.
32. Accordingly, in the absence of an appellate decision granting suspensive effect, the hypothetical possibilities that either the Appeals Chamber could overturn the Admissibility Decision or that Libya could file a second admissibility challenge, do not detract from the immediate imperative for the Pre-Trial Chamber to take all measures within its control to advance the ICC proceedings concerning Mr. Gaddafi (in a manner which is consistent with his rights) and to ensure the timely implementation of the order to surrender him to the custody of the ICC.

⁸ ICC-01/11-01/11-347.

III. Relief Sought

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

- i. Order the commencement of the pre-confirmation process before the ICC; and
- ii. Take all reasonable measures to ensure the immediate surrender of Mr. Gaddafi to the ICC.



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

Dated this, 7th Day of August 2013

At London, United Kingdom