

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 30 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 with a Public Annex**

**Prosecution's Response to the Defence "Request for an order for the  
commencement of the pre-confirmation phase"**

**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. Counsel for Saif Al-Islam Gaddafi (“Defence”) requests that the Pre-Trial Chamber I (“the Chamber”) order the commencement of the pre-confirmation phase, and in particular the disclosure of information to the Defence pursuant to Article 67(2) and Rules 76 and 77. The Defence grounds its request on the basis of Rule 123(2) and considers that the term “consultations” referred to therein is broad enough to encompass judicial directions in preparation of the confirmation hearing. According to the Defence, this does not bind the Chamber to hold a hearing *in absentia* and only lays the preparatory groundwork in the eventuality that the Chamber decides to follow this course.
  
2. The Defence request should be dismissed. First, the Chamber has already rejected an equivalent request in a previous decision, when it ruled that full disclosure in relation to the substantive case against Mr. Gaddafi appears unwarranted at this stage. Second, full disclosure is premature as it is not necessary for the exercise of the procedural rights of the Defence at this stage of the proceedings. Further, the Defence’s request lacks specificity in terms of what is sought and for what reasons. Third, Rule 123(2) does not support the Defence’s request to start the pre-confirmation phase; to the contrary, it seeks to determine whether there is cause to hold the confirmation hearing in the circumstances enumerated under Article 61(2)(b), namely, when the suspect has fled or cannot be located. Fourth, a confirmation hearing *in absentia* is not possible in the instant case because the location of Mr. Gaddafi is known.

## Procedural Background

3. On 16 May 2011, the Prosecution requested an arrest warrant for Muammar Gaddafi, Saif Al-Islam Gaddafi (“Saif Al-Islam”) and Abdullah Al-Senussi.<sup>1</sup> On 27 June 2011, Pre-Trial Chamber I decided on the Prosecution’s application

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<sup>1</sup> ICC-01/11-4-Red.

(“Article 58 Decision”)<sup>2</sup> and issued arrest warrants against Muammar Gaddafi, Saif Al-Islam<sup>3</sup> and Abdullah Al-Senussi.<sup>4</sup>

4. On 1 May 2012, Libya challenged the admissibility of the case against Mr. Gaddafi before the Court pursuant to Article 19(2)(b) of the Rome Statute.<sup>5</sup>
5. On 31 May 2013, Pre-Trial Chamber I found the case against Mr. Gaddafi admissible before the Court and reminded Libya of its obligation to surrender Mr. Gaddafi (“Admissibility Decision”).<sup>6</sup>
6. On 7 June 2013,<sup>7</sup> and on 24 June 2013, Libya appealed against the Admissibility Decision of the case against Mr. Gaddafi.<sup>8</sup>
7. On 2 August 2013, the Chamber stated, following a request of the Defence,<sup>9</sup> that, inter alia, full disclosure in relation to the substantive case appeared unwarranted due to the factual circumstances of the case,<sup>10</sup> but that disclosure of [REDACTED] was merited to permit the Defence to exercise its rights in the concrete circumstances of the case, in particular, to take measures to preserve evidence and to request measures of protections to individuals who may be at risk on account of their association with the proceedings before the Court (“Decision on Disclosure”).<sup>11</sup>

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<sup>2</sup> ICC-01/11-1.

<sup>3</sup> ICC-01/11-13 and 14.

<sup>4</sup> ICC-01/11-15. On 22 November 2011, the proceedings against Muammar Gaddafi were discontinued due to his death. See ICC-01/11-01/11-28.

<sup>5</sup> ICC-01/11-01/11-130.

<sup>6</sup> ICC-01/11-01/11-344-Red.

<sup>7</sup> ICC-01/11-01/11-350.

<sup>8</sup> ICC-01/11-01/11-370-Conf-Exp. The public redacted version was filed on 25 June 2013 (ICC-01/11-01/11-370-Red2).

<sup>9</sup> ICC-01/11-01/11-340-Conf .

<sup>10</sup> ICC-01/11-01/11-392-Red-Corr, paras.34-35.

<sup>11</sup> ICC-01/11-01/11-392-Red-Corr, para.41. See also paras.36-37 [‘Decision’].

8. On 7 August 2013, the Defence filed its “Request for an order for the commencement of the pre-confirmation phase” (“Defence Request”).<sup>12</sup> The Defence 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, in particular, disclosure of Article 67(2) and Rules 76 and 77 material.<sup>13</sup>

### Submissions

(i) *The Chamber has already rejected the Defence Request*

9. The Defence is effectively asking for full disclosure of Article 67(2) and Rules 76 and 77 material. According to the Defence, such disclosure would permit Counsel to start with the review of the material and, upon surrender of the suspect to the ICC, be in a position to draw his attention to the most important documentation.<sup>14</sup> The Defence argues that its request will expedite any upcoming confirmation hearing.<sup>15</sup> It submits that the petition is consistent with the Defence rights to be informed of the charges and to have adequate time and facilities to prepare for trial pursuant to Article 67(1)(a) and (b);<sup>16</sup> in particular, the Defence would be able to identify potential witnesses, who may require immediate protection, and additional evidence that may otherwise disappear.<sup>17</sup>

10. The request should be rejected. This Chamber has already ruled in its Decision on Disclosure that full disclosure in relation to the substantive case against Mr.

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<sup>12</sup> ICC-01/11-01/11-397 [‘Request’].

<sup>13</sup> Request, paras.7,22,24 .

<sup>14</sup> Request, para.24.

<sup>15</sup> Request, paras.16-17. While a joint reading of paras.16 and 17 appears to indicate that the Defence refers to a confirmation hearing upon surrender of Mr. Gaddafi – even if *in absentia* -, a joint reading of paras.10 and 12 appear to indicate that the Defence considers that the possibility of a confirmation hearing *in absentia* – regardless of any surrender – is possible.

<sup>16</sup> Request, paras.22 and 23.

<sup>17</sup> Request, para.25.

Gaddafi appears unwarranted at this stage.<sup>18</sup> This conclusion is firmly based on the factual circumstances of this case, namely that “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”.<sup>19</sup> On these grounds alone, the Defence Request should be rejected.

*(ii) The Defence Request lacks specificity*

11. In the Decision on Disclosure, the Chamber noted, when granting the Defence's request for disclosure of one witness statement, that the Defence had been specific enough both in terms of what was sought and the reasons why disclosure of the material was required,<sup>20</sup> and that disclosure appeared necessary to exercise the procedural rights of the Defence in the concrete circumstances of this case.<sup>21</sup>

12. To the contrary, the instant Request is a full-fledged fishing expedition of material potentially falling within the purview of Article 67(2) and Rules 76 and 77 without any concrete and compelling argument on why disclosure is necessary. The abstract and speculative nature of the Defence Request is further evidenced by the Defence's speculation that disclosure would permit it to identify “potential” witnesses (who may require protection) and relevant evidence (that may otherwise disappear) in the event that a confirmation

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<sup>18</sup> Decision, para.34.

<sup>19</sup> Decision, para.35.

<sup>20</sup> Decision, para.40.

<sup>21</sup> Decision, para.41. In particular, to preserve the evidence and ensure the protection of the witness.

hearing is held.<sup>22</sup> Wholesale requests for disclosure that fail to identify the precise purpose justifying such disclosure have been considered to constitute a “fishing expedition” and have accordingly been rejected by Chambers of this Court.<sup>23</sup> As indicated by Trial Chamber III, the Prosecution does not have the obligation of “handing the defence the keys to the warehouse”.<sup>24</sup> As a result, the Request should also be rejected because of its lack of specificity.

(iii) *Full disclosure of information pursuant to Article 67(2) and Rules 76 and 77 is not necessary for the exercise of the rights of the Defence at this stage*

13. Further, the Defence fails to demonstrate how a blanket disclosure of information pursuant to Article 67(2) and Rules 76 and 77 is necessary for the exercise of its rights at this concrete stage of the proceedings. The Defence

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<sup>22</sup> The Defence indicates that disclosure “merely lays the groundwork” to ensure that Chamber and parties are prepared “to participate in a confirmation hearing in absentia, should it later be deemed appropriate to convene such a hearing” and ensuring an expeditious confirmation process “upon Mr Gaddafi’s surrender, once Libya decides to comply with the ICC’s orders”.

<sup>23</sup> See for instance, ICC-01/05-01/08-632, para. 26; ICC-01/04-01/06-103, pp.2-3. It is also well-established in the jurisprudence of the *ad hoc* tribunals that a request for disclosure of confidential information must identify the precise legitimate forensic purpose that would justify disclosure. See in this regard, ICTY: *Prosecutor v. Tolimir*, IT-05-88/2-T, Decision on Defence Request for Access to Confidential Materials in the *Prosecutor v. Tolimir* Case, 2 June 2010; *Prosecutor v. Dragomir Milošević*, IT-98-29/I-A, Decision on Radovan Karadžić's Motion for Access to Confidential Material in the *Dragomir Milošević* case, 19 May 2009, para. 7; *Prosecutor v. Milan Martić*, 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; *Prosecutor v. Krajisnik*, IT-00-39-A, Decision on “Motion by Mico Stanisic for Access to All Confidential Materials in the *Krajisnik* Case”, 21 February 2007, p. 4. *Prosecutor v. Karadžić*, IT-95-5/18-PT, Decision on Jovica Stanisic's Motion for Access to Confidential Materials in the *Karadžić* case, 20 May 2009, para. 4; *Prosecutor v. Stanisic and Zupljanin*, IT-08-91-PT, Decision on Stojan Zupljanin's Access to Confidential Material in the *Krajisnik*, *Mrda*, *Stakic* and *Brdanin* Cases, 24 April 2009, para. 11; *Prosecutor v. Brđjanin*, IT-99-36-T, Decision on Motion by Momcilo Gruban for Access to Confidential Materials in the *Brđjanin* and *Talic* Case, 1 April 2003; *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-A, Decision on Motion by Pasko Ljubicic for Removal of Redactions (Appeals Chamber), 1 May 2003. ICTR: *Ferdinand Nahimana Jean-Bosco Barayagwiza Hassan Ngeze (Appellants) v. The Prosecutor (Respondent)*, ICTR-99-52-A, Decision on “Joseph Nzirorera's Motion for Access to Appeal Briefs”, 27 October 2005; *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Disclosure of Confidential Material Requested by Defence for Ntahobali, 24 September 2004, Para.7. SCSL: *Prosecutor v. Taylor*, SCSL-03-1-T, Decision On Ex Parte And Confidential Prosecution Motion For An Order To Provide To The Prosecution Non-Privileged Documents Recently Obtained From The Accused’s Personal Archive, 5 November 2007, paras.11-14.

<sup>24</sup> ICC-01/05-01/08-632, para. 26.

argues that Mr. Gaddafi is not at fault for not being before the Court<sup>25</sup> and recalls the Chamber's ruling that Mr. 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 ICC.<sup>26</sup>

14. This finding however does not give the Defence *carte blanche* to invoke any provision of the Statute regardless of its applicability at the current stage of the proceedings in this case; to the contrary, it means 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. The Chamber has been clear in this regard when it stated that the "Defence has the right and duty to exercise its function in an effective manner and [...] *within the context of the proceedings before the Court*",<sup>27</sup> and that "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*".<sup>28</sup>

15. Indeed, the different stages of the proceedings before the Court are set out in the Statute<sup>29</sup> and the Rules<sup>30</sup> and follow certain logic. The rights and obligations of parties and participants vary depending on the stage of the proceedings. For example, the Prosecution needs to prove its case to different and progressively higher evidentiary standards throughout the proceedings -

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<sup>25</sup> Request, para.28.

<sup>26</sup> Request, para.1.

<sup>27</sup> Decision, para.36. Emphasis added.

<sup>28</sup> Decision, para.38. Emphasis added.

<sup>29</sup> *See for example*, the distinct stages of proceedings enumerated under the Rome Statute, including the process for investigations (Articles 52-56), obtaining an arrest warrant (Article 58), the confirmation of charges (Article 61), the trial (Articles 62-75), sentencing (Articles 76-80), and the appeal (Articles 81-85).

<sup>30</sup> *See for example*, the rules governing investigations and the collection of evidence (Rules 104-120), the confirmation of charges (Rules 121-126), the closure of the "pre-trial phase" (Rules 127-130), the trial (Rules 131-144), sentencing (Rules 145-148), and the Appeal (Rules 149-161).



be it investigation, confirmation of charges and trial.<sup>31</sup> Similarly, the Prosecution's disclosure obligations also vary throughout the proceedings. In particular, the Prosecution does not need to disclose all its evidence at confirmation<sup>32</sup> and need not call witnesses and may rely on documentary or summary evidence at that stage.<sup>33</sup>

16. Notably, Article 61(3) and Rule 121 regulate disclosure for the purposes of the confirmation hearing. Article 61(3) states that “within a *reasonable time before the [confirmation] hearing*”, the person shall be provided with a copy of the DCC and be informed of the evidence on which the Prosecutor intends to rely at the hearing.<sup>34</sup> Therefore, the Prosecution's pre-trial disclosure obligation under Article 61(3) is clearly linked to the confirmation hearing. Rule 121 develops what a “reasonable time” means and provides for the relevant timeframes, that range from 30 days before the hearing to 15 days, if the Prosecution wishes to amend the charges or present new evidence.<sup>35</sup> Similarly, Article 61(6) and Rule 121(6) also impose a disclosure obligation on the Defence, if it intends to present evidence at the hearing.

17. The Defence Request ignores these provisions and attempts to create an artificial phase which has no basis in the statutory framework.

18. Hence, the Defence's rights to be informed of the charges and to have adequate time and facilities to prepare pursuant to Article 67(1)(a) and (b)<sup>36</sup> should be interpreted in light of the concrete phase of the proceedings and the facts of the case. Pursuant to Article 67(1)(a), the Defence has the right to

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<sup>31</sup> ICC-02/05-01/09-73OA, para.30; See the various standards of proof required at the different stages of proceedings under the Rome Statute, such as obtaining an arrest warrant (Article 58(1)(a): “reasonable grounds to believe”), confirmation of charges (Article 61(7): “substantial grounds to believe”), and at trial (Article 66(3): “beyond a reasonable doubt”).

<sup>32</sup> ICC-01/04-01/06-102, para.14.

<sup>33</sup> Article 61(5).

<sup>34</sup> Emphasis added.

<sup>35</sup> Rule 121(3) to (5).

<sup>36</sup> Request, paras.22 and 23.

prepare with respect to the matters before the Court or the matters which it is entitled to raise at that stage.<sup>37</sup> Further, the Defence's right to be informed of the charges under Article 67(1)(a) is satisfied at this stage with the Article 58 Decision and the Arrest Warrant. Should Mr. Gaddafi appear before the Court, the Prosecution will prepare a DCC pursuant to Article 61(3) and Regulation 52 of the Regulations of the Court to ensure that the Defence's right - *at that stage* - is fully complied with.

19. In sum, at this stage, and considering the facts of the case - in particular, that Mr. Gaddafi's surrender to the Court and a confirmation hearing may appear uncertain -,<sup>38</sup> full disclosure of Article 67(2) and Rules 76 and 77 is not necessary for the Defence to meaningfully exercise its rights at this concrete stage of the proceedings.

*(iv) The consequences of full disclosure of the Prosecution's evidence*

20. Pre-confirmation proceedings are very taxing and involve a large amount of work and use of resources that should not be unnecessarily imposed on the Prosecution and the Court as a whole.<sup>39</sup> Disclosure may also entail serious consequences for the safety and well-being of witnesses and their families which must not be lightly considered. If the most recent jurisprudence of the Majority of this Chamber in the *Gbagbo* case is to be abided by in this case, the Prosecution would need to complete its investigations and disclose to the Defence a large amount – if not all - of its evidence, both documental and

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<sup>37</sup> Decision, para.37.

<sup>38</sup> Decision, para.35.

<sup>39</sup> As noted by Judge Trendafilova: "[...] the Single Judge cannot disregard the continuous increase in the number of situations and cases before the Court. Some of these situations and cases are more active than others depending on, inter alia, whether or not suspects have been apprehended or appeared voluntarily. In these circumstances, there is a need to prioritise these active cases which require prompt action and to manage them with the staff available." See ICC-01/04-02/06-73, para. 41

testimonial, in order to be confirmation ready.<sup>40</sup> Most importantly, disclosure will most likely require the adoption of protective measures to ensure the safety and well-being of witnesses and their families. Thus, while Mr. Gaddafi may not be at fault for not having a trial (and confirmation hearing) before the ICC, the witnesses whom the Prosecution interviewed are not either. The Prosecution recalls that at this stage there may be no real prospect of having a confirmation hearing, let alone a trial, and it is even unclear whether Mr. Gaddafi would choose Mr. Jones as counsel should he appear before the Court. On that basis, disclosure of sensitive witness information to the Defence would create more risks than benefits, which significantly outweigh the need to be “prepared” if there was ever a confirmation hearing.

*(v) The Statute and the Rules do not support the arguments that the pre-confirmation phase has started in the current case*

21. As noted above, although the Defence effectively asks for full disclosure of Article 67(2) and Rules 76 and 77 material, it presents its request under the guise of an application to commence the pre-confirmation phase. The Defence argues that, as Rule 125 permits the Chamber to hold a confirmation hearing *in absentia* of the suspect, it follows that the 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.<sup>41</sup> Further, the Defence refers to Rule 123(2) as supporting authority and argues that the term “consultations” referred to therein is “broad enough to encompass judicial litigation and directions

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<sup>40</sup> The Majority stated that the Prosecution needs to “present all her evidence” and “her strongest possible case” at confirmation and that it favours “first-hand” testimony of the witness talking about his or her “personal observations”. ICC-02/11-01/11-432, paras.25,27,37. The Majority of PTC I also stated that it “is not prepared to accept allegations proven solely through anonymous hearsay in documentary evidence”. See para.37. The Prosecution has appealed this decision. ICC-02/11-01/11-474OA5.

<sup>41</sup> Request, para.12.

concerning the procedures for the confirmation hearing” in preparation for the eventuality that the Chamber decides to hold a hearing *in absentia*.<sup>42</sup>

22. The Defence submissions are incorrect and based on a partial and erroneous reading of the relevant provisions. Rule 123(2) reads as follows:

“The Pre-Trial Chamber may hold consultations with the Prosecutor, at the request of the latter or on its own initiative, in order to determine whether there is cause to hold a hearing on confirmation of charges *under the conditions set forth in article 61, paragraph 2 (b)[...]*”.<sup>43</sup>

23. Article 61(2), which is omitted by the Defence, reads:

“The Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has:

- (a) Waived his or her right to be present; or
- (b) Fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held”

24. A plain reading of these provisions 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. Therefore, and contrary to the Defence Request, Rule 123(2) does not permit the commencement of the pre-confirmation process in the “eventuality” that the Chamber may decide to hold a confirmation hearing in the future;<sup>44</sup> to the contrary, the consultations will seek to determine whether the hearing can be held at all. Only when the

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<sup>42</sup> Request, para.15. The Defence argues that although the provision does not refer to the Defence to trigger this mechanism, the Defence could request and prompt the Chamber to exercise its discretion to convene these observations. See para.14.

<sup>43</sup> Emphasis added.

<sup>44</sup> Request, para.15.

decision to convene the hearing has been made, disclosure and further preparations will be instructed by the Chamber.

25. Further, and even if the Defence had requested the scheduling of a confirmation hearing – which does not appear to be the case, Rule 123(2) would not permit the Defence to trigger consultations to determine whether there is cause for the hearing because Mr. Gaddafi’s case does not fall within any of the factual scenarios of Article 61(2)(b); he has not fled, and it is not the case that he cannot be found. As the Defence indicates, the location of Mr. Gaddafi is known,<sup>45</sup> and he is currently detained in Zintan.<sup>46</sup> Therefore, the Defence Request lacks legal basis and, on these grounds alone, should be dismissed.

26. The Defence further adds that a joint reading of Rule 123(2) and (3) impose on the Chamber a “clear obligation” to take all necessary and appropriate measures to move the ICC proceedings forward in an expeditious manner and the Chamber would therefore be compelled to commence the pre-confirmation process.<sup>47</sup>

27. This submission is misplaced. Chambers of this Court have the obligation to ensure fair and expeditious proceedings, but cannot be asked to bypass the relevant provisions in order to move forward.<sup>48</sup> Accordingly, the Chamber is not expected to, and should not, commence proceedings leading to the confirmation of charges in contravention of the regime envisaged by the Statutory framework.<sup>49</sup> Further, and contrary to the Defence’s submission, the objective of Rule 123 is not to move the ICC proceedings forward in an

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<sup>45</sup> Request, para.28.

<sup>46</sup> See ICC-01/11-01/11-344-Red, paras. 205-206; and ICC-01/11-01/11-370-Conf-Red, paras. 157-158.

<sup>47</sup> Request, para.31.

<sup>48</sup> ICC-01/04-01/06-2799 OA19, para.8.

<sup>49</sup> See above section (iii).

expeditious manner but rather, as the heading of the Rule itself so indicates, to ensure the presence of the person concerned at the confirmation hearing.

(vi) *A confirmation hearing in absentia is not possible in the present case*

28. The Defence appears to assume that a confirmation hearing could be held *in absentia* even if Mr. Gaddafi has not surrendered and has not appeared before the Court.<sup>50</sup> The debate among commentators with respect to the possibility of holding confirmation hearings without the suspect's prior surrender is irrelevant in this case.<sup>51</sup> Even assuming that the statutory framework permits such a possibility, a contextual reading of the relevant provisions indicates that it would only be possible in the second scenario under Article 61(2)(b), namely, if the person cannot be located. The other two scenarios (the suspect has waived his or her right to be present under Article 61(2)(a), or has fled pursuant to Article 61(2)(b) first sentence) require that the suspect has been previously made available to the Court.

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<sup>50</sup> Request, paras.12 and 16. Although in para.17 it refers to Mr. Gaddafi's surrender.

<sup>51</sup> Commentators differ with respect to the possibility of holding a confirmation of charges without prior surrender and first appearance. Some authors indicate that first appearance is necessary, to do otherwise would imply an *in absentia* trial. See M. Marchesiello, in Cassesse (ed.) *The Rome Statute of the International Criminal Court, a Commentary*, vol. II, (Oxford University Press: 2011), p.1244 [Marchesiello']. However, other authors note that a confirmation hearing is not a trial and the principle is not violated. Moreover, the drafting history (in particular the fact that the drafters considered since the beginning of the negotiations a similar provision as Rule 61 of the ICTY Rules), and the ambiguity of Article 61(2) and Rule 123(2) and (3) would call for the possibility of confirmation hearings *in absentia* without first appearance. See W. Schabas, *The International Criminal Court. A Commentary on the Rome Statute*, (Oxford University Press: 2010), p.737. Judge Trendafilova further notes that the wording of Article 61(1) would also support this later interpretation. In particular, the phrase "subject to the provisions of paragraph 2" introduces an exception to the requirement of "surrender or voluntary appearance". See E. Trendafilova in C.Stahn and G.Sluiter (eds.) *The Emerging Practice of the International Criminal Court*, (Koninklijke Brill NV, 2009), p.453 [Trendafilova']. This later argument is however controversial because the phrase "subject to..." may also qualify the subsequent sentence, namely, "[...]the Pre-Trial Chamber shall hold a hearing to confirm the charges [...]". The Spanish reading of this provision would support this interpretation: "Con sujeción a lo dispuesto en el párrafo 2 y dentro de un plazo razonable tras la entrega de la persona a la Corte o su comparecencia voluntaria ante ésta [...]", namely, "Subject to the provisions of paragraph 2, within a reasonable time after the person's surrender or voluntary appearance [...]".

29. Rule 124(1) indicates that “[i]f the person concerned *is available to the Court* but wishes to waive the right to be present at the hearing on confirmation of charges, he or she shall submit a written request to the Pre-Trial Chamber [...]”.<sup>52</sup> Thus, a suspect who wishes to waive his or her right to be present at the confirmation hearing pursuant to Article 61(2)(a) has been previously available to the Court. This would presuppose that his or her initial appearance had taken place.<sup>53</sup> This is not the case in the instant situation because Mr. Gaddafi, under the custody of the Zintan brigade, is not available to the Court.

30. Further, a person who has “fled” within the terms of Article 61(2)(b), first sentence, has been at some point available to the Court. This option implies three cumulative elements: (a) the availability of the person to the Court and his or her initial appearance; (b) the person’s subsequent flight; and (c) a failure to re-apprehend and return the person or to otherwise re-establish his/her link with the Court.<sup>54</sup> Mr. Gaddafi’s situation does not fall within this scenario.

31. It follows, that a confirmation of charges *in absentia* without prior surrender would only be possible under the second option provided in Article 61(2)(b), namely, the person “cannot be found”. However, and as noted before, Mr. Gaddafi is currently located in Zintan, where he is in detention.

*(vii) The exceptionality of the confirmation hearings in absentia*

32. In any event, the holding of a confirmation hearing *in absentia* of the suspect person is an exceptional recourse,<sup>55</sup> as the Defence acknowledges.<sup>56</sup> Further, a

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<sup>52</sup> Rule 124(1). Emphasis added.

<sup>53</sup> Trendafilova, p.454.

<sup>54</sup> Trendafilova, pp.454-455.

<sup>55</sup> Separate Opinion of Judge Pikis, ICC-01/04-01/06 OA 7, para. 2: “Although the confirmation hearing may in the circumstances specified in article 61 (2) of the Statute (see also rule 125 of the Rules of

teleological interpretation of the Rome Statute also calls for the exceptional application of this possibility. The purpose of the confirmation process is to determine whether there is enough evidence to move forward to trial. The confirmation is only a means or part of a process towards the final goal of having a trial which, under Article 63(1), requires the presence of the accused person as a general and mandatory rule subject to the exceptions expressly set out in that provision.<sup>57</sup>

33. The Prosecution further notes that Rule 61 of the UN *ad hoc* Tribunals, which to some extent inspired the discussions of the drafters in relation to Article 61(2),<sup>58</sup> was only used at the ICTY in 1995 and 1996 but it was later abandoned, and it was never used at the ICTR.<sup>59</sup> These proceedings permitted the public

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Procedure and Evidence) be held in the absence of the person against whom the charges are leveled, such course must in the nature of things be *an exceptional one*." Emphasis added.

<sup>56</sup> Request, para.11.

<sup>57</sup> A literal reading of Article 63 indicates that the accused shall be present at trial and allows for only one exception, the removal of a disruptive Accused pursuant to Article 63(2), which provides that a disruptive accused may be removed from the courtroom "only for such duration as strictly required". This limitation on the Chamber's power to remove an accused demonstrates that even in the exceptional situation of a disruptive accused, the drafters wanted to ensure that the accused was "present during the trial" to the greatest extent possible. Thus, as is clear from the drafting history, the Rome Statute does not provide for trials *in absentia*. A contextual and teleological interpretation of the Statute supports this plain text reading. See William Schabas in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2nd ed., C.H. Beck Hart Nomos, 2008), p.1194, margin-no.10; see also Terrier F., "Trial Proceedings: Powers of the Trial Chamber" in Casasse, Gaeta and Jones (eds) (2nd ed.), *The Rome Statute of the International Criminal Court: A Commentary* (Vol.II) (OUP: 2009), p.1283 ("Trial in absentia, or par contumace, that is, in the absence of the accused, is not provided for by the Statute"); see also Roy Lee (ed.), *The International Criminal Court: the making of the Rome Statute: issues, negotiations and results* (Martinus-Nijhoff Publishers, 1999), p.261 ("the Statute does not provide for any such trials to take place before the Court"). The Prosecution is currently appealing a decision of Trial Chamber V that permitted Mr. Ruto to be absent of the trial proceedings. See ICC-01/09-01/11-831OA5.

<sup>58</sup> H. Friman in R. Lee (ed.), *ICC: Elements of Crimes and Rules of Procedure and Evidence*, (Transnational Publishers, Inc.: 2001), pp. 527-528.

<sup>59</sup> K. Shibahara and W. Schabas, "Confirmation of the charges before trial", in Triffterer (eds.), *Commentary on the Rome Statute of the International Criminal Court* (C.H. Beck, Hart, Nomos: 2008), pp.1172-1173; W. Schabas, *The International Criminal Court. A Commentary on the Rome Statute*, (Oxford University Press: 2010) p.735. Authors opine that the proceeding was perhaps abandoned because the Prosecutor became too busy with defendants who had become under the Tribunal's control, and might also have thought that this proceeding would only benefit the accused while offering little or no assistance in obtaining a conviction. These proceedings might also have served to provide work to judges starved of judicial activity.



airing of the evidence against the accused and the possible issuance of an international arrest warrant, thereby enhancing the likelihood of the accused's arrest.<sup>60</sup> This should be distinguished from the ICC where the arrest warrants – if unsealed – are already “international”. Finally, and as noted above, the resources of the Court are scarce and the holding of a confirmation hearing entails a large disclosure of material which affects the safety and well-being of witnesses and their families. Hence, such a decision should not be made unnecessarily.

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<sup>60</sup> *Prosecutor v. Rajic*, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, IT-95-12, 13 September 1996, para. 3.

### Relief Sought

34. For the reasons stated above, the Prosecution requests that the Pre-Trial Chamber reject the Defence Request.



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Fatou Bensouda, Prosecutor

Dated this 30<sup>th</sup> day of August 2013  
At The Hague, The Netherlands