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

Date: 4 September 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**

**Defence Request for Leave to Reply to “Prosecution’s Response to the Defence  
‘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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## I. Introduction

1. The Defence for Mr. Saif Al-Islam Gaddafi respectfully seeks leave to reply to the Prosecution response of 29 August 2013, for the reasons set out below.
2. On 29 August 2013, the Prosecution filed its response ("the Prosecution Response") to the request of the Defence for Mr. Saif Al-Islam Gaddafi to commence Rule 123 consultations, with a view to starting certain elements of the pre-confirmation phase in advance of the surrender of Mr. Gaddafi to the ICC ("the Defence Request").
3. The Prosecution opposed the Defence Request in its entirety, referring to it as a request for "blanket disclosure of information",<sup>1</sup> which is a "fishing expedition",<sup>2</sup> lacking in specificity.<sup>3</sup>
4. It is unhelpful and misleading to reduce the Defence Request to a generic request for disclosure, and to argue it on that basis.
5. The Defence requested the Chamber to conduct consultations with a view to determining which procedural activities can be conducted at this point in time without prejudicing the rights of Mr. Gaddafi. The pre-confirmation process is not uniquely concerned with disclosure, but may also concern a variety of other issues, such as victim participation, the finalisation of E-Court and disclosure protocols, witness protection and investigation protocols, and State cooperation requests related to Defence investigations.
6. The Prosecution also appears to assume that disclosure is an all or nothing process, as opposed to an obligation which is tailored to the particular procedural activity occurring in the case, the specific needs of the Defence, and the individually assessed protective requirements of Prosecution witnesses.
7. For this reason, the Pre-Trial Chamber has ruled that the fact that Mr. Gaddafi has not yet been surrendered to the ICC does not in itself, exempt the

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<sup>1</sup> Prosecution Response, para. 14.

<sup>2</sup> Prosecution Response, para. 13.

<sup>3</sup> Prosecution Response, paras. 12-13.

Prosecution from disclosing evidence.<sup>4</sup> Rather, the extent of the Prosecution's disclosure obligations will depend on the particular exigencies of the Defence, and the specific procedural activity occurring before the Chamber.

8. Since the Chamber has not yet conducted any hearings to determine which procedural activities can commence at this stage, the Defence has not yet submitted any argumentation as to the specific scope of Prosecution disclosure, and it would be premature to have required such argumentation.
9. The Prosecution Response also appears to be predicated on the following, flawed assumptions:
  - i. That the Prosecution should not be compelled to disclose any evidence when it is uncertain as to whether:
    1. the case will continue to be admissible before the ICC;
    2. Mr. Gaddafi will be surrendered to the ICC; or
    3. the present Counsel will continue to represent Mr. Gaddafi;<sup>5</sup>
  - ii. That unspecified security concerns, and the workload and resource issues involved in implementing disclosure outweigh the defendant's right to expeditious proceedings, and the overarching Statutory emphasis on expedition and diligence;<sup>6</sup> and
  - iii. That since the criteria for the convocation of an *in absentia* confirmation hearing do not apply to Mr. Gaddafi, there is no basis to conduct preliminary consultations or to commence the pre-confirmation hearing proceedings.<sup>7</sup>

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<sup>4</sup> ICC-01/11-01/11-392-Red, para. 33.

<sup>5</sup> Prosecution Response, para. 21.

<sup>6</sup> Prosecution Response, para. 21.

<sup>7</sup> Prosecution Response, para. 26, 29-31.

10. The current litigation concerns the first time that any party appearing before the ICC has requested the Pre-Trial Chamber to engage in Rule 123 consultations with a view to determining whether to convene a confirmation hearing *in absentia*. The precise scope of Article 61(2) and Rule 123 has yet to be determined. It is therefore in the interests of justice that the Pre-Trial Chamber is able to benefit from the full range of arguments on these issues before rendering its decision on a matter, which has extremely significant consequences for the rights of Mr. Gaddafi, in particular, his right to be tried promptly before the ICC.
11. The Defence therefore respectfully submits that there is good cause to grant the Defence leave to reply to the above, incorrect assumptions.
12. The Defence has included its substantive arguments in order to assist the Chamber to issue an expeditious decision on the Defence Request. It has been filed publicly due to the fact that no reference is made to confidential issues or decisions.

## **II. Submissions**

13. The Prosecution's position - that the Defence Request should be rejected in its entirety because "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"<sup>8</sup> - seeks to re-litigate matters, which have already been ruled upon by either the Appeals Chamber or the Pre-Trial Chamber.
14. In arguing that the Prosecution should not be compelled to disclose evidence to the Defence at this stage of the proceedings because it is possible that Counsel could be replaced, the Prosecution is rehashing the arguments which were made, and dismissed by the Pre-Trial Chamber in its decision of 1

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<sup>8</sup> Prosecution Response, para. 21.

August 2013.<sup>9</sup> As confirmed by the Chamber, "no limit in relation to the scope of counsel's mandate has been set out by the Chamber",<sup>10</sup> and as such, the provisional nature of counsel's appointment pursuant to Regulation 76 is not a valid ground to limit disclosure.

15. Since it is Counsel's strict professional duty to transmit the case file (including any materials disclosed by the Prosecution) to any new Defence counsel,<sup>11</sup> the theoretical possibility that Counsel might be replaced at some point in the future has no impact on the resources or workload of the Prosecution.
16. Similarly, the Prosecution's argument that it should not be required to effect disclosure in circumstances in which it is uncertain that Mr. Gaddafi will ever appear before the ICC (presumably because the case might either be referred back to Libya or Libya might continue to refuse to surrender Mr. Gaddafi to the ICC) seeks to arrogate to itself investigative powers devoid of any corresponding disclosure duties, which is contrary to the tenor of Article 54 of the Statute.<sup>12</sup>
17. The Prosecution's position is also contrary to the Appeals Chamber's decision on suspensive effect, which mandates that the case against Mr. Gaddafi must be considered to be admissible before the ICC, irrespective of the fact that Libya has filed an appeal.<sup>13</sup> The possibility that the Appeals Chamber could potentially reverse the Pre-Trial Chamber's decision is therefore not a relevant legal factor. Since the case is admissible before the ICC at this point in time and Libya is obliged to cooperate with the ICC pursuant to Security Council Resolution 1970, the Chamber must operate in accordance with the presumption that Mr. Gaddafi will eventually be surrendered to the ICC.

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<sup>9</sup> ICC-01/11-01/11-392-Red, para. 31.

<sup>10</sup> ICC-01/11-01/11-392-Red, para. 31.

<sup>11</sup> Article 18(5) of the Code of Professional Conduct for Counsel.

<sup>12</sup> The Appeals Chamber has construed Article 54 to impose a duty on the Prosecution to conduct its investigations in such a manner that it is in a position to fulfil its corollary duty of disclosure to the Defence, in a manner which respects the rights of the defendant under the Statute: ICC-01/04-01/06-1486.

<sup>13</sup> ICC-01/11-01/11-387.

18. In this regard, although the Prosecution has cited Rule 61 precedents at the ICTY in order to argue against the Defence request, the Prosecution has acknowledged that the public convocation of such a hearing could “enhanc[e] the likelihood of the accused’s arrest”.<sup>14</sup> Similarly, although the arrest warrant against Mr. Gaddafi has already been made public, the public commencement of ICC proceedings would serve to dispel any ambiguities concerning the ICC’s exercise of jurisdiction over the case. The hearing would thus play an important role in consolidating international support for the execution of Libya’s obligation to surrender Mr. Gaddafi to the ICC.
19. It is also notable that the power of the Chamber to conduct ‘consultations’ in order to determine whether to hold an *in absentia* confirmation hearing is located in Rule 123, which is titled ‘Measures to ensure the presence of the person concerned at the confirmation hearing’. It would therefore appear that the drafters considered that such consultations could, in themselves, act as an impetus to the surrender or arrest of a defendant.
20. Although the presumption must be that Mr. Gaddafi will, at some juncture, be surrendered to the ICC, it is also not correct that the criteria for an *in absentia* hearing cannot be applied to Mr. Gaddafi. The Libyan authorities have consistently indicated that the location of Mr. Gaddafi’s detention is secret, and neither the ICRC nor the ICC delegations have been able to visit his actual detention facility. There is absolutely no factual or legal distinction between the situation of Mr. Gaddafi, and that of a defendant who “cannot be found” within the meaning of Article 61(2)(b) of the Statute.
21. Moreover, if, for any reason, the detention conditions of Mr. Gaddafi were to be modified in order to enable him to communicate with the Court or his Counsel, then it might be possible to invoke Article 61(2)(a) – a waiver of his right to be present.

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<sup>14</sup> Prosecution Response, para. 34.

22. In any case, it is clear from the wording of Rule 123(2) that it is not necessary for the Chamber to determine in advance of its decision to hold consultations whether the criteria under Article 61(2) would be met; to the contrary, the wording of Rule 123(2) implies that holding such consultations is a condition precedent to a determination as to whether the “conditions set forth in Article 61(2) are fulfilled”. It would therefore be premature for the Pre-Trial Chamber to determine at this point whether a confirmation hearing *in absentia* either could or should be held.
23. The Prosecution’s reliance on unspecified security concerns and the workload associated with implementing redactions in order to justify complete non-disclosure is both legally incorrect and extremely concerning.
24. Firstly, disclosure to the Defence cannot be equated to disclosure to the general public. It cannot be the case that there is a justified risk associated with the disclosure of all non-public items of evidence and statements to professional Counsel. Moreover, if, as has been argued by the Prosecution, disclosure of evidence to the Defence could endanger the safety of witnesses, then this is something that would be taken into consideration by the Chamber in determining the timing of disclosure, and the level of redactions. The Appeals Chamber has categorically stated that non-disclosure cannot be assessed in a generic manner or justified by reference to general insecurity:<sup>15</sup> such issues can only be assessed on a case by case basis in reference to specific items of evidence, and after taking into consideration the needs of the Defence in connection with the particular procedural activities which are currently being conducted before the Chamber.
25. Secondly, as a general principle, concerns associated with workload and resources should not be used to derogate from the rights of the Defence, in particular, the right to expeditious proceedings. As underscored by Trial Chamber II:

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<sup>15</sup> ICC-01/04-01/07-475, paras. 69-73.



“a persistent lack of resources can never be an excuse for not complying with legal obligations or for not respecting deadlines, much less for ignoring the rights of the Defence to have adequate time for preparation and to be tried without undue delay. In this context, the Chamber refers to the well established jurisprudence of the European Court of Human Rights to the effect that excessive workload or lack of necessary means is no justification for violating the right to be tried without undue delay”.<sup>16</sup>

26. If the Prosecution experiences difficulties in implementing redactions or disclosure within any time frame set by the Chamber, then the Prosecution has the possibility to request additional time pursuant to Regulation 35. Such difficulties do not, however, justify blanket non-disclosure of all evidence, and a failure to even submit requests for protective measures to the Chamber in advance of disclosure or to litigate the legal principles governing disclosure and witness protection.
27. Mr. Gaddafi has already been held in detention for approximately 22 months – which is more than twice as long as the standard time period for the confirmation phase. Mr. Gaddafi has a right to have his name cleared and to be freed if there is insufficient evidence to confirm the charges, at the earliest possible juncture. Mr. Gaddafi’s right to expeditious proceedings must therefore be given the priority it deserves.
28. As found by the Pre-Trial Chamber, Mr. Gaddafi cannot be equated to a typical suspect in a case which is dormant pending the surrender or arrest of the suspect: Mr. Gaddafi “is not at large, is not trying to evade justice and manifests his or her readiness to submit him/herself to the authority of the

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<sup>16</sup> ICC-01/04-01/07-1336, para. 6.

Court”.<sup>17</sup> The fact that he has been detained for over twenty-two months thus far cannot be attributed to the conduct of Mr. Gaddafi.

29. Unless the Prosecution is willing to support a future request for provisional release, their present stance will have the effect of further prolonging the pre-trial detention of Mr. Gaddafi. As observed by the ICTR Appeals Chamber:

“[b]ecause the Prosecutor has the authority to commence the entire legal process, through investigation and submission of an indictment for confirmation, the Prosecutor has been likened to the ‘engine’ driving the work of the Tribunal. Or, as one court has stated, “[T]he ultimate responsibility for bringing a defendant to trial rests on the Government and not on the defendant”. Consequently, once the Prosecutor has set this process in motion, she is under a duty to ensure that, within the scope of her authority, the case proceeds to trial in a way that respects the rights of the accused.”<sup>18</sup>

30. Deferring all pre-confirmation preparation until after Mr. Gaddafi’s surrender to the ICC is directly contrary to this prosecutorial duty of diligence, and the Prosecutor’s express duty under Article 54(1)(c) to fully respect Mr. Gaddafi’s right to expeditious hearings.

31. Finally, the Prosecutor has relied upon Article 61(2) to argue that since the hearing itself cannot be convoked unless one of the criteria in Article 61(2) is satisfied, it is not possible to conduct preliminary steps either, unless the defendant has either waived the right to be present (Article 61(2)(a)) or has fled or cannot be found (Article 61(2)(b)).

32. As set out above, it is premature and unnecessary to determine at this juncture whether Article 61(2) could be applied to Mr. Gaddafi. However, irrespective of this issue, the Prosecution position – which presupposes that the pre-

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<sup>17</sup> ICC-01/11-01/11-392-Red at para. 33.

<sup>18</sup> *Barayagwiza v. Prosecutor*, Decision of the Appeals Chamber, 2 November 1999, para. 92.

confirmation preparatory procedures cannot be conducted unless the defendant has appeared before the ICC or the Article 61(2) criteria are fulfilled - finds no support in either the practice of the ICC, or the clear language of the Statute and Rules.

33. In terms of the practice of the ICC, Pre-Trial Chambers have often convened preliminary Status Conferences to discuss the progress of the case, without requiring the presence of the defendant, or the submission of a signed waiver. In the *Kony* case, the Pre-Trial Chamber allowed several procedural issues to be litigated – such as admissibility and victim participation– notwithstanding the absence of all of the defendants.<sup>19</sup>
34. Provided that the rights of the defendant are protected, this practice is also consistent with the regulatory framework of the ICC. Article 61 of the Statute stipulates that the confirmation hearing must be held within a reasonable time of the surrender of the defendant. It does not preclude the possibility that pre-confirmation preparation can commence in advance of the person's surrender or voluntary appearance.
35. Similarly, although Rule 121 sets out the cut off point for disclosure before the confirmation hearing, it does not preclude the possibility that disclosure or litigation concerning the confirmation hearing could commence in advance of the person's surrender to the ICC. As found by Pre-Trial Chamber II, "the deadlines established by rule 121 of the Rules are only indicative of the minimum time-limits that a party can avail itself to comply with its disclosure obligations".<sup>20</sup>
36. For example, Article 61(3) provides that the defendant must be informed of the charges and the Prosecution evidence "[w]ithin a reasonable time before the hearing". Rule 121(3) further specifies that disclosure of the charges and the evidence must take place no later than 30 days before the hearing:

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<sup>19</sup> ICC-02/04-01/05-408, ICC-02/04-01/05-375, ICC-02/04-01/05-356

<sup>20</sup> ICC-01/09-01/11-44, ICC-01/09-01/11-62, para. 13.

although it imposes a maximum cutoff point for disclosure, no minimum time period is set.

37. Notably, Rule 121(2), which requires the Pre-Trial Chamber to convene hearings and issue decisions to regulate the pre-confirmation hearing process, refers to “the person in respect of whom a warrant of arrest or a summons to appear has been issued”. This broad language includes persons, such as Mr. Gaddafi, who are the subject of a warrant of arrest, but who have not yet had their initial appearance before the Court. The language employed in Rule 121(2) also mirrors the language used in Article 19(2) – which allows a person, who is the subject of a summons or an arrest warrant - to file a challenge to admissibility or jurisdiction prior to the person’s surrender to the ICC.
38. Since Article 61(1) mandates that the confirmation hearing must take place within a reasonable time after the person’s surrender to the ICC, the immediate commencement of the pre-confirmation process would also facilitate the ability of the Chamber to ensure that it is possible to convene the confirmation hearing within a reasonable time frame after Mr. Gaddafi is surrendered to the ICC.

### **III. Relief Sought**

39. For the reasons set out above, the Defence for Mr. Saif Al-Islam Gaddafi respectfully requests the Honourable Pre-Trial Chamber to:
  - a. Grant leave to file a reply to the Prosecution Response; and
  - b. Order the commencement of the pre-confirmation process before the ICC.

A handwritten signature in black ink, appearing to read 'John Jones', written in a cursive style.

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

Dated this, 4<sup>th</sup> Day of September 2013

At London, United Kingdom