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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

Request for Leave to Appeal against the “Decision on the ‘Request for an order for the commencement of the pre-confirmation phase’ by the Defence of Saif Al-Islam Gaddafi”

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 files this request for leave to appeal against the “Decision on the ‘Request for an order for the commencement of the pre-confirmation phase’ by the Defence of Saif Al-Islam Gaddafi” (“Decision of 10 September 2013”).¹
2. The Defence seeks leave to appeal the Decision of 10 September 2013 on three issues:
 - a) whether the Chamber adopted an incorrect interpretation of Rule 121(2) (“First Issue”);
 - b) whether the Chamber erred in finding that the Prosecutor did not have an obligation to disclose exculpatory evidence to the Defence prior to the initial appearance of a suspect (“Second Issue”); and
 - c) whether the Chamber erred in failing to take into account both the specific circumstances of a defendant and its obligation to exercise due diligence to ensure the defendant’s right to expeditious proceedings (“Third Issue”).
3. It is submitted that these three issues meet the necessary criteria for leave to appeal pursuant to article 82(1)(d).

II. Applicable Law

4. Article 82(1)(d) of a Statute provides that a party may appeal:

“A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.”

¹ ICC-01/11-01/11-440

5. The jurisprudence of the Appeals Chamber has held that an “issue” is an identifiable subject or topic requiring a decision for its resolution and not merely a question over which there is a disagreement or conflicting opinion.² An “issue” is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination.³
6. The term “fair” in the context of article 82(1)(d) is associated with the norms of a fair trial “the attributes of which are an inseverable part of the corresponding human right, incorporated in the Statute by distinct provisions of it (articles 64(2) and 67(1) and 21(3)); making its interpretation and application subject to internationally recognised human rights”.⁴
7. The Appeals Chamber has further held that “expeditiousness” explicitly constitutes “an attribute of fair trial”.⁵ Moreover, the principles of fair trial “are not confined to trial proceedings but extend to pre-trial proceedings” and that any “[b]reach or violation from the rules of a fair trial at the pre-trial stage of proceedings may have implications on the proceedings and may affect the outcome of the trial”.⁶ At the very core of article 82(1)(d) is the “purging [of] the pre-trial process of errors...designed as a safeguard for the integrity of proceedings”.⁷
8. The issue must be such that its immediate resolution by the Appeals Chamber may materially advance the proceedings. This entails moving proceedings forward by ensuring they follow the right course and “[r]emoving doubts about the correctness of a decision or mapping a course of action along the right lines”.⁸ In deciding upon a request under article 82(1)(d), the Chamber “must ponder the possible implications of a given issue being wrongly

² ICC-01/04-168, para. 9.

³ *Ibid.*

⁴ ICC-01/04-168, para. 11.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

⁸ ICC-01/04-168, para. 15.

decided on the outcome of the case [which] involves a forecast of the consequences of such an occurrence”.⁹

III. Submissions

9. Pursuant to article 82(1)(d), the Defence seeks leave to appeal the Decision of 10 September 2013 on the following three issues:

- a) whether the Chamber adopted an incorrect interpretation of Rule 121(2);
- b) whether the Chamber erred in finding that the Prosecutor did not have an obligation to disclose exculpatory evidence to the Defence prior to the initial appearance of a suspect (“Second Issue”); and
- c) whether the Chamber erred in failing to take into account both the specific circumstances of a defendant and its obligation to exercise due diligence to ensure the defendant’s right to expeditious proceedings (“Third Issue”).

10. As developed below, these three issues arise out of the Decision of 10 September 2013 and significantly affect the fair and expeditious conduct of proceedings which require an immediate resolution by the Appeals Chamber that may materially advance proceedings.

i. The First Issue arises out of the Decision of 10 September 2013

11. In the Decision of 10 September 2013, the Pre-Trial Chamber noted 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”.¹⁰ It then noted, “Rule 121(2) of the Rules further mandates that the Chamber “shall” **then** take the

⁹ ICC-01/04-168, para. 13.

¹⁰ Decision of 10 September 2013, para. 27.

necessary decision regarding the disclosure that is to take place (emphasis added)".¹¹

12. This resulted in the Chamber's finding that it was not compelled to organise the disclosure of materials related to the merits of the case prior to the surrender of Mr. Gaddafi unless there existed "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".¹²
13. In this regard, the Chamber found that in the referenced instance, it had already observed that the "prospect of surrender of the suspect to the Court appears uncertain"¹³ and that "those circumstances remain in place".¹⁴ In such circumstances, the Chamber found 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"¹⁵ and that such measures "would need to be reviewed upon Mr. Gaddafi's surrender, in light of the factual circumstances at that time".¹⁶
14. The Defence submits that the Chamber erred in its interpretation of Rule 121(2). First, a correct reading of Rule 121 does not reveal any sequential link between Rule 121(1) and Rule 121(2) that would premise the triggering of both sub-provisions of Rule 121 on the initial appearance of a suspect. Whilst Rule 121(1) does explicitly state that the date of the confirmation of charges hearing can only be set during the suspect's first appearance before the Court, that is not the case for Rule 121(2).¹⁷ The Chamber erred by reading the term, "then"

¹¹ *Ibid.*

¹² Decision of 10 September 2013, para. 28.

¹³ Decision of 10 September 2013, para. 29.

¹⁴ *Ibid.*

¹⁵ Decision of 10 September 2013, para. 30.

¹⁶ Decision of 10 September 2013, para. 31.

¹⁷ Rule 121(2): "In accordance with article 61, paragraph 3, the Pre-Trial Chamber shall take the necessary decisions regarding disclosure between the Prosecutor and the person in respect of whom a warrant of arrest or a summons to appear has been issued".

into Rule 121(2) when it does not appear there nor does it arise by necessary implication.

15. Unlike Rule 121(1), Rule 121(2) does not specify that decisions regarding disclosure shall occur during the suspect's first appearance. Nor does it provide any term which would imply that decisions regarding disclosure can only be made once the criteria within Rule 121(1) have been met.
16. Second, Rule 121(2) does not imply that the phrase, "necessary decisions on disclosure", is synonymous with decisions on "full disclosure proceedings leading to the confirmation of charges hearing". Rather, there are other steps that can be litigated and finalised as part of the disclosure process. This includes, inter alia, decisions on: e-court protocol; disclosure format; redaction protocol, including the redaction protocol for victim applications and the scope of the material to be disclosed.
17. These procedures largely concern technical issues that: first, do not endanger witnesses or victims and second, will not need to be re-litigated once Mr. Gaddafi is surrendered to the Court.
18. They are also procedures that are envisaged by the Appeals Chamber to take place prior to the initial appearance of a suspect in its anticipation that at the time that an application for a warrant of arrest is submitted, the Prosecution should already have taken the necessary steps to ensure that it is ready to disclose information.¹⁸
19. The First Issue is essential to the reasoning applied by the Chamber in its Decision of 10 September 2013. The Pre-Trial Chamber repeatedly relied upon the fact that Mr. Gaddafi's initial appearance had not taken place as justification for not undertaking decisions on the disclosure process, including those that establish a timetable for requests for redactions and protective measures.

¹⁸ ICC-01/05-01/08-323.

20. Had the Chamber adopted an alternative approach to Rule 121(2), it would have granted the Defence request for the commencement of the pre-confirmation phase and allowed the abovementioned processes to take place. As such, the First Issue arises from the Decision of 10 September 2013 and qualifies as an appealable issue.

ii. The Second Issue arises from the Decision of 10 September 2013

21. In the Decision of 10 September 2013, the Pre-Trial Chamber assessed whether the “commencement of the ‘disclosure proceedings’”¹⁹ would be in the interests of judicial economy and the good administration of justice; ultimately concluding that it was not.

22. The Defence’s request for the commencement of pre-confirmation phase necessarily included a request for exculpatory material. Therefore, in the course of its finding, the Chamber ultimately considered that the disclosure of exculpatory evidence could be delayed until there was a “reasonable prospect that Mr. Gaddafi’s initial appearance would be imminent”.²⁰

23. Such a finding conflicts with the plain language of article 67(2) of the Statute, which provides that exculpatory evidence is to be disclosed “as soon as practicable” and that the burden is on the Prosecution to disclose incriminating and exculpatory material, independent of any request.²¹ There are no exceptions to this obligation in the Statute, nor are any situations described in the text where the disclosure of exculpatory evidence would be “unwarranted”.²²

24. When considering whether material should be disclosed, the first and foremost determination to be made is whether it is disclosable pursuant to article 67(2) and not whether it would require a considerable amount of

¹⁹ Decision of 10 September 2013, para. 30.

²⁰ *Ibid.*

²¹ ICC-02/05-03/09-501 OA4, para. 34.

²² Decision of 10 September 2013, para. 30.

resources on the part of the Prosecutor or the Court in general.²³ Moreover, the Prosecution's disclosure obligation is guided by the principle of publicity of proceedings pursuant to regulation 23 *bis* (3) of the Regulations of the Court so as to obligate the Prosecution to consider whether materials submitted in connection with an application for an arrest warrant need to remain classified as either confidential or *ex parte*.²⁴

25. The Chamber's finding that decisions on disclosure could be legally delayed until Mr. Gaddafi's initial appearance before the Court goes to the core of why the Defence's request to commence the pre-confirmation phase of proceedings was denied. For this reason, the Second Issue clearly arises from the Decision of 10 September 2013. This issue does not constitute a mere disagreement or conflicting opinion with the Chamber's reasoning, but instead is essential to understanding the scope of Mr. Gaddafi's rights under article 67(2) of the Statute.

iii. The Third Issue arises out of the Decision of 10 September 2013

26. In its Decision of 10 September 2013, the Pre-Trial Chamber considered that "due to the absence of any reasonable expectation that Mr. Gaddafi will be shortly surrendered to the Court, an order for the 'commencement of the pre-confirmation process'....appear[ed] not to be 'in the interests of judicial economy and the good administration of justice'".²⁵

27. In reaching this conclusion, the Chamber held that it could not "ignore that meaningful disclosure proceedings require a considerable amount of resources on the part of the Prosecutor and the Court in general".²⁶ Moreover, it observed that decisions generally on protective measures "would need to be reviewed

²³ ICC-02/05-03/09-501 OA4, para. 37.

²⁴ ICC-02/05-03/09-501 OA4, paras 43 to 44.

²⁵ Decision of 10 September 2013, para. 32.

²⁶ Decision of 10 September 2013, para 31.

upon Mr. Gaddafi's surrender...[which] would lead to a duplication of activities of all the actors involved in the proceedings".²⁷

28. However, in finding that the specific circumstances of the case did not warrant granting the Defence request for a hearing to discuss the implementation of certain pre-confirmation procedures at this stage, the Chamber failed to give due consideration to the specific circumstances surrounding the fact that Mr. Gaddafi's initial appearance had not taken place.
29. Consequently, the Chamber failed to take into account its obligation to ensure that proceedings are fair and expeditious and conducted with full respect for the fair trial rights accorded to Mr. Gaddafi within the Rome Statute, namely, the right to be tried without undue delay pursuant to article 67(1)(c).
30. It also exercised its discretion in a manner contrary to the general principle that 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:

"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".²⁸

31. Despite the Appeals Chamber's final determination on suspensive effect,²⁹ Libya has yet to meet its surrender obligation. To date, Mr. Gaddafi has remained in solitary pre-trial detention for over 22-months with no or limited

²⁷ *Ibid.*

²⁸ ICC-01/04-01/07-1336, para. 6.

²⁹ ICC-01/11-01/11-364 OA4.

access to information regarding proceedings before the ICC. Moreover, he has now been charged by Libyan authorities with a number of serious crimes and faces a real risk of execution upon conviction.³⁰

32. As a result of this, the Defence has been unable to conduct any meaningful preparation related to the merits of the case, despite the considerable time that has elapsed whilst Mr. Gaddafi has been held in illegal pre-trial detention. 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, in particular given the Chamber's previous determination that 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 Court".³¹ Mr. Gaddafi's position is therefore dramatically different from a typical suspect in a case which remains dormant pending the surrender or arrest of a suspect.
33. As mentioned above, the Defence's request for the commencement of pre-confirmation procedures extends beyond the physical act of "full disclosure proceedings". Issuing decisions, for example on either redaction or e-court protocol would not, as the Chamber considers, require any extra resources beyond those already allocated to the case; do not impact on the protection of victims and witness and would not have to be re-litigated on the appearance of Mr. Gaddafi.
34. Rather, they are part of a process that would enable the Prosecution to be in a timely position to disclose material to the Defence to enable it to challenge the legal basis of the issued arrest warrant and an opportunity to seek provisional release immediately upon his surrender, as envisaged by the Appeals Chamber.³²

³⁰ ICC-01/11-01/11-424; *see also* <https://www.amnesty.org/en/news/libya-al-gaddafi-loyalists-risk-revenge-death-sentences-2013-08-02>

³¹ ICC-01/11-01/11-392-Red, para. 33.

³² ICC-01/05-01/08-323.

35. This issue clearly arises from the Decision of 10 September 2013 and is not merely a question over whether there is a disagreement or conflicting opinion with the findings of the Chamber. Had the Chamber factored in the time already spent by Mr. Gaddafi in pre-trial detention, alongside its considerations regarding the “amount of resources on the part of the Prosecution” and the need to review decisions on protective measures, it would have materially affected the disposition of the Chamber’s conclusions. As such, the Third Issue is appealable.

iv. All three issues fulfil the requirements of article 82(1)(d)

36. All three issues significantly affect the fairness of proceedings. Concerning the First and Second Issue, the Appeals Chamber has already held that “the disclosure process is essential in ensuring the fairness of the proceedings and that the rights of the defence are respected, in particular the principle of equality of arms... [and that] [t]his must remain paramount in decisions that are taken in relation to disclosure”.³³

37. The Third Issue concerns Mr. Gaddafi’s fundamental right to be tried without undue delay and the impact of delaying all decisions concerning the confirmation stage until after the first appearance of Mr. Gaddafi before the Court has taken place. This arguably results in two considerable delays: first, the delay caused in waiting for Libya to meet its surrender obligation; and second, the delay caused in allowing the Prosecution time to logistically organise itself to be in a position to meet its obligations necessary for the confirmation of hearings charges.

38. Considerable delays in the commencement of criminal proceedings against a suspect have been determined by this Chamber to involve “significant repercussions on the fair and expeditious conduct of the proceedings”.³⁴

³³ ICC-02/05-03/09-501 OA4, para. 34.

³⁴ ICC-01/11-01/11-419, para. 44.

39. Needless to say, had the Chamber found that it could allow certain pre-confirmation processes to take place this would undoubtedly significantly affect the expeditiousness of proceedings. Rather than litigating matters such as the logistics of translation requests or the redaction policy of this Chamber after the surrender of Mr. Gaddafi (both of which are matters that do not need to be assessed according to the circumstance at the time of surrender); they could already be finalised prior to the initial appearance. This would reduce the time needed to resolve the matters in the lead up to the confirmation hearing and thereby reduce the already considerable amount of time that Mr. Gaddafi has remained in pre-trial detention.
40. The determination of the Appeals Chamber on whether certain aspects of the pre-confirmation phase can take place prior to the initial appearance of Mr. Gaddafi would materially advance proceedings. It would remove any doubts as to whether in specific circumstances, the commencement of pre-confirmation procedures should occur and determine whether the Chamber have incorrectly prevented the case from progressing
41. An immediate resolution of all three issues would also allow for substantive aspects of the case to begin and continue in an expeditious manner, as opposed to allowing the case to lay dormant until Libya decides if and when it will comply with the surrender obligation.

IV. Relief sought

42. For the foregoing reasons, the Defence for Mr. Saif Al-Islam Gaddafi requests the Honourable Pre-Trial Chamber to grant leave to appeal the First, Second and Third Issue as identified above.



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

Dated this, 17th Day of September 2013

At London, United Kingdom