

**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**



Original: English

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

Date: 23 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**

**Prosecution's Response to the Defence "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:** Office of the Prosecutor

**Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:**

**The Office of the Prosecutor**

Ms Fatou Bensouda  
Mr James Stewart

**Counsel for Saif Al-Islam Gaddafi**

Mr John Jones, QC

**Counsel for Abdullah Al-Senussi**

Mr Ben Emmerson, QC  
Mr Rodney Dixon

**Legal Representatives of Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the  
Defence**

**States Representatives**

Professor Ahmed El-Gehani  
Professor James Crawford, SC  
Mr Wayne Jordash  
Ms Michelle Butler

**Amicus Curiae**

**REGISTRY**

---

**Registrar**

Mr Herman von Hebel  
Mr Didier Preira

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Other  
Section**

## Introduction

1. On 10 September 2013, Pre-Trial Chamber I (the “Chamber”) rejected the Defence of Saif Al-Islam Gaddafi’s (the “Defence”) request for an order for the commencement of the pre-confirmation phase including, *inter alia*, full disclosure of Article 67(2) and Rules 76 and 77 material by the Prosecution (the “Decision”). The Defence seeks leave to appeal the Decision and claims that three issues arise (the “Application”). The Prosecution submits that the Application should be rejected. The three purported issues are either premised on a mischaracterization of the Decision or constitute a mere disagreement with the Chamber’s assessment of the facts and interests affected. If however the Chamber determines that the issues arise from the Decision, the Prosecution submits that they do not meet the requirements under Article 82(1) (d).

## Procedural Background

2. On 7 August 2013, the Defence filed the “Request for an order for the commencement of the pre-confirmation phase”.<sup>1</sup> (“Request”) On 29 August 2013, the Prosecution responded to the Request.<sup>2</sup>
3. On 10 September 2013, the Chamber issued the Decision where it rejected the Defence’s Request.<sup>3</sup>
4. On 17 September, the Defence submitted the Application, arguing that three issues arise from the Decision: (1) whether the Chamber adopted an incorrect interpretation of Rule 121(2) (“First Issue”); (2) 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

---

<sup>1</sup> ICC-01/11-01/11-397.

<sup>2</sup> ICC-01/11-01/11-425-Red.

<sup>3</sup> ICC-01/11-01/11-440.

Issue”); and (3) 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”).<sup>4</sup>

## Submissions

### I. The Issues raised by the Defence do not constitute Appealable Issues for the purposes of Article 82(1)(d)

#### *First Issue*

5. In the First Issue, the Defence raises the question of whether the Chamber adopted an incorrect interpretation of Rule 121(2). The Defence claims that the Chamber incorrectly found a sequential link between Rule 121(1) and Rule 121(2),<sup>5</sup> and also that Rule 121(2) implies that the phrase “necessary decisions on disclosure” is synonymous with decisions on “full disclosure proceedings leading to the confirmation of charges hearing”.<sup>6</sup>
6. The Prosecution submits that the First Issue is premised on a partial reading of the Decision, which did not reject the Defence’s request for disclosure solely on the grounds of its reading of Rule 121(2).<sup>7</sup> The Chamber’s legal interpretation of the provision was not determinative of the rejection of the Defence’s Request, since the Chamber accepted that there might be specific circumstances warranting disclosure of materials related to the merits of the case even before the suspect’s initial appearance before the court.<sup>8</sup> The Chamber however concluded that in light of the circumstances of this case

---

<sup>4</sup> ICC-01/11-01/11-445.

<sup>5</sup> Application, para.14.

<sup>6</sup> Application, para.16.

<sup>7</sup> Leave to appeal has been denied when the decision has been mischaracterized: ICC-01/09-02/11-406, para.46; ICC-01/04-01/07-15, para.15; ICC-01/04-01/07-1732, paras.15,17-18; ICC-01/04-01/10-487, paras.32-33; ICC-01/04-01/07-1088, paras.33-35; ICC-01/04-535, paras. 26-29; ICC-01/04-01/10-106, p. 6; ICC-02/11-01/11-350, paras.42,44.

<sup>8</sup> Decision, para.28.

disclosure was not merited.<sup>9</sup> Chambers of this Court have indicated that abstract legal questions of hypothetical concern are not appealable issues.<sup>10</sup> Therefore, the First Issue should be dismissed.

7. Moreover, the Defence misconstrues the Decision when it asserts that the Chamber found that “necessary decisions on disclosure” in rule 121(2) are synonymous with “full disclosure proceedings leading to the confirmation of charges hearing”. There was no such finding: the Chamber was merely referring to and describing<sup>11</sup> the Defence Request<sup>12</sup> – which sought on full disclosure of PEXO, INCRIM and Rule 77 information.

#### *Second Issue*

8. In the Second Issue, the Defence raises the question of 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. The Chamber made no such definitive finding. In fact, and as already advanced, the Chamber *explicitly* accepted that there may be specific circumstances in a given case warranting the taking of decisions regarding the disclosure of materials related to the merits of the case even before the suspect’s initial appearance before the court.<sup>13</sup> The Chamber however concluded that the Defence’s wholesale request for disclosure of Rule 76 and 77 and Article 67(2) material was not merited in light of the facts of this case. Hence, the Second Issue is premised on a mischaracterization of the Decision and does not arise from it.<sup>14</sup>

---

<sup>9</sup> Decision, paras.29-31.

<sup>10</sup> ICC-01/05-01/08-532, para.17; ICC-01/05-01/08-75, para.11; ICC-02/04-01/05-367, para.22; ICC-01/09-01/11-301, para.34, ICC-01/09-02/11-406, paras.50, 61.

<sup>11</sup> Decision, para.26.

<sup>12</sup> Defence Request, paras.19-20.

<sup>13</sup> Decision, para.28.

<sup>14</sup> Leave to appeal has been denied when the decision has been mischaracterized: ICC-01/09-02/11-406, para.46; ICC-01/04-01/07-15, para.15; ICC-01/04-01/07-1732, paras.15,17-18; ICC-01/04-01/10-487,

### *Third Issue*

9. In the Third Issue, the Defence claims that the Chamber “failed to give due consideration to the specific circumstances surrounding the fact that Mr. Gaddafi’s initial appearance had not taken place.”<sup>15</sup> The Defence then states that “[c]onsequently” the Chamber failed to take into account its obligation to ensure that proceedings are fair and expeditious.<sup>16</sup> The Defence adds that “[h]ad the Chamber factored in the time already spent by Mr. Gaddafi in pre-trial detention...it would have materially affected the disposition”<sup>17</sup>
  
10. The Prosecution submits that the Third Issue constitutes a disagreement with the Chamber’s Decision,<sup>18</sup> which, contrary to the Defence’s submissions, did take into consideration the specific circumstances of the case and the suspect. In particular, the Chamber considered that (1) the decision determining that the case is admissible is currently being reviewed by the Appeals Chamber,<sup>19</sup> and (2) the prospect of surrender of the suspect to court appears uncertain, especially since the Libyan authorities lack custody over Mr. Gaddafi.<sup>20</sup> As a result, the Chamber could not predict with any certainty if and when Mr. Gaddafi will be surrendered, and by extension, proceedings before the court may commence.<sup>21</sup> Against this backdrop,<sup>22</sup> the Chamber considered whether the commencement of disclosure proceedings was “in the interests of judicial economy and the good administration of justice”<sup>23</sup> and balanced the different

---

paras.32-33; ICC-01/04-01/07-1088, paras.33-35; ICC-01/04-535, paras. 26-29; ICC-01/04-01/10-106, p. 6; ICC-02/11-01/11-350, paras.42,44.

<sup>15</sup> Decision, para.28.

<sup>16</sup> Application, para.29.

<sup>17</sup> Application, para.35.

<sup>18</sup> Leave to appeal has been denied if the issue is “merely a question over which there is disagreement or conflicting opinion”: ICC-01/04-168OA3, para.9; ICC-01/05-01/08-532, para.17; ICC-02/05-02/09-267, para.22; ICC-01/04-01/06-1557, para.30; ICC-01/04-01/07-2035, para.25; ICC-02/05-03/09-179, para.27.

<sup>19</sup> Decision, para.29.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Decision, para.30.

<sup>23</sup> Ibid.

interests at stake.<sup>24</sup> On the basis of this operation, the Chamber concluded that certain factors called for the rejection of the Request; in particular, the Chamber afforded weight to the imposition of intrusive protective measures to victims and witnesses at risk when there is little prospect currently that Mr Gaddafi will appear before the Court and when the measures will entail a duplication of the Court's work because they will have to be revisited if Mr Gaddafi surrenders.<sup>25</sup>

11. The fact that the Defence disagrees with Chamber's assessment of the different factors and with its conclusion does not constitute an appealable issue.<sup>26</sup> Hence the Third Issue does not arise from the Decision.

## II. The issues do not affect the fair and expeditious conduct of the proceedings.

12. Regarding the First and Second Issues, the Defence makes a generic reference to a finding of the Appeals Chamber that the disclosure process is essential in ensuring the fairness of the proceedings.<sup>27</sup> However, the mere fact that an issue relates to disclosure is insufficient to satisfy the requirements of Article 82(1)(d).<sup>28</sup> It is settled law that the Defence cannot speculate in the abstract that the Decision causes prejudice to the rights of the accused in order to invoke that the fairness of the proceedings are affected.<sup>29</sup> A purely general complaint of this type does not suffice and, on these grounds alone, these arguments should be rejected.<sup>30</sup>

---

<sup>24</sup> Ibid.

<sup>25</sup> Decision, paras.31-32.

<sup>26</sup> ICC-01/04-168 OA3, para.9; ICC-01/05-01/08-532, para.17; ICC-02/05-02/09-267, para.22; ICC-01/04-01/06-1557, para.30; ICC-01/04-01/07-2035, para.25; ICC-02/05-03/09-179, para.27; ICC-02/11-01/11-99-Conf, para.21.

<sup>27</sup> ICC-01/11-01/11-445, para.36.

<sup>28</sup> ICC-01/04-01/10-116 paras.18-25, ICC-01/05-01/08-75 para.39.

<sup>29</sup> ICC-01/04-168 OA3, para.10; ICC-02/04-01/05-316, p.6; ICC-01/09-02/11-211, paras.33 and 39; ICC-01/04-01/06-2109, para.22; ICC-01/05-01/08-680, para.36.

<sup>30</sup> ICC-01/04-01/06-2463, para.31.

13. Further, the Prosecution submits that even if, *arguendo*, the Chamber had adopted an incorrect interpretation of Rule 121(2), as noted above this interpretation did not have a determinative impact on the Decision as the Chamber accepted the possibility of disclosure before the suspect's initial appearance - even cited an example where such disclosure took place in these proceedings<sup>31</sup> and considered whether disclosure was warranted in light of the facts of this case.<sup>32</sup> Hence, an erroneous interpretation of Rule 121 would not have significantly impacted on the fairness of proceedings.
14. With respect to the Third Issue, the Defence claims that it affects 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."<sup>33</sup> The Defence alleges that the above "results" in two "considerable delays", the first being "the delay caused in waiting for Libya to meet its surrender obligations"<sup>34</sup> and the second the "delay caused in allowing the Prosecution time to logistically organize itself to be in a position to meet its obligations necessary for the confirmation of charges."<sup>35</sup> The Prosecution submits that the Defence arguments are premised on the assumption that unless full disclosure is effected now, if and when Mr Gaddafi is surrendered, the proceedings will be unfairly slow.<sup>36</sup> This statement is speculative and the purported prejudice is hypothetical therefore not showing how the Chamber's Decision significantly impacted on the fairness of the proceedings.<sup>37</sup> Mr Gaddafi has indeed the right to be tried without undue delay, but in order to be tried, Libya needs to surrender him, and the Chamber's Decision has no impact on this matter. Further, the

---

<sup>31</sup> Decision, para. 28.

<sup>32</sup> Decision, paras.29-31.

<sup>33</sup> Application, para.37.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> Application, para.38.

<sup>37</sup> ICC-01/04-01/07-1958, para.20; ICC-02/04-01/05-367, paras.21-22.



Defence's assumption is not necessarily correct because – as the Chamber noted<sup>38</sup> - even if full disclosure is ordered now, the protective measures imposed on witnesses will have to be revisited if and when Mr Gaddafi surrenders. Hence, the Defence arguments are again speculative;<sup>39</sup> the Third Issue does not have a significant impact on the expeditiousness of the proceedings at this stage.

### III. Immediate resolution of the issues will not materially advance the proceedings.

15. The Defence does not make detailed arguments as to how an immediate resolution of the three issues may materially advance the proceedings and merely argues that appellate review would “remove any doubts as to whether in specific circumstances, the commencement of pre-confirmation procedures should occur”<sup>40</sup> and “allow for substantive aspects of the case to begin and continue”.<sup>41</sup> The Defence however does not explain what these “substantive aspects of the case” are, and how appellate review of the Decision would have an impact on the same.

16. The Chamber's Decision makes clear that it will consider Defence's requests for disclosure prior to the suspect's first appearance before the Court, and it will determine whether it is warranted in light of the facts of the case and the arguments justifying the request advanced by the Defence.<sup>42</sup> Hence, any resolution of these issues by the Appeals Chamber is premature and will not materially advance the proceedings.<sup>43</sup>

---

<sup>38</sup> Decision, para.31.

<sup>39</sup> ICC-01/04-168 OA3, para.10; ICC-02/04-01/05-316, p.6 ; ICC-01/09-02/11-211 paras. 33 and 39; ICC-01/09-02/11-88, para.25, see also paras.23-27; ICC-01/04-01/06-2109, para.22; ICC-01/05-01/08-680, para. 36; ICC-01/09-02/11-275, paras.28-29; ICC-01/09-01/11-301, para.30.

<sup>40</sup> Application, para. 40.

<sup>41</sup> Application, para. 41.

<sup>42</sup> Decision, para.28 referring to ICC-01/11-01/11-392-Red-Corr.

<sup>43</sup> ICC-01/04-168, paras.14-15,18.

## Conclusion

17. For the reasons set out above, the Prosecution requests that the Chamber reject the Defence's Application.



---

Fatou Bensouda, Prosecutor

Dated this 23<sup>rd</sup> day of September, 2013  
At The Hague, The Netherlands