

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **09 December 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**

**Urgent Request for Ruling on Requests for Finding of Non-compliance**

**Source: Defence for Mr. Saif Al-Islam Gaddafi**

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

**The Office of the Prosecutor**

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Mr. Fabricio Guariglia

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Defence**

**States' Representatives**

Professor Ahmed El-Gehani  
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Ms. Michelle Butler

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Mr. Herman von Hebel, Registrar

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and  
Reparations Section**

**Other**

1. The Pre-Trial Chamber has before it multiple requests for a finding of non-compliance filed by the Defence over the course of seven months (collectively “Requests”).<sup>1</sup>
2. The Pre-Trial Chamber has yet to issue any decision on the Requests. This is despite the fact that the Requests concern the implementation of judicial decisions related to the surrender of Mr. Gaddafi to the Court<sup>2</sup> and the return of privileged documents illegally seized from the Defence.<sup>3</sup>
3. Each of the Requests were filed on an **urgent** basis that not only concerned Libya’s failure to implement judicial decisions but also its public intention not to do so. The monthly-repeated Requests are indicative of Libya’s continued flagrant denial to meet its obligations.<sup>4</sup>
4. The lack of any ruling on the Requests not only constitutes a real risk to Mr. Gaddafi and those associated with proceedings against him,<sup>5</sup> but also denies Mr. Gaddafi’s fundamental right to be heard in proceedings in before the Court.<sup>6</sup> In other words, a failure to rule on the Requests constitutes a direct denial of the right to be heard and of the right of access to justice. Justice delayed is justice denied.
5. The right to be heard is an intrinsic element of the fundamental right to a fair trial pursuant to article 67(1). It is a right guaranteed at both the national and international level.<sup>7</sup> Most notably it is not a theoretical or illusory right and

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<sup>1</sup> [Redacted]

<sup>2</sup> ICC-01/11-01/11-387

<sup>3</sup> ICC-01/11-01/11-291

<sup>4</sup> Even as recently as 6 December 2013, Libya remains resolute in ignoring its obligation to surrender Mr. Gaddafi *see* France 24 interview with Prime Minister Ali Zeidan, 6 December 2013 at 15:09 to 15:25:

“[Reporter] ‘Does this mean you will not surrender Abdullah Senussi or Saif Gaddafi to the International Criminal Court?’ [PM Ali Zeidan] ‘No, they will be tried here, by Libyan citizens in Libya’”

<http://youtu.be/P7ortUWhhM>.

<sup>5</sup> [Redacted]

<sup>6</sup> This right is corollary to Mr. Gaddafi’s fundamental rights to: actively participate in the proceedings; communicate in confidence with his Defence; expeditious proceedings and protection from arbitrary detention. All of which are violated following the outstanding surrender request. [Redacted].

<sup>7</sup> *See Prosecutor v. Goran Jelusic*, IT-95-10-A, Appeals Chamber, “Judgement”, 5 July 2001, para. 27; *Prosecutor v. Alex Tamba Brima et al.*, SCSL-2004-16-A, Appeals Chamber, “Judgment”, 22 February 2008, SCSL-2004-16-A, para. 64. *See also* United Kingdom, High Court of Justice Queen’s Bench Divisional Court, *Department of Public Prosecutions v. Cosier*, 5 April 2000, [2000] C.O.D. 284; United Kingdom, Divisional Court, *R v. Barking and Dagenham Justices, ex parte Director of Public Prosecutions*, 8 November 1994, [1995]

therefore, in order for it to be effective, the Chamber is “under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties”.<sup>8</sup>

6. The silence of the Chamber on the Request thus far, indicates that the submissions therein have not been heard in contravention of Mr. Gaddafi’s rights.
7. Whilst the decision to issue a finding of non-compliance rests with the Chamber, this does not bar the Chamber from effectively hearing submissions on this issue from parties to the proceedings.<sup>9</sup> In this regard, it is noted that in *The Prosecutor v. Ahmed Harun and Ali Kushayb*, Pre-Trial Chamber I issued a decision referring Sudan to the Security Council only a month after hearing submissions from the Prosecution requesting a finding of non-cooperation.<sup>10</sup>
8. In line with the principle of equality of arms, this degree of expeditiousness should be applied to requests for findings of non-compliance issued by the Prosecution and Defence alike. This is underscored by the Pre-Trial Chamber’s duty to ensure that all reasonable measures have been taken to secure the arrest of a person subject to a warrant of arrest.<sup>11</sup> This includes the available remedy provided for in article 87(7).
9. No such comments have been issued in relation to the Requests in the present case. The Defence remains clueless as to when a decision may be forthcoming. This is of particular concern given the potential possibility of construing the Pre-Trial Chamber’s failure to resolve the Requests in a reasonable time frame as denying Mr. Gaddafi his right to the protection of the law<sup>12</sup> and amount to

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CrimLR953; United States of America, Supreme Court, *Mathews v. Eldridge*, 24 February 1976, 424 U.S. 319, p. 333; and United States of America, Supreme Court, *Fuentes v. Shevin*, 12 June 1972, 407 U.S. 67, p. 80.

<sup>8</sup> ECtHR, Application No. 47287/99, *Perez v. France*, Grand Chamber, "Judgment", 12 February 2004, para. 80.

<sup>9</sup> ICC-01/04-168 OA3, para 20.

<sup>10</sup> ICC-02/05-01/07-48-Red and ICC-02/05-01/07-57

<sup>11</sup> Rule 123(3)

<sup>12</sup> *Prosecutor v. Ieng Sary*, A189/I/8, Pre-Trial Chamber, “Decision on Ieng Sary’s Appeal Regarding the Appointment of a Psychiatric Expert”, 21 October 2008, paras 23-24.

constructive dismissal without any reasoning.<sup>13</sup> This would be contrary to the obligation of a court to issue a reasoned decision and a violation of fair right procedures.<sup>14</sup>

10. For these reasons, the Defence respectfully requests the Honourable Pre-Trial Chamber to issue an immediate ruling on the abovementioned Requests.



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

Dated this, 9<sup>th</sup> Day of December 2013

At London, United Kingdom

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<sup>13</sup> *Prosecutor v. Nuon Chea et al.*, E189/2/3, Supreme Court Chamber, “Decision on Nuon Chea’s ‘Appeal Against Constructive Dismissal of Application for Immediate Action Pursuant to Rule 35’”, 26 November 2012, paras 3 and 5.

<sup>14</sup> ECtHR, Application No. 18390/91, *Ruiz Torija v. Spain*, Grand Chamber, “Judgement”, 9 December 1994.