

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Decision on the “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 to be notified, in accordance with regulation 31 of the Regulations of the Court, to:

The Office of the Prosecutor
 Fatou Bensouda, Prosecutor
 James Stewart, Deputy Prosecutor

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

Counsel for Abdullah Al-Senussi

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
 Participation/Reparation**

**The Office of Public Counsel for
 Victims**

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

States Representatives

**Other
 Appeals Chamber**

REGISTRY

Registrar
 Herman von Hebel

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
 Section**

Pre-Trial Chamber I (the “Chamber”) of the International Criminal Court (the “Court”) issues the following decision on the “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’” (the “Request”).¹

I. Procedural history

1. On 7 August 2013, the Defence for Saif Al-Islam Gaddafi (“Mr Gaddafi”) filed the “Request for an order for the commencement of the pre-confirmation phase” (the “Request of 7 August 2013”), in which it requested the Chamber to order the commencement of the pre-confirmation process before the Court and take all reasonable measures to ensure the immediate surrender of Mr Gaddafi to the Court.²

2. On 10 September 2013, the Chamber issued the “Decision on the ‘Request for an order for the commencement of the pre-confirmation phase’ by the Defence of Saif Al-Islam Gaddafi” (the “Decision”), in which it declined to commence “the pre-confirmation phase”.³

3. On 17 September 2013, the Defence filed the Request⁴ and on 23 September 2013, the Prosecutor filed the “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’” (the “Response”).⁵

¹ ICC-01/11-01/11-445.

² ICC-01/11-01/11-397, para. 33.

³ Pre-Trial Chamber I, ICC-01/11-01/11-440, p. 14.

⁴ ICC-01/11-01/11-445, paras 2, 9 and 42.

⁵ ICC-01/11-01/11-453.

II. Applicable law

4. The Chamber notes article 82(1)(d) of the Rome Statute (the “Statute”), rule 155 of the Rules of Procedure and Evidence (the “Rules”) and regulation 65 of the Regulations of the Court. In particular, article 82(1)(d) of the Statute requires the party requesting leave to appeal to demonstrate that the decision concerned “involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and for which [...] an immediate resolution by the Appeals Chamber may materially advance the proceedings”.

5. According to established jurisprudence, 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”.⁶ As such, hypothetical concerns, abstract legal questions or questions over which there is mere disagreement or conflicting opinion may not constitute issues.

6. In addition, for leave to appeal to be granted, it is necessary that the “issue” identified by the party would significantly affect either the fair and expeditious conduct of the proceedings or the outcome of the trial – the two “elements of justice” found in article 82(1)(d) of the Statute.⁷ The requirement that the effects must be “significant” has been described by the Appeals Chamber as a requirement to “affect in a material way” or “be likely to have repercussions on”.⁸

7. Finally, it is necessary that, in the opinion of the Chamber, an immediate resolution of the issue by the Appeals Chamber may materially advance the proceedings. As held by the Appeals Chamber, “the issue must be such that its

⁶ Appeals Chamber, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 9.

⁷ *Ibid.*, paras 10.

⁸ *Ibid.*, para. 10.

immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial”.⁹ Accordingly, “[p]ut in a nutshell, the object of paragraph (d) of article 82 (1) of the Statute is to preempt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial”.¹⁰

III. Analysis

8. The Defence requests leave to appeal the Decision with respect to three discrete issues.¹¹ In the view of the Chamber, since the First Issue and the Second Issue are both concerned with the disclosure of material prior to the first appearance of a suspect, it is appropriate for their analyses to be conducted at the same time.

A. The First Issue and the Second Issue

9. The First Issue identified by the Defence is “whether the Chamber adopted an incorrect interpretation of rule 121(2)” of the Rules. The Second Issue is “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”.¹²

Submissions of the Defence

10. On the First Issue, the Defence submits that the Chamber erred in applying an interpretation of rule 121(2) of the Rules that was incorrect in two respects. First, the Defence argues that the Chamber made a link with rule

⁹ *Ibid.*, para. 14.

¹⁰ *Ibid.*, para. 19.

¹¹ Request, paras 2-3, and 9-10.

¹² *Ibid.*, paras 2, 9.

121(1) of the Rules, such that the obligation to “take the necessary decisions regarding disclosure” was understood to be triggered by the initial appearance of the suspect before the Court.¹³ Second, the Defence submits that the Chamber wrongly construed the phrase “necessary decisions regarding disclosure” in rule 121(2) of the Rules as being synonymous with “decisions on full disclosure proceedings leading to the confirmation of charges hearing”.¹⁴ Rather, the Defence considers certain technical issues, such as e-court protocol, disclosure format, and redaction protocol can be litigated and finalised as part of the disclosure process in advance of Mr Gaddafi’s surrender.¹⁵

11. The Defence argues that the First Issue was “essential to the reasoning applied by the Chamber”,¹⁶ as the 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. As such, the Defence contends that the Request of 7 August 2013 would have been granted if the Chamber had adopted a different approach.¹⁷

12. As to the Second Issue, the Defence in essence submits that the Chamber’s findings included the consideration that “the disclosure of exculpatory evidence could be delayed until there was a ‘reasonable prospect that Mr. Gaddafi’s initial appearance would be imminent’”.¹⁸ In the view of the Defence, this holding runs counter, to, *inter alia*, the Prosecutor’s obligation under article 67(2) of the Statute which provides that exculpatory evidence is to be disclosed ‘as soon as practicable’.¹⁹ It also maintains that the burden is on

¹³ *Ibid.*, paras 11-15.

¹⁴ *Ibid.*, paras 16-18.

¹⁵ *Ibid.*, paras 16-18.

¹⁶ *Ibid.*, para. 19.

¹⁷ *Ibid.*, para. 20.

¹⁸ *Ibid.*, para. 22.

¹⁹ *Ibid.*, paras 23-24.

the Prosecutor “to disclose incriminating and exculpatory material, independent of any request”.²⁰

13. In the submission of the Defence, both the First Issue and the Second Issue, which arise from the Decision,²¹ satisfy the requirements of article 82(1)(d) of the Statute.²² The Defence cites the jurisprudence of the Appeals Chamber that “the disclosure process is essential in ensuring the fairness of the proceedings and that the rights of the defence are respected [...]”.²³ Accordingly, the Defence submits that the First Issue and the Second Issue would significantly affect the fair conduct of proceedings due to the importance of the disclosure process in ensuring fairness.²⁴ As to the expeditious conduct of proceedings, the Defence contends that “matters such as the logistics of translation requests or the redaction policy of this Chamber” could be finalised before the suspect’s first appearance, which 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”.²⁵

14. The Defence submits that “an immediate resolution of [both] issues would allow for substantive aspects of the case to begin and continue in an

²⁰ *Ibid.*, para. 23.

²¹ *Ibid.*, paras 20 and 25.

²² *Ibid.*, para. 36.

²³ *Ibid.*, para. 36, referring to Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled “Decision on the Defence’s Request for Disclosure of Documents in the Possession of the Office of the Prosecutor”, 28 August 2013, ICC-02/05-03/09-501 OA 4, para. 34.

²⁴ *Ibid.*, para. 36, referring to Appeals Chamber, Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled “Decision on the Defence’s Request for Disclosure of Documents in the Possession of the Office of the Prosecutor”, 28 August 2013, ICC-02/05-03/09-501 OA 4, para. 34.

²⁵ *Ibid.*, para. 39.

expeditious manner”.²⁶ However, the Defence advances no specific argument concerning the effects of the First Issue or the Second Issue on the outcome of the trial.

Submissions of the Prosecutor

15. The Prosecutor contends that the First Issue is not an “issue” within the meaning of article 82(1)(d) of the Statute because the interpretation of rule 121(2) of the Rules is an abstract legal question of hypothetical concern.²⁷ The Prosecutor argues that “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” and that the Chamber’s conclusion that disclosure was not merited was made in light of the “circumstances of the case”, such that the interpretation of rule 121(2) of the Rules, incorrect or otherwise, was not determinative of the Decision.²⁸ The Prosecutor submits that, in relation to the second error of interpretation alleged by the Defence, the Chamber made no finding that the phrase “necessary decisions on disclosure” in rule 121(2) of the Rules is synonymous with “full disclosure proceedings leading to the confirmation of charges hearing”, since the Chamber was “merely referring to and describing the Defence Request”.²⁹

16. The Second Issue does not arise from the Decision, according to the Prosecutor, because the Chamber did not make a “definitive finding” that the Prosecutor had no obligation to disclose potentially exculpatory evidence to

²⁶ Request, para. 41.

²⁷ Response, para. 6.

²⁸ *Ibid.*, para. 6.

²⁹ *Ibid.*, para. 7.

the Defence prior to the initial appearance of a suspect, and in fact the Chamber accepted the possibility that such disclosure may take place.³⁰

17. With respect to both issues, the Prosecutor submits that the Defence arguments as to the fairness and expeditiousness of the proceedings amount to a “purely general complaint” and are insufficient to meet the requirements of article 82(1)(d) of the Statute.³¹ In the view of the Prosecutor, since the Chamber’s interpretation of rule 121(2) of the Rules was not determinative of the Decision, an erroneous interpretation would not have significantly affected the fairness of proceedings.³²

18. The Prosecutor submits that the Defence made no “detailed arguments as to how immediate resolution of [either] issue may materially advance the proceedings”³³ and that resolution of either issue would be “premature” given the Chamber’s willingness to entertain individual Defence requests for disclosure prior to the suspect’s first appearance.³⁴

Analysis

19. At the outset, the Chamber considers that the Defence mischaracterises the Decision to a certain extent, by stating that the Decision contained a 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 considers that no part of the Decision ruled out the possible existence of such an obligation.

20. Whereas the First Issue and the Second Issue arise from the Decision, the Chamber is not satisfied that either issue meets the requirements of article

³⁰ *Ibid.*, para. 8.

³¹ *Ibid.*, para. 12.

³² *Ibid.*, para. 13.

³³ *Ibid.*, para. 15.

³⁴ *Ibid.*, para. 16.

82(1)(d) of the Statute. The principal Defence arguments in support of both the First Issue and the Second Issue are premised on the notion that proceedings will be unfairly lengthened if the disclosure of certain evidence takes place after Mr Gaddafi's first appearance before the Court, and that in order to remedy this possibility, certain technical procedural decisions should be rendered in advance for preparation purposes.

21. Moreover, the Chamber has adopted measures to lessen any impact this issue may have on the fairness or expeditiousness of proceedings or the outcome of the trial. The Chamber restates its finding that specific circumstances may warrant "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".³⁵

22. On the basis of the Defence submissions and the present circumstances of the case, the Chamber finds no reason to believe that proceedings would be made significantly less fair or expeditious should the disclosure of such material take place after the suspect's appearance. Neither is the Chamber persuaded that adopting the actions suggested by the Defence now, with a view to allowing "significant aspects of the case to begin and continue in an expeditious manner",³⁶ can be predicted to hold appreciable benefits for the fairness or expeditiousness of the proceedings in the event that the hypothetical initial proceedings were to materialise. In addition and for the same reasons, the Chamber considers it unforeseeable that either issue would significantly affect the outcome of the trial; indeed the likelihood of such repercussions is more remote than the possibility of significant effects on fairness and expeditiousness.

³⁵ Decision, para. 28, referring to Pre-Trial Chamber I, "Corrigendum to Decision on the "Defence request for an order of disclosure"", 1 August 2013, ICC-01/11-01/11-392-Red-Corr.

³⁶ Request, para. 41.

B. The Third Issue

23. The Third Issue identified by the Defence is “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”.³⁷

Submissions of the Defence

24. The Defence submits that the Chamber, when considering whether to issue an order to commence the “pre-confirmation process” in “the interests of judicial economy and the good administration of justice”,³⁸ failed to take into account the “specific circumstances surrounding the fact that Mr. Gaddafi’s initial appearance had not taken place”.³⁹ In particular, the Defence submits the Chamber should have considered the fact of Libya’s failure to surrender Mr Gaddafi to the Court, the conditions and duration of his detention, and the nature of the domestic proceedings against him,⁴⁰ all of which rendered the Defence “unable to conduct any meaningful preparation related to the merits of the case”.⁴¹ The Defence further submits that the Chamber wrongly took into account “concerns associated with workload and resources”.⁴² The Defence argues that, had the Chamber borne in mind the correct considerations, its conclusions would have been “materially affected”.⁴³

25. The Defence suggests that the Third Issue, which arises from the Decision,⁴⁴ would significantly affect the fair and expeditious conduct of the

³⁷ Request paras 2, 9.

³⁸ *Ibid.*, para. 26, referring to the Decision, para. 32.

³⁹ *Ibid.*, para. 28.

⁴⁰ Request, para. 31.

⁴¹ *Ibid.*, para. 32.

⁴² *Ibid.*, paras 27 and 30.

⁴³ *Ibid.*, para. 35.

⁴⁴ *Ibid.*, para. 35.

proceedings as it involves “considerable delays” to the proceedings.⁴⁵ The Defence argues that allowing “certain pre-confirmation processes to take place” would significantly expedite proceedings.⁴⁶ The Defence does not specifically address the potential effects of the Third Issue on the outcome of the trial.

26. Concerning the effects of immediate resolution by the Appeals Chamber, the Defence submits that a determination 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”⁴⁷ and that “an immediate resolution of [the issue] would [...] 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”.⁴⁸

Submissions of the Prosecutor

27. The Prosecutor submits that in essence, the Third Issue “constitutes a disagreement” with the Chamber and that the specific circumstances of the case and the suspect were taken into consideration, in particular by accounting for the pending appeal of the decision of the admissibility of the case and the fact that the prospect of the suspect’s surrender to the Court appears uncertain.⁴⁹ According to the Prosecutor, the Chamber was in no position to “predict with any certainty if and when Mr. Gaddafi will be surrendered, and by extension, proceedings before the court may commence”.⁵⁰

⁴⁵ *Ibid.*, paras 37-38.

⁴⁶ *Ibid.*, para. 39.

⁴⁷ *Ibid.*, para. 40.

⁴⁸ *Ibid.*, para. 41.

⁴⁹ Response, para. 9-11.

⁵⁰ *Ibid.*, para. 10.

28. The Prosecutor avers that the Third Issue does not affect the fair and expeditious conduct of the proceedings since “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”, an assumption which the Prosecutor dismisses as speculative.⁵¹ The Prosecutor submits that the determination of the Third Issue can have no impact on whether Libya will surrender Mr Gaddafi to the Court, which is the event that would enable the realisation of his right to be tried without delay.⁵² Furthermore, the Prosecutor submits that “even if full disclosure is ordered now, the protective measures imposed on witnesses will have to be revisited if and when Mr Gaddafi surrenders”.⁵³

29. The Prosecutor submits that immediate resolution of the Third Issue will not materially advance the proceedings and that the Defence made no detailed arguments on this point.⁵⁴

Analysis

30. The Chamber considers that the Third Issue does not qualify as an appealable issue within the meaning of article 82(1)(d) of the Statute. The Defence alleges that the Chamber failed to take into account both the specific circumstances of the suspect and the Chamber’s obligation to exercise due diligence to ensure the defendant’s right to expeditious proceedings. Accordingly, the subject of the Third Issue is the relative weight to be given to those different circumstances during the Chamber’s assessment of whether to

⁵¹ *Ibid.*, para. 14.

⁵² *Ibid.*, para. 14.

⁵³ *Ibid.*, para. 14.

⁵⁴ *Ibid.*, paras 15-16.

order the commencement of the pre-confirmation process in “the interests of judicial economy and the good administration of justice”.⁵⁵

31. According to the jurisprudence of the Appeals Chamber, 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” and furthermore a “conflict of opinion does not define an appealable subject”.⁵⁶ It is the view of the Chamber that the Defence, in reiterating the different factors in support of its own position, is merely contesting the Chamber’s conclusion. In arriving at its determination, the Chamber took into account the specific circumstances of Mr Gaddafi in relation to the uncertainty of his surrender to the Court, the lack of Libyan custody over Mr Gaddafi and the infeasibility of predicting if and when he will be surrendered.⁵⁷ The Defence does not substantiate how the alleged failure to give weight to those specific factors would have led to a different conclusion. Rather, the Defence solicits a speculative argument about whether the Chamber’s ruling would have been different, an argument which amounts only to a disagreement with the Chamber’s view.

⁵⁵ *Ibid.*, para. 26, referring to Decision, para. 32.

⁵⁶ Appeals Chamber, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 9.

⁵⁷ Decision, para. 29.

FOR THESE REASONS, THE CHAMBER

REJECTS the Request.

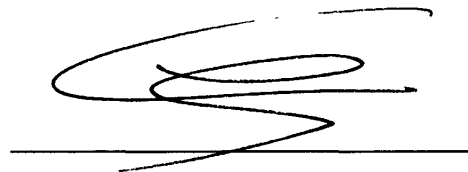
Done in both English and French, the English version being authoritative.



Judge Silvia Fernández de Gurmendi
Presiding Judge



Judge Hans-Peter Kaul



Judge Christine Van den Wyngaert

Dated this Wednesday, 11 December 2013

At The Hague, The Netherlands