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

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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 Document

**Decision on the “Request for Leave to Appeal the Pre-Trial Chamber’s
Failure to Issue a Decision” filed 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

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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

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Pre-Trial Chamber I (the “Chamber”) of the International Criminal Court (the “Court”) issues the following decision on the “Request for Leave to Appeal the Pre-Trial Chamber’s Failure to Issue a Decision” (the “Application”) submitted by the Defence of Saif Al-Islam Gaddafi (“Mr Gaddafi”).¹

1. On 26 February 2011, the United Nations Security Council adopted Resolution 1970, whereby it referred to the Prosecutor the situation in the Libyan Arab Jamahiriya since 15 February 2011.²

2. On 27 June 2011, upon request by the Prosecutor,³ the Chamber issued a warrant of arrest against, among others, Mr Gaddafi.⁴

3. On 5 July 2011, the Registrar, pursuant to an order of the Chamber,⁵ notified the Libyan authorities of a request for cooperation asking for their assistance in arresting Mr Gaddafi and surrendering him to the Court (the “Surrender Request”).⁶

4. Mr Gaddafi was arrested in Libya on 19 November 2011.⁷

5. On 1 May 2012, Libya challenged the admissibility of the case against Mr Gaddafi before the Court.⁸ As of that moment, and until the Chamber’s rejection of this challenge on 31 May 2013,⁹ Libya postponed the execution of

¹ ICC-01/11-01/11-522-Conf-Exp. A public redacted version is also available (ICC-01/11-01/11-522-Red).

² S/RES/1970 (2011).

³ ICC-01/11-4-Red.

⁴ Pre-Trial Chamber I, “Warrant of Arrest for Saif Al-Islam Gaddafi”, ICC-01/11-01/11-3.

⁵ Pre-Trial Chamber I, “Decision on the ‘Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI’”, 27 June 2011, ICC-01/11-01/11-1, pp. 41-42.

⁶ ICC-01/11-01/11-5 and ICC-01/11-01/11-25-Conf.

⁷ See ICC-01/11-01/11-34-Anx.

⁸ ICC-01/11-01/11-130-Conf and annexes. A public redacted version is also available (ICC-01/11-01/11-130-Red).

⁹ Pre-Trial Chamber I, “Decision on the admissibility of the case against Saif Al-Islam Gaddafi”, ICC-01/11-01/11-344-Conf. A public redacted version is also available (ICC-01/11-01/11-344-Red).

the Surrender Request in conformity with article 95 of the Rome Statute (the “Statute”).¹⁰

6. Following the Chamber’s decision declaring the case against Mr Gaddafi admissible before the Court, and the resulting termination of the postponement of the Surrender Request within the terms of article 95 of the Statute, the Registrar, acting as the channel of communication in respect of requests for cooperation made by the Chamber in accordance with rule 176 of the Rules of Procedure and Evidence (the “Rules”), has on several occasions been in contact with the Libyan authorities and reminded them of their obligation to proceed to the immediate surrender of Mr Gaddafi to the Court.¹¹

7. In parallel, the Defence has continuously brought to the Chamber’s attention certain factual aspects in respect of Libya’s alleged failure to comply with its outstanding duty *vis-à-vis* the Court, and has repeatedly requested the Chamber to make a finding of non-cooperation by Libya and refer the matter to the Security Council so as to achieve Libya’s compliance with the Surrender Request (collectively, the “Defence Requests” or “Requests”).¹²

8. The Chamber did not issue any ruling on these Requests, and, most notably, did not make any finding of non-cooperation by Libya referring the matter to the Security Council.

¹⁰ See Pre-Trial Chamber I, “Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Rome Statute”, 1 June 2012, ICC-01/11-01/11-163.

¹¹ See the most recent filing by the Registrar in this regard, ICC-01/11-01/11-506-Conf-Red and its annexes II and IV.

¹² ICC-01/11-01/11-347, dated 7 June 2013 as amended by ICC-01/11-01/11-358, dated 18 June 2013; ICC-01/11-01/11-388, dated 23 July 2013; ICC-01/11-01/11-424, dated 29 August 2013; ICC-01/11-01/11-469-Conf-Exp, dated 22 October 2013 to which an addendum was filed on 16 January 2014, ICC-01/11-01/11-501-Conf-Exp; ICC-01/11-01/11-486-Conf-Exp, dated 27 November 2013; ICC-01/11-01/11-489-Conf-Exp, dated 10 December 2013 to which an addendum was filed on 13 December 2013, ICC-01/11-01/11-491.

9. On 10 March 2014, the Defence filed the Application, requesting the Chamber “to grant leave to appeal in relation to whether the Pre-Trial Chamber erred by failing to rule on the Defence Requests”.¹³

10. On 14 March 2014, the Prosecutor¹⁴ and Libya¹⁵ provided their responses to the Application, both opposing that the leave to appeal requested by the Defence be granted.

11. On 20 March 2014, the Defence requested leave to reply to the responses to its Application.¹⁶

12. The Chamber notes article 82(1)(d) of the Statute, rule 155 of the Rules and regulation 65 of the Regulations of the Court (the “Regulations”).

13. Article 82(1)(d) of the Statute provides that either 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.

14. According to established jurisprudence, an “issue” is an identifiable subject or topic requiring a decision for its resolution, as opposed to a hypothetical concern or an abstract legal question or a question over which there is a mere disagreement or conflicting opinion. An “issue” is constituted

¹³ Application, para. 88.

¹⁴ ICC-01/11-01/11-526.

¹⁵ ICC-01/11-01/527.

¹⁶ ICC-01/11-01/11-531. Libya responded to this filing on 26 March 2014, see ICC-01/11-01/11-532.

by a subject the resolution of which is “essential for the determination of matters arising in the judicial cause under examination”.¹⁷

15. Furthermore, for leave to appeal to be granted, article 82(1)(d) of the Statute requires 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. In order to assess whether the issue would indeed significantly affect one of the “elements of justice” mentioned in article 82(1)(d) of the Statute, the Chamber “must ponder the implications of a given issue being wrongly decided” on the fairness and expeditiousness of the proceedings or the outcome of the trial, performing an “exercise [that] involves a forecast of the consequences of such an occurrence”.¹⁸

16. 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 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”.¹⁹

17. Accordingly, “[p]ut in a nutshell, the object of paragraph (d) of article 82 (1) of the Statute is to pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial”.²⁰

18. The Chamber also notes regulation 24(5) of the Regulations which provides that “[p]articipants may only reply to a response with the leave of

¹⁷ 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.

¹⁸ *Ibid.*, paras 10 and 13.

¹⁹ *Ibid.*, para. 14.

²⁰ *Ibid.*, para. 19.

the Chamber". As recalled above, the Defence requests leave to reply to the responses to its Application provided by the Prosecutor and Libya.²¹ The Chamber considers that it is already in possession of all the necessary submissions in order to take an informed decision on the Application. No further submission would therefore be beneficial to the Chamber's final determination.

19. The issue for which the Defence requests leave to appeal is "whether the Pre-Trial Chamber erred by failing to issue a decision on the Defence Requests in a timely manner" (the "Issue").²² Therefore, the Defence wishes to appeal under article 82(1)(d) of the Statute the absence of a decision. In the Defence view, "[a] failure to issue a decision within a reasonable time can be equated to a constructive refusal of the Defence Requests".²³ The Defence indeed contends that "[t]he failure to issue a timely decision is also analogous to a failure to issue a reasoned decision [as] in both circumstances, the applicant is deprived of the right to be apprised of the legal and factual reasons for denying the requested relief".²⁴ The Defence in consequence maintains that "[s]ince the absence of a legal and factual reasons can constitute an appealable issue for the purposes of Article 82(1)(d), there is no reason why the absence of a ruling itself cannot constitute an appealable issue".²⁵ The Defence concludes its argumentation by highlighting that "the right to a fair trial includes the right to a fair appeal [and] [t]he Defence must have the right to seek appellate intervention if the Pre-Trial Chamber has failed to provide an appropriate remedy within a reasonable time frame".²⁶

²¹ ICC-01/11-01/11-531.

²² Application, para. 12.

²³ *Ibid.*, p. 11.

²⁴ *Ibid.*, para. 54.

²⁵ *Ibid.*, para. 55.

²⁶ *Ibid.*, para. 56.

20. The Chamber recalls that article 82(1)(d) of the Statute provides that a party may appeal “a decision”, and that rule 155 of the Rules requires that “a decision” be notified before an application for leave to appeal can be made. These provisions clearly indicate that leave to appeal may only be granted in respect of a decision rendered by the Chamber.²⁷ While it is true that the Chamber has not issued a decision on the Defence Requests, which have been submitted *seriatim* over the past months, the Chamber opines that no “constructive refusal” can be deduced from the mere passage of time, and that the absence of a ruling in this regard cannot be equated to a “decision” within the meaning of article 82(1)(d) of the Statute. Indeed no decision rejecting the Requests has been taken and the Chamber is yet to determine at the opportune time whether to resort to a finding of non-cooperation in the case at hand. These considerations lead the Chamber to conclude that, in the present circumstances, the absence of a decision on the Defence Requests may not be equated to a decision that may be appealed pursuant to article 82(1)(d) of the Statute.

21. In any case, even if the Chamber were to accept that the Defence, in the present circumstances, may seek leave to appeal the Chamber’s failure to render a decision on the Defence Requests, the issue in relation to which the leave to appeal is requested would not significantly affect the fair and expeditious conduct of the present proceedings or the outcome of the trial.

22. As recalled above, in determining whether the issue qualifies as an “appealable” one, the Chamber is requested to “ponder the implications of [this] issue being wrongly decided”, performing an “exercise [that] involves a

²⁷ *Ibid.*

forecast of the consequences of such an occurrence”.²⁸ The Chamber understands the reference to the fair conduct of the proceedings in article 82(1)(d) of the Statute to indicate the potential of an issue to significantly hinder, limit or otherwise have a considerable bearing on the scope and the exercise of the rights of the parties in pursuing their legitimate interests in the proceedings before the Court. For the reasons set out below, the Chamber is not satisfied that Mr Gaddafi’s rights would be significantly affected if one assumed that the Chamber erred in not issuing a decision on the Defence Requests to make a finding of non-cooperation by Libya for its failure to comply with the Surrender Request. In this regard, the Chamber observes that, in the Application, the Defence effectively relies on two distinct lines of reasoning, which will be addressed in turn.

23. First, the Chamber notes the Defence general submission to the effect that it is entitled to a ruling on its Requests²⁹ and that the absence of any such ruling violates its “right to be heard [that] is an intrinsic element of the fundamental right to a fair trial pursuant to article 67(1)”.³⁰ Similarly, the Defence refers to the “right to a remedy”³¹ and the “right to a fair appeal”³² as further components of the right to a fair trial, allegedly prejudiced by the Chamber’s failure to issue in due course a ruling on the Defence Requests to make a finding of non-cooperation by Libya. The Chamber recognises that, in general, the Defence may seek issuance by the Chamber of requests for cooperation under Part 9 of the Statute as may be necessary to the exercise of the defence rights, as well as the fact that the Defence can bring to the Chamber’s attention any information that may be relevant to its consideration

²⁸ 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, paras 10 and 13.

²⁹ Application, paras 46 to 56.

³⁰ *Ibid.*, para. 46, with reference to the Defence filing ICC-01/11-01/11-489-Red, para. 5.

³¹ Application, para. 47.

³² *Ibid.*, para. 56.

of what steps may be taken to ensure the implementation of the Court's requests for cooperation, including, as far as the matter *sub judice* is concerned, requests for arrest and surrender. However, the Defence is not entitled to impose to the Chamber an obligation to adopt – and thus justify a failure to adopt – a particular course of action in case of lack of non-compliance by a State with a particular request for cooperation.

24. It is worth recalling that making a finding of non-cooperation by a State on the part of the Court is neither a mandatory action, nor necessarily the most effective one in all circumstances. Any such finding is one of the tools that the Court may or not decide to use at a certain point in time as a last resort measure or as part of a comprehensive strategy to promote cooperation. Other measures to that effect that may be taken by several organs of the Court, as appropriate and depending on the concrete circumstances, may also include, *inter alia*, reminders and consultations.

25. Second, the Chamber notes the arguments advanced by the Defence to the effect that the Issue significantly affects the fair and expeditious conduct of the proceedings as it prejudices certain rights to which Mr Gaddafi is entitled before the Court,³³ notably his right “to challenge the legality of his detention and seek provisional release”,³⁴ his “right to silence under Article 55 or Article 67(1)”,³⁵ “his right to be tried in an expeditious manner”³⁶ and “his right not to be detained for an unreasonable length of time during the pre-trial proceedings”.³⁷ In this context, the Defence explicitly argues that “Mr. Gaddafi's continued detention in Libya could irreversibly prejudice his

³³ *Ibid.*, paras 57 to 74.

³⁴ *Ibid.*, para. 60.

³⁵ *Ibid.*, para. 65.

³⁶ *Ibid.*, para. 74.

³⁷ *Ibid.*

ability to participate in his Defence before the ICC”³⁸ and that “Libya’s failure to surrender Mr. Gaddafi to the custody of the ICC has also consigned Mr Gaddafi to a legal black hole for the last 9 months”.³⁹

26. It is clear from these submissions by the Defence that it is not the lack of a ruling on whether a finding of non-cooperation by Libya should be made that significantly affects the fair and expeditious conduct of the proceedings, but it is the non-surrender of Mr Gaddafi to the Court and his continued detention in Libya that produces the results that the Defence alleges. Indeed, as recalled above, making a finding of non-cooperation is one of the tools that may be available to the Court, but it is not the only one or necessarily the most effective one; nor is the mandatory course of action that the Chamber is required to pursue. Moreover, the Chamber is not persuaded by the Defence suggestion that a decision on the Requests (or even a finding of non-cooperation by Libya) would inevitably lead to Mr Gaddafi’s surrender to the Court. The Chamber is indeed of the view that the Defence argument that the absence of a ruling on the Defence Requests in itself significantly affects the fair and expeditious conduct of the proceedings merely rests on the hypothetical and speculative scenario that, should such ruling have been issued, Mr Gaddafi would have been surrendered to the Court and would now be in a position to fully enjoy his statutory rights in the present proceedings. This argument however falls short of meeting the requirement of article 82(1)(d) under consideration.

27. In these circumstances, and as stated above, the Chamber is not satisfied that the Issue significantly affects the fair and expeditious conduct of the proceedings within the meaning of article 82(1)(d) of the Statute, under either of the two lines of reasoning relied upon by the Defence in the Application.

³⁸ *Ibid.*, para. 58.

³⁹ *Ibid.*, para. 59.

28. The same conclusion must be reached in respect of the alternative requirement under article 82(1)(d) of the Statute, *i.e.* that an issue is appealable also when it would significantly affect the outcome of the trial, on which no submission is even put forward by the Defence.

FOR THESE REASONS, THE CHAMBER

REJECTS the Defence request for leave to reply to the Prosecutor and Libya's responses to the Application; and

REJECTS the Application.

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 Tuesday, 10 June 2014

At The Hague, The Netherlands