

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/11-01/11 OA 4

Date: 17 September 2013

THE APPEALS CHAMBER

Before:

**Judge Anita Ušacka, Presiding Judge
Judge Sang-Hyun Song
Judge Sanji Mmasenono Monageng
Judge Akua Kuenyehia
Judge Erkki Kourula**

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 an immediate finding of non-compliance and
referral to United Nations Security Council”**

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Mr Fabricio Guariglia

Counsel for Saif Al-Islam Gaddafi
Mr John R.W.D. Jones
Ms Sarah Bafadhel

States Representatives
Mr Ahmed El-Gehani
Mr Philippe Sands

Counsel for Abdullah Al-Senussi
Mr Ben Emmerson
Mr Rodney Dixon

Office of Public Counsel for victims
Ms Paolina Massidda

REGISTRY

Registrar
Mr Herman von Hebel

A. Uthman

The Appeals Chamber of the International Criminal Court,

In the appeal of Libya against the decision of Pre-Trial Chamber I entitled “Decision on the admissibility of the case against Saif Al-Islam Gaddafi” of 31 May 2013 (ICC-01/11-01/11-344-Red),

Having before it Mr Gaddafi’s “Request for an immediate finding of non-compliance and referral to United Nations Security Council” of 9 September 2013 (ICC-01/11-01/11-434),

Renders unanimously the following

DECISION

The “Request for an immediate finding of non-compliance and referral to United Nations Security Council” is dismissed.

REASONS

I. BACKGROUND

1. On 27 June 2011, Pre-Trial Chamber I (hereinafter: “Pre-Trial Chamber”) issued a warrant of arrest for Mr Saif Al-Islam Gaddafi (hereinafter: “Mr Gaddafi”).¹ On 4 July 2011, the Registrar, pursuant to an order by the Pre-Trial Chamber in its decision on the aforementioned warrant of arrest, issued a request to the Libyan authorities for the arrest and surrender of Mr Gaddafi to the Court (hereinafter: “Surrender Request”).²

2. On 31 May 2013, the Pre-Trial Chamber issued the “Decision on the admissibility of the case against Saif Al-Islam Gaddafi”³ (hereinafter: “Admissibility

¹ “Warrant of Arrest for Saif Al-Islam Gaddafi”, ICC-01/11-01/11-3; “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”, ICC-01/11-01/11-1.

² “Request to the Libyan Arab Jamahiriya for the arrest and surrender of Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah Al-Senussi”, ICC-01/11-01/11-5.

³ ICC-01/11-01/11-344-Red.

Decision”), finding that the case against Mr Gaddafi was admissible and “remind[ing] Libya of its obligation to surrender [Mr Gaddafi] to the Court”.⁴

3. On 18 July 2013, the Appeals Chamber issued the “Decision on the request for suspensive effect and related issues”⁵ (hereinafter: “Suspensive Effect Decision”) in which it rejected Libya’s request for suspensive effect and “recall[ed] that Libya is currently obliged to surrender Mr Gaddafi to the Court”.⁶

4. On 23 July 2013, Mr Gaddafi filed before the Pre-Trial Chamber the “Request for Finding of Non-Compliance and Referral to United Nations Security Council”⁷ (hereinafter: “Request before the Pre-Trial Chamber”). First, Mr Gaddafi requested that the Pre-Trial Chamber make a finding that “the Government of Libya has failed to cooperate with the Court by deliberately refusing to surrender Saif Al-Islam Gaddafi.”⁸ Second, Mr Gaddafi requested that the Pre-Trial Chamber “[f]ind that, pursuant to article 97, the Government of Libya has failed to consult with the Court without delay with regard to compliance with the Surrender Request”.⁹ Finally, Mr Gaddafi requested that the Chamber “[r]efer, in accordance with article 87(7) of the Statute and regulation 109(4) of the Regulations, its finding of non-compliance to the President of the Court for transmission to the Security Council, through the Secretary-General of the United Nations.”¹⁰

5. On 14 August 2013, Libya filed the “Response to the Gaddafi Defence’s ‘Request for Finding of Non-Compliance and Referral to United Nations Security Council’”,¹¹ submitting that the Request before the Pre-Trial Chamber should be rejected. On 20 August 2013, Mr Gaddafi filed the “Request for Leave to reply to the Government of Libya’s ‘Response to the Gaddafi Defence’s ‘Request for Finding of

⁴ Admissibility Decision, p. 91.

⁵ ICC-01/11-01/11-387 (OA 4).

⁶ Suspensive Effect Decision, para. 27.

⁷ ICC-01/11-01/11-388.

⁸ Request before the Pre-Trial Chamber, para. 17, *see also* paras 1-13.

⁹ Request before the Pre-Trial Chamber, para. 17, *see also* paras 1-13.

¹⁰ Request before the Pre-Trial Chamber, para. 17, *see also* paras 14-16.

¹¹ ICC-01/11-01/11-402.

Non-Compliance and Referral to United Nations Security Council””,¹² to which Libya filed a response on 26 August 2013.¹³

6. On 9 September 2013, Mr Gaddafi filed before the Appeals Chamber the “Request for an immediate finding of non-compliance and referral to United Nations Security Council”¹⁴ (hereinafter: “Request”), requesting the Appeals Chamber to find that 1) Libya has “deliberately taken steps that are directly incompatible with the surrender request thereby circumventing the Appeals Chamber’s final decision rejecting the request for suspensive effect”; 2) Libya has “failed to consult with the Court without delay with regard to compliance with the Surrender Request”; and 3) Libya, “pursuant to United Nations Security Council Resolution 1970 (2011), has failed to “cooperate fully with and provide any necessary assistance to the Court.”¹⁵ Mr Gaddafi further requests that the Appeals Chamber “[r]efer, in accordance with article 87(7) of the Statute and regulation 109(4) of the Regulations, its finding of non-compliance to the President of the Court for transmission to the Security Council, through the Secretary-General of the United Nations” and also asks the Appeals Chamber to “[d]eprecate the objectionable public statements made by officials representing the Government of Libya”.¹⁶

II. MERITS

7. The Appeals Chamber dismisses the Request for the following reasons. As the case of *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi* is still at the pre-trial stage and as the Surrender Request was issued pursuant to an order by the Pre-Trial Chamber, the Appeals Chamber is not competent to make a finding on non-compliance.

8. Mr Gaddafi argues that, in the Suspensive Effect Decision, the Appeals Chamber upheld “Libya’s current obligation to surrender Mr. Gaddafi to the Court”¹⁷ and therefore asserts that the Appeals Chamber is competent to rule on Libya’s

¹² ICC-01/11-01/11-410.

¹³ “Response to Defence for Mr. Saif Al-Islam Gaddafi ‘Request for Leave to reply to the Government of Libya’s “Response to the Gaddafi Defence’s Request for Finding of Non-Compliance and Referral to the United Nations Security Council””, ICC-01/11-01/11-416.

¹⁴ ICC-01/11-01/11-434 (OA 4).

¹⁵ Request, para. 19.


¹⁶ Request, para. 19.

¹⁷ Request, para. 7.

alleged non-compliance with the Surrender Request.¹⁸ Contrary to this assertion, the Appeals Chamber emphasises that the Suspensive Effect Decision clarified that the pending appeal against the Admissibility Decision does not have any implications on the Surrender Request, which therefore continues to have effect. The Appeals Chamber also notes that Mr Gaddafi's Request before the Pre-Trial Chamber, filed on 23 July 2013, is pending.

9. For the same reasons, the Appeals Chamber finds that it is not competent to make a finding relevant to article 97 of the Statute (Consultations) or otherwise render a decision with respect to Libya's conduct relevant to the Surrender Request.

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



Judge Anita Ušacka
Presiding Judge

Dated this 17th day of September 2013

At The Hague, The Netherlands

¹⁸ Request, paras 13, 14.