

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 10 April 2019

THE APPEALS CHAMBER

Before: Judge Chile Eboe-Osuji
Judge Howard Morrison
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balugi Bosa

SITUATION IN LIBYA

IN THE CASE OF

THE PROSECUTOR V. SAIF AL-ISLAM GADDAFI

Public

Defence Appeal against Pre-Trial Chamber I's "Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute'" and Application for extension of time to file the Appeal Brief

Source: Defence for Dr. 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

Ms. Fatou Bensouda

Mr. Julian Nicholls

Counsel for Dr. Saif Al Islam Gadafi

Mr. Essa Faal

Ms. Rohini Alagendra

Mr. Aidan Ellis

Mr. Khaled Al Zaidy (Libyan National Counsel)

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms. Paolina Massidda

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

States Representative

Amicus Curiae Applicants

REGISTRY

Registrar

Mr. Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Mr. Philip Ambach

Other

I. Introduction

1. The defence for Dr. Saif Al-Islam Gadafi (“Defence”) hereby files its appeal against Pre-Trial Chamber I’s “Decision on the ‘Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute’” (“Decision”),¹ issued by majority (Presiding Judge Kovács and Judge Alapini-Gansou) on 5 April 2019. Judge Perrin de Brichambaut did not sign the Decision and “will file a minority opinion in due course” (“Minority Opinion”).²
2. The Defence submits this appeal pursuant to articles 19(6) and 82(1)(a) of the Rome Statute (“Statute”), rules 154,³ 156 and 158 of the Rules of Procedure and Evidence (“Rules”), and Regulation 64 of the Regulations of the Court (“Regulations”).
3. The Defence additionally requests the Appeals Chamber, pursuant to Regulation 35 of the Regulations, to extend the time limit for filing the Defence appeal brief. Specifically, the Defence requests the Appeals Chamber order that the brief be filed within 31 days of the notification of the Decision (by 9 May 2019 at 4pm)⁴ if the Minority Opinion is notified on or prior to the 21-day deadline established under Regulation 64(2) for the submission of the appeal brief,⁵ and within ten (10) days of notification of the Minority Opinion if the Minority Opinion is notified after the noted 21-day deadline. The Defence submits that good cause exists to grant the requested extension of time. There is a reasonable prospect that the Minority Opinion may influence the Defence’s consideration of its grounds of appeal as well as its substantive submissions on appeal. The Defence

¹ ICC-01/11-01/11-662.

² Decision, p. 29.

³ Pursuant to Rule 154(1), a party may file an appeal under Article 82(1)(a) of the Statute “not later than five days from the date upon which the party filing the appeal is notified of the decision”. Here, the applicable filing deadline is 4pm on 15 April 2019.

⁴ In accordance with the rules for calculating time limits established under Regulation 33.

⁵ Regulation 64(2) provides in relevant part that “the appellant shall file an appeal brief within 21 days of notification of the relevant decision”.

should be provided a fair opportunity to consider the substance of the Minority Opinion, once issued, when drafting its appeal brief.

II. Appeal of the Pre-Trial Chamber's Decision

4. The Defence hereby appeals the Pre-Trial Chamber's Decision rejecting the "Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute" ("Admissibility Challenge")⁶ and finding that Dr Gaddafi's case is admissible before the Court.

5. Pursuant to Regulation 64(1) of the Regulations, the Defence provides the following information in relation to its notice of appeal against the Decision:

(a) The name and number of the case or situation:

6. The Prosecutor v. Saif Al-Islam Gaddafi, ICC-01/11-01/11.

(b) The title and date of the decision being appealed:

7. "Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute'", issued on 5 April 2019.

(c) Whether the appeal is directed against the whole decision or a part thereof:

8. The appeal is directed against parts (b) and (c) of the Decision's disposition – namely, the Chamber's rejection of the Admissibility Challenge and decision that the case against Dr. Gaddafi is admissible before the Court.⁷ The Defence does not appeal part (a) of the Decision's disposition – namely, the Chamber's holding that Dr. Gaddafi has *locus standi* to lodge the Admissibility Challenge.⁸

⁶ 6 June 2018, ICC-01/11-01/11-640.

⁷ Decision, p. 29.

⁸ *Ibid.*

(d) *The specific provision of the Statute pursuant to which the appeal is filed:*

9. The Defence files this appeal pursuant to articles 19(6) and 82(1)(a) of the Statute, and additionally pursuant to rules 154, 156 and 158 of the Rules, and Regulation 64 of the Regulations.

(e) *The relief sought:*

10. The Defence requests the Appeals Chamber reverse the Pre-Trial Chamber's rejection of the Admissibility Challenge and determine that the case against Dr. Gadafi is inadmissible before the Court.

III. Application for extension of time to file the appeal brief

11. The Defence requests the Appeals Chamber, pursuant to Regulation 35 of the Regulations, to extend the time limit for filing the Defence appeal brief and order that the brief be filed within 31 days of the notification of the Decision (by 9 May 2019 at 4pm)⁹ if the Minority Opinion is notified on or prior to the 21-day deadline established under Regulation 64(2) of the Regulations for the submission of the appeal brief, and within ten (10) days of notification of the Minority Opinion if the Minority Opinion is notified after the noted 21-day deadline.

12. Regulation 35 of the Regulations provides that:

1. Applications to extend or reduce any time limit as prescribed in these Regulations or as ordered by the Chamber shall be made in writing or orally to the Chamber seized of the matter setting out the grounds on which the variation is sought.

2. The Chamber may extend or reduce a time limit if good cause is shown and, where appropriate, after having given the participants an opportunity to be heard. After the lapse of a time limit, an extension of time may only be granted if the participant seeking the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control.

⁹ In accordance with the rules for calculating time limits established under Regulation 33.

13. Regulation 64(2) of the Regulations provides in relevant part that “the appellant shall file an appeal brief within 21 days of notification of the relevant decision”. Pursuant to Regulation 33 (“Calculation of time limits”), the 21-day deadline falls on Sunday 28 April 2019, and the Defence appeal brief must be submitted no later than 4pm on Tuesday, 30 April 2019.¹⁰
14. The Defence submits that good cause exists to grant the requested extension of the deadline for submission of the Defence appeal brief on account of the pending Minority Opinion. The Decision is not signed by Judge Perrin de Brichambaut, and no indication is given in the Decision that Judge Perrin de Brichambaut concurs with the outcome of the Decision.¹¹
15. Parties and participants regularly rely upon non-majority opinions issued by Judges of the Pre-Trial or Trial Chambers to the decision under appeal in the party or participant’s submissions before the Appeals Chamber.¹² In the context of applications for leave to appeal the decision of a Chamber pursuant to Article 82(1)(d) of the Statute, at least two Chambers (Trial Chamber V(A) and Trial Chamber VII) have granted a party’s request to suspend the running of the 5-day time limit to file an application for leave to appeal the impugned decision

¹⁰ The Defence notes that Monday, 29 April 2019, is an official Court holiday.

¹¹ Contrast with Pre-Trial Chamber II, *Prosecutor v. Bashir*, Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir, 11 December 2017, ICC-02/05-01/09-309 (wherein Judge Perrin de Brichambaut signed the decision of the Pre-Trial Chamber and concurred with its result, but issued a minority opinion in which he disagreed with the majority’s reasoning for the outcome (ICC-02/05-01/09-309-Anx-tENG)).

¹² See, e.g., *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece, and the Kingdom of Cambodia*, Prosecution Appeal Brief, 11 February 2019, ICC-01/13-85 (wherein the Prosecution cites nineteen (19) times to Judge Kovás’ dissenting opinion (ICC-01/13-68-Anx) to the decision under appeal, in support of its submissions); *Prosecutor v. Katanga*, Defence’s Document in Support of Appeal Against the Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, 10 January 2013, ICC-01/04-01/07-3339 (wherein the defence relies on the dissenting opinion of Judge Van den Wyngaert to the appealed decision (ICC-01/04-01/07-3319-tENG/FRA) throughout its appeal brief); *Prosecutor v. Lubanga*, Defence Appeal against the Decision of 14 July 2009 entitled Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, 10 September 2009, ICC-01/04-01/06-2112-tENG (wherein the defence relies upon the minority opinion of Judge Fulford (ICC-01/04-01/06-2069-Anx1) to the decision under appeal in support of its submissions for several grounds of appeal).

until notification of an outstanding dissenting or partially dissenting opinion.¹³ Trial Chamber IV, by majority, rejected an analogous defence request to suspend the time limit for submission of a leave to appeal application until notification of the outstanding dissenting opinion to the decision in question.¹⁴ In his dissenting opinion to Trial Chamber IV's impugned decision, Judge Eboe-Osuji stated his view that "due process does not support the rejection of the Defence request for suspension of time".¹⁵

16. The Defence submits that the approach of Trial Chambers V(A) and VII, as well as the view of the dissenting Judge of Trial Chamber IV, generally reflects the appropriate manner of addressing applications for suspension of the time limit in the context of Article 82(1)(d) leave to appeal requests where a non-majority opinion is outstanding. The issue *sub judice* is not the identification of appealable issues and the substantiation of arguments for purposes of an Article 82(1)(d) leave to appeal application, but the formulation of actual grounds of appeal and substantive arguments on appeal. The Defence submits that the due process interests of Dr. Gadaffi being provided a fair opportunity to consider the Minority Opinion once it is notified – and potentially rely upon or otherwise address the Minority opinion in its appeal brief – are even more salient, and that good cause is accordingly established pursuant to Regulation 35 to grant the extension requested.

¹³ See Trial Chamber VII, *Prosecutor v. Bemba et al.*, Narcisse Arido's Request for Leave to Appeal the 'Decision on the Submission of Auxiliary Documents' (ICC-01/05-01/13-922), 22 June 2015, ICC-01/05-01/13-1026, para. 7 (the grant of suspension is confirmed again in defence filing ICC-01/05-01/13-2145-Corr-Red at fn. 171); Trial Chamber V(A), *Prosecutor v. Ruto and Sang*, Decision on defence applications for leave to appeal the "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation and the request of the Government of Kenya to submit amicus curiae observations", 23 May 2014, ICC-01/09-01/11-1313, fn. 26 (the underlying defence request for extension of time is ICC-01/09-01/11-1275).

¹⁴ See *Prosecutor v. Banda*, Dissenting Opinion of Judge Eboe-Osuji in the Decision on 'Warrant of arrest for Abdallah Banda Abakaer Nourain', 15 September 2014, ICC-02/05-03/09-606-Anx-Corr, fn. 1. As far as the Defence can ascertain, the only reference in the public record to the defence of Mr. Banda's request for suspension of the time limit and the majority of Trial Chamber IV's decision thereon is in the dissenting opinion of Judge Eboe-Osuji.

¹⁵ *Ibid.*

17. The Defence submits that the requested extension – effectively an extension of ten days of the Regulation 64(2) deadline or ten days from notification of the Minority Opinion if the Minority Opinion is notified after the 21-day Regulation 64(2) deadline – is both reasonable, and coherent from an administration standpoint. While the Defence is unaware of the contents of the Minority Opinion, and while not prejudging the Defence’s ultimate decision on its grounds of appeal, the Defence does note that the Decision addresses issues of some complexity that have not previously been the primary or fully considered subjects of determinations by Chambers of the Court. These include, for example, the interpretation and application of articles 17(1)(c) and 20(3) of the Statute¹⁶ and the identification and application of “universal tendency[ies]” regarding pardons or amnesties applied to grave and systematic human rights violations in the context of admissibility challenges.¹⁷ The Defence submits that there is a reasonable prospect that the Minority Opinion will address these and / or other issues of a certain degree of complexity, and that the extension of time requested is reasonable to provide the Defence a fair opportunity to consider the minority viewpoint and if needed reference or address the relevant portions of the Minority Opinion in the appeal brief.
18. The Defence also notes that the time period for filing the appeal brief includes the entirety of the judicial recess running from 19 to 29 April 2019, including three official Court holidays. The Defence advises that members of the Defence will not be available to work on the appeal brief for a period of a few days during this judicial recess, and submits, as the Appeals Chamber has decided in a similar situation,¹⁸ that this discrete period of unavailability during the recess

¹⁶ Decision, paras. 30-53.

¹⁷ *Id.* at paras. 61-78.

¹⁸ See *Prosecutor v. Banda*, Decision on Mr Banda's request for extension of time for the filing of a document in support of the appeal, 24 December 2014, ICC-02/05-03/09-624, para. 6 (“*The Appeals Chamber notes the argument of Mr Banda that the time limit for the filing of the document in support of the appeal runs at the time of judicial recess, when members of his defence team are unavailable to work. In the particular circumstances*”).

constitutes an additional basis of good cause for a reasonable extension of the deadline for submission of the appeal brief.

19. The Defence accordingly requests the Appeals Chamber to grant the requested extension of time for the filing of the Defence appeal brief.

Relief Requested

20. The Defence respectfully requests the Appeals Chamber, pursuant to articles 19(6) and 82(1)(a) of the Statute and Rule 158 of the Rules, to:

(a) Reverse, in relevant part,¹⁹ Pre-Trial Chamber I's "Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute'", dated 5 April 2019; and

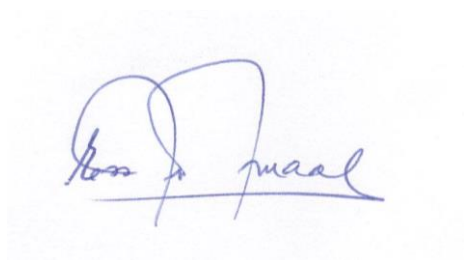
(b) Determine that the case against Dr. Saif Al-Islam Gaddafi is inadmissible before the Court.

21. The Defence additionally, further to the reasons set out at paragraphs 11 to 19 above, and pursuant to Regulation 35 of the Regulations, respectfully requests the Appeals Chamber to extend the deadline for submission of the Defence appeal brief and order that the appeal brief be filed within 31 days of the notification of the Decision if the Minority Opinion of Judge Perrin de Brichambaut is notified on or prior to the 21-day deadline established under Regulation 64(2) for the submission of the appeal brief, and within ten (10) days of notification of the Minority Opinion if the Minority Opinion is notified after the noted 21-day deadline.

of the present case, the Appeals Chamber is satisfied that, in light of these submissions, 'good cause' has been shown. The Appeals Chamber considers the requested extension to be reasonable."

¹⁹ As submitted at paragraph 8 *supra*, the Defence does not appeal part (a) of the Decision's disposition holding that "Mr Gaddafi has a *locus standi* to lodge the Admissibility Challenge".

Respectfully submitted,



Essa M. Faal
Counsel for Dr. Saif Al-Islam Gadafi

Dated this 10th Day of April 2019
At Banjul, The Gambia