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Date: 16 April 2012

PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernandez 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

Prosecution's Response to "Government of Libya's Application for Leave to Appeal the 'Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi'"

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

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(Participation/Reparation)**

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Other

Introduction

1. On 22 March 2012, Libya notified the Chamber of its intention to challenge the admissibility of the case concerning Saif Al-Islam pursuant to articles 19(2)(b), (5), and (6) by 30 April 2012 and requested, pending a decision on this challenge, that the Pre-Trial Chamber suspend its execution of the surrender request in relation to Saif Al-Islam Gaddafi in accordance with, *inter alia*, article 95 and rule 58.¹
2. On 4 April 2012, the Pre-Trial Chamber denied the request, stating that article 95 only applies if there is an admissibility challenge under consideration by the Court pursuant to articles 18 or 19. The Chamber then noted that the Libyan authorities had not made an admissibility challenge, but only announced that one is forthcoming.² The Chamber therefore rejected Libya's request and did not consider it necessary to determine whether article 95 applies to surrender requests.³
3. On 10 April 2012, Libya sought leave to appeal the decision's statutory interpretation of article 95.
4. In the narrow circumstances of the instant proceedings, where Libya is a direct party to the order immediately directed against it, from which it seeks leave to appeal, and where the order is related to – indeed, rejects – Libya's request to suspend Saif Al-Islam's surrender for an additional few weeks within which it will make an admissibility challenge, the Prosecution agrees that Libya has standing to seek leave to appeal.
5. In light of the context in which the application is brought and the complexity and the importance of the issues that arise from the Pre-Trial Chamber's decision, the Prosecution does not oppose Libya's application.

¹ ICC-01/11-01/11-82.

² ICC-01/11-01/11-100, para.18.

³ Ibid.

Background

6. On 27 June 2011, the Chamber issued a warrant of arrest against, among others, Saif Al-Islam Gaddafi.⁴ On 5 July 2011, the Registrar notified the Libyan authorities of a request for cooperation asking for their assistance in arresting Saif Al-Islam and surrendering him to the Court (the "Surrender Request").⁵
7. On 23 November 2011, a letter from the National Transitional Council was transmitted to the Chamber. The letter confirmed the arrest of Saif Al-Islam on 19 November 2011 in Libya.⁶
8. On 23 January 2012, the Libyan authorities sought, pursuant to article 94, postponement of the Surrender Request pending the completion of national proceedings in relation to other crimes against Saif Al-Islam (the "First Postponement Request").⁷
9. On 7 March 2012, the Chamber dismissed the First Postponement Request and requested that Libya make its decision to grant the Surrender Request and inform the Chamber accordingly.⁸
10. On 22 March 2012, Libya notified the Chamber of its intention to challenge the admissibility of the case concerning Saif Al-Islam pursuant to articles 19(2)(b), (5), and (6) by 30 April 2012 and requested, pending a decision on this challenge, that the Pre-Trial Chamber suspend its Surrender Request in accordance with, *inter alia*, article 95 and rule 58 (the "Second Postponement Request").⁹
11. On 30 March 2012, the Office of Public Counsel for the Defence (the "OPCD"), having been previously authorised by the Chamber to represent the general interests of Saif Al-Islam,¹⁰ opposed the Second Postponement Request.¹¹

⁴ ICC-01/11-01/11-3.

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

⁶ ICC-01/11-01/11-34 with annex.

⁷ ICC-01/11-01/11-44 with confidential annex 1.

⁸ ICC-01/11-01/11-72.

⁹ ICC-01/11-01/11-82.

¹⁰ ICC-01/11-01/11-39-Red, p.6.

12. On 4 April 2012, the Pre-Trial Chamber denied the Second Postponement Request (“the Decision”).¹² The Chamber stated that the provisions relied upon by Libya (article 95 and rule 58) only apply if there is an admissibility challenge under consideration by the Court pursuant to articles 18 or 19. The Chamber then noted that the Libyan authorities had not made an admissibility challenge, but only announced that one is forthcoming.¹³ The Chamber therefore rejected Libya’s Request and did not consider it necessary to determine whether article 95 applies to surrender requests.¹⁴
13. On 10 April 2012, Libya sought leave to appeal the Decision (the “Application”) and simultaneously filed a direct appeal before the Appeals Chamber.¹⁵
14. On 12 April 2012, the Office of Public Counsel for the Defence (“OPCD”) responded to Libya’s Application and Appeal.¹⁶

Submissions

15. The Prosecutor acknowledges that absent a challenge to the admissibility of the case Libya is not a party to the current pre-confirmation proceeding. However, the order for which appeal is sought is directed exclusively to Libya and not to either the Prosecution or the suspect. Therefore, Libya is clearly a party to this confined proceeding, having been subject to a direct order by the Court. It is seemingly inconsistent to say that the Court may order a State to take specific action while also denying the State the status of party to the proceeding out of which the order against it arises.
16. In this respect, the situation is also clearly distinguishable from the asylum litigation before Trial Chamber I, in which the Appeals Chamber dismissed an

¹¹ ICC-01/11-01/11-94-Conf-Red with confidential annex.

¹² ICC-01/11-01/11-100.

¹³ Ibid., paras.17-18.

¹⁴ Ibid, para.18.

¹⁵ ICC-01/11-01/11-102 and ICC-01/11-01/11-103 OA2.

¹⁶ ICC-01/11-01/11-106 and ICC-01/11-01/11-107 OA2, respectively.

appeal by the Kingdom of the Netherlands. In that matter, while the State had an interest in the Trial Chamber's decision concerning the ability of a witness to claim asylum in the national court, it was not itself subject to an order of the Court.¹⁷

17. Thus, in the Prosecution's view, in the narrow circumstances of the instant proceedings, where Libya is a direct party to the order immediately directed against it, from which it seeks leave to appeal, and where the order is related to – indeed, rejects – Libya's request to suspend the surrender of Saif Al-Islam for an additional few weeks within which to make an admissibility challenge -- Libya may be considered to be a "party" for these confined purposes.
18. The Prosecution further notes that the decision has an obvious impact on the fair and expeditious conduct of the proceedings or the outcome of the trial. The ability of Libya to invoke article 95 before surrendering the person affects both fairness and expedition, and also potentially affects whether there will even be a trial outcome in this Court. This is particularly relevant in the instant case, as Libya has claimed that it will make a formal admissibility challenge shortly
19. Finally, the Prosecution submits that appellate resolution of the issue may materially advance the proceedings. It will first provide clarity as to the issue of whether a State may request a postponement of surrender under article 95 to permit it to file an admissibility challenge, which is an issue of general interest for the Court. And by providing an authoritative determination as to whether Libya must proceed to the surrender of the suspect regardless of its evinced intention to challenge admissibility and the accompanying request for postponement, it will bolster the efficient conduct of the instant proceedings.

¹⁷ ICC-01/04-01/06-2779, para.12. The Prosecution is equally mindful of the Appeals Chamber's jurisprudence on interlocutory appeals: ICC-01/04-01/06-2799 OA19, para.7.

Conclusion

20. For the above mentioned reasons, the Prosecution does not oppose leave to appeal being granted.



Luis Moreno-Ocampo,
Prosecutor

Dated this 16th Day of April 2012

At The Hague, The Netherlands