

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/11-01/11 OA 2

Date: 25 April 2012

THE APPEALS CHAMBER

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

SITUATION IN THE LIBYAN ARAB JAMAHIRIYA

**IN THE CASE OF THE PROSECUTOR v. SAIF AL-ISLAM GADDAFI and
ABDULLAH AL-SENUSSI**

Public document

**Decision on “Government of Libya’s Appeal Against the ‘Decision Regarding the
Second Request by the Government of Libya for Postponement of the Surrender
of Saif Al-Islam Gaddafi’” of 10 April 2012**

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

The Office of the Prosecutor

Ms Fatou Bensouda, Deputy Prosecutor
Mr Fabricio Guariglia

The Office of Public Counsel for the Defence

Mr Xavier-Jean Keïta
Ms Melinda Taylor

States Representatives

Mr Philippe Sands, Libya
Mr Payam Akhavan, Libya
Ms Michelle Butler, Libya

REGISTRY

Registrar

Ms Silvana Arbia



The Appeals Chamber of the International Criminal Court,

In the appeal of Libya against the decision of Pre-Trial Chamber I entitled “Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi” of 4 April 2012 (ICC-01/11-01/11-100),

After deliberation,

Renders unanimously the following

DECISION AND ORDER

1. The appeal of Libya against the decision of Pre-Trial Chamber I entitled “Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi” is dismissed as inadmissible.
2. The request for suspensive effect contained in the “Government of Libya’s Appeal Against the ‘Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi’” is rejected.
3. The “Application on behalf of the Government of Libya for leave to reply to the ‘Response to the “Government of Libya’s appeal against the Decision regarding the second request by the Government of Libya for postponement of the surrender of Saif Al-Islam Gaddafi”” is rejected.
4. The “Application on behalf of the Government of Libya to reclassify as confidential and ex parte its ‘Application for leave to reply to the “Response to the ‘Government of Libya’s appeal against the Decision regarding the second request by the Government of Libya for postponement of the surrender of Saif Al-Islam Gaddafi’”” is rejected.
5. The Registry shall reclassify as public the “Application on behalf of the Government of Libya to reclassify as confidential and ex parte its

‘Application for leave to reply to the “Response to the ‘Government of Libya’s appeal against the Decision regarding the second request by the Government of Libya for postponement of the surrender of Saif Al-Islam Gaddafi”’.

REASONS

I. PROCEDURAL HISTORY

A. Proceedings before the Pre-Trial Chamber

1. On 27 June 2011, Pre-Trial Chamber I (hereinafter: “Pre-Trial Chamber”) issued a warrant of arrest against Saif Al-Islam Gaddafi (hereinafter: “Mr Gaddafi”).¹ On 4 July 2011, the Registrar issued the “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”² (hereinafter: “Surrender Request”).
2. On 6 December 2011, the Pre-Trial Chamber authorised the Office of Public Counsel for the Defence (hereinafter: “OPCD”) to represent the interests of Mr Gaddafi until otherwise decided by that Chamber.³
3. On 23 January 2012, following Mr Gaddafi’s reported arrest in Libya, the Registrar transmitted observations of Libya in which it requested to postpone the Surrender Request pending the completion of national proceedings against Mr Gaddafi in relation to other crimes⁴ (hereinafter: “First Postponement Request”).
4. On 7 March 2012, the Pre-Trial Chamber rendered its “Decision on Libya’s Submissions Regarding the Arrest of Saif Al-Islam Gaddafi” in which it dismissed the First Postponement Request and requested Libya to arrange for the surrender of Mr Gaddafi.⁵

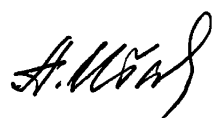
¹ “Warrant of Arrest for Saif Al-Islam Gaddafi”, ICC-01/11-01/11-3.

² ICC-01/11-01/11-5.

³ “Public Redacted Version of Decision Requesting Libya to file Observations Regarding the Arrest of Saif Al-Islam Gaddafi”, ICC-01/11-01/11-39-Red, p. 6.

⁴ Annex 1 to “Report of the Registrar on Libya’s observations regarding the arrest of Saif Al-Islam Gaddafi”, ICC-01/11-01/11-44-Anx1-Red.

⁵ ICC-01/11-01/11-72.



5. On 22 March 2012, Libya submitted the “Notification and Request by the Government of Libya in response to ‘Decision on Libya’s Submissions Regarding the Arrest of Saif Al-Islam Gaddafi’”⁶ (hereinafter: “Second Postponement Request”) in which it notified the Pre-Trial Chamber of its intention to challenge the admissibility of the case against Mr Gaddafi by 30 April 2012 and requested a postponement of the Surrender Request pending a decision on that challenge.

6. On 4 April 2012, the Pre-Trial Chamber rendered its “Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi”⁷ (hereinafter: “Impugned Decision”) in which it rejected the Second Postponement Request.

7. On 17 April 2012, the Pre-Trial Chamber appointed Mr Xavier-Jean Keïta and Ms Melinda Taylor from the OPCD as counsel for Mr Gaddafi.⁸

B. Proceedings before the Appeals Chamber

8. On 10 April 2012, Libya filed the “Government of Libya’s Appeal Against the ‘Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi’”⁹ (hereinafter: “Appeal”) in which it appealed the Impugned Decision and requested that the appeal have suspensive effect pursuant to article 82 (3) of the Statute.

9. On 12 April 2012, the OPCD filed the “Response to the ‘Government of Libya’s Appeal Against the ‘Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi’””¹⁰ (hereinafter: “OPCD Response”).

10. On 16 April 2012, Libya filed its “Application on behalf of the Government of Libya for leave to reply to the ‘Response to the ‘Government of Libya’s appeal against the Decision regarding the second request by the Government of Libya for

⁶ ICC-01/11-01/11-82.

⁷ ICC-01/11-01/11-100. The OPCD’s filing in response to the Second Postponement Request was rejected by the Pre-Trial Chamber as inadmissible since it exceeded the page limit for filings pursuant to regulations 36 and 37 of the Regulations of the Court by 2,000 words.

⁸ “Decision Appointing Counsel from the OPCD as Counsel for Saif Al-Islam Gaddafi”, ICC-01/11-01/11-113.

⁹ ICC-01/11-01/11-103 (OA 2).

¹⁰ ICC-01/11-01/11-107 (OA 2).

postponement of the surrender of Saif Al-Islam Gaddafi””¹¹ (hereinafter: “Application for Leave to Reply”) in which it requested leave to reply to the OPCD Response.

11. On 19 April 2012, Libya filed the “Application on behalf of the Government of Libya to reclassify as confidential and *ex parte* its ‘Application for leave to reply to the “Response to the ‘Government of Libya’s appeal against the Decision regarding the second request by the Government of Libya for postponement of the surrender of Saif Al-Islam Gaddafi””¹² (hereinafter: “Application for Reclassification”) in which it requested the Appeals Chamber to reclassify the Application for Leave to Reply as confidential and *ex parte*.

II. DETERMINATION BY THE APPEALS CHAMBER

A. Admissibility of the Appeal

12. Libya submits the Appeal under article 82 (1) (a) of the Statute. This provision reads:

Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence: (a) A decision with respect to jurisdiction or admissibility.

13. The Appeals Chamber has ruled repeatedly on the scope of “decision[s] with respect to jurisdiction or admissibility” under article 82 (1) (a) of the Statute.¹³ The Appeals Chamber has held that:

It is not sufficient that there is an indirect or tangential link between the underlying decision and questions of jurisdiction or admissibility [...] a decision of a Pre-Trial or Trial Chamber may constitute a “decision with respect to [...] admissibility” only to the extent that it consisted of or “was based on” a ruling that a case was admissible or inadmissible [footnote omitted].¹⁴

¹¹ ICC-01/11-01/11-112 (OA 2).

¹² ICC-01/11-01/11-117-Conf-Exp (OA 2).

¹³ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “Decision on the admissibility of the ‘Appeal Against Decision on Application Under Rule 103’ of Ms Mishana Hosseinioun of 7 February 2012”, 9 March 2012, ICC-01/11-01/11-74 (OA), para. 10; *Situation in the Republic of Kenya*, “Decision on the admissibility of the ‘Appeal of the Government of Kenya against the “Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence”””, 10 August 2011, ICC-01/09-78 (OA), para. 15.

¹⁴ *Situation in the Republic of Kenya*, “Decision on the admissibility of the ‘Appeal of the Government of Kenya against the “Decision on the Request for Assistance Submitted on Behalf of the Government

14. The Impugned Decision concerned a request for the postponement of surrender under article 95 of the Statute and made no determination concerning the admissibility of the case. Therefore, the Impugned Decision cannot be characterised as a decision that consisted of, or was based on, a ruling that the case against Mr Gaddafi was admissible or inadmissible.

15. In the context of the Impugned Decision, the Pre-Trial Chamber found that Libya's announcement that such a challenge was forthcoming could not be considered as a challenge to the admissibility of a case.¹⁵ Libya's argument that the Impugned Decision was therefore a "decision pertaining directly to admissibility"¹⁶ is not convincing. The Pre-Trial Chamber dealt exclusively with the question of whether admissibility proceedings had begun. It did not make a finding on whether the case against Mr Gaddafi was admissible. As reflected in the Appeals Chamber's jurisprudence cited above, such a finding is required for a decision to be appealed under article 82 (1) (a) of the Statute.

16. For the reasons stated above, the Appeals Chamber concludes that the Impugned Decision does not constitute a "decision with respect to admissibility" pursuant to article 82 (1) (a) of the Statute. The Appeals Chamber therefore dismisses the appeal as inadmissible.

17. Since the appeal is clearly inadmissible, the Appeals Chamber does not require further submissions on the matter and rejects the Application for Leave to Reply.

B. Request for Suspensive Effect

18. In its Appeal filed on 10 April 2012, Libya made a request under article 82 (3) of the Statute that the appeal have suspensive effect on the order to surrender Mr Gaddafi.¹⁷ The Appeals Chamber has previously found that there is no reason to grant suspensive effect when an appeal has been found to be inadmissible.¹⁸

of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence""", 10 August 2011, ICC-01/09-78 (OA), para. 15.

¹⁵ Impugned Decision, para 18.

¹⁶ Appeal, para. 17.

¹⁷ Appeal, paras 25-29.

¹⁸ *Prosecutor v. Callixte Mbarushimana*, "Reasons for 'Decision on the appeal of the Prosecutor of 19 December 2011 against the "Decision on the confirmation of the charges" and, in the alternative, against the "Decision on the Prosecution's Request for stay of order to release Callixte Mbarushimana"

19. For the same reasons, the Appeals Chamber dismisses Libya's request for suspensive effect.

C. Libya's Application for Reclassification

20. In its Application for Reclassification, Libya requests that its Application for Leave to Reply be reclassified as confidential and *ex parte*. The reason given is that it mistakenly disclosed information by identifying a specific international newspaper in a footnote.¹⁹ The information in the footnote supports the allegation that the OPCD Response was sent inappropriately by OPCD to an international newspaper before it was registered in the Court records. Libya further requests the Appeals Chamber to order the parties who have received the Application for Leave to Reply to destroy any copies thereof and refrain from using the information contained in that footnote.²⁰ Should the Application for Reclassification be granted, Libya indicates its intention to immediately file a public redacted version of this document in which the name of the newspaper would be redacted from the footnote in question.²¹

21. Libya makes the following argument in support of its request:

[T]he mere title of the newspaper (when read in the context of the subject matter of this case) allows a reasonably informed person to draw conclusions as to the identity of the journalist which will have serious repercussions for their ongoing employment at the said newspaper.²²

22. According to the second sentence of regulation 23 *bis* (3) of the Regulations of the Court, "[a] Chamber may [...] re-classify a document upon request by any other participant or on its own motion." The Application for Leave to Reply has been filed publicly in proceedings that are public. The Court's legal texts, in particular articles 72, 73 of the Statute and rules 73 or 87 of the Rules of Procedure and Evidence, do not provide for the confidentiality of the information at issue. Furthermore, Libya does not adequately substantiate or justify a threat to a person who would be protected by making this information confidential. Considering that the proceedings before the Court are, in principle, public, the Appeals Chamber finds that Libya's arguments in

and on the victims' request for participation' of 20 December 2011", 24 January 2012, ICC-01/04-01/10-483 (OA 3), para. 26.

¹⁹ Application for Reclassification, para. 3.

²⁰ Application for Reclassification, para. 6.

²¹ Application for Reclassification, para. 7.

²² Application for Reclassification, para. 5.



support of reclassification do not establish a factual or legal basis for the confidential treatment of the information. The Appeals Chamber therefore rejects Libya's Application for Reclassification.

23. For the same reasons, the Appeals Chamber finds that Libya's Application for Reclassification cannot be maintained as a confidential and *ex parte* document but should be reclassified as public.

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

A handwritten signature in black ink, appearing to read 'A. Ušacka', followed by a long horizontal flourish.

Judge Anita Ušacka
Presiding Judge

Dated this 25th day of April 2012

At The Hague, The Netherlands