

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 24 June 2013

THE APPEALS CHAMBER

Before: Judge Anita Usacka, 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

**Prosecution's Response to the Government of Libya's Request for Suspensive
Effect**

Source: Office of the Prosecutor

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

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Procedural Background

1. On 1 May 2012, Libya challenged the admissibility of the case against Saif Al-Islam Gaddafi ("Saif Al-Islam").¹
2. On 1 June 2012, Pre-Trial Chamber I decided that Libya may postpone the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to Article 95 of the Statute until such time that the Chamber has ruled on the Admissibility Challenge.²
3. On 31 May 2013, Pre-Trial Chamber I found the case against Saif Al-Islam admissible before the Court and reminded Libya of its obligation to surrender Saif Al-Islam ("Admissibility Decision").³
4. On 7 June 2013, the Government of Libya filed its appeal against the Admissibility Decision and requested suspensive effect of the order for the surrender of Saif Al-Islam ("Libya's Request").⁴
5. On 17 June 2013, the Defence for Saif Al-Islam ("Defence") requested to dismiss Libya's request for suspensive effect.⁵ On 18 June 2013, it requested an immediate ruling on Libya's request for suspensive effect.⁶
6. On 20 June 2013, the Appeals Chamber ordered that the Prosecutor may respond to the request for suspensive effect.⁷

¹ ICC-01/11-01/11-130.

² ICC-01/11-01/11-163.

³ ICC-01/11-01/11-344-Red.

⁴ ICC-01/11-01/11-350.

⁵ ICC-01/11-01/11-357 OA4.

⁶ ICC-01/11-01/11-359 OA4.

⁷ ICC-01/11-01/11-364 OA4.

Submissions

7. The Prosecution submits that the Appeals Chamber has the authority to suspend the order for surrender of Saif Al-Islam pursuant to Article 82(3). However, Libya has not advanced any argument to support its request and further, the surrender of Saif Al-Islam does not appear to create an irreversible situation.

i. The Appeals Chamber has the authority to suspend Libya's obligation to surrender Saif Al-Islam pursuant to Article 82(3)

8. The Pre-Trial Chamber decided that Libya may postpone its obligation to surrender Saif Al-Islam pending a final determination of the admissibility of the case. Once the Chamber found the case admissible, the postponement was terminated and Libya was obliged to surrender Saif-Al Islam before the Court. Hence, Libya's present obligation to surrender Saif-Al Islam is an immediate consequence of the Admissibility Decision which Libya seeks to appeal before the Appeals Chamber.⁸ Therefore, and contrary to the Defence submissions,⁹ the Appeals Chamber has the authority to decide on the suspension of Libya's obligation to surrender Saif Al-Islam. A decision of the Appeals Chamber to suspend the Admissibility Decision, pending the determination of its appeal, would entail a suspension of the obligation to surrender.¹⁰

9. Moreover, the Appeals Chamber has stated that "[s]uspensive effect [...] maintains the position as it was prior to the issuing of the Impugned Decision".¹¹ The *status quo ante* or the position as it was prior to the issuing of the

⁸ Similarly, the Appeals Chamber found that the effect or implications of a decision do not qualify or alter the character of that decision and that, in that context, a release order forms an integral part of a decision declining to confirm charges. See ICC-01/04-01/06-926 OA8, para.15, quoted in ICC-01/04-01/10-483 OA3, para.22. The same reasoning can be applied to the instant case.

⁹ ICC-01/11-01/11-357OA4, paras.21-32.

¹⁰ The Prosecution notes that the Appeals Chamber has been seized in prior occasions with requests for the suspension of decisions finding the case admissible or within the jurisdiction of the Court. See ICC-01/05-01/08-817OA3, para.11 and ICC-01/09-01/11-391OA3OA4, para.10.

¹¹ ICC-01/04-02/12-12OA, para.17 referring to ICC-01/04-01/06-1444-Anx OA 2, para.6 "Suspension [...] is designed to sustain the status quo ante, that is, the position obtaining prior to the issuance of the *sub judice* decision".

Admissibility Decision was the postponement of Libya's obligation to surrender Saif Al-Islam pending the determination of the admissibility of the case. Therefore, Article 82(3) permits Libya to seek suspensive effect before the Appeals Chamber to maintain the position predating the issuing of the Admissibility Decision.

ii. Libya has failed to show that the surrender of Saif Al-Islam would create an irreversible situation

10. An Appeals Chamber decision to grant suspensive effect is a discretionary one, and should consider the specific circumstances of the case.¹² In prior decisions, the Appeals Chamber has considered whether the implementation of the decision (i) would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the appellant, (ii) would lead to consequences that would be very difficult to correct and may be irreversible, or (iii) could potentially defeat the purpose of the appeal.¹³
11. Moreover, the Appeals Chamber has clarified that the appellant needs to request for suspensive effect, and provide arguments in support of its request, in the appeal as prescribed in Rule 156(5).¹⁴
12. The Prosecution notes that Libya has not advanced any argument to support its request in its appeal nor has it indicated that the surrender of Saif Al-Islam would create an irreversible situation that would be very difficult to correct even if the Appeals Chamber overturns the Admissibility Decision. However, the Appeals Chamber still has discretion to entertain Libya's Request and determine

¹² ICC-01/04-02/12-12OA, para.18 referring to ICC-01/05-01/08-499 OA2, para.11; ICC-01/04-01/06-1290 OA11, para.7; ICC-01/04-01/06-2953A A2 A3 OA21, para.81.

¹³ ICC-01/04-02/12-12OA, para.19 referring to ICC-01/05-01/08-817OA3, para.11.

¹⁴ ICC-01/05-01/08-499 OA2, paras. 9-10

whether the suspension of the surrender is merited if it considers that any of the above-cited criteria are met.¹⁵

13. Further, the Appeals Chamber has held in deciding on similar requests that, even if the proceedings continue and the Appeals Chamber subsequently reverses the impugned decision, any ongoing proceedings could be discontinued at that time. Thus, depending on the circumstances of the case, there may be no irreparable consequences or irreversible situation if the impugned decision is not suspended as long as any adverse consequence can be avoided by the reversal.¹⁶
14. The Prosecution submits that this reasoning applies to the instant case and that consequently, Saif Al-Islam could be surrendered before the Court and the proceedings commence. Should the Appeals Chamber overturn the Pre-Trial Chamber's decision, the proceedings could be discontinued at that time and Saif Al-Islam returned to Libya. Hence, and unless the Appeals Chamber decides to entertain additional reasons provided by Libya in its document in support of appeal or to consider additional factors in exercise of its discretion, Libya's Request should be rejected.

Conclusion

15. The Prosecution submits that the Appeals Chamber has the authority to suspend Libya's obligation to surrender Saif Al-Islam pursuant to Article 82(3). Libya has however failed to provide arguments in support of its request and the surrender of Saif Al-Islam before the Court does not appear to create an irreversible situation or entail irreparable consequences should the Appeals Chamber overturn the Admissibility Decision. Thus, and unless the Appeals Chamber decides to entertain additional reasons provided by Libya in its document in

¹⁵ The Prosecution notes that the Appeals Chamber has entertained requests for suspensive effect in cases where the Appellant failed to advance any argument in the notice of appeal or it advanced arguments in a subsequent document. See for example, ICC-01/09-01/11-391 OA3 OA4, paras.4-5; ICC-01/05-01/08-817 OA3, paras.10-11.

¹⁶ ICC-01/09-01/11-391 OA3 OA4, para.10; ICC-01/05-01/08-817 OA3, para.11.

support of appeal or to consider other factors in exercise of its discretion, Libya's Request for suspensive effect should be rejected.



Fatou Bensouda,
Prosecutor

Dated this 24th day of June 2013

At The Hague, The Netherlands