

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 18 July 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 suspensive effect and related issues

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 the Defence
Mr John R.W.D. Jones

States Representatives
Mr Philippe Sands
Mr Payam Akhavan
Ms Michelle Butler
Mr Ahmed El-Gehani

Counsel for Abdullah Al-Senussi
Mr Benedict Emmerson

REGISTRY

Registrar
Mr Herman von Hebel

A handwritten signature in black ink, appearing to be 'A. von Hebel', located in the bottom right corner of the page.

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 “The Government of Libya’s Appeal against Pre-Trial Chamber I’s ‘*Decision on the admissibility of the case against Saif Al-Islam Gaddafi*’” of 7 June 2013 (ICC-01/11-01/11-350 OA 4), in which a request for suspensive effect pursuant to article 82 (3) of the Statute is made,

Renders unanimously the following

DECISION

1. The request for suspensive effect is rejected.
2. The “Libyan Government’s application for leave to file a consolidated reply to the ‘Defence Response to Government of Libya’s Request for Suspensive Effect’ and the ‘Prosecution’s Response to the Government of Libya’s Request for Suspensive Effect’” (ICC-01/11-01/11-373 OA 4) is rejected.

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 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

¹ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “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.



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.²

2. On 1 May 2012, Libya submitted its challenge to the admissibility of the case³ (hereinafter: “Challenge to Admissibility”). In that challenge, it also sought the “postponement and suspension of the Pre-Trial Chamber’s order to surrender Mr Gaddafi pending a final determination of [its challenge]”⁴ (hereinafter: “Request for Postponement”), arguing that article 95 of the Statute applied to requests for surrender.⁵

3. On 1 June 2012, having heard from the Office of Public Counsel for the defence and the Prosecutor,⁶ the Pre-Trial Chamber issued the “Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Rome Statute”⁷ (hereinafter: “Decision on Postponement”). It found that “article 95 of the Statute is applicable to requests for arrest and surrender, pending determination of an admissibility challenge brought before the Court”,⁸ that Libya’s challenge to admissibility had been properly made, and that therefore the request for arrest and surrender could be postponed “until such time that the Chamber has ruled on the [Challenge to Admissibility]”.⁹

4. On 31 May 2013, the Pre-Trial Chamber issued the “Decision on the admissibility of the case against Saif Al-Islam Gaddafi”¹⁰ (hereinafter: “Impugned Decision”). Having found the case against Mr Gaddafi to be admissible, the Pre-Trial

² Registrar, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “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 “Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute”, ICC-01/11-01/11-130-Red.

⁴ Challenge to Admissibility, para. 103 (footnote omitted), *see also* para. 106.

⁵ Challenge to Admissibility, para. 105.

⁶ “Public Redacted Version of the ‘Response to the Request to Postpone the Surrender of Mr. Saif Al-Islam Gaddafi Pursuant to Article 95 of the Statute’”, 11 May 2012, ICC-01/11-01/11-141-Red; “Prosecution’s Response to Government of Libya’s Request for the Postponement of the Surrender of Saif Al-Islam Gaddafi Brought Within their Application to Challenge the Admissibility of the Case under Article 19”, 11 May 2012, ICC-01/11-01/11-142; “Libyan Government Application for leave to reply and reply to OPCD Response to the request to postpone the surrender of Mr Saif Al-Islam Gaddafi pursuant to article 95 of the Statute”, 16 May 2012, ICC-01/11-01/11-149; “Defence Response to Libyan Application for Leave to Reply and Reply”, 18 May 2012, ICC-01/11-01/11-151.

⁷ ICC-01/11-01/11-163.

⁸ Decision on Postponement, para. 37.

⁹ Decision on Postponement, p. 16; *see also* para. 39.

¹⁰ ICC-01/11-01/11-344-Red. The confidential version was issued on the same date.

Chamber “recall[ed] Libya’s obligation to surrender [Mr Gaddafi]”.¹¹ In the operative part of the decision, it “remind[ed] Libya of its obligation to surrender [Mr Gaddafi] to the Court”.¹²

B. Proceedings before the Appeals Chamber

5. On 7 June 2013, Libya filed “The Government of Libya’s Appeal against Pre-Trial Chamber I’s ‘*Decision on the admissibility of the case against Saif Al-Islam Gaddafi*’”¹³ (hereinafter: “Appeal”). Libya refers to, *inter alia*, article 82 (3) of the Statute and rule 156 (5) of the Rules of Procedure and Evidence, regulating suspensive effect.¹⁴ It requests that the Appeals Chamber reverse the Impugned Decision, determine that the case against Mr Gaddafi is inadmissible and “suspend the order for the surrender of [Mr Gaddafi] pending the conclusion of the present appeal, pursuant to article 82(3) of the Statute”¹⁵ (hereinafter: “Request for Suspensive Effect”).

6. On 17 June 2013, Mr Gaddafi requested that the Appeals Chamber dismiss the Request for Suspensive Effect¹⁶ (hereinafter: “Mr Gaddafi’s Response”). He argues that the Appeals Chamber is not seised of an appeal regarding a request for surrender and is therefore not competent “to suspend an obligation which does not fall within the scope of its appellate review”.¹⁷ He also submits that Libya has not provided any arguments to support its request within the appropriate time frame and, in the absence of such, its burden has not been met.¹⁸ He argues that the Appeals Chamber should dismiss the request *in limine*¹⁹ but states that if the Appeals Chamber does not do so, he “reserves [his] right to submit a full response in relation to the merits of the Request”.²⁰

¹¹ Impugned Decision, para. 219.

¹² Impugned Decision, p. 91.

¹³ ICC-01/11-01/11-350 (OA 4).

¹⁴ Appeal, paras 5, 8.

¹⁵ Appeal, paras 11 - 12.

¹⁶ “Defence Response to Government of Libya’s Request for Suspensive Effect”, ICC-01/11-01/11-357 (OA 4).

¹⁷ Mr Gaddafi’s Response, paras 2, 21 - 32.

¹⁸ Mr Gaddafi’s Response, paras 3 - 4, 33 - 44.

¹⁹ Mr Gaddafi’s Response, paras 5, 6, 32, 44, 45.

²⁰ Mr Gaddafi’s Response, para. 7.

7. On 18 June 2013, Mr Gaddafi filed a “Request for Urgent Appeals Ruling”²¹ (hereinafter: “Mr Gaddafi’s Request for Urgent Ruling”), stating that, on 17 June 2013, the Libyan authorities had announced that they intended to convene hearings against Mr Gaddafi for crimes which appeared to be related to ICC crimes in the first half of August 2013²² and requesting that the Appeals Chamber rule immediately on the Request for Suspensive Effect.²³

8. On 24 June 2013, following an order by the Appeals Chamber,²⁴ the Prosecutor filed her response to the Request for Suspensive Effect²⁵ (hereinafter: “Prosecutor’s Response”) submitting that the Appeals Chamber is competent to decide on the request.²⁶ She submits that Mr Gaddafi’s surrender does “not appear to create an irreversible situation”.²⁷ Referring to the lack of reasons in the Appeal and the fact that surrender “does not appear to create an irreversible situation or entail irreparable consequences should the Appeals Chamber overturn the [Impugned Decision]”, she submits that “unless the Appeals Chamber decides to entertain additional reasons provided by Libya in its document in support of appeal or to consider other factors in exercise of its discretion, [the Request for Suspensive Effect] should be rejected”.²⁸

9. On the same day, Libya filed its document in support of the appeal²⁹ (hereinafter: “Document in Support of the Appeal”), reiterating therein its Request for Suspensive Effect³⁰ and, in answer to Mr Gaddafi’s Response, stating that it had “been properly made”.³¹

10. On 25 June 2013, Libya filed “The Libyan Government’s Response to Gaddafi Defence ‘Request for Urgent Appeals Ruling’”³² (hereinafter: “Libya’s Response to

²¹ ICC-01/11-01/11-359 (OA 4).

²² Mr Gaddafi’s Request for Urgent Ruling, para. 4.

²³ Mr Gaddafi’s Request for Urgent Ruling, paras 9 - 11.

²⁴ “Order in relation to the request for suspensive effect of the appeal”, 20 June 2013, ICC-01/11-01/11-364 (OA 4).

²⁵ “Prosecution’s Response to the Government of Libya’s Request for Suspensive Effect”, ICC-01/11-01/11-368 (OA 4).

²⁶ Prosecutor’s Response, paras 7 – 9.

²⁷ Prosecutor’s Response, para. 7, p. 5, para. 15.

²⁸ Prosecutor’s Response, para. 15.

²⁹ “Document in Support of the Government of Libya’s Appeal against the ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’”, ICC-01/11-01/11-370-Red2 (OA 4).

³⁰ Document in Support of the Appeal, para. 201.

³¹ Document in Support of the Appeal, para. 179.

³² ICC-01/11-01/11-371 (OA 4).

Mr Gaddafi's Request for Urgent Ruling"). It argues that Mr Gaddafi's request appears "to be without legal basis".³³ And, it submits several reasons as to why Libya deserves the chance to be heard on its appeal against the Impugned Decision.³⁴

11. On 27 June 2013, Libya filed the "Libyan Government's application for leave to file a consolidated reply to the 'Defence Response to Government of Libya's Request for Suspensive Effect' and the 'Prosecution's Response to the Government of Libya's Request for Suspensive Effect'"³⁵ (hereinafter: "Libya's Application for Leave to Reply"). It requests leave to file a consolidated reply to the documents referred to therein pursuant to regulation 24 (5) of the Regulations of the Court, referring to the ten day time limit in regulation 34 (c) of the same Regulations, by 5 July 2013, within ten days of filing of the Prosecutor's Response.³⁶ It also responds to what it characterises as a request by Mr Gaddafi to file a further response on the merits of the Request for Suspensive Effect should the Appeals Chamber reject his submission that it should be dismissed *in limine*.³⁷

II. PRELIMINARY ISSUES

12. Libya did not include any reasons for its Request for Suspensive Effect in the Appeal although reasons are contained in the Document in Support of the Appeal.³⁸ On the lack of reasoning being raised by Mr Gaddafi³⁹ and the Prosecutor,⁴⁰ Libya submits that it had met the procedural requirements for an application for suspensive effect. It submits, *inter alia*:

Pursuant to Rule 156(5), "[w]hen filing the appeal, the party appealing [...] must [...] request that the appeal have suspensive effect in accordance with article 82, paragraph 3". This is exactly what was done.[] The reasons supporting a request for suspensive relief are inherent in, and contingent upon, the substantive appeal. As a result, the necessary argumentation in support of such a request, is the very existence of an appeal. There is no additional procedural requirement.⁴¹

³³ Libya's Response to Mr Gaddafi's Request for Urgent Ruling, para. 3.

³⁴ Libya's Response to Mr Gaddafi's Request for Urgent Ruling, para. 6.

³⁵ ICC-01/11-01/11-373 (OA 4).

³⁶ Libya's Application for Leave to Reply, paras 19, 25.

³⁷ Libya's Application for Leave to Reply, paras 20 - 24.

³⁸ Document in Support of the Appeal, paras 178 - 192.

³⁹ Mr Gaddafi's Response, paras 3 - 6, 33 - 44.

⁴⁰ Prosecutor's Response, paras 7, 11 - 12, 15.

⁴¹ Document in Support of the Appeal, para. 192.

- a. The authority of the Appeal's *[sic]* Chamber to order suspensive effect in relation to the transfer of Mr. Gaddafi to the Court in the present circumstances;
- b. The permissible form and content of argumentation in support of a request by the Libyan Government for suspensive effect;
- c. Whether, and to what extent, the absence of suspensive effect would cause detriment to the Libyan Government.⁴⁶ [footnotes omitted]

17. It argues that those filings "each raise arguments concerning the [three] issues that are either incorrect, speculative, or raise new and distinct issues of law and fact".⁴⁷ In relation to the first two issues, as the Appeals Chamber is now considering the merits of the Request for Suspensive Effect, the Appeals Chamber finds that these issues have become moot. On the third issue, the Appeals Chamber notes that Libya has already filed four documents in relation to the Request for Suspensive Effect. The Appeals Chamber considers that Libya has had ample opportunity to provide reasons. The Appeals Chamber notes that in the Document in Support of the Appeal in particular⁴⁸ Libya put forward reasons as to why suspensive effect should be granted and as to why implementation of the decision would "create an irreversible situation or one that would be very difficult to correct; or potentially defeat the purpose of the appeal".⁴⁹

18. For these reasons, the Appeals Chamber rejects Libya's Application for Leave to Reply.

III. MERITS

19. Article 82 (3) of the Statute provides:

An appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence.

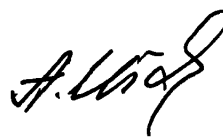
20. The Appeals Chamber recalls that, as far as article 82 (3) of the Statute is concerned, "[s]uspension involves the non-enforcement of a decision, the subject of

⁴⁶ Libya's Application for Leave to Reply, para. 6.

⁴⁷ Libya's Application for Leave to Reply, para. 8.

⁴⁸ Document in Support of the Appeal, paras 186 - 190.

⁴⁹ Document in Support of the Appeal, para. 186.



an appeal”.⁵⁰ In this case, the Impugned Decision is a decision on admissibility and not the warrant of arrest and the request for surrender.

21. Libya’s Request for Suspensive Effect is put somewhat ambiguously. It does not refer to the Impugned Decision, which concerns the admissibility of the case against Mr Gaddafi, but rather to “the order for his surrender”: it requests that the Appeals Chamber “suspend the order for the surrender of [Mr Gaddafi] pending the conclusion of the present appeal, pursuant to article 82(3) of the Statute”.⁵¹ Nevertheless, in the Document in Support of the Appeal, Libya clarifies that its request in fact relates to implementation of the Impugned Decision.⁵² The Appeals Chamber therefore understands the request to be a request pursuant to article 82 (3) of the Statute and rule 156 (4) of the Rules of Procedure and Evidence in relation to the Impugned Decision.

22. The Appeals Chamber has previously found that the decision to order that an appeal has suspensive effect is discretionary; it has stated that, “[t]herefore, when faced with a request for suspensive effect, the Appeals Chamber will consider the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under these circumstances”.⁵³ It has also summarised circumstances in which it has exercised its discretion to grant suspensive effect:

In past decisions, the Appeals Chamber, when deciding on requests for suspensive effect, has considered whether the implementation of the decision under appeal (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”.⁵⁴ [footnotes omitted]

⁵⁰ *Prosecutor v. Germain Katanga*, “Decision on the request for suspensive effect of the appeal against Trial Chamber II’s decision on the implementation of regulation 55 of the Regulations of the Court”, 16 January 2013, ICC-01/04-01/07-3344 (OA 13), para. 5, referring to previous jurisprudence.

⁵¹ Appeal, para. 12.

⁵² Document in Support of the Appeal, paras 182 - 190.

⁵³ *Prosecutor v. Mathieu Ngudjolo Chui*, “Decision on the request of the Prosecutor of 19 December 2012 for suspensive effect”, 20 December 2012, ICC-01/04-02/12-12 (OA), para. 18, referring to previous jurisprudence.

⁵⁴ *Prosecutor v. Germain Katanga*, “Decision on the request for suspensive effect of the appeal against Trial Chamber II’s decision on the implementation of regulation 55 of the Regulations of the Court”, 16 January 2013, ICC-01/04-01/07-3344 (OA 13), para. 6, referring to previous jurisprudence.



23. The Appeals Chamber is not convinced that the reasons advanced by Libya merit the granting of suspensive effect to the Appeal.

24. Libya argues that implementation of the Impugned Decision would create an irreversible situation or one that would be very difficult to correct or would potentially defeat the purpose of the appeal.⁵⁵ It argues that “[t]he purpose of the present appeal is to allow the Libyan domestic criminal process in respect of Mr. Gaddafi to continue to completion”.⁵⁶ The Appeals Chamber finds, however, that the purpose of the appeal is for the Appeals Chamber to reach a decision pursuant to rule 158 (1) of the Rules of Procedure and Evidence, which provides that “[a]n Appeals Chamber which considers an appeal referred to in this section may confirm, reverse or amend the decision appealed”. The purpose is not to permit Libya to conduct its domestic criminal proceedings.

25. Second, Libya argues that transfer of Mr Gaddafi to the ICC “would undermine the domestic investigation concerning his individual culpability, as well as creating substantial impediments with regard to a wider prosecutorial strategy and Libya’s transitional justice policy as a whole”.⁵⁷ It refers to, *inter alia*, the creation of an “irreversible situation” or “one that would be very difficult to correct and may be irreversible”.⁵⁸

26. The Appeals Chamber notes that, as far as national investigations are concerned, Libya is in a position to continue its investigations irrespective of the ongoing proceedings before the Court. The Appeals Chamber considers that it has not been provided with information as to why Mr Gaddafi’s transfer to the Court would prevent Libya from continuing with its investigations concerning him, in addition to any other investigations or prosecutions. The Appeals Chamber is not convinced by the reasons provided as to why surrender of Mr Gaddafi to the Court would produce the results alleged.

27. Having concluded that there is no reason to grant suspensive effect in this case, the Appeals Chamber recalls that Libya is currently obliged to surrender Mr Gaddafi

⁵⁵ Document in Support of the Appeal, paras 183, 186.

⁵⁶ Document in Support of the Appeal, para. 187.

⁵⁷ Document in Support of the Appeal, para. 189.

⁵⁸ Document in Support of the Appeal, para. 189; *see also* paras 188, 190.

to the Court. This obligation arises from the request for surrender which was issued pursuant to the Pre-Trial Chamber's decision on the warrant of arrest.⁵⁹ Leaving aside the question of whether article 95 of the Statute relates also to requests for surrender, the Appeals Chamber finds that, in any event, article 95 of the Statute is not applicable to the appellate phase of proceedings. This is because this phase of the proceedings is regulated by article 82 (3) of the Statute. In addition, in the view of the Appeals Chamber, once the Pre-Trial or Trial Chamber has ruled on an admissibility challenge, it is no longer "under consideration by the Court", as referred to in article 95 of the Statute. Rather, the decision on the admissibility challenge is being reviewed by the Appeals Chamber pursuant to article 82 (1) (a) of the Statute.

28. The Appeals Chamber notes Mr Gaddafi's request seeking an immediate ruling on the Request for Suspensive Effect. The Appeals Chamber has decided on this issue in any event "as expeditiously as possible" as required by rule 156 (4) of the Rules of Procedure and Evidence. The Appeals Chamber also notes Mr Gaddafi's submission that, should the Appeals Chamber not dismiss the Request for Suspensive Effect *in limine*, "then [he] reserves [his] right to submit a full response in relation to the merits of the Request".⁶⁰ The Appeals Chamber has now decided on the merits of the Request for Suspensive Effect and sees no need to receive further submissions from Mr Gaddafi in addition to those which he had already filed, also bearing in mind the approach now taken in this decision.

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



Judge Anita Ušacka
Presiding Judge

Dated this 18th day of July 2013

At The Hague, The Netherlands

⁵⁹ Pre-Trial Chamber I, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "Warrant of Arrest for Saif Al-Islam Gaddafi", 27 June 2011, ICC-01/11-14; "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", 27 June 2011, ICC-01/11-12 and Registrar, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "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", 4 July 2011, ICC-01/11-01/11-5.

⁶⁰ Mr Gaddafi's Response, para. 7.