



Original: English

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

Date: 10 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

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"

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

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Introduction

1. The Government of Libya files this application before Pre-Trial Chamber I (“the Chamber”) for leave to appeal against the “Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi” dated 4 April 2012¹ (“the Second Postponement Decision”) pursuant to article 82(1)(d) of the ICC Statute, Rule 155 of the Rules of Procedure and Evidence and Regulation 65 of the Regulations of Court.
2. The Government of Libya submits that the Chamber committed a serious error of law by applying an incorrect interpretation of articles 19 and 95 of the ICC Statute and Rule 58 of the ICC Rules of Procedure and Evidence. This incorrect interpretation resulted in the Pre-Trial Chamber erroneously finding that there was no admissibility challenge under consideration at the time of the Second Postponement Decision and therefore no basis upon which to order postponement of the surrender request pursuant to article 95.
3. The Government of Libya has today filed its Appeal against the Second Postponement Decision with the Appeals Chamber pursuant to Article 82(10)(a) which provides the Government with an automatic right of appeal to the Appeals Chamber. This Appeal covers the same error that is the subject of the present application for leave to appeal.
4. The Government of Libya’s primary submission is that no leave is required to have its appeal heard by the Appeals Chamber. The present application for leave is filed in the event that the Appeals Chamber does not accept this submission, and on the basis that the requirements of Article 82(1)(d) are

¹ ICC-01/11-01/11-100

satisfied in that the errors concern issues that would significantly affect the fair and expeditious conduct of the proceedings, and for which an immediate resolution by the Appeal Chamber may materially advance the proceedings. There are no provisions in the Statute or Rules of the Court which prevent the Pre-Trial Chamber from subsequently granting leave in the event that the Appeals Chamber rejects the Government's principal submission in circumstances where the requirements of article 82(1)(d) are met.

5. The Libyan Government takes the opportunity at the outset of respectfully reminding the Pre-Trial Chamber of the context in which this application for leave to appeal is brought. It will be recalled that the National Transitional Council of Libya only gained control of the country in late 2011 after the capture of Muammar Gaddafi. It is currently preparing for elections to be held on 20 June 2012. It is simultaneously engaging in a wholesale review and reform of the work of the entire government which was in a state of significant decay and disarray due to years of corruption, mismanagement and neglect by the Gaddafi regime. This work is being undertaken in a changing security environment as the country has only very recently emerged from armed conflict following a lengthy period in which atrocities were commonplace. The Libyan Government regards the trial of Saif Al-Islam and Abdullah Al-Senussi as a matter of the highest national importance, not only in bringing justice for the Libyan people but also in demonstrating that the new Libyan justice system is capable of conducting fair trials (that meet all applicable international standards) in complex cases. To this end, the Libyan Government has notified the Court by way of a rule 58 request of its commitment to bringing the two suspects in this case to justice in Libya and its intention to file an article 19 admissibility challenge application in the coming weeks.

6. The Libyan Government has expended considerable resources in order to

ensure the safe and secure temporary custody of Saif Al-Islam Gaddafi in Zintan. The Libyan Government is very mindful of the unfortunate way in which Muammar Gaddafi passed away and of the perilous situation which Mr Gaddafi would face if he were not adequately protected while in custody. Accordingly, it has been engaged for some time in the process of negotiations with the local authorities in Zintan to try to make arrangements for his safe transfer to a better equipped detention facility in Tripoli, that meets applicable international standards. Given the situation in Libya, this has not been a straightforward task and has demonstrated to the Libyan Government the considerable difficulties which it would face if it had to immediately arrange for the surrender of Mr Gaddafi to the Hague. It is for these reasons that the Libyan Government has requested the Court to postpone the order to surrender Gaddafi pending completion of the admissibility challenge proceedings.

Procedural History

7. On 27 June 2011, the Chamber issued a warrant of arrest against, among others, Saif Al-Islam Gaddafi ("Mr Gaddafi").² On 5 July 2011 the Registrar notified the Libyan authorities of a request for cooperation asking for their assistance in arresting Mr Gaddafi and surrendering him to the Court.³
8. On 23 January 2012 the Libyan Authorities sought postponement of the surrender of Mr Gaddafi to the Court pending the completion of national proceedings in relation to other crimes against Mr Gaddafi ("First Postponement Request").⁴ This postponement request was based on article 94(1) of the ICC Statute.

² ICC-01/11-01/11-3.

³ ICC-01/11-01/11-5; ICC-01/11-01/11-25-Conf.

⁴ ICC-01/11-01/11-44, with confidential Annex 1.

9. On 7 March 2012 the Chamber issued the “Decision on Libya’s Submissions regarding the arrest of Saif Al-Islam Gaddafi” (“the First Postponement Decision”) dismissing the request for postponement and requesting that the Libyan Government make their decision to surrender Mr Gaddafi to the Court and inform the Chamber accordingly within seven days of notification of the Arabic translation of the decision.⁵

10. On 22 March 2012, in the Notification and Request by the Government of Libya in response to the First Postponement Decision (“the Second Postponement Request”), the Government notified the Chamber of its intention to challenge the admissibility of the case concerning Mr Gaddafi pursuant to articles 19(2)(b), (5) and (6) of the Rome Statute (“Statute”) by 30 April 2012. In this filing the Libyan Government also requested that, pending a decision on this challenge, the Pre-Trial Chamber suspend its surrender request in relation to Mr Gaddafi in accordance with, *inter alia*, Article 95 of the Statute and Rule 58 of the Rules of Procedure and Evidence.⁶

11. On 4 April 2012, the Chamber rendered its Second Postponement Decision in which it rejected the Second Postponement Request and “reiterate[d] its request that Libya make its decision to grant the Surrender Request and proceed immediately with the surrender of Mr Gaddafi to the Court”.

Applicable Law

12. The Pre-Trial Chamber has repeatedly stated that leave to appeal pursuant to Article 82(1)(d) will be granted only if it meets the following two cumulative criteria:
 - i. it must be an issue that would significantly affect (i) both the fair and

⁵ ICC-01/11-01/11-72-Conf.

⁶ ICC-01/11-01/11-82-Conf.

expeditious conduct of the proceedings; or (ii) the outcome of the trial; and

- ii. it must be an issue for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.⁷

13. For the purposes of this test an "issue" is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion.⁸ In addition, the Chamber has held that an appealable issue must emanate from the ruling of the decision concerned and not merely represent an abstract question or a hypothetical concern.⁹

14. The Chamber has previously found that the principle of fairness of proceedings is a fundamental element to all judicial proceedings, and is enshrined in various international legal instruments.¹⁰ Fairness is preserved when a party is provided with the genuine opportunity to present its submissions and to be appraised of, and comment on, the observations and evidence submitted to the Court that might influence its decision.

15. The expeditiousness of proceedings is closely linked to the concept of judicial

⁷ Prosecutor v. Bemba, ICC-01/05-01/08-532, Pre-Trial Chamber II, Decision on the Prosecutor's Application for Leave to Appeal the "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", 18 Sept 2009 ("Bemba Leave to Appeal Confirmation Decision").

⁸ Situation in the Democratic Republic of the Congo, ICC-01/04-168, Appeals Chamber, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, para. 9 ("Lubanga Extraordinary Review Decision").

⁹ Pre-Trial Chamber II, Bemba Leave to Appeal Confirmation Decision, para 17. See also, Prosecutor v. Bemba, ICC-01/05-01/08-75, Pre-Trial Chamber III, Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure, 25 August 2008, para. 11.

¹⁰ Article 10 of the Universal Declaration of Human Rights, article 14(1) of the International Covenant on Civil and Political Rights, Article 6(1) of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, Article 8(1) of the American Convention on Human Rights and Article 7(1) of the African Charter on Human Rights.

proceedings "within a reasonable time"¹¹ and complements the guarantees afforded to the suspect, such as the right to fair and public proceedings. The issue concerned must be of such nature as to significantly affect the expeditiousness of the proceedings, namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned.

16. The Appeals Chamber has held that the Pre-Trial Chamber "must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence".¹²

17. As the Appeals Chamber has previously determined, the issue must be such "that its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial." Furthermore, "advancing" the proceedings has been identified by the Appeals Chamber as "removing doubts about the correctness of a decision or mapping a course of action along the right lines"; the term "immediate" has been defined as "underlin[ing] the importance of avoiding errors through the mechanism provided by subparagraph (d) by the prompt reference of the issue to the court of appeal".¹³

18. The relevant provisions of the ICC Statute and Rules of Procedure which are relied upon by the Government of Libya for the purposes of this application for leave to appeal are as follows:

¹¹ See e.g. ECtHR, *Pélissier and Sassi v. France*, Reports of Judgments and Decisions, 1999-11, Application no 25444/94, paras 67; Inter-American Court of Human Rights ("IACtHR"), *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, Judgment of 21 June 2002, Series C, No 94 (2002), para. 143; M. Nowak (ed.), *U.N. Covenant on Civil and Political Rights, CCPR Commentary*, (Engel Publisher, 2nd rev. ed., 2005), p. 333 et seq., with further references to case law.

¹² *Lubanga Extraordinary Review Decision*, para. 13.

¹³ *Ibid*, paras 14-19.

Article 19

- (1) The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.
- (2) Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:
- ...
- (b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted;
- or
- ...
- (4) The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c).
- (5) A State referred to in paragraph 2 (b) and (c) shall make a challenge at the earliest opportunity.
- (6) Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges, they shall be referred to the Trial Chamber. Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82.
- ...
- (8) Pending a ruling by the Court, the Prosecutor may seek authority from the

Court:

...

- (c) In cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58.

...

Article 95

Where there is an admissibility challenge under consideration by the Court pursuant to article 18 or 19, the requested State may postpone the execution of a request under this Part pending a determination by the Court, unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to article 18 or 19.

Rule 58

- (1) A request or application made under article 19 shall be in writing and contain the basis for it.
- (2) When a Chamber receives a request or application raising a challenge or question concerning its jurisdiction or the admissibility of a case in accordance with article 19, paragraph 2 or 3, or is acting on its own motion as provided for in article 19, paragraph 1, it shall decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings. It may hold a hearing. It may join the challenge or question to a confirmation or a trial proceeding as long as this does not cause undue delay, and in this circumstance shall hear and decide on the challenge or question first.

...

Submissions

19. The Government of Libya seeks leave to appeal on the basis of the following error of law which satisfies the requirements of article 82(1)(d).

20. The Pre-Trial Chamber found that “rule 58 of the Rules only details some specific points of procedure which are involved when making an admissibility challenge under article 19 of the Statute ... [and] cannot therefore be used as a legal basis by the Government of Libya in support of its Second Postponement Request”.¹⁴ It also held that article 95 of the Statute which “only applies when there is an admissibility challenge under consideration ... cannot serve as a legal basis for” the Second Postponement Request because “there is currently no such challenge before the Chamber”.¹⁵

21. In making these findings the Pre-Trial Chamber fell into legal error because, as outlined above with respect to the meaning of the phrase “decision with respect to ... admissibility”, it failed to give effect to the complex inter-relationship between articles 19 and 95 of the ICC Statute and rule 58 of the Rules of Procedure and Evidence. These provisions make clear that an article 19 admissibility challenge may be brought, pursuant to rule 58, by way of a “request” or “application”. In the present case, the Government of Libya made clear in its Second Postponement Request that its “request” for postponement of surrender pursuant to article 95 and rule 58 of the Statute was made in connection with its article 19 admissibility challenge which would be fully detailed in an “application” to be filed with the Court on 30 April 2012. Accordingly, the Pre-Trial Chamber was wrong to assert that there was no admissibility challenge under consideration such that article 95 could be relied upon to found the postponement request.

¹⁴ Second Postponement Decision, paragraph 17.

¹⁵ Second Postponement Decision, paragraph 18.

22. The meaning of “request” and “application” under rule 58 and the corollative application of article 95 to such article 19 “requests” are important legal issues which have not previously been determined by the Appeals Chamber. The terms “request” and “application” in rule 58 must have been intended to operate in such a manner that the “request” is akin to a notification of an admissibility challenge pending the collation of evidence and the “application” is the subsequent filing which details all the arguments and evidence in support of an admissibility challenge. Indeed, it is very common in the procedural law of many legal systems to have a two-step process for substantive legal proceedings involving a notification of intention to file a submission followed by a fully reasoned submission. It is the Libyan Government’s submission that the drafters of the Rome Statute envisaged such a process in relation to article 19 admissibility challenges and it is for this reason that the terms “request” and “application” were inserted into rule 58. The Pre-Trial Chamber’s erroneous application of these provisions led directly to its incorrect finding that there was no article 19 admissibility challenge under consideration at the time of the Second Postponement Decision. As a result the Chamber did not go on to consider whether article 95 applies to surrender requests.¹⁶ The effect of the Pre-Trial Chamber’s approach is to penalize Libya for not filing an “application” that was premature, in the sense that it did not set out fully and completely the legal and factual materials supporting the “application” having regard to the need to gather *inter alia* necessary evidence and properly brief counsel.

23. It is the Libyan Government’s submission that article 95 does apply to surrender requests. This provision operates in effect as an exception (in cases where there is an admissibility challenge) to the article 89(1) duty to surrender an individual to the Court. Indeed, the first part of article 95 specifically

¹⁶ Second Postponement Decision, paragraph 18.

clarifies that it applies to all requests “under this Part” (ie. including requests for surrender). The second part of article 95 enables the Court to rule that the state has to comply even before the jurisdictional challenge is resolved, but this duty to cooperate only applies to requests for the collection of evidence (ie. it is not applicable to requests for surrender). Indeed, the application of the first limb of article 95 to requests for surrender is supported by learned commentators.¹⁷

24. This interpretation of article 95 is also consistent with several other provisions of the ICC Statute which contemplate a situation where a State maintains custody of a suspect until the Court decides on that State’s admissibility challenge. Such provisions include article 19(8) which enables the Prosecutor to “prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58” while challenges to admissibility are pending. This provision is redundant if a State was under an obligation to turn over anyone subject to an arrest warrant immediately. This interpretation of article 95 would also provide for a consistent approach for state challenges to admissibility pursuant to article 19 and *ne bis in idem* challenges brought by a suspect in a national court pursuant to article 89(2).¹⁸ There is no logical reason for the two challenges to be treated any differently and this adds weight to the reason for adopting the Libyan Government’s preferred construction of article 95. This is all the more pressing when one considers that the provisions of the ICC Statute pertaining to cooperation and admissibility are rightly interpreted with the principle of complementarity at the forefront of one’s mind.¹⁹

25. Following this reasoning, had the Pre-Trial Chamber applied the Libyan

¹⁷ Kress & Prost, ‘Article 95’ in Triffterer, “Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article”, 2nd Edition, page 1594 at 4.

¹⁸ Kress & Prost, ‘Article 89’ in Triffterer, “Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article”, 2nd Edition, page 1538 at 2.

¹⁹ Preparatory Committee, 1996 Report, Vol 1, para 316.

Government's article 58 request in the correct way, the decision would have been substantially different. It would have had to conclude that there was an article 19 admissibility challenge under consideration for the purposes of article 95 and would then have had to go on to consider the applicability of article 95 to surrender requests. Had this consideration been undertaken, the Libyan Government's request for postponement of the surrender of Mr Gaddafi pending the determination of its admissibility challenge would have been granted. In Libya's submission there was no proper reason for the request to have been denied.

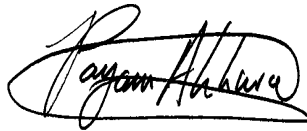
26. The Pre-Trial Chamber's legal error significantly affects the fair and expeditious conduct of the proceedings. It is manifestly unfair to deny the Government of Libya's request for a postponement of the order to surrender Mr Gaddafi in circumstances where it has made an admissibility challenge "request" pursuant to articles 19 and 95 and rule 58. Such a decision plainly runs counter to the doctrine of complementarity upon which the Rome Statute is based. It would be unjust and wrong to fail to recognize the applicability of article 95 to the present situation in circumstances where an admissibility challenge can be said to be under consideration.

27. An immediate resolution of the issue by the Appeal Chamber would materially advance the proceedings. Were the Appeals Chamber to decide that the Pre-Trial Chamber had committed a legal error, it could overrule the Pre-Trial Chamber's decision and decide whether the Government of Libya should be granted a postponement of the order to surrender. Such a postponement would avoid the absurd situation where Libya is forced, under difficult security conditions, to surrender Mr Gaddafi to the Court only for him to have to be subsequently returned to Libya in the event that Libya's admissibility challenge is successful. This scenario would risk unnecessarily risk Mr Gaddafi's security, waste costs and would also set back the progress of Libya's

domestic proceedings which are the subject of the extant admissibility challenge.

Conclusion

28. For these reasons, the Government of Libya respectfully requests the Chamber to grant it leave to appeal against the error of law proposed in this Application.



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Professor Payam Akhavan
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Counsel on behalf of the Government of Libya

Dated this 10th day of April 2012

At Tripoli, Libya