Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-01/11-01/11**
Date: **28 October 2013**

THE APPEALS CHAMBER

Before: **Judge Anita Usaka, 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

Response to the Al-Senussi Defence's "Request for Suspensive Effect"

Source: **The Government of Libya, represented by:**
Professor Ahmed El-Gehani
Professor James Crawford SC
Mr. Wayne Jordash
Ms Michelle Butler

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

The Office of the Prosecutor
Ms. Fatou Bensouda

Counsel for the Defence
Counsel for Saif Al-Islam Gaddafi:
Mr. John R.W.D Jones QC
Ms. Sarah Bafadhel

Counsel for Abdullah Al-Senussi:
Mr. Ben Emmerson QC
Mr. Rodney Dixon
Ms. Amal Alamuddin
Mr. Anthony Kelly
Professor William Schabas

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants (Participation/Reparation)

The Office of Public Counsel for Victims
Ms. Paolina Massidda
Ms. Sarah Pellet
Mr. Mohamed Abdou

The Office of Public Counsel for the Defence

State's Representatives
Professor Ahmed El-Gehani
Professor James Crawford SC
Mr. Wayne Jordash
Ms. Michelle Butler

REGISTRY

Registrar
Mr. Herman von Hebel

Counsel Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

I. INTRODUCTION

1. The Libyan Government hereby files its Response to Abdullah Al-Senussi's "Request for Suspensive Effect" ("Request"), which was filed together with the "Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I's 'Decision on the admissibility of the case against Abdullah Al-Senussi'" on 17 October 2013.[1] This Response relates only to the Request, and not to the substance of the appeal.

2. The Defence seeks suspensive effect in respect of the "Decision on the admissibility of the case against Abdullah Al-Senussi" ("Admissibility Decision") of 11 October 2013.[2] The Government hereby submits that the Chamber should reject the Request for suspensive effect on the bases that:
   a. the order that Mr. Al-Senussi asks the Appeals Chamber to make would not be suspensive in relation to the Admissibility Decision, and could not be made on the legal basis that Mr. Al-Senussi advances; and
   b. the Defence has failed to show that suspensive relief is necessary in order to prevent "an irreversible situation that could not be corrected even if the Appeals Chamber ruled in favour of the Appellant"; or consequences that "would be very difficult to correct and may be irreversible"; or "defeat[ing] the very purpose of the appeal".[3]

II. SUBMISSIONS

A. Absence of legal basis for relief sought

3. Mr. Al-Senussi's Request is made pursuant to Article 82(3) of the Statute, and

[1] ICC-01/011-01/11-468.
[2] ICC-01/11-01/11-466.
[3] Appeals Chamber, *Prosecutor v. Bemba*, Decision on the request of Mr Bemba to give suspensive effect to the appeal against the "Decision on the admissibility and abuse of process challenges", ICC-01/05-01/08-817, 9 July 2010, para. 11; *Prosecutor v. Lubanga*, Decision on the request of Mr. Thomas Lubanga Dyilo for suspensive effect of his appeal against the oral decision of Trial Chamber I of 18 January 2008, ICC-01/04-01/06-1290, 22.04.2008.

Rule 156(5) of the Rules of Procedure and Evidence.[4] Under these provisions, Mr. Al-Senussi requests that the Appeals Chamber order the Libyan Government "not to try Mr. Al-Senussi in Libya while the Appeals Chamber is seized of this appeal and until the Appeals Chamber's final judgment on the admissibility of Mr. Al-Senussi's case is rendered".[5] However, it is submitted that, even if the Appeals Chamber were to grant suspensive effect in relation to the Admissibility Decision, this would not provide a basis for making the order requested.

4. Suspension of the effect of the Admissibility Decision means simply that the legal position of the parties is returned to the position which would have pertained if the decision subject to appeal had not been made:

> *Suspension [...] is designed to sustain the status quo ante, that is, the position obtaining prior to the issuance of the sub judice decision.*[6]

5. For the following reasons, the Admissibility Decision did not change the legal *status quo*. As a result, the suspension of its effect does not entail the consequences requested by Mr. Al-Senussi.

6. The mere launching of an ICC investigation does not, *of itself*, have any impact upon the legal validity of sovereign acts of a state: *only the Chamber's determination of a case as admissible before the ICC does so*. Whenever the ICC initiates or maintains criminal proceedings, it does so on the presumption that the domestic jurisdiction is not conducting any criminal process or is conducting one that is not genuine. Of course, a state could simply acquiesce in the ICC's exercise of jurisdiction. However, once a state has launched an admissibility challenge and the existence of a domestic case is not in issue, it would take a

[4] Request, para. 2.
[5] Request, paras. 13, 32.
[6] ICC-01/04-02/12-12OA, para.17 referring to ICC-01/04-01/06-1444-Anx OA 2, para.6

positive decision of admissibility in order to deny the domestic jurisdiction its right to administer a criminal justice process on its own territory. Where – as in the present case – the domestic legal order does not acquiesce, the *status quo* entails the normal administration of a criminal justice process at the domestic level.

7. The Appeals Chamber's finding that "states have the primary responsibility to exercise criminal jurisdiction"[7] can only mean that, once a state has established the existence of a domestic process (in respect of the same case) exercise of criminal jurisdiction at the national level is the *status quo.* Consistent with this is the general principle of international law, that the sovereign acts of a State within its domestic jurisdiction are presumed to be valid unless otherwise established.[8]

8. In effect, therefore, the Admissibility Decision in Libya's favour did not *create* a right for Libya to progress its domestic criminal process. Rather, it was a decision *not to interfere* in that extant process. The suspension of the Admissibility Decision – and the maintenance of the *status quo ante* - cannot therefore preclude the Libyan Government from making progress with the domestic case.

B. Impact upon the appeal and/or creation of an "irreversible situation"

9. Article 82(3) sets out a presumption against suspensive effect, such that "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". The burden therefore falls on the party requesting suspensive effect to satisfy the Appeals Chamber that implementation of the Chamber's decision would result

[7] Kenya Admissibility Decision, Appeals Chamber, para. 36.
[8] *See* Bin Cheng, *General Principles Of Law As Applied By International Courts & Tribunals* 305 (1953).

in any of the three above scenarios.[9] Failure to demonstrate "strong" or "compelling" reasons, which would justify the suspension, will result in the Appeals Chamber dismissing the request.[10]

10. Mr. Al-Senussi argues that failure to grant suspensive effect "would defeat the very purpose of the appeal and render it moot"[11] and/or would create "an irreversible situation that could not be corrected even if the Appeals Chamber ruled in favour of the Appellant".[12] In support of this, Mr. Al-Senussi asserts that Libya would "try and sentence Mr. Al-Senussi";[13] would fail to provide a fair trial; and would imminently impose the death penalty. Mr. Al-Senussi also asserts that suspensive effect, and in particular, the order requested, is justified in order to guarantee that the Appeals Chamber would consider and decide on the merits of the Defence's appeal against postponement of the surrender order relating to Mr. Al-Senussi. It is submitted that each of these arguments are based upon factual and/or legal errors, and must be rejected.

11. Further, or in the alternative, Mr. Al-Senussi's Request fails to demonstrate that it would be proportionate to prevent Libya making progress with its domestic criminal justice process. It is a mark of considerable achievement that a domestic criminal investigation, which has received the imprimatur of the Pre-Trial Chamber, has been possible in a transitional, post-revolutionary Libya. The challenges that remain can be overcome only if the ICC, and the international community more generally, provide Libya with the opportunity to continue its processes until completion. Unnecessary delays or adjournments to the judicial process risks creating further obstacles that would damage the integrity of the process or otherwise prove to be chronically disruptive. It would, therefore, be disproportionate and inappropriate to impose an order

[9] ICC-01/09-02/11-401 para. 10.
[10] ICC-01/09-02/11-401, para. 10; ICC-01/04-02/12-12, paras. 23-24.
[11] Request, para. 19.
[12] Request, para. 19.
[13] Request, para. 19.

upon Libya preventing progress with the domestic criminal justice process. This point is made yet clearer when it is considered that the effect of preventing progress with the domestic case against Mr. Al-Senussi would not impact only upon that one case, but would have that effect in relation to the cases against all joined co-accused.

1. Purpose of the appeal

12. Mr. Al-Senussi argues that "[t]he very purpose of the appeal is […] to determine finally where Mr. Al-Senussi is to be tried and sentenced".[14] He refers to the Admissibility Decision as the "decision to try and sentence Mr. Al-Senussi in Libya".[15] This reveals a profound misconception of the legal nature of the appeal, and likewise of the Admissibility Decision. Clearly the Admissibility Decision does not preclude subsequent applications, by the Prosecutor under article 19(10) (which may, of course, be informed by information or representations originating from the Defence).

13. Still less is the Admissibility Decision a decision to "try and sentence" anyone. The decision to proceed to trial is that of the prosecuting authority, and the decision to sentence is that of the trial court, and only if the accused is found guilty. The purpose of the appeal is corrective:[16] to determine whether, at the time of the Admissibility Decision, the Pre-Trial Chamber erred in its analysis of the law and facts – not to preclude future submissions on the issue of admissibility.

2. Alleged irreversible consequences

14. Mr. Al-Senussi's Request relies upon this erroneous conception of the purpose of the appeal, in order to assert that suspensive effect is justified as a means of

[14] Request, para. 20.
[15] Request, para. 21.
[16] Decision on the "Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber's Decision on Admissibility" ICC-01/09-01/11-234, para. 11.

preventing Libya from behaving "as if a final decision on the admissibility of the case has already been made by the ICC".[17] In other words, the underlying basis for the Request is the *mere existence of the defence's right of appeal*. If that were to lead automatically to suspensive effect, it would not only empty the existence of the decision of the Pre-Trial Chamber of any effect or meaning, but would also place the State in a worse position than prior to the Admissibility Decision. As has been concluded many times in the jurisprudence, suspensive effect is not automatic. The Appeals Chamber has previously found that the decision to order that an appeal has suspensive effect is discretionary, and 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".[18]

15. In order to be successful in an application for suspensive effect, such circumstances must indicate "an irreversible situation that could not be corrected even if the Appeals Chamber ruled in favour of the Appellant"; or consequences that "would be very difficult to correct and may be irreversible"; or would "defeat the very purpose of the appeal".[19] Mr. Al-Senussi points out that "the need to preserve the integrity of the proceedings overrides any other consideration".[20] This must include the integrity of the domestic proceedings – especially where the Pre-Trial Chamber has positively assessed their existence and focus.

---

[17] Request, para. 21.

[18] *Prosecutor v. Saif Al-Islam Gaddafi*, "Decision on the request for suspensive effect and related issues", ICC-01/11-01/11-387, para. 22; *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.

[19] Appeals Chamber, *Prosecutor v. Bemba*, Decision on the request of Mr Bemba to give suspensive effect to the appeal against the "Decision on the admissibility and abuse of process challenges", ICC-01/05-01/08-817, 9 July 2010, para. 11; *Prosecutor v. Lubanga*, Decision on the request of Mr. Thomas Lubanga Dyilo for suspensive effect of his appeal against the oral decision of Trial Chamber I of 18 January 2008, ICC-01/04-01/06-1290, 22.04.2008.

[20] *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", ICC-01/04- 01/07-3344 (OA 13), 16 January 2013, para. 9.

a) Timing of trial

16. Mr. Al-Senussi's only factual basis for assertions concerning the timing of the trial are "report[s] that the accusation phase would be completed on 24 October 2013, which would make the accusation phase a month shorter than was submitted by Libya in its filing to the ICC".[21] We are now, of course, beyond that date, without the consequence that Mr. Al-Senussi predicted. Not only have his assertions been shown to be baseless, they were – even at the time of writing – unsupported by credible evidence.

17. Furthermore, even if the Libyan criminal process were to proceed beyond the accusation stage, this could found a request for suspensive effect only if that process were to create "an irreversible situation that could not be corrected even if the Appeals Chamber ruled in favour of the Appellant"; or consequences that "would be very difficult to correct and may be irreversible"; or would "defeat the very purpose of the appeal".[22] Mr. Al-Senussi's argument that Article 17(1)(c) is a "different basis for inadmissibility"[23] is erroneous, and in any event seeks to distract from the fact that mere progress with a domestic trial would not necessarily impose any prejudice upon the Defence, let alone any *irreversible* consequences. Whilst Mr. Al-Senussi's arguments concerning the death penalty, the quality of due process in Libya, and the appeal against the postponement of the surrender order (each of which are addressed below) might *potentially* meet this test, mere progress in the domestic case does not.

b) Arguments concerning the death penalty

18. The Defence asserts that "[i]n Mr. Al-Senussi's case, any domestic trial in Libya

[21] Request, para. 22.

[22] Appeals Chamber, *Prosecutor v. Bemba*, Decision on the request of Mr Bemba to give suspensive effect to the appeal against the "Decision on the admissibility and abuse of process challenges", ICC-01/05-01/08-817, 9 July 2010, para. 11; *Prosecutor v. Lubanga*, Decision on the request of Mr. Thomas Lubanga Dyilo for suspensive effect of his appeal against the oral decision of Trial Chamber I of 18 January 2008, ICC-01/04-01/06-1290, 22.04.2008.

[23] Request, para. 23.

would inevitably result in the imposition of the death penalty", and appears to assert, albeit opaquely, that this sentence would be carried out by the time of the appeal.[24] This argument has already been made on numerous occasions, and is profoundly flawed. Although the Libyan Government's response thereto has already been made resoundingly clear [25] (and accepted by the Pre-Trial Chamber), it will be summarised here. Notwithstanding the irrelevance of capital punishment to the Pre-Trial Chamber's admissibility assessment,[26] there is absolutely no credible sense in which imposition could either be imminent, or could follow automatically from a conviction. The following reasoning, in support of the Libyan Government's response to the above arguments, applies *even if Mr. Al-Senussi's erroneous submissions on the imminence of the trial were accepted*.

19. First, any judgment of the Libyan Criminal Trial Court can be appealed to the Supreme Court by the Prosecutor or by the defendant, depending on whether it is a verdict of acquittal or conviction. If there is an error of law, the Supreme Court nullifies the verdict. Where the death penalty has been imposed, a more

[24] Request, paras. 19, 26.

[25] See Admissibility Challenge, 132-134.

[26] The Court was not designed to harmonise standards and enforce an agreed ideal that is confined to certain parts of the world. A state's recourse to the death penalty is lawful under international law and is outside the judicial purview of the ICC. According to the complementarity principle, "from the standpoint of the Statute and the Court, states are free to decide on the question in accordance with their national laws" (Jesssica Almqvist, "Complementarity and Human Rights: A Litmus Test for the International Criminal Court" (2008) 30 Loy. L.A. Int'l & Comp. L. Rev 335, 341). This is reflected in Article 80 of the Statute (Carsten Stahn, "Libya, the International Criminal Court and Complementarity: A Test for 'Shared Responsibility'" (2012) JICJ 1, 22), as well as in the Statement of Mr Conso (Italy) (President), 9th plenary meeting, 17 July 1998, A/CONF.183/SR.9, para 53 (contained within A/CONF.183/13 (Vol.11) at page 124:

> *"The debate at this conference on the issue of which penalties should be applied by the Court has shown that there is no international consensus on the inclusion or non-inclusion of the death penalty. However, in accordance with the principle of complementarity, national jurisdictions have the primary responsibility for investigating, prosecuting and punishing individuals, in accordance with their national laws, for crimes falling under the jurisdiction of the International Criminal Court. In this regard, the Court would clearly not be able to affect national policies in this field. It should be noted that not including the death penalty in the Statute would not in any way have a legal bearing on national legislation and practice regarding the death penalty. Nor shall it be considered as influencing the development of international customary law or in any other way the legality of penalties imposed by national systems for serious crimes".*

stringent procedure is followed: the Supreme Court is not limited to considering errors of law, but reviews all factual, legal and procedural matters leading to the verdict and sentence.

20. Second, the sentence *cannot be carried out* until the Supreme Court has considered the case and, *even if the defendant does not appeal the sentence, the Prosecutor is obliged to do so* before the sentence can be carried out. (Articles 385bis and 429 Criminal Procedure Code).

21. Third, there is also provision, within Libyan domestic law, for commutation of a death sentence to one of life imprisonment where there is forgiveness. Consistent with Article 6 of the International Covenant on Civil and Political Rights, the case is brought back before the Trial Court to hear evidence of the family members and to impose a new sentence on the convicted person.

22. Fourth, with specific regard to Mr. Al-Senussi, the Government's commitment to applying its domestic processes in full and not rushing to judgment are apparent from, *inter alia*, the progression of his case to the accusation stage, and its joinder with the cases against other accused with alleged involvement in the same crimes. The suggestion that Mr. Al-Senussi is at imminent risk of execution is completely without merit.

c) Due process

23. Mr. Al-Senussi also seeks to assert that, notwithstanding the issue of sentencing, any Libyan criminal process entails "continuing violations of Mr. Al-Senussi's fundamental due process and fair trial rights [which] […] could not be reversed after the event".[27] The Libyan Government refutes these allegations vehemently. However, presuming for present purposes that the Appeals Chamber were to allow Mr. Al-Senussi's appeal, such that the Libyan domestic legal system no

[27] Request, para. 19. See also, para. 28.

longer had the right to conduct the trial, any prejudice – in the form of investigations or court proceedings undertaken up to that point – *would* be reversed. At the point of transfer of Mr. Al-Senussi from Libya to the ICC, there would be no possibility of conviction or sentencing in Libya unless a subsequent admissibility challenge were successful. Any prejudice that might conceivably be caused to Mr. Al-Senussi by the denial of suspensive relief must be drastically diminished by this fact.

24. As already noted, Mr. Al-Senussi must not be permitted to rely upon the mere existence of his right to appeal the Admissibility Decision. Consequently, the likelihood of Mr. Al-Senussi's arguments succeeding before the Appeals Chamber must be borne in mind. Mr. Al-Senussi recognises that his arguments, in this regard, are an allegation that the "Pre-Trial Chamber erred in finding that his case was inadmissible before the ICC" which is the "subject of the present appeal".[28] Not only were Mr. Al-Senussi's arguments concerning Libyan due process rejected by the Pre-Trial Chamber, they are as yet unsubstantiated before the Appeals Chamber.

d) Appeal against the postponement of surrender order

25. Mr. Al-Senussi also seeks to meet his burden of proof in relation to suspensive effect by asserting that it is necessary in order to "guarantee that the Appeals Chamber would consider and decide on the merits of the Defence's appeal against the postponement of surrender order against Mr. Al-Senussi".[29] It is submitted, first, that the Appeals Chamber's consideration of the Defence's appeal against the postponement of surrender order is unaffected by the Admissibility Decision. There is no reason why this appeal cannot be adjudicated in the absence of suspensive effect in relation to the Admissibility Decision and/or of the order that Mr. Al-Senussi seeks in the Request.

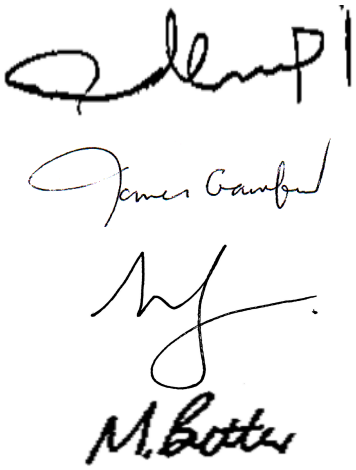
[28] Request, para. 19. See also para. 28.
[29] Request, para. 31.

26. Even if there were any prejudice to Mr. Al-Senussi which suspensive effect would alleviate, this must be weighed against the prejudice caused to the Libyan Government by provision of suspensive effect. It is self-evident that postponement of the surrender order was granted in order to ensure that the Libyan domestic criminal process was not prejudiced by an ICC case that may have been found inadmissible. The fact that it has now been so found further reaffirms the need for postponement of the surrender.

III. RELIEF REQUESTED

27. For each and all of the foregoing reasons, the Libyan Government respectfully submits that the Appeals Chamber should reject the Defence's Request.

Respectfully submitted:



Professor Ahmed El-Gehani
Professor James Crawford SC
Mr Wayne Jordash
Ms Michelle Butler

Libyan ICC Coordinator and
Counsel on behalf of the Government of Libya
in the case of Abdullah Al-Senussi

Dated this 28th day of October 2013
At London, United Kingdom