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APPEALS CHAMBER

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

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

Public

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"

Source: The Government of Libya, represented by:
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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 appeal before the Appeals Chamber 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)(a) of the ICC Statute and Rule 154 of the Rules 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 Libyan Government takes the opportunity at the outset of respectfully reminding the Appeals Chamber of the context in which this appeal is brought. It will be recalled that the National Transitional Council of Libya only gained control of the country following the capture of Muammar Gaddafi in late 2011. 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

¹ ICC-01/11-01/11-100

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.

4. 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

5. 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

² ICC-01/11-01/11-3.

assistance in arresting Mr Gaddafi and surrendering him to the Court.³

6. 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.
7. 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
8. 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
9. On 4 April 2012, the Chamber rendered its Second Postponement Decision in which it rejected the Second Postponement Request and "reiterate[d] its

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.

⁵ ICC-01/11-01/11-72-Conf.

⁶ ICC-01/11-01/11-82-Conf.

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

10. The Government of Libya files this appeal pursuant to Article 82(1)(a) and in accordance with Rule 154(1). The Government of Libya will file a document in support of its appeal under Regulation 64(2) to elaborate on the grounds of appeal as set out below.

11. Article 82(1)(a) of the Statute allows parties to appeal “A decision with respect to ... admissibility.” Such appeals can be based on errors of law, errors of fact and procedural irregularities.⁷

12. Rule 154(1) states that “An appeal may be filed under ... article 82, paragraph 1 (a) or (b), not later than five days from the date upon which the party filing the appeal is notified of the decision.” Regulation 64(2) provides that “the appellant shall file a document in support of the appeal, with reference to the appeal, within the 21 days of notification of the relevant decision.”

13. 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 appeal are as

⁷ The Appeals Chamber has held that appeals under Article 82(1)(a) can be based on errors of laws, errors of fact and procedural errors. See *Prosecutor v. Kony*, Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19 (1) of the Statute" of 10 March 2009, ICC-02/04-01/05, 16 September 2009, para. 47.; *Prosecutor v. Bemba*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled "Decision on the Admissibility and Abuse of Process Challenges", ICC-01/05-01/08, 19 October 2010, para. 100-101. The Appeals Chamber has held that “for a successful appeal, the error raised by an appellant must have materially affected the impugned decision ... the Appeals Chamber stated that an error materially affected the impugned decision if the decision would have been "substantially different'.” *Prosecutor v. Katanga*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07, 25 September 2009, para. 37.

follows:

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 on Appeal

A. The Second Postponement Decision is a "decision with respect to ... admissibility"

14. The Government of Libya brings this appeal against the Second Postponement Decision before the Appeals Chamber on the basis that it is "*a decision with respect to ... admissibility*" as provided for Article 82(1)(a).

15. The Government is mindful of the previous rulings of the Appeals Chamber with respect to the phrase "decision with respect to" that the operative part of the decision itself must pertain directly to a question on the jurisdiction of the Court or the admissibility of a case. It is not sufficient that there is an indirect or tangential link between the underlying decision and questions of jurisdiction or admissibility. The Appeals Chamber has also clarified that it is the nature, and not the ultimate effect or implication of a decision, that determines whether an appeal falls under article 82 (1) (a) of the Statute. Even if the ultimate impact of a decision of a Pre-Trial or Trial Chamber were to affect the admissibility of cases, that fact would not, in and of itself, render the decision a "decision with respect to [...] admissibility" under article 82 (1) (a).⁸

16. In the present case, a core part of the Pre-Trial Chamber's reasoning in the Second Postponement Decision was a determination that there was no article 19 admissibility challenge under consideration by the Pre-Trial Chamber and in fact only a mere announcement by the Libyan Government that an admissibility challenge was forthcoming.⁹ As is set out below with respect to the errors of fact and law alleged on this appeal, it is the Libyan Government's

⁸ 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, para 17.

⁹ Second Postponement Decision, paragraph 18.

submission that in fact, an admissibility challenge was already under consideration by the Pre-Trial Chamber prior to the Second Postponement Decision by virtue of the Second Postponement Request. This is because the Second Postponement Request invoked rule 58 of the Rules of Court and “requested” that the order for surrender be suspended pending the resolution of the article 19 Admissibility Challenge.¹⁰ This “request” was made pursuant to rule 58 and is the first stage in the Libyan Government’s article 19 admissibility challenge, which is to be followed up by an “application” pursuant to rule 58 on 30 April 2012.¹¹

17. The Second Postponement Decision does not merely have an indirect or tangential link to a question of admissibility but rather is, by its very nature, a decision pertaining directly to admissibility. For this reason, the Libyan Government maintains that this appeal is appropriately brought by right pursuant to article 82(1)(a) of the Statute.

B. The Second Postponement Decision suffers from an error of law

18. 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”.¹² 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”.¹³

19. In making these findings the Pre-Trial Chamber fell into legal error because, as

¹⁰ Second Postponement Request, paragraph 4.

¹¹ Second Postponement Request, paragraphs 3-4.

¹² Second Postponement Decision, paragraph 17.

¹³ Second Postponement Decision, paragraph 18.

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.

20. 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. 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.

21. The Government of Libya's appeal against the Second Postponement Decision meets the standard set by the Appeals Chamber for a successful appeal, namely that "the error raised by an appellant must have materially affected the impugned decision ... [in that] the decision would have been 'substantially different'."¹⁴ The Pre-Trial Chamber rejected the Second Postponement Request on the sole basis that there was no extant article 19 admissibility challenge. As a result the Chamber did not go on to consider whether article 95 applies to surrender requests.¹⁵

22. 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 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

¹⁴ *Prosecutor v. Katanga*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07, 25 September 2009, para. 37.

¹⁵ Second Postponement Decision, paragraph 18.

commentators.¹⁶

23. 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).¹⁷ 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.¹⁸

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

¹⁶ 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.

¹⁷ 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.

¹⁸ Preparatory Committee, 1996 Report, Vol 1, para 316.

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.

Request for Suspensive Effect

25. Pursuant to article 82(3) of the Statute and rule 156(5) of the Rules of Procedure and Evidence, the Government of Libya requests that this appeal have suspensive effect on the order to surrender Mr Gaddafi until the appeal has been concluded. The Government of Libya notes the Appeals Chamber's previous determinations that Article 82(3) of the Statute provides that an appeal shall not have suspensive effect "unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence." [...] The decision on such a request is within the discretion of the Appeals Chamber. Therefore, 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 the circumstances.¹⁹

26. In determining whether to exercise such discretion, it has been stated that the "guiding principle in the exercise of the discretion of the Court lies in the evaluation of the consequences that enforcement of an erroneous decision, if that is found to be the case by the decision of the Appeals Chamber, could have on the proceedings before the first instance court."²⁰ In past decisions, the Appeals Chamber, when deciding on requests for suspensive effect, has

¹⁹ See, among other Appeals Chamber authorities. Prosecutor v. Thomas Lubanga Dyilo, "Decision on the Prosecutor's request to give suspensive effect to the appeal against Trial Chamber I's oral decision to release Mr Thomas Lubanga Dyilo", 23 July 2010, ICC-01/04-01/06-2536 (OA 17), para. 7 (citing Prosecutor v. Jean-Pierre Bemba Gombo, "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'", 9 July 2010, ICC-01/05-01/08-817 (OA 3), para. 6 and the footnotes referenced to therein).

²⁰ ICC-01/04- 01/06-1290-Anx OA11, 13 May 2008, Dissenting Opinion of Judge Pikis, para. 9.

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,²¹ (ii) would lead to consequences that "would be very difficult to correct and may be irreversible",²² or (iii) "could potentially defeat the purpose of the [...] appeal".²³

27. Enforcing the order to surrender Mr Gaddafi in the present circumstances, pending the outcome of this appeal, would have far reaching consequences on the admissibility proceedings as a whole. The Libyan Government is still in the process of conducting its investigations into Mr Gaddafi's alleged criminal conduct and his surrender would prevent the Libyan investigative authorities from conducting interviews with him and obtaining further evidence to support its case against him. This adverse consequence would be very difficult to correct and may be irreversible as it would frustrate the ability of the Libyan authorities to demonstrate concrete evidence of ongoing investigations in its admissibility challenge.

28. Moreover, in the present case, suspensive effect is necessary in order to avoid defeating the very purpose of the appeal. Given that it is the immediate surrender of Mr Gaddafi that has been ordered, suspensive effect is required in order to avoid pre-empting the subject of the appeal – ie. the decision to reject the second postponement request in relation to the surrender of Mr Gaddafi. If the order is not suspended, the entire appeal is rendered moot.

²¹ Prosecutor v. Thomas Lubanga Dyilo, "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", 22 April 2008, ICC-01/04-01/06-1290 (OA 11), para. 8.

²² Prosecutor v. Thomas Lubanga Dyilo, "Decision on the requests of the Prosecutor and the Defence for suspensive effect of the appeals against Trial Chamber I's Decision on Victim's Participation of 18 January 2008", 22 May 2008, ICC-01/04-01/06-1347 (OA 9, OA 10), para. 23. See also paras 19-20.

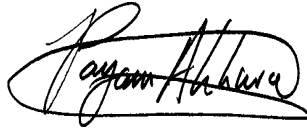
²³ Prosecutor v. Thomas Lubanga Dyilo, "Reasons for the decision on the request of the Prosecutor for suspensive effect of his appeal against the 'Decision on the release of Thomas Lubanga Dyilo'", 22 July 2008, ICC-01/04-01/06-1444 (OA 12), para. 10.

29. It is also submitted that the continuation of the surrender order, amid the current difficult security situation in Libya, and in conditions where there has yet been no judicial determination of admissibility and where the ordered State is in the process of attempting to demonstrate to the Court that it is willing and able to investigate and prosecute the requested person would defeat the object and purpose of the complementarity principle. Such an outcome would be in direct contradiction of this fundamental principle and would undermine one of the core tenets upon which the International Criminal Court was founded. Suspensive effect is thus needed both to prevent irreparable prejudice in this appeal and to uphold the very premise upon which many States signed and ratified the Rome Statute.

Conclusion

30. For these reasons, the Government of Libya respectfully requests the Appeals Chamber to:

- i. order that the appeal has suspensive effect in accordance with article 82(3) and rule 156(5); and
- ii. overturn the Second Postponement Decision by granting the Government's request for postponement of the order to surrender Mr Gaddafi pending the determination of its admissibility challenge.



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Dated this 10th day of April 2012

At Tripoli, Libya