

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **17 June 2013**

THE APPEALS CHAMBER

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

SITUATION IN LIBYA

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

PUBLIC

Defence Response to Government of Libya's Request for Suspensive Effect

Source: Defence for Mr. Saif Al-Islam Gaddafi

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

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I. Introduction

1. The Government of Libya has relied upon Article 82(3) of the Statute to request the Appeals Chamber to suspend the Government's obligation to surrender Mr. Saif Al-Islam Gaddafi to the International Criminal Court (ICC) (the Request).
2. The Appeals Chamber is not currently seised of an appeal against a decision concerning Mr. Gaddafi's surrender. The Appeals Chamber has no competence to suspend an obligation which does not fall within the scope of its appellate review. As such, the Appeals Chamber has no competence to suspend the Government's obligation to surrender Mr. Gaddafi to the ICC.
3. The Government has also failed to provide any argumentation concerning the Appeals Chamber's competence over this matter, nor has it provided any explanation or justification as to how the criteria for suspensive effect would be met in the event that the Appeals Chamber were competent to grant suspensive effect.
4. As the party bringing both the appeal and the request for suspensive effect, the Government bears the burden of argumentation. In the absence of any such argumentation, the burden cannot be met.
5. In light of the patent deficiencies in the Request and bearing in mind Mr. Gaddafi's current detention conditions and precarious legal situation,¹ it would be in the interests of justice and expedition for the Appeals Chamber to dismiss the Request *in limine*, rather than resolving the issue after receiving submissions concerning the merits of the Request.
6. It would also be consistent with the practice adopted by the Appeals Chamber in connection with other instances of unfounded appellate filings.²

¹ ICC-01/11-01/11-323-Conf-Exp, ICC-01/11-01/11-332.

² See for example, ICC-01/11-01/11-64, ICC-01/04-01/06-800, and ICC-01/09-74.

7. Nonetheless, should the Appeals Chamber decline to dismiss the Request *in limine*, then the Defence for Mr. Gaddafi reserves its right to submit a full response in relation to the merits of the Request.

II. Procedural History

8. On 27 June 2011, the Pre-Trial Chamber granted the Prosecutor's application for the issuance of an arrest warrant against Mr. Saif Al-Islam Gaddafi.³
9. On 4 July 2011, the Registry transmitted a surrender request to the Libyan authorities.⁴ Libyan authorities apprehended Mr. Gaddafi on 19 November 2011.
10. On 6 December 2011, the Pre-Trial Chamber invited the Government of Libya to submit observations concerning, *inter alia*, whether and when Libya intended to implement the surrender request.⁵
11. On 23 January 2012, the Government of Libya informed the Pre-Trial Chamber that the authorities intended to prosecute Mr. Gaddafi for domestic offences, which were unrelated to the ICC arrest warrant. The Government therefore requested to postpone Mr. Gaddafi's surrender pursuant to Article 94 of the Statute.⁶
12. The Pre-Trial Chamber dismissed the request on the basis that Article 94 does not encompass surrender requests, and further requested Libya to make its decision to grant the Surrender Request and to arrange with the Registry for Mr. Gaddafi's surrender to the ICC.⁷
13. The Government of Libya subsequently notified the Chamber of its intention to file a challenge to the admissibility of the case, and therefore requested the

³ ICC-01/11-01/11-1.

⁴ ICC-01/11-01/11-5.

⁵ ICC-01/11-01/11-39-Red.

⁶ ICC-01/11-01/11-44, confidential annex 1.

⁷ ICC-01/11-01/11-72.

Chamber to postpone the Government's obligation to surrender Mr. Gaddafi to the ICC, pursuant to Article 95 of the Statute.⁸

14. On 4 April 2012, the Pre-Trial Chamber rejected the request on the ground that Article 95 could not be invoked in connection with a hypothetical admissibility challenge.⁹ The Pre-Trial Chamber therefore "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".¹⁰
15. The Government appealed the decision directly to the Appeals Chamber, pursuant to Article 82(1)(a), and filed a request for leave to appeal before the Pre-Trial Chamber, pursuant to Article 82(1)(d).
16. The Appeals Chamber dismissed the appeal *in limine* due to the fact that the impugned decision was not a decision on admissibility or jurisdiction, and therefore fell outside of the scope of Article 82(1)(a).¹¹
17. On 1 May 2012, the Government of Libya filed a challenge to the admissibility of the case, and contemporaneously invoked Article 95 of the Statute in order to request the postponement of its obligation to surrender Mr. Gaddafi to the ICC.¹²
18. On 1 June 2012, the Pre-Trial Chamber granted the postponement.¹³ The Chamber nonetheless emphasised that Article 95 only permitted Libya to postpone the surrender request on a temporary basis, pending the Chamber's determination of the admissibility challenge.¹⁴
19. On 31 May 2013, the Pre-Trial Chamber rejected the admissibility challenge, and further reminded Libya of its obligation to surrender Mr. Gaddafi to the

⁸ ICC-01/011-01/11-82-Conf.

⁹ ICC-01/11-01/11-100.

¹⁰ *Ibid.* at p. 9.

¹¹ ICC-01/11-01/11-126.

¹² ICC0-01/11-01/11-130.

¹³ ICC-01/11-01/11-163.

¹⁴ At para. 40.

ICC.¹⁵ In referring to this surrender obligation, the Chamber cited its earlier decision of 4 April 2012.¹⁶

20. On 7 June 2013, the Government of Libya appealed the admissibility decision, and further requested the Appeals Chamber to “suspend the order for the surrender of Saif Al-Islam Gaddafi pending the conclusion of the present appeal, pursuant to article 82(3) of the Statute”.¹⁷

III. Submissions

- (a) The Appeals Chamber is seised of a decision on the admissibility of the case, and not a decision ordering Mr. Gaddafi’s surrender. It therefore has no competence to suspend Libya’s obligation to surrender Mr. Gaddafi within the purview of the present appellate proceedings.

21. A decision on admissibility is a decision confirming whether the Court will continue to exercise jurisdiction over the case. Such decisions can be issued irrespective of whether the defendant is in the custody of the ICC, the custody of national authorities, or at large. To borrow the findings of the Appeals Chamber, the “subject matter of the appeal, the sub-judice decision, is not on the face of it a “decision granting or denying [surrender]” of the person”.¹⁸

22. In its decision on the admissibility challenge, the Pre-Trial Chamber made no legal findings or orders concerning the Government of Libya’s obligation to surrender Mr. Gaddafi to the ICC. The Chamber merely recalled the Government’s obligation to do so, and in so doing, cited back to earlier decisions.¹⁹

¹⁵ ICC-01/11-01/11-344-Red.

¹⁶ *Ibid.* at fn 354.

¹⁷ ICC-01/11-01/11-350 at para. 12.

¹⁸ ICC-01/04-01/06-926-at para.2.

¹⁹ ICC-01/11-01/11-344-Red at footnote 354.

23. The Government's obligation to surrender Mr. Gaddafi to the ICC stems from the Pre-Trial Chamber's decision on the Prosecutor's application for an arrest warrant. The surrender obligation therefore predates and exists independently of the decision on the admissibility challenge.
24. This is consistent with the fact that Article 19(9) of the Statute specifies that the "making of a challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge".
25. For this reason, in its 1 June 2012 decision on the Government's request to invoke Article 95 in order to postpone the surrender of Mr. Gaddafi, the Pre-Trial Chamber cited Article 19(9) in order to conclude that notwithstanding the admissibility challenge,
- [t]he arrest warrant remains valid in accordance with article 19(9) of the Statute, and accordingly Libya must ensure that all necessary measures are taken during the postponement in order to ensure the possibility of an immediate execution of the Surrender Request should the case be found admissible.²⁰
26. The legal reasoning underpinning the Government's current obligation to surrender Mr. Gaddafi thus predated and existed autonomously of the Chamber's decision on the admissibility challenge.
27. The independence of the Government's obligation to surrender Mr. Gaddafi to the ICC is further underscored by the fact that the Government expressly requested the Appeals Chamber to suspend its obligation to surrender Mr. Gaddafi to the ICC, as opposed to requesting the Appeals Chamber to suspend the implementation of the Pre-Trial Chamber's decision on the admissibility of the case. If the Government's obligation to surrender Mr. Gaddafi to the ICC were an intrinsic part of the Chamber's resolution of the admissibility challenge, then suspension of the decision on admissibility

²⁰ ICC-01/11-01/11-163 at para. 43.

would have automatically suspended the obligation to surrender Mr. Gaddafi to the ICC.

28. As the Pre-Trial Chamber was not called upon to resolve any legal or factual disputes concerning Libya's obligation to surrender Mr. Gaddafi to the ICC within the context of its decision on the admissibility challenge, Libya's present appeal against this decision cannot encompass any issues pertaining to Libya's obligation to surrender Mr. Gaddafi to the ICC.
29. This is in line with the Appeals Chamber's clarification that firstly, "only an "issue" may form the subject-matter of an appealable decision", and secondly, "[a]n issue is an identifiable subject or topic requiring a decision for its resolution".²¹ Since the Pre-Trial Chamber did not resolve the question of Libya's obligation to surrender Mr. Gaddafi as part of its admissibility determination, this obligation cannot be characterised as an issue which is capable of forming part of the subject matter of the Article 82(1)(a) appeal.
30. Indirect or tangential links between the Chamber's 1 June 2012 postponement decision and its later decision on the admissibility challenge are insufficient to bring the Pre-Trial Chamber's earlier ruling within the scope of the Appeals Chamber's present competence over the admissibility decision.²² In the same manner that the Appeals Chamber found that a decision on a request to postpone surrender pursuant to Article 95 cannot be characterised as a decision on admissibility,²³ a decision on admissibility cannot be characterised as a decision ordering the revocation of the Article 95 postponement of Mr. Gaddafi's surrender.
31. The Appeals Chamber's power to grant suspensive effect is circumscribed by the parameters of the appeal – the Appeals Chamber is not vested with any power to suspend proceedings or decisions which are not before it,²⁴ or which

²¹ ICC-01/04-168 at para. 9.

²² ICC-01/11-01/11-126 at para. 13, citing ICC-01/09-78 (OA), para. 15.

²³ ICC-01/11-01/11-126 at para. 14.

²⁴ ICC-01/04-01/06-844

concern inadmissible appeals.²⁵ The competence of the Appeals Chamber is also triggered by the subject matter of a first instance decision, and not the effects of the decision.²⁶ It therefore follows that the Appeals Chamber has no competence to grant suspensive effect in relation to consequences of a first-instance decision, which do not comprise part of the appellate review.²⁷

32. Given that Libya's obligation to surrender Mr. Gaddafi falls outside of the parameters of the Article 82(1)(a) appeal, the Appeals Chamber is precluded from granting suspensive effect of this obligation. The Request must therefore be dismissed *in limine*.

(b) The Government's request for suspensive effect should be dismissed due to the failure of the Government to adduce any legal or factual argumentation that would be capable of discharging its burden of argumentation, within the stipulated time period for doing so.

33. The Appeals Chamber has held that it is appropriate to grant suspensive effect if 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".²⁸

²⁵ ICC-01/04-01/10-483 at para. 26; ICC-01/11-01/11-126 at para. 18.

²⁶ ICC-01/-4-01/-6-926 at para. 15. ICC-01/04-01/10-483 at paras. 22-23.

²⁷ ICC-01/04-01/10-483 at para. 26; ICC-01/11-01/11-126 at para. 18.

²⁸ 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. *See also* on the first requirement: Appeals Chamber, 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.

34. 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”.
35. The burden therefore falls on the party requesting suspensive effect to satisfy the Appeals Chamber that implementation of the Chamber’s decision would result in an of the three above scenarios.²⁹ Failure to demonstrate “strong” or “compelling” reasons, which would justify the suspension, will result in the Appeals Chamber dismissing the request.³⁰
36. Such argumentation must be submitted within the deadline for submitting the notice of appeal. Rule 156(5) provides that “ [w]hen filing the appeal, the party appealing may request that the appeal have suspensive effect in accordance with article 82, paragraph 3”. For the purposes of an Article 82(1)(a) appeal, the ‘appeal’ is filed five days from the date upon which the party filing the appeal is notified of the decision (Rule 154(1)). The ‘document in support of the appeal’, which must be filed within 21 days of the issuance of the admissibility decision,³¹ is not considered to be the appeal. It therefore follows that the request for suspensive effect must be filed within five days from the date upon which the impugned decision was notified.
37. The Appeals Chamber also confirmed in the Bemba case that any request for suspensive effect must be submitted within the deadline for submitting the notice of appeal set out in Rule 154(1) of the Rules of Procedure and Evidence, and not the document in support of the appeal.³²
38. In contrast to the legislative wording concerning the distinction between the submission of a notice of appeal, and a document in support of the appeal, no such wording is employed in connection with requests for suspensive effect.

²⁹ ICC-01/09-02/11-401 at para. 10.

³⁰ ICC-01/04-02/12-12 at paras. 23-24; ICC-01/09-02/11-401 at para. 10.

³¹ Regulation 64(2) of the Regulations of the Court.

³² ICC-01/05-01/08-962 at para. 10.

The Statute and Rules clearly envisage the submission of such a request as a unitary event, rather than a two-staged procedure.

39. The bifurcation of the suspensive request process would also be contrary to the Appeals Chamber's ruling that parties must comply with decisions unless the decisions are overturned or suspensive effect is granted.³³ Deferring the argumentation on suspensive effect until 21 days after the issuance of the impugned decision would defeat the purpose of the request, as the requesting party would remain in non-compliance with the decision in the interim.
40. The Appeals Chamber would also be prevented from disposing of the request in an expeditious manner, which would be contrary to the underlying emphasis in Rule 156(4) on resolving appellate matters in an expeditious manner.
41. Given that there is no ambiguity in the rules or jurisprudence on this point, the Government should not be granted any leniency.³⁴ This is particularly the case as the Government has not requested further time to submit arguments, nor has it provided any explanation as to why it was not in a position to include argumentation at the time of its request.³⁵
42. Moreover, as found by the Appeals Chamber, the "Statute and the Rules of Procedure and Evidence place a onus on all those involved in the trial to act in a diligent and expeditious manner in the performance of their obligations".³⁶ A participant, who fails to exercise due diligence in submitting a request in a timely manner, may have waived the right to relief on that basis.³⁷
43. The Government is also aware from past decisions of the Pre-Trial Chamber that it cannot invoke the protection of a legal provision by announcing its

³³ ICC-01/04-01/06-2582.

³⁴ The fact that the Government submitted its request for suspensive effect together with supporting argumentation in its 10 April 2012 notice of appeal also indicates that the Government was aware of this procedural requirement: ICC-01/11-01/11-103 at paras. 25-29.

³⁵ ICC-01/05-01/08-962 at para. 10

³⁶ ICC-01/04-01/07-2259 at para. 43.

³⁷ ICC-01/04-01/07-2259 at para. 48.

intention to adduce submissions at a later stage: it must substantiate its request at the time of filing.³⁸ The Government therefore had no legitimate expectation that it would be accorded further opportunities to substantiate its request for suspensive effect.

44. The absence of any argumentation concerning the applicability of the criteria for suspensive effect to the Request is dispositive of Libya's Request – the burden of argumentation cannot be satisfied in a vacuum. This is consistent with the fact that the Appeals Chamber has dismissed appellate grounds *in limine* in circumstances where the appealing party has failed to submit relevant argumentation.³⁹

(c) Relief Sought

45. For the reasons set out above, the Defence for Mr. Saif Al-Islam Gaddafi respectfully requests the Honourable Appeals Chamber to dismiss the Request *in limine*.



John R.W.D. Jones QC, Counsel for Mr. Saif Al-Islam Gaddafi

Dated this, 17th Day of June 2013

At London, United Kingdom

³⁸ ICC-01/11-01/11-100, which noted that the Government had failed to submit any legal argumentation as concerns the applicability of Article 95 (at para. 10), and further concluded that Article 95 could not be invoked in advance of the submission of the admissibility challenge (at para. 18).

³⁹ ICC-02/04-01/05-408 at para. 51; ICC-01/05-01/08-962 at para. 104.