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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

**Libyan Government's Response to
"Defence Request for finding of Non-Compliance"**

Source: The Government of Libya, represented by:
Professor Ahmed El-Ghani
Professor Philippe Sands QC
Professor Payam Akhavan
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

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 (in the case of Saif Al-Islam Gaddafi)

Professor Ahmed El-Ghani

Professor Philippe Sands QC

Professor Payam Akhavan

Ms. Michelle Butler

Amicus Curiae

REGISTRY

Registrar

Mr. Herman von Hebel

Counsel Support Section

Deputy Registrar

Mr. Didier Daniel Preira

I. INTRODUCTION

1. The Government of Libya hereby files its Response to the “Defence Request for Finding of Non-Compliance”, filed on 7 June 2013 (“the Defence Request”).¹ The Government invites the Appeals Chamber to reject the request on the basis that it is unfounded and premature.
2. The Defence Request relates to the Government’s obligation to surrender Mr. Gaddafi following the Pre-Trial Chamber’s decision on 31 May 2013 that the case is admissible (“the Admissibility Decision”). In that decision, the Chamber stated that it “reminds Libya of its obligation to surrender Saif Al-Islam Gaddafi to the Court.”²
3. In its notice of appeal filed on 7 June 2013 in accordance with the statutory deadline, the Libyan Government requested suspensive effect, pursuant to article 82(3) of the Statute (“Libya’s Request”).³ Libya’s Request has led to litigation before the Appeals Chamber regarding the validity of the request. First, on 17 June 2013, the Defence filed a Response in which it requested that the Appeals Chamber dismiss Libya’s Request for suspensive effect.⁴ On the 25 June 2013, the Government filed its Response. The following day, the Defence requested an immediate ruling on Libya’s request for suspensive effect.⁵ The Prosecution filed a Response to Libya’s request for suspensive effect on 24 June 2013.⁶ On 26 June 2013, the Government sought leave to reply to the Defence and Prosecution Responses.⁷ On 25 June 2013, the Government filed its

¹ ICC-01/11-01/11-347

² ICC-01-11-01/11-163

³ *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “The Government of Libya’s Appeal against Pre-Trial Chamber I’s ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’”, 07 June 2013, ICC-01/11-01/11-350.

⁴ ICC-01/11-01/11-357 OA4.

⁵ ICC-01/11-01/11-359 OA4.

⁶ ICC-01/11-01/11-368

⁷ ICC-01/11-01/11-372

Response to the Request for an immediate ruling on the request for suspensive effect.⁸

II. STATUS OF LIBYA'S OBLIGATION TO SURRENDER

4. The Government submits that the Pre-Trial Chamber' admissibility decision does not give rise to an immediate obligation to surrender Mr. Gaddafi. Rather, the obligation is in abeyance pending a decision on the Government's application for suspensive relief. Accordingly, there is no basis for the Defence Request for a finding of non-compliance and it is wholly misconceived.
5. By way of preliminary observation, the Government refers to Rule 150(3), which applies to appeals relating to admissibility by virtue of Rule 154(3), and which provides that: "if an appeal is not filed ... the decision, the sentence or the reparation of the Trial Chamber" shall become final." The Government contends that, as a corollary, a decision is not final if an appeal has been filed. Therefore, the decision the Defence asserts is the basis for a finding of non-compliance – the Admissibility Decision - is not final.
6. The Defence cites its previous filings in support of its contention that "a negative decision on its admissibility challenge would entail an immediate obligation to surrender Mr. Gaddafi to the ICC, and that any failure to do so could attract a finding of non-compliance". At the foundation of that assertion lays the decision of the Appeals Chamber in the *Lubanga* case relating to the stay of proceedings by the Trial Chamber. In that decision, the Appeals Chamber held that:

*"Orders of the Chambers are binding and should be treated as such by all parties and participants unless and until they are suspended, reversed or amended by the Appeals Chamber or their legal effects are otherwise modified by an appropriate decision of a relevant Chamber. "*⁹

⁸ ICC-01/11-01/11-371

⁹ ICC-01/04-01/06-2582 at paragraph 1.

7. In clear contrast to the circumstances of this case, the orders to which the Appeals Chamber were referring were orders of disclosure, for which there is no right of appeal, unlike an admissibility decision. Accordingly, Rule 150 (3) did not apply and the orders became final at the time they were issued. At best therefore, the *Lubanga* Decision provides marginal support for the Defence contention that the obligation to surrender contained within the Chamber's admissibility decision is immediately binding.
8. The Government recognises, however, that, by reason of article 82(3), the non-final nature of the decision does not, in and of itself, suspend the *effect* of a decision. The provision states 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.

9. The effect of this provision, it is submitted, is to allow the Appeals Chamber to find retrospectively that the mere existence of an appeal – at the time it was made – “*of itself* [has] suspensive effect”.¹⁰ In other words, the finding that suspensive relief is granted entails a finding that this was effective from the moment of filing the appeal.
10. The alternative interpretation of article 82(3) – that an appeal shall not have suspensive effect *until* the Appeals Chamber so orders – relies upon a grammatically erroneous interpretation of the text. Not only would acceptance of this interpretation render the words “*of itself*” superfluous, it would require that the phrase “*so orders*” refers back to the first clause of the provision as if it stated, instead “[a]n appeal shall not have suspensive effect...”.¹¹
11. Moreover, the Defence logic fails to appreciate that a lack of applicable suspensive relief from the date of the filing of the appeal (i.e., the date of the

¹⁰ Emphasis added.

¹¹ This is certainly not incompatible with the plain text of Rule 156(5): “When filing the appeal, the party appealing may request that the appeal have suspensive effect in accordance with article 82, paragraph 3.

appeal notice) – would undermine the purpose of suspensive effect in its entirety. There is, in other words, a clear need for suspensive relief *pending the granting of suspensive relief*. The effect of article 82(3) is to respond to that need. There can be no doubt that suspensive relief is permitted under the Statute and the Rules. The existence of suspensive relief pending the grant of suspensive effect necessarily follows. Were this not the case, the very purpose of interim, suspensive relief would be undermined. In the present situation, for example, Mr. Gaddafi could have been transferred to the ICC *after the filing of the appeal but before the Appeals Chamber has determined the application for suspensive relief*. The Appeals Chamber could then, grant suspensive relief, even though the very purpose of doing so had been removed. Patently, this would be the type of interpretation of the Rome Statute which would, pursuant to article 31 and 32(b) of the Vienna Convention on the Law of Treaties, be aptly described as “manifestly absurd or unreasonable”.

12. The absurdity of this situation would be augmented by the arbitrariness of the distinction between the time pending the deadline for submission of the appeal, and the time thereafter, when a request for suspensive relief has been made, but has not yet been determined.
13. The fact of the non-final nature of the decision provides additional support for the submission that a party cannot be found to be in breach of an obligation contained within the impugned decision in the short period of time between the issuing of the decision, the lodging of the appeal and application for suspensive relief, and the subsequent ruling on that application. To do otherwise would be to render these procedural requirements otiose.
14. Further and alternatively, even if the obligation to surrender does remain, the contention that the obligation must equate to “immediate” surrender would, again, defeat the existence and function of an application procedure for suspensive relief.

15. In this regard, the Government notes that the question of the validity of Libya's application for suspensive effect is currently before the Appeals Chamber.¹² The Government reiterates its submissions that the Appeals Chamber is properly seized of the application, the application was properly made, and that there are persuasive reasons why it should be granted.¹³ It relies upon those submissions in support of this Response and to counter any submission that the "Government has failed to request suspensive effect of its obligation to surrender Mr Gaddafi." In the circumstances, pending a ruling from the Appeals Chamber regarding the application for suspensive relief, it is entirely premature and unwarranted to seek a finding of non-compliance.

16. With specific regard to the application for suspensive relief, the Defence's further contention that the Government failed "to seek timely relief" regarding its "ability to implement a decision" and that this "can result in the dismissal *in limine* of a tardy application for relief" is misconceived.¹⁴ The Government filed its notice of appeal, in which it requested suspensive relief, within the time period set down by the Statute, namely 5 days from notification of the admissibility decision. There is no authority to support the Defence contention that the Government was obligated to do so immediately (which, given the short statutory deadline, is the effect of its submission) and that the failure to do so warrants that the application is rejected *in limine*.

17. Leaving aside the practical absurdity of this submission, in circumstances where the Libyan Government *has* complied with the applicable statutory deadline, it would be entirely unjustifiable to dismiss the application simply because the request was not as early as the Defence would have preferred. The authority cited by the Defence in support of its submission relates to a deadline for submitting applications for redactions of documents within the context of a

¹² See paragraph 3, above for relevant filings.

¹³ "The Libyan Government's Response to Gaddafi Defence "Request for Urgent Appeals Ruling" (ICC-01/11-01/11-371), para. 11; "The Libyan Government's Document in Support of Appeal", ICC-01/11-01/11-370-Red2, pages 91-5.

¹⁴ Defence Request, para 8.

disclosure regime and Redaction Protocol set down by the Chamber itself, not by the Statute, the Rules or the Regulations. It therefore is entirely distinguishable from the circumstances of this case and provides no support for the Defence assertion. Accordingly, the Defence submissions in this regard should be rejected.

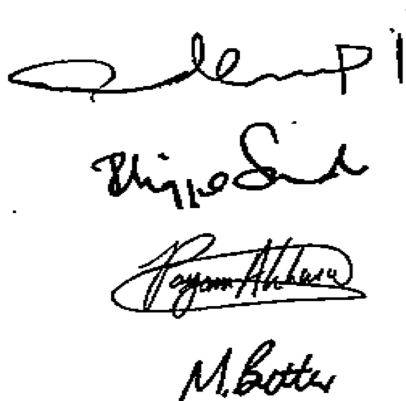
III. FINDING OF NON-COMPLIANCE IS PREMATURE & UNWARRANTED

18. Irrespective of any contention or finding regarding the status of the obligation to surrender, the Government submits that a finding of non-compliance is unwarranted and/or premature, pending the Appeals Chamber ruling upon the application. To decide otherwise would be to render the application process nugatory and undermine the object and purpose of the Statute with its presumption in favour of national prosecutions.
19. The non-surrender of Mr. Gaddafi at this time does not constitute a blatant disregard of a Court order or a refusal to engage in the court processes that may warrant a finding of non-compliance. Rather, the Government has sought to engage properly and in good faith with the court's processes and to actively cooperate with the court to the fullest extent possible in challenging circumstances. To make a finding of non-compliance in the face of such engagement and cooperation would be to disregard the good faith efforts of a State and make a nonsense of the Court's complementary jurisdiction.
20. To seek such a finding *before* the Chamber has even considered the application for suspensive relief is premature and an inappropriate invocation of the Court's power to make a finding of non-compliance.

IV. CONCLUSION

21. For these reasons, the Government of Libya respectfully requests that the Chamber reject the Defence Request for a finding of non-compliance.

Respectfully submitted:



Professor Ahmed El-Ghani

Professor Philippe Sands QC

Professor Payam Akhavan

Ms Michelle Butler

*Libyan ICC Coordinator and
Counsel on behalf of the Government of Libya*

Dated this 28th day of June 2013

At London, United Kingdom