

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/11-01/11
Date: 31 October 2013

THE APPEALS CHAMBER

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

SITUATION IN LIBYA

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

Public

**Prosecution's Response to the Request of the Defence for Mr Abdullah Al-Senussi
for Suspensive Effect (ICC-01/11-01/11-468-Red OA6)**

Source: Office of the Prosecutor

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

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Introduction

1. On 11 October 2013, Pre-Trial Chamber I found that the case against Abdullah Al-Senussi is inadmissible before the ICC because Libya had demonstrated that its domestic proceedings cover the same case as the ICC. On 17 October, Al-Senussi filed his notice of appeal against this decision and requested its suspensive effect and as a consequence, discontinuance of the Libyan proceedings against him. The request for suspensive effect should be rejected. First, the suspension of the decision would not entail discontinuance of the domestic proceedings against Al-Senussi. Second, the Defence has failed to show that the implementation of the decision would create an irreversible situation that could not be addressed if the Appeals Chamber reverses the Pre-Trial Chamber's decision. Finally, Libya is under an obligation to ensure that its domestic proceedings against Al-Senussi do not obstruct the ICC's proceedings.

Procedural Background

2. On 2 April 2013, the Government of Libya ("Libya") challenged the admissibility of the case against Abdullah Al-Senussi ("Al-Senussi").¹
3. On 14 June 2013, Pre-Trial Chamber I decided that Libya, pursuant to Article 95, may postpone the execution of the request for surrender of Al-Senussi pending determination of the Admissibility Challenge ("Article 95 Decision").² On 9 September 2013, the Defence for Al-Senussi ("the Defence") appealed this decision.³ The appeal is pending before the Appeals Chamber.

¹ ICC-01/11-01/11-307-Red2.

² ICC-01/11-01/11-354.

³ ICC-01/11-01/11-439OA5.

4. On 11 October 2013, Pre-Trial Chamber I found the case against Al-Senussi inadmissible before the Court under Article 17(1)(a) ("Admissibility Decision").⁴
5. On 17 October 2013, the Defence filed its appeal against the Admissibility Decision and requested suspensive effect of the Admissibility Decision ("Defence's Request").⁵ The Defence submitted that as a consequence of this suspension, the Appeals Chamber should order Libya not to try Al-Senussi until the final judgment on the appeal against the Admissibility Decision.⁶ The Defence further urges the Appeals Chamber to take steps to seek to guarantee that Al-Senussi is not executed pending a decision on the appeal.⁷
6. On 28 October 2013, Libya requested the Appeals Chamber to reject the Defence's Request.⁸
7. On 28 October 2013, the Appeals Chamber ordered that the Prosecutor may respond to the request for suspensive effect.⁹

Submissions

A. Suspending the Admissibility Decision would not entail discontinuance of the domestic proceedings against Al-Senussi.

8. The Defence submits that as a consequence of the suspension of the Admissibility Decision, the Appeals Chamber should order Libya not to try Al-Senussi domestically during the ICC appeal proceedings.¹⁰ This submission is premised on the incorrect assumption that discontinuance of Libya's domestic

⁴ ICC-01/11-01/11-466-Red.

⁵ ICC-01/11-01/11-468-Red OA6.

⁶ *Ibid*, para.13.

⁷ *Ibid*, para.27.

⁸ ICC-01/11-01/11-471 OA6.

⁹ ICC-01/11-01/11-372 OA6.

¹⁰ Defence's Request, para.13.

proceedings would be a consequence of suspending the Admissibility Decision. However, the suspension of the Admissibility Decision, even if granted, would have no bearing on the Libyan proceedings.

9. The Appeals Chamber has held that “[s]uspensive effect [...] maintains the position as it was prior to the issuing of the Impugned Decision”.¹¹ Prior to the Admissibility Decision, Libya was not prohibited from continuing with its domestic proceedings against Al-Senussi. To the contrary, the Pre-Trial Chamber held that Libya’s intention to carry out the domestic proceedings against Al-Senussi during the admissibility proceedings before the ICC did not amount, *per se*, to a violation of Libya’s obligation to cooperate with the Court as long as “Libya [...] ensure[s] that its going criminal proceedings do not hinder or delay Mr Al-Senussi’s surrender to the Court should the case eventually be declared admissible”.¹²
10. In addition, suspensive effect implies an interactive process between different Chambers of the Court, whereby a first instance Chamber is instructed by the Appeals Chamber not to implement or give effect to a decision pending appellate review. There is no similar relationship between the Appeals Chamber and national courts. Thus, and to the extent that the Defence’s Request amounts to a request to discontinue Libya’s domestic proceedings, the Defence’s Request should be rejected *in limine* because the relief sought falls outside the scope of Article 82(3) and Rule 156(5).

¹¹ ICC-01/04-02/12-12OA, para.17 referring to Separate Opinion Judge Pikis in ICC-01/04-01/06-1444-Anx OA12, para.6 “Suspension [...] is designed to sustain the status quo ante, that is, the position obtaining prior to the issuance of the sub judice decision”.

¹² Article 95 Decision, para.36.

B. Implementing the Admissibility Decision does not create an irreversible situation.

11. In the alternative, and should the Appeals Chamber find that the discontinuance of Libya's domestic proceedings would be a consequence of suspending the Admissibility Decision, the Prosecution submits that suspension is similarly not merited. The Defence has failed to show that the implementation of the Decision creates an irreversible situation, or leads to consequences that would be very difficult to correct, or that could potentially defeat the purpose of the appeal.¹³
12. The Defence puts forward several arguments to support its claim for suspensive effect. First, the Defence submits that in the absence of an order for suspension, Libya would proceed to conduct and complete the trial proceedings against Al-Senussi and that, therefore, the present appeal would be rendered moot.¹⁴ The Defence further argues that "[i]n Mr. Al-Senussi's case, any domestic trial in Libya would inevitably result in the imposition of the death penalty" and that there is no way to correct this situation if the Appeals Chamber reverses the Admissibility Decision.¹⁵ Thus, the Defence requests that the Appeals Chamber take steps to ensure that Al-Senussi is not executed before the Appeals Chamber decides on the appeal against the Admissibility Decision.¹⁶ Second, the Defence argues that the continuation of the Libyan proceedings adversely affects Al-Senussi's rights and the overall fairness and integrity of the proceedings.¹⁷ Third, the Defence argues that suspensive effect would guarantee that the Appeals Chamber considers and decides on the merits of the Defence's appeal against Pre-Trial Chamber I's Article 95 Decision.¹⁸

¹³ ICC-01/04-02/12-12OA, para.19 referring to ICC-01/05-01/08-817OA3, para.11.

¹⁴ Defence's Request, paras.19,21,23.

¹⁵ *Ibid*, para.26. According to the Defence this is supported by the fact that Libya has made it plain that Al-Senussi can be sentenced to death for the offences with which he is charged in Libya, and that other former Gaddafi officials have been sentenced to death in Libya for similar crimes.

¹⁶ *Ibid*, para.27.

¹⁷ *Ibid*, paras.28-30.

¹⁸ *Ibid*, para.31.

(i) *The continuation of the Libyan proceedings does not render the appeal moot*

13. First and contrary to the Defence's submissions, the continuation of the Libyan proceedings pending a decision of the Appeals Chamber does not render the appeal moot. If and when the Appeals Chamber reverses the Admissibility Decision and the case against Al-Senussi is found admissible before the Court, Libya shall surrender Al-Senussi to the Court and discontinue its domestic proceedings.¹⁹
14. Second, the Defence's submissions regarding the inevitability of Al-Senussi's being sentenced to death are speculative and, at this stage, premature. The trial against Al-Senussi is yet to start. Thus, the fact that Al-Senussi is charged with crimes punishable by death does not necessarily mean that he will inevitably be sentenced to death. Similarly, the fact that other former Gaddafi officials have been sentenced to death does not entail that Al-Senussi will follow the same course since every case is determined on its own merits.²⁰
15. In sum, the continuation of the proceedings in Libya, at this stage, does not cause irreversible consequences that cannot be addressed should the case be found admissible. The Prosecution however notes that Libya has an obligation to "cooperate fully with and provide any necessary assistance to the Court and the Prosecutor" pursuant to the United Nations Resolution 1970.²¹ Thus, Libya should ensure that its domestic proceedings do not obstruct the instant proceedings before the Appeals Chamber, including an eventual decision

¹⁹ The Appeals Chamber has held that the continuation of the ICC proceedings does not create an irreversible situation pending a determination by the Appeals Chamber on the admissibility or jurisdiction of the Court and that the ICC proceedings could be discontinued if the Appeals Chamber concludes that a domestic jurisdiction should be seized of the case. ICC-01/09-01/11-391OA3OA4, para.10; ICC-01/05-01/08-817OA3, para.11. The same logic applies to the inverse situation where the domestic authorities are seized with a case pending a determination of the Appeals Chamber.

²⁰ The Prosecution notes that other Gaddafi officials have been acquitted. See: <http://www.reuters.com/article/2013/06/17/us-libya-trial-idUSBRE95G0S120130617>.

²¹ S/RES/1970 (2011).

reversing the Pre-Trial Chamber's ruling and declaring the case admissible before the ICC.²²

(ii) *The Defence failed to demonstrate that the conduct of Al-Senussi's trial in Libya causes an irreversible prejudice.*

16. The Defence has failed to demonstrate that the conduct of Al-Senussi's trial in Libya adversely affects his rights and the overall fairness and integrity of the proceedings to such an extent that it cannot be corrected.
17. The Defence advanced similar submissions to argue that Libya was unwilling to conduct Al-Senussi's proceedings.²³ The Pre-Trial Chamber rejected these arguments and found that the information available does not indicate that the domestic proceedings against Al-Senussi are tainted by departures from, or violations of, the Libyan national law that would support a finding of unwillingness or inability under Article 17 (2) and (3).²⁴
18. The Defence now seeks to re-litigate this matter in its request for suspensive effect, but does not provide supporting evidence of its assertion that the continuation of the domestic proceedings causes an irreversible prejudice. The Defence mostly rehearses some of its previous arguments before the Pre-Trial Chamber,²⁵ and indicates that it will provide compelling evidence in its document in support of appeal.²⁶ This course of action is not appropriate as the Defence has the burden of substantiating its request for suspensive effect as

²² The Pre-Trial Chamber's finding in its Article 95 Decision, para.36 is still valid. The Pre-Trial Chamber held that the continuation of Libyan domestic proceedings does not constitute a violation of Libya's obligation to cooperate with the Court as long as it does not hinder or delay Libya's obligation to surrender Al-Senussi should the case be found admissible.

²³ Defence's Request, para.28 referring to ICC-01/11-01/11-356, paras.124,125,132 and ICC-01/11-01/11-432, para.20. See also Defence's Request, para.30 referring to ICC-01/11-01/11-418, paras.5,7,8 and ICC-01/11-01/11-356, paras.68-72.

²⁴ Admissibility Decision, para. 243. See also paras.239 and 258.

²⁵ See above fn. 23.

²⁶ Defence's Request, para.28.

prescribed by Rule 156(5).²⁷ On these grounds, the Defence's submission should be dismissed.

(iii) *Suspending the Admissibility Decision would not oblige Libya to surrender Al-Senussi.*

19. The Defence argues that "[a] further reason for granting the suspensive effect would be that it would 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".²⁸ According to the Defence, if the Appeals Chamber finds that the Pre-Trial Chamber erred when it suspended Al-Senussi's surrender request pursuant to Article 95 and the Admissibility Decision is suspended, Libya would then be obliged to surrender Al-Senussi pending the appeal proceedings.²⁹

20. This submission is incorrect. First, this argument does not demonstrate that suspensive effect is merited: the Defence concedes that it seeks to ensure that the Appeals Chamber considers and decides the merits of its appeal against the Article 95 Decision,³⁰ but does not show that the implementation of the Admissibility Decision, considering the relevant *status quo*, causes an irreparable prejudice. Second, the suspension of the Admissibility Decision does not bring the result desired by the Defence: as noted above, the Appeals Chamber has held that "[s]uspensive effect [...] maintains the position as it was prior to the issuing of the Impugned Decision".³¹ Thus, as Libya's obligation to surrender Al-Senussi to the Court was suspended pursuant to Article 95, suspending the Admissibility

²⁷ ICC-01/05-01/08-499OA2, paras. 9-10.

²⁸ Defence's Request, para.31.

²⁹ *Idem*.

³⁰ The issue under appeal in that decision is "[t]he postponement of the surrender order on the narrow basis that all the Chamber needed to consider was whether an admissibility challenge had been properly filed before the ICC". See ICC-01/11-01/11-419.

³¹ ICC-01/04-02/12-12OA, para.17 referring to Separate Opinion Judge Pikis in ICC-01/04-01/06-1444-Anx OA12, para.6 "Suspension [...] is designed to sustain the status quo ante, that is, the position obtaining prior to the issuance of the sub judice decision".

Decision would not “re-enact” a pre-existing obligation of Libya to surrender Al-Senussi. On these grounds, the Defence’s argument should be dismissed.

Conclusion

21. The Prosecution submits that unless the Appeals Chamber decides to entertain additional arguments provided by the Defence in its document in support of appeal or to consider other factors in exercise of its discretion, the Defence’s Request for suspensive effect should be rejected.



Fatou Bensouda,
Prosecutor

Dated this 31st day of October 2013
At The Hague, The Netherlands