

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/11-01/11 OA 6

Date: 22 November 2013

THE APPEALS CHAMBER

Before:

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

SITUATION IN LIBYA

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

Public document

**Decision on the request for suspensive effect and the request to file a
consolidated reply**

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Mr Fabricio Guariglia

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

States Representatives
Mr Ahmed El-Gehani
Mr James Crawford
Mr Wayne Jordash
Ms Michelle Butler

Counsel for Abdullah Al-Senussi
Mr Ben Emmerson
Mr Rodney Dixon

REGISTRY

Registrar
Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

In the appeal of the Defence for Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I entitled “Decision on the admissibility of the case against Abdullah Al-Senussi” of 11 October 2013 (ICC-01/11-01/11-466-Conf),

Having before it 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’, and Request for Suspensive Effect” of 17 October 2013 (ICC-01/11-01/11-468-Conf), in which a request for suspensive effect pursuant to article 82 (3) of the Statute is made,

Having before it the “Request on behalf of the Defence for Abdullah Al-Senussi to File a Consolidated Reply to Libya’s ‘Response to the Al-Senussi Defence’s “Request for Suspensive Effect”” and the ‘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)” of 7 November 2013 (ICC-01/11-01/11-475),

Renders unanimously the following

DECISION

1. The request for suspensive effect is rejected.
2. The “Request on behalf of the Defence for Abdullah Al-Senussi to File a Consolidated Reply to Libya’s ‘Response to the Al-Senussi Defence’s “Request for Suspensive Effect”” and the ‘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)” is rejected.

REASONS

I. PROCEDURAL HISTORY

A. Proceedings before the Pre-Trial Chamber

1. On 27 June 2011, Pre-Trial Chamber I (hereinafter: “Pre-Trial Chamber”) issued a warrant of arrest for Mr Abdullah Al-Senussi¹ (hereinafter: “Mr Al-Senussi”). On 4 July 2011, the Registrar, pursuant to an order by the Pre-Trial Chamber in its decision on the aforementioned warrant of arrest, issued a request to the Libyan authorities for the arrest and surrender of Mr Al-Senussi to the Court.²
2. On 2 April 2013, Libya submitted its challenge to the admissibility of the case³ (hereinafter: “Challenge to Admissibility”), also stating that it “exercise[d] its right to postpone the order for surrender of Abdullah Al-Senussi, pursuant to article 95 of the Statute”⁴ pending the determination of the Challenge to Admissibility.
3. On 14 June 2013, the Pre-Trial Chamber issued a decision, in which it postponed, pursuant to article 95 of the Statute, the request for the arrest and surrender of Mr Al-Senussi⁵ (hereinafter: “Decision to Postpone”). Upon being granted leave to appeal, Mr Al-Senussi appealed the Decision to Postpone pursuant to article 82 (1) (d) of the Statute on 9 September 2013⁶ (hereinafter: “Appeal OA 5”). Mr Al-Senussi did not request suspensive effect of this appeal before the Appeals Chamber.

¹ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “Warrant of Arrest for Abdullah Al-Senussi”, ICC-01/11-01/11-4; “Decision on the ‘Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi’”, ICC-01/11-01/11-1.

² Registrar, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “Request to the Libyan Arab Jamahiriya for the arrest and surrender of Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi”, ICC-01/11-01/11-5.

³ “Public and Redacted – Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute”, ICC-01/11-01/11-307-Red2.

⁴ Challenge to Admissibility, para. 206.

⁵ “Decision on Libya’s postponement of the execution of the request for arrest and surrender of Abdullah Al-Senussi pursuant to article 95 of the Rome Statute and related Defence request to refer Libya to the UN Security Council”, ICC-01/11-01/11-354.

⁶ “Appeal on behalf of Mr. Abdullah Al-Senussi against the ‘Decision on Libya’s postponement of the execution of the request for arrest and surrender of Abdullah Al-Senussi pursuant to article 95 of the Rome Statute and related Defence request to refer Libya to the UN Security Council’”, ICC-01/11-01/11-439 (OA 5).

4. On 11 October 2013, the Pre-Trial Chamber issued the “Decision on the admissibility of the case against Abdullah Al-Senussi”⁷ (hereinafter: “Impugned Decision”), finding that the case was inadmissible.

B. Proceedings before the Appeals Chamber

5. On 17 October 2013, the Defence for Mr Al-Senussi filed 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’, and Request for Suspensive Effect”⁸ (hereinafter: “Appeal”). The Defence requests that the Appeals Chamber reverse the Impugned Decision and determine that the case against Mr Al-Senussi is admissible.⁹ It also requests that the Appeals Chamber “immediately suspend” the Impugned Decision pursuant to article 82 (3) of the Statute and, “as a consequence of this suspension, [order] Libya not to try Mr Al-Senussi in Libya while the Appeals Chamber is seized of the present appeal and until it delivers its final judgment on the appeal”¹⁰ (hereinafter: “Request for Suspensive Effect”).

6. Mr Al-Senussi first submits that the implementation of the Impugned Decision – “namely that Libya proceeds to try and sentence Mr Al-Senussi, as opposed to him being transferred and tried at the ICC”¹¹ – would defeat the purpose of the appeal, “which is to determine whether Mr. Al-Senussi can be tried in Libya at all”,¹² and “is centred on the application of Article 17(1)(a)”¹³ (i.e., whether the case is being investigated and prosecuted by Libya), as opposed to article 17 (1) (c) (i.e., whether the person “has already been tried for conduct which is the subject of the complaint”),¹⁴ also in light of the pace of ongoing relevant domestic proceedings.

7. Second, Mr Al-Senussi argues that implementing the Impugned Decision would create an irreversible situation and consequences that could not be corrected, since “any domestic trial in Libya would inevitably result in the imposition of the death

⁷ ICC-01/11-01/11-466-Red.

⁸ ICC-01/11-01/11-468-Conf (OA 6).

⁹ Appeal, para. 32.

¹⁰ Appeal, para. 32; *see also* para. 13.

¹¹ Appeal, para. 19.

¹² Appeal, para. 21.

¹³ Appeal, para. 23.

¹⁴ Appeal, para. 23.

penalty”¹⁵ and it would be impossible to remedy the violations of Mr Al-Senussi’s right to a fair trial which have already occurred and would continue to occur in the context of ongoing domestic proceedings.¹⁶ Finally, Mr Al-Senussi submits that granting suspensive effect “would guarantee that the Appeals Chamber would consider and decide on the merits of the Defence’s appeal against the [Decision to Postpone]” and that the Appeals Chamber could find that “the immediate surrender of Mr. Al-Senussi to The Hague during the appellate proceedings is justified in light of the appeal against the postponement of the surrender order and to ensure a secure and privileged setting for communications between” Mr Al-Senussi and his counsel.¹⁷

8. On 28 October 2013, Libya filed the “Response to the Al-Senussi Defence’s ‘Request for Suspensive Effect’”¹⁸ (hereinafter: “Libya’s Response”). Libya requests that the Appeals Chamber reject the Request for Suspensive Effect, submitting that the order requested by Mr Al-Senussi “would not be suspensive” in relation to the Impugned Decision,¹⁹ and that Mr Al-Senussi’s arguments “are based upon factual and/or legal errors, and must be rejected”.²⁰ More specifically, Libya notes that factual developments show that Mr Al-Senussi’s statements concerning the expected timing for developments of the domestic proceedings are inaccurate,²¹ that mere progress of domestic proceedings would not result in irreversible prejudice²² and that the submissions concerning the purported inevitability of the imminent imposition of a death sentence are ill-founded, in light of the features of relevant domestic proceedings.²³ Finally, Libya submits that the requested suspensive effect of the Impugned Decision would have no impact on the appeal proceedings against the postponement of the surrender order.²⁴

9. On 31 October 2013, following an order by the Appeals Chamber,²⁵ the Prosecutor filed the “Prosecution Response to the Request of the Defence for Mr

¹⁵ Appeal, para. 26.

¹⁶ Appeal, paras 28-30.

¹⁷ Appeal, para. 31.

¹⁸ ICC-01/11-01/11-471 (OA 6).

¹⁹ Libya’s Response, paras 2-8.

²⁰ Libya’s Response, para. 10.

²¹ Libya’s Response, para. 16.

²² Libya’s Response, para. 17.

²³ Libya’s Response, paras 18-22.

²⁴ Libya’s Response, para. 25.

²⁵ “Order in relation to the request for suspensive effect of the appeal”, ICC-01/11-01/11-472 (OA 6).

Abdullah Al-Senussi for Suspensive Effect (ICC-01/11-01/11-468-Red OA 6)” (hereinafter: “Prosecutor’s Response”). Similarly to Libya, the Prosecutor argues that “the suspension of the decision would not entail discontinuance of the domestic proceedings against Al-Senussi”²⁶ and that Mr Al-Senussi “has failed to show that the implementation of the Impugned Decision would create an irreversible situation”.²⁷ As regards the alleged impact of the Request for Suspensive Effect on the Appeals Chamber’s consideration of the Appeal OA 5, the Prosecutor observes that, even if the Request were to be granted, its effect would not be to “re-enact” Libya’s obligation to surrender Mr Al-Senussi, since the suspension of that obligation was not brought about by the Impugned Decision.²⁸ The Prosecutor also submits that “Libya is under an obligation to ensure that its domestic proceedings against Al-Senussi do not obstruct the ICC’s proceedings”.²⁹

10. On 4 November 2013, Mr Al-Senussi filed the “Document in Support of Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I’s ‘Decision on the admissibility of the case against Abdullah Al-Senussi’”³⁰ (hereinafter: “Document in Support of the Appeal”).

11. On 7 November 2013, Mr Al-Senussi filed the “Request on behalf of the Defence for Abdullah Al-Senussi to File a Consolidated Reply to Libya’s ‘Response to the Al-Senussi Defence’s ‘Request for Suspensive Effect’” and the ‘Prosecution’s Response to the Request of the Defence for Mr Abdullah Al-Senussi for Suspensive Effect (ICC-01/11-01/11-468-Red OA 6)’”³¹ (hereinafter: “Request for Leave to Reply”), seeking leave to reply to Libya and the Prosecutor “in order to correct certain factual and legal assertions”³² and requesting the Appeals Chamber to take into account new evidence which had come to light after the filing of the Request for Suspensive Effect and filed with the Document in Support of the Appeal.³³

²⁶ Prosecutor’s Response, paras 1, 8.

²⁷ Prosecutor’s Response, paras 1, 13-18.

²⁸ Prosecutor’s Response, para. 20.

²⁹ Prosecutor’s Response, para. 1.

³⁰ ICC-01/11-01/11-474 (OA 6).

³¹ ICC-01/11-01/11-475 (OA 6).

³² Request for Leave to Reply, para. 3.

³³ Request for Leave to Reply, para. 4.

12. On 13 November 2013, Libya filed the “Response to the Al Senussi Defence Request to file a consolidated reply to the Libyan and Prosecution Responses to the Al Senussi Request for Suspensive Effect”,³⁴ requesting that the Request for Leave to Reply be rejected.

II. MERITS OF THE REQUEST FOR SUSPENSIVE EFFECT

13. Article 82 (3) of the Statute provides:

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.

14. The Appeals Chamber recalls that the decision to order that an appeal has suspensive effect is discretionary in nature and will be taken in light of the specific circumstances of the case.³⁵ The Appeals Chamber has summarised circumstances in which it has exercised its discretion to grant suspensive effect as follows:

In past decisions, the Appeals Chamber, when deciding on requests for suspensive effect, has 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”, (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” [footnotes omitted].³⁶

15. Mr Al-Senussi requests that the Appeals Chamber order, “as a consequence” of the requested suspension, “Libya not to try Mr. Al-Senussi in Libya while the Appeals Chamber is seized of the present appeal and until it delivers its final judgment on the appeal”.³⁷

³⁴ ICC-01/11-01/11-478 (OA 6).

³⁵ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “Decision on the request for suspensive effect and related issues”, 18 July 2013, ICC-01/11-01/11-387 (OA 4), 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), paras 18-19.

³⁶ *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”, 16 January 2013, ICC-01/04-01/07-3344 (OA 13), para. 6. See also *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “Decision on the request for suspensive effect and related issues”, 18 July 2013, ICC-01/11-01/11-387 (OA 4), para. 22; *Prosecutor v. Ruto and Sang*, “Decision on the request for suspensive effect”, 20 August 2013, ICC-01/09-01/11-862 (OA 5), para. 6.

³⁷ Appeal, para. 32. See also Appeal, para 27: “the Appeals Chamber is requested to suspend the implementation of the Admissibility decision, and accordingly, to order Libya not to try and sentence Mr. Al-Senussi while the Appeals Chamber is seized of the present Appeal” (emphasis added).

16. The Appeals Chamber notes that this request exceeds the scope of an order for suspensive effect, which is aimed at preserving the situation existing prior to the issuance of an impugned decision.³⁸ The Impugned Decision, while creating an obstacle to the continuation of the proceedings before the Court, did not alter, or otherwise interfere with, the situation which existed prior to it in respect of domestic proceedings concerning Mr Al-Senussi. This is because Libya's filing of the admissibility challenge before the Pre-Trial Chamber did not, as such, have an impact on domestic proceedings. While the Prosecutor is, pursuant to article 19 (7) and subject to article 19 (8) of the Statute, required to suspend her investigation pending the determination of an admissibility challenge brought by a State, there is nothing in the Statute that suggests that the domestic investigation also has to be suspended during that period. Thus, subject to a State's obligations to cooperate with the Court, domestic proceedings may continue while an admissibility challenge is pending and they are unaffected by a determination that the case is inadmissible before the Court.

17. Since the Impugned Decision, therefore, had no impact on any Libyan proceedings against Mr Al-Senussi, the relief sought by the Defence for Mr Al-Senussi cannot be attained by ordering that the Appeal have suspensive effect. In fact, the Defence seeks an order that would prevent Libya from taking certain steps. The Defence alleges that such steps could frustrate the outcome of the pending appeal against the Impugned Decision. A concluded trial or the execution of the death sentence would make it, in the Defence's submission, impossible to implement the Appeals Chamber's decision, if it decided to reverse the Impugned Decision and find that the case is admissible before the Court. However, as set out above, an order for suspensive effect of the Impugned Decision could not result in the suspension or termination of the domestic proceedings or otherwise affect them.

18. For the above reasons, the Request for Suspensive Effect must be rejected. The Appeals Chamber notes, however, that it will decide on the merits of the Appeal in due course. Should the outcome of the Appeal be that the Impugned Decision is reversed, the case against Mr Al-Senussi would resume before the Court and Libya would be under the obligation to surrender him to the Court. The Appeals Chamber

³⁸ Appeals Chamber, *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. 17.

therefore recalls that Libya's obligation to cooperate with the Court arises from the Security Council Resolution referring the situation to the Court³⁹ and has to be performed in accordance with the principle of good faith, which pervades all obligations arising under international law, including those arising in connection with the UN Charter.⁴⁰

19. In light of this, the Appeals Chamber reminds Libya that, throughout the duration of the proceedings relating to the Appeal, it is bound to abstain from any initiative, measure or action which could result in frustrating the Court's legitimate expectations that, should the Impugned Decision be reversed, it will be possible for the case against Mr Al-Senussi to actually resume before the Court.

III. MERITS OF THE REQUEST FOR LEAVE TO REPLY

20. In his Request for Leave to Reply, Mr Al-Senussi requests that the Appeals Chamber consider the evidence that he submitted together with the Document in Support of the Appeal, because this evidence was not available at the time when the Request for Suspensive Effect was filed. In his submission, it "concern[s] Mr Al-Senussi's treatment in detention in Libya before and during the accusation stage".⁴¹ Furthermore, he submits that there is good cause to grant leave to reply to "submissions and assertions made by Libya and the Prosecution, which the defence could not have dealt with in its request and which are false and should be corrected".⁴²

³⁹ United Nations, Security Council, *Resolution 1970*, 26 February 2011, S/RES/1970 (2011), para. 5.

⁴⁰ For a statement of the principle that "States shall fulfil in good faith the obligations assumed by them in accordance with the Charter" see United Nations, General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, 24 October 1970, A/RES/2625 (XXV). See also International Court of Justice, *Nuclear Tests (Australia v. France)*, "Judgment", 20 December 1974, ICJ Reports 1974, para. 46; *LaGrand (Germany v. United States of America)*, "Judgment", 27 June 2001, ICJ Reports 2001, para. 103; International Criminal Tribunal for the former Yugoslavia, Trial Chamber, *Prosecutor v. Slobodan Milosevic*, "Decision on Prosecution Application for Further Action in relation to previous Rule 54 bis", 31 October 2005, IT-02-54-T, para. 16. See also ICTY, Appeals Chamber, *Prosecutor v. Tihomir Blaskic*, "Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997", 29 October 1997, IT-95-14, para. 68.

⁴¹ Request for Leave to Reply, para. 8.

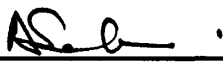
⁴² Request for Leave to Reply, para. 15.

21. As held previously by the Appeals Chamber, it is possible, pursuant to regulation 24 (5) of the Regulations of the Court, for the Appeals Chamber to grant leave to reply in relation to a response to a request for suspensive effect.⁴³

22. As to the substance, the Appeals Chamber notes that the evidence referred to by Mr Al-Senussi relates to issues outside the scope and purpose of an order for suspensive effect. In light of the reasoning developed in paragraphs 16 and 17 above, the Appeals Chamber considers that this evidence is not relevant for the purpose of deciding on the Request for Suspensive Effect. Similarly, Mr Al-Senussi's request to reply to Libya's "claim that proceedings before the accusation Chamber are not concluded" relates to developments in the domestic proceedings which are of no relevance to the Request for Suspensive Effect. The Appeals Chamber also notes that all of the remaining issues to which Mr Al-Senussi wishes to reply are of a legal nature and would consist in additional arguments in support of views which have already been put before it.

23. The Appeals Chamber, accordingly, rejects the Request for Leave to Reply.

Done in both English and French, the English version being authoritative.



Judge Akua Kuenyehia
Presiding Judge

Dated this 22nd day of November 2013

At The Hague, The Netherlands

⁴³ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "Decision on the request for suspensive effect and related issues", 18 July 2013, ICC-01/11-01/11-387 (OA 4), para. 15.