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No.: ICC-01/11-01/11
Date: 25 February 2013

PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernández 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

Decision on the “Government of Libya’s Application for Leave to Appeal the “Decision on the Urgent Application on behalf of Abdullah Al-Senussi for Pre-Trial Chamber to order the Libyan Authorities to comply with their obligations and the orders of the ICC””

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

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Pre-Trial Chamber I (the “Chamber”) of the International Criminal Court (the “Court”) issues the following decision on the “Government of Libya’s Application for Leave to Appeal the “Decision on the Urgent Application on behalf of Abdullah Al-Senussi for Pre-Trial Chamber to order the Libyan Authorities to comply with their obligations and the orders of the ICC”.¹

I. Procedural history

1. On 27 June 2011, the Chamber issued the “Decision on the ‘Prosecutor’s Application Pursuant to Article 58 as to the Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi’”,² and warrants of arrest for, *inter alia*, Abdullah Al-Senussi (“Mr Al-Senussi”).³
2. On 21 March 2012, the Registrar filed the “Report of the Registry regarding the arrest of Abdullah Al-Senussi”.⁴
3. On 1 May 2012, the Chamber received the “Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute” (the “Admissibility Challenge”), challenging the admissibility of the case against Saif Al-Islam Gaddafi (“Mr Gaddafi”).⁵
4. On 17 September 2012, the Registrar filed the “Second Report of the Registry on the status of the execution of the request for arrest and surrender of Abdullah Al-Senussi”.⁶
5. On 10 December 2012, the Chamber issued the “Corrigendum to the Order in relation to the request for arrest and surrender of Abdullah Al-Senussi”,

¹ ICC-01/11-01/11-277.

² ICC-01/11-01/11-1.

³ ICC-01/11-01/11-4.

⁴ ICC-01/11-01/11-80-Red.

⁵ ICC-01/11-01/11-130-Red.

⁶ ICC-01/11-01/11-208.

whereby it: (i) instructed the Registrar to “reiterate to the Libyan authorities the request for arrest and surrender of Mr Al-Senussi and remind them of their obligation to comply with the request”; and (ii) requested the Libyan authorities to confirm the extradition of Mr Al-Senussi from Mauritania to Libya, and provide the name of the detention centre in which Mr Al-Senussi is being held, if any, as well as information about his state of health.⁷

6. On 9 January 2013, the Defence of Mr Al-Senussi filed the “Urgent Application on behalf of Abdullah Al-Senussi for Pre-Trial Chamber to order the Libyan Authorities to comply with their obligations and the orders of the ICC”,⁸ whereby it requested that the Chamber refer Libya and Mauritania to the Security Council for their non-compliance with the obligations to cooperate with the Court.⁹ Alternatively, or in addition, the Defence of Mr Al-Senussi requested that the Chamber order Libya to: (i) transfer Mr Al-Senussi to the custody of the Court within 5 calendar days;¹⁰ (ii) cease immediately all actions and proceedings in respect of Mr Al-Senussi’s case which could in any way impede his arrest and surrender to the Court, including commencement of any national trial proceedings;¹¹ and (iii) facilitate a secure and privileged visit to Mr Al-Senussi by his counsel and family with all necessary immunities and protections on an urgent basis.¹²

7. On 15 January 2013, Libya informed the Chamber, *inter alia*, of the fact that the investigation into the national case against Mr Al-Senussi is approaching

⁷ ICC-01/11-01/11-241-Corr.

⁸ ICC-01/11-01/11-248.

⁹ *Ibid.*, paras 6 and 67.

¹⁰ *Ibid.*, paras 6, 68, 69.

¹¹ Defence Application, paras 6, 60 to 64, 68 and 69.

¹² *Ibid.*, paras 6, 65, 66, 68 and 69.

completion, and the case will accordingly be transferred in the next month to the *Chambre d'Accusation* for pre-trial proceedings.¹³

8. On 16 January 2013, the Registrar filed in the record of the case the response received from the Libyan authorities pursuant to the order issued by the Chamber on 10 December 2012.¹⁴

9. On 18 January 2013, the Chamber, noting that Libya had neither surrendered Mr Al-Senussi to the Court nor undertaken any of the proceedings prescribed under the Rome Statute (the "Statute") to postpone Mr Al-Senussi's surrender to the Court, requested the Libyan authorities to provide observations on how Libya intends to fulfil its obligations to cooperate with the Court in relation to the arrest and surrender of Mr Al-Senussi, and especially its duty to comply with the Surrender Request.¹⁵

10. On 28 January 2013, Libya filed the "Libyan Government's Observations regarding the case of Abdullah Al-Senussi".¹⁶

11. On 6 February 2013, the Chamber delivered its "Decision on the 'Urgent Application on behalf of Abdullah Al-Senussi for the Pre-Trial Chamber to order the Libyan Authorities to comply with their obligations and the orders of the ICC'"¹⁷ (the "impugned Decision") whereby it ordered the Libyan authorities to proceed to the immediate surrender of Mr Al-Senussi to the Court and to refrain from taking any action which would frustrate, hinder or delay Libya's compliance with this obligation.

¹³ ICC-01/11-01/11-251, paras 4 and 5.

¹⁴ ICC-01/11-01/11-252, and annexes attached thereto.

¹⁵ ICC-01/11-01/11-254.

¹⁶ ICC-01/11-01/11-260.

¹⁷ ICC-01/11-01/11-269.

12. On 12 February 2013, Libya filed the application for leave to appeal the Decision of 6 February 2013 (the "Application").¹⁸

13. On 14 February 2013 the Defence filed a response to the Application.¹⁹ On 18 February 2013 the Prosecutor submitted its response.²⁰

II. Background and submissions of the parties

A. *The impugned Decision*

14. In the Decision of 6 February 2013, the Chamber held:

30. As made clear in article 95 of the Statute, and as already observed by the Chamber, the postponement of a surrender request pursuant to this provision can only be made "[w]here there is an admissibility challenge under consideration". Accordingly, any expression of intention to challenge the admissibility of the case against Mr Al-Senussi (...) is of no consequence for the application of article 95 of the Statute. In fact, the Chamber has already held specifically that article 95 of the Statute cannot constitute a legal basis to postpone a request for surrender following a mere announcement that an admissibility challenge is forthcoming and, therefore, in the absence of any such challenge before the Chamber.

31. Furthermore, the Chamber cannot accept Libya's argument that the Admissibility Challenge of 1 May 2012 is to be considered a challenge to the admissibility of the case against Mr Al-Senussi. At the time, it was Libya's own submission that said challenge only covered Mr Gaddafi. On this basis, and granting Libya's specific request, the Chamber determined that the challenge should be considered only with respect to the case against Mr Gaddafi.

32. Moreover, Libya's present contention that the Admissibility Challenge needs to be supplemented by further critical submissions' can only be understood as an acknowledgment that the Admissibility Challenge of 1 May 2012 cannot be considered as a complete challenge to the admissibility of the case against Mr Al-Senussi. However, the Chamber observes that an incomplete challenge which needs to be supplemented in due course cannot be considered as having been "properly made within the terms of article 19 of the Statute and rule 58 of the Rules" (...).

33. On the basis of the above, the Chamber considers that, regardless of whether the Admissibility Challenge can be considered as an expression of Libya's intention to challenge the admissibility of the case against Mr Al-Senussi or instead as a fractional admissibility challenge to be supplemented in due course, Libya's submissions are

¹⁸ ICC-01/11-01/11-277.

¹⁹ ICC-01/11-01/11-278.

²⁰ ICC-01/11-01/11-280.

presently not sufficient to trigger the applicability of article 95 of the Statute and justify a postponement of the execution of the Surrender Request.

15. As regards the argument that the Surrender Request should be postponed on the basis of rule 58(2) of the Rules of Procedure and Evidence (the "Rules") as an exercise of the Chamber's discretion to take the appropriate measures for the proper conduct of the admissibility proceedings, the Chamber recalled its finding regarding an identical argument made by Libya with respect to the postponement of the surrender of Mr Gaddafi:

[R]ule 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. This rule makes no mention of postponing a request for cooperation and cannot therefore be used as a legal basis by the Government of Libya in support of its [request for postponement of the surrender of Mr Gaddafi].

And added:

In addition, the determination of the "appropriate measures for the proper conduct of the proceedings" within the meaning of rule 58 of the Rules is dependent on the existence of admissibility proceedings as properly triggered in accordance with the appropriate procedure set out in the Statute. As observed above, no such procedure has been undertaken by Libya with respect to the case against Mr Al-Senussi.

16. Therefore, the Chamber considered that Libya remained under obligation to comply with the Surrender Request and ordered the Libyan authorities to proceed to the immediate surrender of Mr Al-Senussi to the Court and to refrain from taking any action which would frustrate, hinder or delay Libya's compliance with this obligation.²¹

B. Libya's Application

17. In its Application, the Government of Libya submits that the Chamber has erred in ruling that there is no admissibility challenge under consideration by the Court regarding Mr Al-Senussi. The Application is, therefore, premised on

²¹ ICC-01/11-01/11-269.

the existence of “a clear question regarding the requisite content and form of an admissibility challenge”.²²

18. According to Libya, the Chamber made three erroneous determinations when it found that the government had merely enunciated “an intention to challenge the admissibility of the case”, when it established that the Admissibility Challenge of 1 May 2012 did not constitute a challenge with respect to Mr Al-Senussi and when it concluded that an incomplete challenge is not a proper challenge within the terms of article 19 of the Statute and rule 58 of the Rules.²³

19. In particular, the Libyan authorities argue that the Admissibility Challenge, the observations filed by Libya on 28 January 2013 and Libya’s Response to the Defence Application referred to by the Chamber in the Decision of 6 February 2013, actually “set out in writing the parameters of Libya’s challenge to the admissibility of the case and the basis upon which it is made, whilst seeking to rely on supplemental material in due course to provide further clarifications on the developments in the case since 1 May 2012”. It is submitted that the Chamber required an erroneously high level of formality when concluding that an incomplete challenge is not a challenge.²⁴

20. The Libyan Government submits that it would have been appropriate for the Court to use rule 58(2) of the Rules to postpone the surrender of Mr Al-Senussi.²⁵

21. Further, the Libyan Government contends that the errors made by the Chamber significantly affect the fair and expeditious conduct of the proceedings as it “plainly runs counter to the doctrine of complementarity”

²² ICC-01/11-01/11-277, para. 19.

²³ *Ibid.*, paras 26, 28 and 30.

²⁴ *Ibid.*, paras 25-32.

²⁵ *Ibid.*, paras 41-42.

and that it would be “unjust and wrong to fail to recognize the applicability of article 95 to the present situation”.²⁶

22. Finally, according to the Libyan Government, the intervention of the Appeals Chamber would, in effect, materially advance the proceedings as it would “avoid the absurd situation where Libya is forced, under difficult and volatile security conditions, to surrender Mr. Al-Senussi to the Court only for him to be subsequently returned to Libya in the event that Libya’s admissibility challenge is successful”.²⁷

C. The Defence’s Response

23. In its Response, the Defence submits that “Libya’s application argues the merits of a potential appeal without establishing the specific requirements for leave to appeal to be granted”.²⁸

24. In particular, the Defence argues that Libya has failed to show that the Chamber committed any errors of law, and, instead is merely “disagreeing with the findings of the Chamber”.²⁹ It is submitted that “Libya has not shown that any of the issues identified would significantly affect ‘the fair and expeditious conduct of the proceedings’, let alone that an immediate resolution by the Appeals Chamber could ‘materially advance the proceedings’”. It is argued that by submitting its Application without any foundation Libya is, in effect, “further delaying, and not advancing, the proceedings”.³⁰

D. The Prosecutor’s Response

²⁶ *Ibid.*, para. 44.

²⁷ *Ibid.*, para. 45.

²⁸ ICC-01/11-01/11-278, para. 3.

²⁹ *Ibid.*, paras 11-12.

³⁰ *Ibid.*, para. 16.

25. In turn, the Prosecutor indicates that the Libyan Government has failed to clearly identify precise issues. It is submitted that the issues constitute “mere disagreements with the Chamber’s ruling” or an “overly broad hypothetical question that does not arise from the Impugned Decision”³¹ and were litigated and decided upon prior to the impugned Decision.³²

26. In addition, the Prosecutor contends that Libya failed to show how the alleged errors significantly affect the fair and expeditious conduct of the proceedings and has failed to establish a “clear link between the alleged procedural violations and the fairness of proceedings”.³³

27. Finally, as regards the requirement that an immediate resolution of the issue by the Appeals Chamber would materially advance the proceedings, the Prosecutor is of the view that Libya’s argument is unpersuasive and that the course of action proposed “will only cause an unnecessary delay in the proceedings”.³⁴

III. Analysis and conclusions of the Chamber

28. The Chamber notes article 82(l)(d) of the Statute and Rule 155 of the Rules.

29. Article 82(1)(d) of the Statute sets out the following prerequisites to the granting of a request for leave to appeal:

- (a) the decision involves an issue that would significantly affect (i) the fair and expeditious conduct of the proceedings, or (ii) the outcome of the trial; and

³¹ ICC-01/11-01/11-280, paras 17-22.

³² *Ibid.*, paras 23-27.

³³ *Ibid.*, paras 30.

³⁴ *Ibid.*, para. 32.

(b) in the opinion of the Pre-Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

30. With respect to the particular question of the meaning of the term “issue” in the context of the first limb of the test under article 82(1)(d) of the Statute, the Appeals Chamber has stated the following:

An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. [...] An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination.³⁵

31. The Libyan Government argues that the Chamber made the following erroneous determinations:

i. That Libya’s submissions are presently not sufficient to trigger the applicability of Article 95 regardless of whether the Admissibility Challenge of 1 May 2012 can be considered as an expression of Libya’s intention to challenge the admissibility of the case against Mr Al-Senussi or instead as a fractional admissibility challenge to be supplemented in due course.

ii. That, given its silence in this regard, Rule 58(2) cannot be used as a legal basis for postponement of surrender and, in any event, it is dependent upon the existence of admissibility proceedings as properly triggered in accordance with the appropriate procedure in the Statute and no such procedure has been undertaken by Libya with respect to Mr Al-Senussi.³⁶

32. The Chamber agrees that the issues proposed for appeal arise out of the Impugned Decision. The impugned decision found that an expression of intention to challenge the admissibility of the case is of no consequence for the application of article 95 of the Statute.³⁷ It also indicated that an incomplete

³⁵ Appeals Chamber, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168, para. 9.

³⁶ ICC-01/11-01/11-277 para 17. In paras 25 to 42 it is submitted that the Chamber erred in: (i) determining that there is no admissibility challenge under consideration; (ii) failing to give full consideration to the manner in which an admissibility challenge can be brought; (iii) failing to consider the applicability of Article 95 of the Statute to the request for surrender of Mr. Al-Senussi; (iv) its interpretation of Rule 58(2) of the Rules and its finding that it does not apply.

³⁷ ICC-01/11-01/11-269 para. 30.

challenge which needs to be supplemented in due course cannot be considered properly made within the terms of article 19 of the Statute and rule 58 of the Rules.³⁸ Accordingly, the Chamber concluded that Libya's submissions were not sufficient to trigger the applicability of article 95 of the Statute and justify a postponement of the Surrender Request.³⁹ Moreover, the impugned decision found that rule 58(2) of the Rules cannot serve as a legal basis for the Libyan Government's request for postponement of the suspect's surrender and that, in addition, the determination of the "appropriate measures for the proper conduct of the proceedings" is dependant on the existence of admissibility proceedings, as properly triggered.⁴⁰ The Chamber is of the view that the Libyan representatives have properly identified appealable issues arising from the impugned Decision.

33. However, the Chamber finds that the Libyan Government has not sufficiently demonstrated that the issues significantly affect either: a) "the fair and expeditious conduct of the proceedings"; or b) "the outcome of the trial". The Chamber notes that the first requirements, "fair and expeditious", are cumulative whereas the "outcome of the trial" requirement is alternative thereto. This means that failure to fulfill either the "outcome of the trial" requirement or both of the requirements of "fair and expeditious" is fatal to the application.

34. In the view of the Chamber, the allegations advanced by Libya refer exclusively to concerns of "fairness":

It is manifestly unfair to deny the Government of Libya's request for a postponement of the order to surrender in circumstances where it has made an admissibility challenge pursuant to articles 19 and 95 and rule 58, whether it be construed as an "application" or, more broadly, as a "request" based on

³⁸ *Ibid.*, para. 32.

³⁹ *Ibid.*, para. 33.

⁴⁰ *Ibid.*, para. 35.

the Libyan Government's proposed interpretation of that term. Such a decision plainly runs counter to the doctrine of complementarity upon which the Rome Statute is based and the object and purpose of the Rome Statute. It would be unjust and wrong to fail to recognize the applicability of article 95 to the present situation in circumstances where an admissibility challenge can be said to be under consideration.⁴¹

35. The same consideration, namely that the allegations advanced by Libya refer exclusively to submissions on fairness, applies to the line of argument that surrendering the suspect would hamper current domestic proceedings, will cause immeasurable harm to the efforts to reinstate the rule of law in Libya and affect national security.⁴²

36. In sum, Libya has not advanced any argument or even allegation that the issues would significantly affect the *expeditiousness* of the proceedings before this Court. Moreover, it has failed to advance any consideration as to how the impugned decision may affect the *outcome of the trial*. In the circumstances, absent any reference or indication by the Libyan Government as to how these requirements are met, the Chamber is wholly unable to carry out an assessment under article 82(1)(d) of the Statute as to whether Libya has shown that the issues, if wrongly decided, may significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.


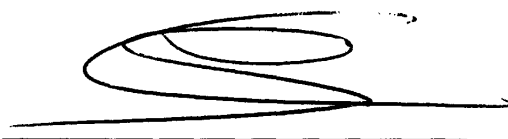
FOR THESE REASONS, THE CHAMBER

REJECTS the Application for Leave to Appeal.

⁴¹ ICC-01/11-01/11-277 para. 44.

⁴² *Ibid.*, para. 43.

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


Judge Silvia Fernández de Gurmendi
Presiding Judge
Judge Hans-Peter Kaul
Judge Christine Van den Wyngaert

Dated this 25 February 2013

At The Hague, The Netherlands