

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 14 March 2014

**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**

**Prosecution's Response to Defence Application for Leave to Appeal "the Pre-Trial Chamber's Failure to Issue a Decision"**

**Source:** Office of the Prosecutor

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

**The Office of the Prosecutor**

Fatou Bensouda  
James Stewart  
Julian Nicholls  
Helen Brady

**Counsel for Saif Al-Islam Gaddafi**

John R.W.D. Jones  
Sara Bafadhel

**Counsel for Abdullah Al-Senussi**

Benedict Emmerson  
Rodney Dixon

**Legal Representatives of Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for Participation/Reparation**

**The Office of Public Counsel for Victims**

Paolina Massidda  
Sarah Pellet  
Mohamed Abdou

**The Office of Public Counsel for the Defence**

**States Representatives**

Ahmed El-Gehani  
James Crawford SC  
Wayne Jordash  
Michelle Butler

**Amicus Curiae**

**REGISTRY**

---

**Registrar**

Herman von Hebel

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section Other**

## Introduction

1. The Prosecution opposes the Gaddafi Defence's application for leave to appeal the Pre-Trial Chamber's failure to issue a decision ("Application").<sup>1</sup> The Application should be dismissed *in limine* because it seeks to appeal a decision that has not yet been issued. Alternatively, even if the Chamber considers that "a decision" within the meaning of Article 82(1)(d) of the Statute has been rendered, the Application should be dismissed because it fails to establish an appealable issue within the meaning of Article 82(1)(d).

## Procedural Background

2. On 31 May 2013, Pre-Trial Chamber I ("Chamber") found the case against Saif Al-Islam Gaddafi ("Gaddafi") admissible before the Court and reminded Libya of its obligation to surrender Gaddafi.<sup>2</sup> On 7 and 24 June 2013, Libya appealed the Decision ("Appeal").<sup>3</sup>

3. On 23 July 2013, the Gaddafi Defence ("Defence") filed its request for finding of non-compliance and referral to the United Nations Security Council, in which, it requested the Chamber, among others, to find that the Government of Libya had failed to cooperate with the Court by deliberately refusing to surrender Gaddafi. Further, it requested the Chamber to refer the matter to the Security Council.<sup>4</sup> On 9 December 2013, the Defence filed before the Pre-Trial Chamber its urgent request for ruling on requests for finding of non-compliance.<sup>5</sup> On 13 December 2013, it filed an urgent addendum thereto.<sup>6</sup>

---

<sup>1</sup> ICC-01/11-01/11-522-Red.

<sup>2</sup> ICC-01/11-01/11-344-Red.

<sup>3</sup> ICC-01/11-01/11-350 OA4 and ICC-01/11-01/11-370-Conf-Exp OA5. The public redacted version was filed on 25 June 2013 (ICC-01/11-01/11-370-Red2 OA4).

<sup>4</sup> ICC-01/11-01/11-388.

<sup>5</sup> ICC-01/11-01/11-489-Red. The Prosecution notes that it does not have access to the confidential version of this filing, and that footnote 1 in this filing which is cited in the Application as a reference to the Defence requests for non-compliance is redacted in the version available to the Prosecution.

<sup>6</sup> ICC-01/11-01/11-491.

## Submissions

### Absence of a ruling does not equate to a "Decision" within the terms of Article 82(1)(d)

4. The Defence argues that the absence of a ruling from the Chamber in relation to the various Defence requests for findings of non-compliance constitutes an appealable issue.<sup>7</sup> In so doing, the Defence seeks to appeal a non-existent decision. As a result, the Application should be dismissed *in limine*.

5. The legal framework of the Court does not allow for an appeal for a decision that has not been rendered. Nor does it consider a purported delay in issuing a decision as a "decision" subject in itself to appellate review.

6. First, Articles 81 and 82 of the Statute, which exhaustively enumerate the grounds of appeal, do not recognise the possibility of a party to appeal an undecided or pending issue.<sup>8</sup> In addition, Article 82(1)(d) of the Statute, when read in conjunction with Rule 155, refutes the argument indicating that absence of a ruling may equate to an appealable decision. These provisions clearly require that a decision be first *rendered and notified to the parties* before an application for leave to appeal can be made. Pursuant to Rule 155, such an application can only be filed within five days of notification of the underlying decision.

7. Taking the Defence's arguments challenging the above legal reasoning to their logical extension, there would be nothing to prevent a party from lodging an appeal against the absence of a ruling whenever this party unilaterally deemed that the Chamber took more time than necessarily required to decide a matter. This logic applies equally to direct appeals which are submitted directly to the Appeals Chamber without prior vetting from the first instance chamber. In such situations, the first instance chamber would be deprived not only of its discretion to manage its case, but also from an opportunity to express the reasons for its exercise of

---

<sup>7</sup> Application, paras. 53-55.

<sup>8</sup> ICC-01/04-168 OA3, paras. 35, 39; ICC-01/04-01/06-2799 OA19, para. 7; ICC-01/04-01/06-2823 OA20, para. 14; ICC-01/04-01/07-3424 OA14, para. 28; and ICC-01/04-01/06-926 OA8, para.9.

discretion. Similarly, the Appeals Chamber would be asked to decide blindly on a decision that has not been written, or to speculate as to what may have caused the first instance Chamber to exercise its discretion as to the timing of the decision.

8. Additionally, the Defence's approach, if granted, could undermine the judicial economy of the proceedings by inviting countless appeals unforeseen by the Statute at any juncture of the case, subject only to the parties' will.

*The Application fails to identify an appealable issue*

9. Should the Chamber nevertheless consider that a "decision" within the meaning of Article 82(1)(d) of the Statute has been rendered in relation to the non-compliance requests of the Defence, the Application should be dismissed because it fails to establish an appealable issue.

10. The Appeals Chamber has held that "only an issue may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement of a 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. It may be legal or factual or a mixed one."<sup>9</sup>

11. Contrary to the Defence's argument, the mere refusal of its requests does not amount in and of itself to an appealable issue. Rather, the Defence simply disagrees with the manner in which the Chamber disposes of requests and the application before it, and wishes that it would prioritise its request for a finding of

---

<sup>9</sup> ICC-01/04-168 OA3, para. 9. ICC-02/04-01/05-367, para. 22; ICC-02/05-02/09-267, p. 6; ICC-01/04-01/06-2463, para. 8; ICC-01/09-02/11-27, para. 7. *See also*, ICC-01/04-01/06-1433 OA11, (Dissenting Opinion of Judge Song), para. 4, specifying that "[a] decision "involves" an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made."

non-compliance. Therefore, the issue raised in the Application is “merely a question over which there is disagreement or conflicting opinion”.<sup>10</sup>

12. The Defence further contends that a failure to issue a decision within a reasonable time can be equated to a constructive refusal of the Defence Requests.<sup>11</sup> This argument is unsupported and also indicates that the issue is a mere disagreement; the Defence prefers that a decision on the pending requests had been issued already. Even if, *arguendo*, the Chamber failed to issue a decision within a reasonable time, that issue could only be raised on appeal once a decision has been issued.

13. Finally, the appealable issue identified by the Defence in its Application is the purported “refusal” of the Chamber to grant the Defence’s request for a finding of non-compliance. Thus, the issues of the status of Gaddafi’s detention in Libya,<sup>12</sup> prospects of national proceedings in Libya,<sup>13</sup> and the volatile security situation in Libya,<sup>14</sup> while important issues, are not issues which require resolution in order to determine the question of non-compliance.<sup>15</sup>

---

<sup>10</sup> ICC-01/04-168 OA3, para. 9; ICC-01/05-01/08-532, para.17; ICC-02/05-02/09-267, para. 22; ICC-01/04-01/06-1557, para. 30; ICC-01/04-01/07-2035, para. 25; ICC-02/05-03/09-179, para. 27.

<sup>11</sup> Application, paras. 4, 44-56.

<sup>12</sup> Application, paras. 76, 77.


<sup>13</sup> Application, paras. 79, 80, 81.

<sup>14</sup> Application, paras. 82, 83.

<sup>15</sup> As the Appeal Chamber has held: “An issue is an identifiable subject or topic requiring a decision for its resolution” (emphasis added) ICC-01/04-168 OA3, para. 9. ICC-02/04-01/05-367, para. 22; ICC-02/05-02/09-267, p. 6; ICC-01/04-01/06-2463, para. 8; ICC-01/09-02/11-27, para. 7. *See also*, ICC-01/04-01/06-1433 OA11, (Dissenting Opinion of Judge Song), para. 4, specifying that “[a] decision “involves” an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made.”

### Conclusion

14. The Chamber should reject the Application.



---

Fatou Bensouda, Prosecutor

Dated this 14<sup>th</sup> day of March 2014

At The Hague, The Netherlands