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

Date: 16 April 2012

APPEALS CHAMBER

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

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

Public

**Application on behalf of the Government of Libya for leave to reply to the
‘Response to the “Government of Libya’s appeal against the Decision regarding
the second request by the Government of Libya for postponement of the
surrender of Saif Al-Islam Gaddafi”’**

Source: The Government of Libya, represented by:
Professor Philippe Sands QC
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Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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Victims**

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**Victims Participation and Reparations
Section**

Other

Introduction

1. Pursuant to regulations 24(5), 28 and 65 of the Regulations of Court, the Government of Libya files this Application for leave to reply to the 'Response to the "Government of Libya's appeal against the Decision regarding the second request by the Government of Libya for postponement of the surrender of Saif Al-Islam Gaddafi"' ("the OPCD Response") filed on 12 April 2012.
2. Leave to reply is respectfully sought to respond to the several erroneous statements of both law and fact contained in the OPCD Response.

Submissions

(A) The OPCD is wrong to suggest that Libya's appeal should be rejected in limine

3. In its Response, the OPCD states that the Libyan Government's appeal pursuant to article 82(1)(a) of the ICC Statute should be rejected *in limine* due to the fact that "the impugned decision did not concern a challenge to the admissibility of the Court under article 19 of the Statute".¹ This submission is wrong for the reasons set forth by the Libyan Government in its appeal.² Contrary to the submissions of the OPCD, the impugned decision concerned the Libyan Government's "request" under Rule 58 of the ICC Rules of Procedure and Evidence ("Rule 58") raising a challenge to admissibility (as a precursor to a Rule 58 "application" on admissibility to be filed on 30 April 2012). It was therefore a decision with respect to jurisdiction or admissibility for the purposes of article 82(1)(a) of the Statute.

¹ OPCD Response, paragraphs 14-26.

² Government of Libya's appeal against the 'Decision regarding the second request by the Government of Libya for postponement of the surrender of Saif Al-Islam Gaddafi', ICC-01/11-01/11-103, 10 April 2012, paragraphs 14 – 17.

(B) *The OPCD is wrong to suggest that Appeals Chamber has already ruled on the issue which is the subject of the present appeal*

4. The additional submission by the OPCD that the Appeals Chamber “clearly found in the Kenyan cases that rule 58 does not entitle a State to file a staggered admissibility challenge”³ is a misstatement of both the Appeals Chamber’s prior rulings and the basis for the present appeal. At no point in its detailed consideration of the Kenyan admissibility challenge did the Appeals Chamber consider the meaning of a “request” as distinct from an “application” for the purposes of Rule 58⁴ – because this was clearly not the basis upon which the Kenyan admissibility challenge was argued.⁵

(C) *The OPCD is wrong to suggest that the Libyan Government is attempting to make more than one admissibility application*

5. The OPCD is also wrong to suggest that allowing the appeal would be to “allow states to file multiple requests and applications concerning admissibility ... [and thus] fundamentally contrary to the underlying principles of article 19, in particular, the presumption that admissibility may only be challenged once”. The Libyan Government is very clearly only seeking to make one admissibility challenge – it has made an initial notification of its intention to make such a challenge (a “request” under Rule 58) and intends to follow this with a full admissibility “application” (under Rule 58) within a reasonable time period. Interpreting Rule 58 as proposed by

³ OPCD Request, paragraph 22.

⁴ Prosecutor v Ruto, Kosgey and Sang, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the application by the Government of Kenya challenging the admissibility of the case pursuant to article 19(2)(b) of the Statute’, 30 August 2011, ICC-01/09-01/11-307.

⁵ Prosecutor v Ruto, Kosgey and Sang, Appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the application by the Government of Kenya challenging the admissibility of the case pursuant to article 19(2)(b) of the Statute’, 6 June 2011, ICC-01/09-01/11-109; Prosecutor v Ruto, Kosgey and Sang, Document in support of the Appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the application by the Government of Kenya challenging the admissibility of the case pursuant to article 19(2)(b) of the Statute’, 20 June 2011, ICC-01/09-01/11-135.

the OPCD would penalize the Libyan Government for merely notifying the Court of its intentions through a “request” to file an admissibility “application”. Such an interpretation is manifestly absurd.

6. The OPCD suggestion that the Appeals Chamber should make a final ruling as to the admissibility of the case based merely on Libya’s “request” to the Pre-Trial Chamber⁶ is in flagrant disregard of the principle of complementarity. It is well-established that under article 17 of the ICC Statute, the Court may *only* exercise jurisdiction in circumstances where national judicial systems are either unwilling or unable to investigate or prosecute. Denying the Libyan Government a reasonable opportunity to demonstrate, by way of a comprehensive “application” setting forth its arguments and evidence in full, that it is both willing and able to genuinely investigate and prosecute Saif Al-Islam Gaddafi and Abdullah Al-Senussi by lodging an article 19 admissibility challenge in the very near future would be in manifest contradiction with the object and purpose of complementarity under the Rome Statute.

(D) The OPCD is wrong to suggest that the Appeals Chamber should not grant suspensive effect in relation to the impugned decision

7. The OPCD is wrong to argue that “there is no basis for granting suspensive effect in the present circumstances”.⁷ The unique situation faced by the Libyan Government has been briefly outlined in its appeal.⁸ The Libyan Government is making considerable efforts to ensure a genuine investigation of Saif Al-Islam Gaddafi and Abdullah Al-Senussi for crimes against humanity and to hold fair trials in accordance with the results of the investigation. The Libyan Government has no intention of holding a rushed trial of these two persons

⁶ OPCD Response, paragraphs 25-26.

⁷ OPCD Response, paragraphs 28-34

⁸ Appeal against the decision regarding the second request by the Government of Libya for postponement of the surrender of Saif Al-Islam Gaddafi, ICC-01/11-01/11-103, 10 April 2012, paragraphs 3-4.

that would constitute a violation of international minimum standards of due process. The OPCD suggestion that there is a “strong probability” that “Mr Gaddafi will be [sic] have been tried and executed, before the ICC will be in a position to render a decision on admissibility”⁹ is nothing more than speculation and a baseless affront to the good faith efforts of Libya despite the difficult circumstances prevailing in the aftermath of mass-atrocities committed by the Gaddafi regime.

8. The Libyan Government strongly refutes the numerous incorrect statements which the OPCD has made in its Response¹⁰ and in other filings,¹¹ which it intends to address fully in other submissions. The failure of OPCD to even attempt to verify some of these absurd allegations (e.g. that Mr. Gadaffi has only been charged in relation to licensing of camels and fish farms and that he is being held incommunicado) has unfairly prejudiced the Government of Libya in these proceedings. Libya is acting in good faith and seeking to comply with the Court’s orders; it is for this reason that the Libyan Government has engaged in this legal process and sought suspensive effect of the order to surrender pending a final determination of its admissibility challenge.¹² For the Appeals Chamber to deny suspensive effect in the circumstances would significantly undermine the principle of complementarity - the pillar upon which the Court was founded - and stigmatize a Government that is both willing and able to eradicate impunity in relation to crimes against humanity committed against Libyan citizens.

(E) The approach of the OPCD with respect to the media

9. The OPCD complain in their Response about statements of “high level Libyan

⁹ OPCD Response, paragraph 31.

¹⁰ OPCD Response, paragraphs 30, 33-34.

¹¹ Addendum to the Urgent Report of Concerning the Trip to Libya, ICC-01/11-01/11-70-Red2.

¹² Appeal against the Decision regarding the second request by the Government of Libya for postponement of the surrender of Saif Al-Islam Gaddafi, ICC-01/11-01/11-103, 10 April 2012, paragraphs 25-29.

authorities” which they say “underscore the necessity of taking strong measures at the earliest possible juncture to ensure Libya’s compliance with the Decision”.¹³ Again, the OPCD has made no attempt to verify the official position of the Libyan Government. Like any other country recently emerging from armed conflict, mass-atrocities, and a complete change in government, Libya is progressively creating new institutions and allocating responsibility for dealing with certain tasks (including communications with the media) to appropriate officials. It is for this reason that certain statements made to the press do not necessarily represent the considered or official position of the Government with respect to the trial of Mr Gaddafi and Mr Al-Senussi.

10. It is also apparent that the media are being given access to the filings of the OPCD before they have been received by Libya: counsel for Libya have on at least one occasion received a copy of an OPCD filing from a media source a day before it was received from the Registry.¹⁴ It further appears that the OPCD may be sending filings – or extracts thereof – to selected media representatives, with a view to stirring controversy and litigating its case in the media. This conduct only compounds the effect of unverified and erroneous allegations that are falsely attributed to the Libyan Government.

11. Libya reserves the right to make an application in due course in relation to such manifestly inappropriate activities by the OPCD. The Libyan Government considers that it is not in keeping with judicial propriety for parties to be seen to be litigating their case in the media. The Government of Libya does not intend to litigate this important issue in such a manner and would likewise invite the OPCD to desist from its current practice of briefing the media as to its filings in advance of those filings being notified and distributed by the Registrar, and from making sensationalist claims that are

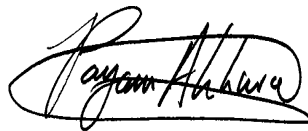
¹³ OPCD Response, paragraph 31.

¹⁴ By way of example, the OPCD Response was sent by email from an officer of the OPCD to the New York Times at approximately 9:00pm CET on 11 April 2012 but was not notified by the Registrar as being filed until 10:18am CET on 12 April 2012.

unsupported by evidence, without any attempt to verify facts in consultation with the Libyan Government. Such conduct is not befitting of the OPCD, which is bound to apply the highest professional standards in all of its activities. This behaviour further has the potential to affect the proper administration of justice and the integrity of the present proceedings before the Chamber.¹⁵ Libya too is entitled to proceedings before the ICC that meet the highest standards of fairness and integrity.

Conclusion

12. For the reasons set forth above, the Government of Libya respectfully requests that the Appeals Chamber grant leave to the Government of Libya to reply to the new and erroneous arguments advanced by the OPCD in its Response.


Professor Philippe Sands QC
Professor Payam Akhavan
Michelle Butler

Counsel on behalf of the Government of Libya

Dated this 16th day of April 2012

At London, United Kingdom

¹⁵ Prosecutor v Muthaura, Kenyatta and Ali, Decision on the Defence "Application for Order to the Prosecutor regarding extra-judicial comments to the press", 5 May 2011, ICC-01/09-02/11-83, paragraph 6.