



Original: English

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

Date: 25 June 2013

THE APPEALS CHAMBER

Before: Judge Anita Ušacka, Presiding Judge
Judge Akua Kuenyehia
Judge Sang-Hyun Song
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

The Libyan Government's Response to Gaddafi Defence "Request for Urgent Appeals Ruling"

Source: The Government of Libya, represented by:
Professor Ahmed El-Gehani
Professor Philippe Sands QC
Professor Payam Akhavan
Ms Michelle Butler

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

The Office of the Prosecutor

Ms. Fatou Bensouda

Counsel for the Defence

Counsel for Saif Al-Islam Gaddafi:

Mr. John R.W.D Jones QC

Ms. Sarah Bafadhel

Counsel for Abdullah Al-Senussi:

Mr. Ben Emmerson QC

Mr. Rodney Dixon

Ms. Amal Alamuddin

Mr. Anthony Kelly

Professor William Schabas

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

Ms. Paolina Massidda

Ms. Sarah Pellet

Mr. Mohamed Abdou

The Office of Public Counsel for the Defence

State's Representatives (in the case of Saif Al-Islam Gaddafi)

Professor Ahmed El-Ghani

Professor Philippe Sands QC

Professor Payam Akhavan

Ms. Michelle Butler

Amicus Curiae

REGISTRY

Registrar

Mr. Herman von Hebel

Counsel Support Section

Deputy Registrar

Mr. Didier Daniel Preira

I. INTRODUCTION

1. On 18 June 2013, the Defence for Saif Al-Islam Gaddafi filed the “Request for Urgent Appeals Ruling” (“Defence Request”).¹ The Libyan Government hereby files its Response, pursuant to Regulation 24(3).

II. SUBMISSIONS

2. Mr. Gaddafi requests that the Appeals Chamber issue an immediate ruling on the Government of Libya’s request for suspensive effect.
3. The Libyan Government notes, at the outset, that no provision of the Statute or Rules provides a clear basis for Mr. Gaddafi’s request, and the Request makes no reference to any provision at all. Further, there *are* references to the possibility for expedited procedure in other situations. Thus, the Defence Request appears to be without legal basis.
4. Relatedly, it should also be noted that the requirement, under Rule 156(4), that an “appeal shall be heard as expeditiously as possible” could never mean that an opportunity to hear and consider key arguments, which are of profound importance to the parties and vital for the Chamber’s consideration, should be sacrificed in favour of undue expedition.
5. Mr. Gaddafi’s submissions are made on the basis of a series of assertions, including allegations as to the attitude of the Libyan Government to compliance with international legal obligations and the stage that the domestic criminal proceedings has reached.
6. As to the latter, Mr. Gaddafi contends that the Appeals Chamber’s decision on the admissibility issue may occur after the commencement of the domestic trial of Mr. Gaddafi. On the basis of this speculative assertion, Mr. Gaddafi seeks to deny the Libyan Government the opportunity the time and opportunity to make full argument in respect of its admissibility challenge. As set out in the Libyan

¹ ICC-01/11-01/11-359.

Government's Document in Support of Appeal, the final determination of the admissibility before the ICC of the case against Mr Gaddafi is of such importance as to warrant an oral hearing. The same reasons militate even more forcefully in favour of denial of the Defence Request for an expedited decision. In sum, it is vital that the parties be afforded every opportunity to convey their arguments to the Appeals Chamber for the following reasons:

- a. There is a lack of precedent or guidance, in jurisprudence, or in the negotiating history of the Rome Statute, as to the current situation, namely one in which (i) the ICC has gained jurisdiction by way of a resolution of the UN Security Council; and (ii) there is the context of an extant, active domestic investigation. This situation raises fundamental questions as to the relationship between states and the ICC, which will have a far-reaching impact;
- b. In light of this, there is a heightened need for the Chamber to have every possible opportunity to seek and ascertain the facts in Libya, and the Libyan Government's view of the applicable law;
- c. The importance of the perceptions of the Libyan people as to the legal process underlying the complementarity principle – and the concomitant need for transparency – should be accorded due weight, given the historic importance of the case in Libya;
- d. As recognised by the UN Secretary General, upholding “Libyan ownership” of the Libyan transition is of paramount importance,² as is “giv[ing] [Libya] the space required to determine its future”;³

² United Nations Security Council, Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2011/727, 22 November 2011; United Nations Security Council, Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2012.129, 1 March 2012.

³ Report of 1 March 2012, pp.11,12.

- e. The Libyan Government has genuine a genuine demonstrated commitment to exercising its sovereign right to conduct *genuine* domestic criminal investigations and prosecutions as appropriate;
 - f. More generally, the case is of immense importance to the international community writ large.
7. Mr. Gaddafi's submissions seek to mask the prejudice that granting the Defence Request would cause to the Libyan Government by asserting that, in light of the Decision of Pre-Trial Chamber I on the admissibility of the case against Saif al-Islam Gaddafi of 31 May 2013 ("Gaddafi Admissibility Decision"), "only the ICC has jurisdiction to prosecute Mr. Gaddafi for conduct related to the ICC charges".⁴
 8. It should be noted, first, that this is legally wrong. Libya's standing to appeal in this matter arises from the fact that it is, pursuant to Article 19(2)(b) of the Statute "[a] State which has *jurisdiction* over [the *Gaddafi* case], on the ground that it is investigating or prosecuting the case or has investigated or prosecuted".
 9. The assertion that "only the ICC has jurisdiction to prosecute Mr. Gaddafi for conduct related to the ICC charges"⁵ is not merely an error of terminology as between "jurisdiction" and admissibility". This, in combination with Mr. Gaddafi's arguments concerning the progress of domestic proceedings, reflects a misconception that the Libyan Government is barred from making progress with its domestic criminal investigation because of the mere existence of ICC jurisdiction. It should be noted, in this regard, that although the Pre-Trial Chamber found the case admissible, the request for interim suspensive relief⁶ and the strong support for it to be granted,⁷ indicate that the Gaddafi Admissibility Decision should not be implemented until after the appeal in

⁴ Defence Request, para. 3.

⁵ Defence Request, para. 3.

⁶ ICC-01/11-01/11-350 at para. 12.

⁷ As indicated in the Appeal and Document in Support of the Appeal.

relation thereto is resolved. The situation following the decision of 31 May 2013 must be understood in this context.

10. In short, the transfer of Mr. Gaddafi to the ICC would prohibit Libya taking any further “progressive steps”⁸ in its investigation, thereby preventing or irreversibly impeding the progress of the domestic investigation in respect of Mr. Gaddafi. Clearly, immediate transfer would specifically undermine the purpose of the appeal. Therefore, in light of the possibility of suspensive interim relief until the appeal is determined, it is the *right* to appeal that should be the decisive factor as to procedure. In this regard, it is worth repeating that *rights* must be not “theoretical or illusory”, but rather “practical and effective”.⁹
11. In this regard, Mr. Gaddafi gives misplaced emphasis to the fact that the Libyan Government’s request for suspensive effect was phrased as relating to the transfer of Mr Gaddafi to the ICC, as opposed to the Pre-Trial Chamber’s finding that the case is admissible before the ICC.¹⁰ Given that interim suspensive relief is directed to the effects of *implementation* of an impugned decision during the period before the appeal is determined, this distinction is illusory. The principal potential impact of the Gaddafi Admissibility Decision, *during the period before the Appeals Chamber renders its decision*, would be the transfer of Mr. Gaddafi to the ICC, and the effects of this (*inter alia* irretrievable or serious harm to the Libyan investigation in relation to Mr. Gaddafi, and to the planned prosecutions of other accused persons).
12. Pursuant to the regime of the ICC Statute, Libya is making submissions as to its willingness and ability to pursue a genuine domestic prosecution. Further, the opportunity to make such submissions, and to make progress with the domestic criminal process is further *protected* by the Statute, in the form of the regime of suspensive effect. Despite this Mr. Gaddafi seeks to characterise as unlawful the

⁸ As recognised by the Pre-Trial Chamber: see Gaddafi Admissibility Decision, paras. 54, 73.

⁹ See, for example, *Artico v. Italy* (1980) 3 EHRR 1, para. 33; *Liu v. Russia* (No. 2) [2011] ECHR29157/09; *Scordino v. Italy* (No. 1) (GC) No. 36813/97.

¹⁰ Defence Request, paras. 1, 2, referring to ICC-01/11-01/11-344-Red.

activities that underpin the admissibility challenge (and by corollary, any appeal in respect of that admissibility challenge).

13. Mr. Gaddafi's misconception is further reflected in the assertion that statements of a kind associated with a normal domestic level criminal process in Libya or elsewhere, especially one involving a high-profile accused person, evince disregard for international legal obligations. Mr Gaddafi refers to a press conference by an official of the Prosecutor's Office, as an indication of "blatant disregard for [international legal] obligations".¹¹

*We assure the Libyan people that the investigation in this case will come to an end and that the case will be disposed of [referred] in the near future, and its first hearings will be held, with God's will, in the first half of August. The case will be referred to the Accusation Chamber, which will view it and then refer it to Criminal Court – Appeals Circuit—in the Court of Tripoli, which is competent to view this case.*¹²

14. To be clear, (in addition to the obligations rooted in the state co-operation provisions of the Statute, which are subject to potential suspensive relief) the applicable international obligations are (i) to conduct a prosecution (either an investigation or an investigation and a trial) where international crimes are alleged to have taken place; and (ii) for this process to be *genuine*. Statements such as the above would be associated with the progression of a normal domestic-level criminal process *anywhere*. Indeed, they are a strong indication of Libya's desire to fulfil the object and purpose of the Rome Statute: to end impunity for international crimes, through the genuine domestic prosecution of those alleged to be responsible.

15. Notwithstanding political statements of intent, relating to the future development of the case, including the transfer of Mr Gaddafi to Tripoli, the Gaddafi case is currently in the investigation phase. In this regard, it should be

¹¹ Defence Request, para. 4. See also para. 5.

¹² Defence Request, annex A.

noted that the admissibility assessment must address the present status of the case, and not engage in speculation as regards its future development.

16. The same applies to the existence of the death penalty.¹³ In any event, it is clear that as a matter of law, it is simply irrelevant to the admissibility question. Moreover, the availability of the death penalty does not mean that it will be applied. Where the death penalty has been imposed, the sentence cannot be carried out until the Supreme Court has considered the case. Commutation of the death sentence to life imprisonment is possible where the family members of victims forgive the convicted person. Once the trial court hears the evidence of family members, they may impose a new sentence. Additional guarantees are provided under articles 31 and 33 of Libya's Constitutional Declaration.¹⁴ Further as the Pre-Trial Chamber has recognised, Libya has ratified relevant human rights instruments.¹⁵

17. As regards legal representation of Mr. Gaddafi,¹⁶ as Libya indicated in its submissions on 23 January 2013¹⁷, and again on 4 March 2013¹⁸, the Government made considerable efforts to secure legal representation for Gaddafi.¹⁹ Libya accepts that this process has been difficult and no lawyers had been found at the

¹³ See Defence Request, para. 9.

¹⁴ See Gaddafi Admissibility Challenge, paras 56, 67.

¹⁵ Gaddafi Admissibility Decision, para. 202, referring to ICCPR, the UN Convention against Torture, the International Convention on the Elimination of Racial Discrimination, the African Charter on Human and Peoples' Rights, the Arab Charter on Human Rights and resolutions such as the Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, adopted by the African Union in 2003

¹⁶ ICC-01/11-01/11-332-Anx3: Full Press conference by Al-Alagi and Usama Al-Juweili concerning Saif's Trial 02-05-2013).

¹⁷ Libya's Further Submissions, paragraph 97, Minister of Justice stated that Ministry officials "have been in continuous high level contact with the Libyan Law Society and the Popular Lawyers Office in order to select a suitably qualified and committed highly qualified counsel or a team of defence counsels to represent him during his forthcoming trial".

¹⁸ Libya's Consolidated Reply, paragraph 53: "the Libyan Government is in the process of approaching the Bar Associations of Tunisia and Egypt to obtain a suitably qualified and experienced counsel for Saif Al-Islam Gaddafi who will be permitted, together with a Libyan lawyer, to represent Saif Al-Islam Gaddafi in the Libyan proceedings."

¹⁹ *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "Addendum to the "Urgent Defence Request" of 21 January 2013, and Request for Finding of Non-Compliance", 07 May 2013, ICC-01/11-01/11-332-Anx3: Full Press conference by Al-Alagi and Usama Al-Juweili concerning Saif's Trial 02-05-2013).

time of those filings. Since then, legal representatives were appointed for Mr. Gaddafi at his hearing in Zintan on 2 May 2013 relating to incidental domestic charges. One of the lawyers is a private lawyer appointed by Mr. Gaddafi's aunt and the Court appointed the second. Mr. Gaddafi explicitly confirmed to the court that he consented to these lawyers representing him. Those proceedings were subsequently adjourned partly at the request of defence counsel so that they had sufficient time to consider the case file fully.²⁰

18. The defence also refers to concern as to whether his defence strategy in the ICC would be different from that pursued at the domestic level.²¹ The ICC must not follow the Defence's exhortation to procure a case for itself simply as a result of differences, which are immaterial to the admissibility assessment, between the domestic legal system and case and the ICC's own processes. Such immaterial differences include those relating to rules concerning disclosure of witnesses' identities or the procedure for calling witnesses. It would be absurd, and contrary to the object and purpose of the Rome Statute if the domestic process *per se* (to the extent that it is not identical to the ICC process) amounted to a reason for the ICC to undermine the Libyan Government's opportunity to make full arguments, pursuant to its right to appeal in respect of the admissibility of the *Gaddafi* case.

19. Finally, even if the Chamber were to accept the flawed premises of the Defence Request, Mr. Gaddafi overstates the significance of commencement of a trial (or of any other aspect of criminal process). Of course, this is not a bar to a decision by the ICC as to admissibility *or the implementation*. A State may submit a new challenge to admissibility under article 19(4) *only* in "exceptional" circumstances, whereas the ICC Prosecutor can raise admissibility before the ICC at a later date even without exceptional circumstances.

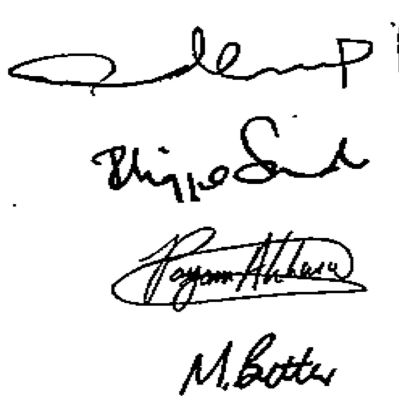
²⁰ *Ibid.*

²¹ Defence Request, para. 7.

III. CONCLUSION

20. For the reasons set forth above, the Government of Libya respectfully requests that the Appeals Chamber reject the Defence Request.

Respectfully submitted:



Professor Ahmed El-Ghani
Professor Philippe Sands QC
Professor Payam Akhavan
Ms Michelle Butler
*Libyan ICC Coordinator and
Counsel on behalf of the Government of Libya*

Dated this 25th day of June 2013
At London, United Kingdom