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

Date: 27 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***

**Libyan Government's application for leave to file a consolidated reply to the  
"Defence Response to Government of Libya's Request for Suspensive Effect" and  
the "Prosecution's Response to the Government of Libya's Request for Suspensive  
Effect"**

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

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**REGISTRY**

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**Registrar**

Mr. Herman von Hebel

**Counsel Support Section**

**Deputy Registrar**

Mr. Didier Daniel Preira

## I. INTRODUCTION

1. The Government of Libya hereby files an application for leave to reply to the “Defence Response to Government of Libya’s Request for Suspensive Effect”<sup>1</sup> (“Gaddafi Response”); and the “Prosecution’s Response to the Government of Libya’s Request for Suspensive Effect”<sup>2</sup> (“Prosecution Response”). Each of these filings concern the Libyan Government’s request for suspensive effect, pursuant to article 82(3) of the Statute, as outlined in its notice of appeal on 7 June 2013 (“Request”).<sup>3</sup>
2. The Prosecution Response requests that, “unless the Appeals Chamber decides to entertain additional reasons provided by Libya in its document in support of appeal or to consider other factors in exercise of its discretion, Libya’s Request for suspensive effect should be rejected”.<sup>4</sup> The Gaddafi Response requests that the Appeals Chamber dismiss the Request *in limine*.<sup>5</sup>
3. Mr. Gaddafi also requests that the Gaddafi Defence be permitted to submit a further response in relation to the merits of the Request (if the Appeals Chamber were to decline to dismiss the Request *in limine*).<sup>6</sup> The Libyan Government will also set out its response to this application (see Part III, below).

## II. APPLICATION FOR LEAVE TO REPLY

### A. *Applicable Law*

4. Pursuant to Regulation 24(5) of the Regulations of the Court “participants may

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<sup>1</sup> ICC-01/11-01/11-357.

<sup>2</sup> ICC-01/11-01/11-368.

<sup>3</sup> *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “The Government of Libya’s Appeal against Pre-Trial Chamber I’s ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’”, 07 June 2013, ICC-01/11-01/11-350.

<sup>4</sup> Prosecution Response, para. 15.

<sup>5</sup> Gaddafi Response, para. 45.

<sup>6</sup> Gaddafi Response, para. 7.

only reply to a response with the leave of the Chamber”.<sup>7</sup>

5. According to Regulation 34(c), if leave is granted, any reply “shall be filed within ten days of notification [...] of the response”. However, under Regulation 29 and Rule 101 of the Rules of Procedure and Evidence, the Chamber has discretion to make orders in relation to time limits having “regard to the need to facilitate fair and expeditious proceedings” (Rule 101) and as “necessary in the interests of justice” (Regulation 29).

#### **B. Submissions**

6. The Libyan Government submits that there is good cause<sup>8</sup> to grant leave to reply in respect of all of the matters raised within the Prosecution Response and the Gaddafi Response. Both raise the following issues:
  - a. The authority of the Appeal’s Chamber to order suspensive effect in relation to the transfer of Mr. Gaddafi to the Court in the present circumstances;<sup>9</sup>
  - b. The permissible form and content of argumentation in support of a request by the Libyan Government for suspensive effect;<sup>10</sup>
  - c. Whether, and to what extent, the absence of suspensive effect would cause detriment to the Libyan Government.<sup>11</sup>
7. The mutual relevance of each of these filings, it is submitted, militates strongly in favour of the Appeals Chamber granting the Libyan Government the opportunity to file a *consolidated* reply.

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<sup>7</sup> *Prosecutor v Lubanga*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Decision sur la demande de mise en liberte proviso ire de Thomas Lubanga Dyilo”, ICC-01/04-01/06-824, 13 February 2007, para. 68.

<sup>8</sup> *Prosecutor v. Bemba*, Decision on the Defence’s Request for Leave to Reply on the Motion for Provisional Release dated 24 November 2008, 27 November 2008, ICC-01/05-01/08-294; *Prosecutor v. Mbarushimana* Decision on the Prosecution’s request for leave to reply to the “Defence Response to Prosecution’s Request for the Review of Potentially Privileged Material”, 24 November 2011.

<sup>9</sup> Prosecution Response, paras 7-9; Gaddafi Response, paras 21-32.

<sup>10</sup> Prosecution Response, paras 7, 10-12; Gaddafi Response, paras 33-44.

<sup>11</sup> Prosecution Response, paras 7, 13, 14; Gaddafi Response, paras 35.

8. The Prosecution and Gaddafi Responses each raise arguments concerning the above-mentioned issues that are either incorrect, speculative, or raise new and distinct issues of law and fact. Examples of this can be found in respect of each of the three issues (listed above) in both Responses.

1. Authority to grant suspensive relief

9. As to the issue of the authority of the Appeals Chamber to grant suspensive relief in the present circumstances, the Libyan Government takes no issue with the Prosecution's submissions and no reply is necessary. However, the Defence position - that the Appeals Chamber has no authority, in the present circumstances to grant suspensive effect - is an erroneous interpretation of the law. Any reply would counter this assertion and address the numerous arguments advanced in support, including that the obligation to transfer is independent of the question of admissibility.<sup>12</sup>
10. In light of multi-faceted nature of these arguments, as well as the profound impact that the Defence's approach - if accepted - would have upon both the Libyan Government's rights and interests, it is submitted that the interests of justice dictate the need for a reply. Further, the difference between the Prosecution's position and that of the Defence militates in favour of receipt of submissions from the Libyan Government on this matter.

2. Argumentation in support of a request

11. Turning to the permissible form and content of argumentation in support of a request by the Libyan Government for suspensive effect: Mr. Gaddafi objects to suspensive effect on the basis that (i) no supporting argumentation was

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<sup>12</sup> Defence Response, para. 27

submitted at the time of filing this request; and (ii) there is no legitimate opportunity to make supporting argumentation in the document in support of the appeal because “Statute and Rules clearly envisage the submission of such a request as a unitary event, rather than a two-staged procedure”.<sup>13</sup> The Prosecution makes a similar argument, albeit with different reasoning in support. It would be argued, in reply, that both arguments are legally erroneous, and based upon a misconception of the nature of interim suspensive relief.

### 3. Impact upon Libya of refusal of suspensive relief

12. Regarding the question of detrimental impact, the Prosecution’s factual argument is that Mr. Gaddafi “could be surrendered before the Court and the proceedings commence”,<sup>14</sup> on the basis that “this does not *appear* to create an irreversible situation”.<sup>15</sup> The speculative basis of the Prosecution’s current position, in this regard, is underlined by its argument that “*depending on the circumstances of the case, there may be no irreparable consequence or irreversible situation if the impugned decision is not suspended*”.<sup>16</sup> This clearly merits a reply by the Libyan Government, which is in the best position to furnish the Chamber with relevant information as to the irreversibility or otherwise of the surrender.

13. On the same issue, Mr. Gaddafi argues that, in the absence of “strong” or “compelling” reasons, which would justify the suspension, the Appeals Chamber will dismiss the request,<sup>17</sup> and that Article 82(3) sets out a presumption against suspensive effect. A reply would set out why this submission amounts to a legal error.

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<sup>13</sup> Defence Response, paras 36, 38.

<sup>14</sup> Prosecution Response, para. 14.

<sup>15</sup> Prosecution Response, para. 7 (emphasis added).

<sup>16</sup> Prosecution Response, para. 13 (emphasis added).

<sup>17</sup> Defence Response, para. 35, referring to ICC-01/04-02/12-12 at paras. 23-24; ICC-01/09-02/11-401 at para. 10.

4. Merits of granting reply

14. In light of the profound impact that the Appeals Chamber's decision will have upon the sovereign rights and interests of the post-revolutionary Libyan state, the importance of these matters is self-evident. The fact that the Prosecution and Defence express starkly divergent views in relation to some of these matters indicates a level of uncertainty as to the approach that the Appeals Chamber could take in resolving this matter. This further underlines the importance to be attached to providing the Libyan Government with an opportunity to apprise the Appeals Chamber of its position.
15. In the event that leave is granted to reply, Libya would not repeat arguments already made in its previous submissions, but rather would confine its submissions to addressing only matters raised by the Responses.
16. The Libyan Government notes, in this regard, that its "Document in Support of the Government of Libya's Appeal against the 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi'"<sup>18</sup> was filed before the Prosecution's Response was filed. Therefore, the two issues listed above (authority of the Appeal's Chamber to order suspensive effect, and the permissible form and content of argumentation) are not matters which fell to be addressed in the request, or in the Document in Support.
17. Consequently, the Prosecution Response includes submissions on the above issues, in relation to which the Chamber has not been apprised of the Libyan Government's position, including the argument that the request for suspensive relief was not supported by any or adequate argumentation. These are submissions of a legal nature, in relation to which, the Libyan Government contends it is imperative that the Appeals Chamber has the opportunity to consider the Libyan Government's position. It should be noted that, although

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<sup>18</sup> ICC-01/11-01/11-370 ("Document in Support of Appeal"). See, in particular, paras 178-192.

the date of the Defence Response was in advance of submission of the Document in Support of Appeal, it was not possible to address the specific nature of Defence's submissions in that filing due to page limitations.<sup>19</sup>

18. A Reply by the Libyan Government will assist the Court's deliberations. The Libyan Government makes this request bearing in mind the Chamber's duties to balance the competing interests at stake – namely the need to ensure that the proceedings are fair in the sense that, *inter alia*, the parties enjoy the opportunity to respond to other parties' submissions (and the Chamber is assisted by having all the relevant information and arguments before it), and that the proceedings are expeditious and avoid unnecessary delays. A Chamber "must ensure that proceedings are fair in the sense that, *inter alia*, the Government lodging the challenge enjoys the opportunity to respond to the parties' and participants' observations", provided the proceedings remain "equally expeditious in order to avoid unnecessary delays of the entire proceedings".<sup>20</sup> In the Gaddafi proceedings, the Pre-Trial Chamber upheld the appropriateness of authorising Libya to file a reply to responses addressing admissibility issues, due to Libya's status as the "triggering force and main actor in [admissibility] proceedings".<sup>21</sup>

##### 5. Deadline for submitting Reply

19. The Libyan government notes that, pursuant to Regulation 34(c), the usual deadline for a reply would be within 10 days of notification. This would entail deadlines of 28 June 2013 and 5 July 2013 in relation to the Defence Response and the Prosecution Response respectively. However, for the reasons outlined, it is submitted that a consolidated reply would facilitate fair and expeditious proceedings, and that it is necessary in the interests of justice. It would,

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<sup>19</sup> See Document in Support of Appeal, fn. 251

<sup>20</sup> *Prosecutor v Ruto et al*, "Decision under Regulation 24(5) of the Regulations of the Court on the Motion submitted on behalf of the Government of Kenya", Pre-Trial Chamber II, 2 May 2011, ICC-01/09-01/11-76, para. 15.

<sup>21</sup> ICC-01/11-01/11-191, para. 8.



therefore, be within the Chamber's discretion under Regulation 29 and Rule 101 of the Rules of Procedure and Evidence, to make an appropriate order in relation to time limits. The Libyan Government hereby applies for leave to file a consolidated reply to the Gaddafi and Prosecution Responses within 10 days of notification of the Prosecution Response (ie. by 5 July 2013).

### III. MR. GADDAFI'S REQUEST TO MAKE FURTHER SUBMISSIONS

#### A. *Applicable Law*

20. Regulation 24(1) states that

*The Prosecutor and the defence may file a response to any document filed by any participant in the case in accordance with the Statute, Rules, these Regulations and any order of the Chamber.*

#### B. *Submissions*

21. Mr. Gaddafi's request to file a further Response is made conditional upon the Appeals Chamber's dismissal of the request by the Gaddafi Defence, that the Libyan Government's Request (for suspensive effect) be dismissed *in limine*.<sup>22</sup>

22. The nature of such a request is essentially to dismiss the Libyan Government's Request without further consideration (literally, "at the threshold"). Such requests usually pertain to the exclusion of evidence, such that the evidence concerned is not put before the tribunal of fact. In the context of an appeal this essentially means that the appellate tribunal does not consider the argument.

23. In the present context, it amounts to rejecting the Libyan Government's Request *without submission of a Reply*. For this reason, the rejection *in limine* of the request for suspensive relief would amount to exactly the same as dismissal without receipt of a reply. It follows that (i) the notion of dismissal *in limine* is irrelevant to the present circumstances, and (ii) Mr. Gaddafi's assertion that the Gaddafi

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<sup>22</sup> Gaddafi Response, para. 7.

Defence should be permitted to file a further response were the Appeals Chamber to reject the application for dismissal *in limine* is simply a request to *file a second response* – and indeed, to do so after the Appeals Chamber has determined the matter. As indicated by the plain text of Regulation 24(1), there is no legal basis whatsoever for such a request. Still less is there the “right” to make such a response which Mr. Gaddafi purports to “reserve”.<sup>23</sup> It would be contrary to the interests of justice to permit Mr. Gaddafi to file such a “response”.

24. Moreover, and in any event, the legal basis for dismissal *in limine* of a party’s request or application (as set out in the jurisprudence to which Mr. Gaddafi refers), is that the said request or application fails to make any, or sufficient, submissions as to how this matter or act alleged made a material difference to an impugned decision.<sup>24</sup> In the context of the present Request for interim suspensive relief, the equivalent is that the request is made absent of argumentation in support (as noted above). However, whether or not argumentation in support of an application for suspensive relief is *separate from the existence of the substantive appeal* is itself one of the matters that is in issue (as would be explained in a reply from the Libyan Government).

#### IV. CONCLUSION

25. For these reasons, the Government of Libya respectfully requests the Chamber to:

- a. Grant it leave to a consolidated Reply to the Gaddafi Response and the Prosecution Response;
- b. Set a deadline for this Reply of 5 July 2013 (10 days following filing of the

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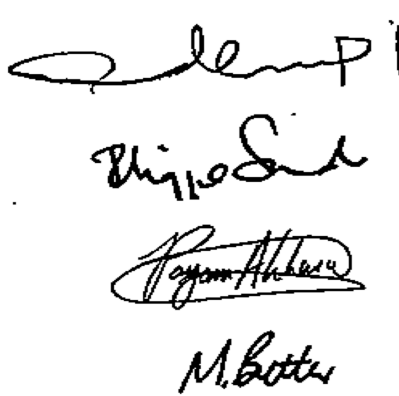
<sup>23</sup> Gaddafi Response, para. 7.

<sup>24</sup> *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhmmbo, & Dominic Ongwen*, “Judgment on the appeal of the Defence against the “Decision on the admissibility of the case under article 19 (1) of the Statute” of 10 March 2009”, ICC-02/04-01/05-408, para. 51; *Prosecutor v. Jean-Pierre Bemba Gombo* “Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled “Decision on the Admissibility and Abuse of Process Challenges”, ICC-01/05-01/08-962, para. 103. See also Gaddafi Request, fn. 39.

Prosecution Response);

- c. Reject Mr. Gaddafi's request to submit a further response.

Respectfully submitted:




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 Professor Payam Akhavan  
 Michelle Butler

ICC Focal Point and Counsel on behalf of the Government of Libya  
 (in the proceedings relating to Saif Al-Islam Gaddafi)  
*in the case of Abdullah Al-Senussi*

Dated this 27<sup>th</sup> day of June 2013  
 At London, United Kingdom