



Original: English

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

Date: 29 July 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

Libyan Government's Request to file further submissions clarifying matters raised in the Prosecution and Defence Responses to "Document in Support of Libya's Appeal against the "Decision on the admissibility of the case against Saif Al-Islam Gaddafi""

Source: The Government of Libya in the case of Mr Saif Al-Islam Gaddafi 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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I. INTRODUCTION

1. Libya files this request for leave to file further submissions clarifying certain important matters arising from:
 - (i) the “Confidential Prosecution Response to the “Document in Support of the Government of Libya’s Appeal against the Decision on the admissibility of the case against Saif Al-Islam Gaddafi” (“the Defence Response”)¹; and
 - (ii) the “Confidential Defence Response to the “Document in Support of the Government of Libya’s Appeal against the Decision on the admissibility of the case against Saif Al-Islam Gaddafi” (“the Defence Response”)².
2. Libya seeks leave to file such further submissions within an expeditious timeframe and by no longer than 13 August 2013.

II. APPLICABLE LAW

3. The Appeals Chamber has previously ruled that replies to responses to documents in support of appeal may not be filed pursuant to regulation 24(5) of the Regulations of the Court³ for appeals brought under rule 154 and rule 155 of the Rules of Procedure and Evidence.⁴ However, the Appeals Chamber has a discretion under regulation 28 of the Regulations of the Court to order further submissions by parties or participants when it is “necessary for the proper disposal of the Appeal [...] bearing in mind the principle of equality of arms and the need for expeditious proceedings”.⁵ In exercising this discretion, the Appeals Chamber has previously ruled that further submissions will not be ordered where those submissions merely involve

¹ ICC-01/11-01/11-384-Conf, 16 July 2013 (Notified to the Government on 19 July 2013 by DHL Courier).

² ICC-01/11-01/11-386-Conf, 18 July 2013 (Notified to the Government on 19 July 2013 by DHL Courier).

³ Regulation 24(5) of the Regulations of the Court states, *inter alia*, “participants may only reply to a response with the leave of the Chamber”.

⁴ *Prosecutor v Ruto et al*, Decision on the application on behalf of the Government of Kenya for leave to reply to the Prosecution’s response to the Appeal of the Government of Kenya against the decision on the application by the Government of Kenya challenging the admissibility of the case pursuant to article 19(2)(b) of the Statute, 1 August 2011, ICC-01/09-01/11-OA, para 8. See also ICC-01/04-01/06-424 (OA 3) at para 6 and ICC-01/04-01/07-148(OA), para 6.

⁵ ICC-01/09-01/11 OA, para 9.

disagreement with arguments offered in the Responses by the parties and / or the development of arguments which are already before the Appeals Chamber.⁶

III. RATIONALE FOR REQUEST FOR FURTHER SUBMISSIONS

4. The Prosecution and Defence have raised arguments and issues in their Responses which are either not correct or which are raised for the first time and thus necessitate further submissions from Libya in order to ensure that the Appeals Chamber has all the relevant information and submissions before it. The need to correct inaccuracies or respond to new arguments in the submissions considered by the Appeals Chamber prior to making a decision on the appeal constitutes good cause for the exercise of the Chamber's discretion to permit further submissions by Libya.⁷
5. Granting the Government an opportunity to file limited further submissions dealing with matters raised in the responses filed by the Prosecution and Defence would ensure that the principle of equality of arms is upheld. In the unusual context of an appeal against a decision on an admissibility challenge by a State, the exercise of the Appeals Chamber's discretion in this manner would ensure that the "proceedings are fair in the sense that, *inter alia*, the Government (the "triggering force and main actor in [admissibility] proceedings⁸) lodging the challenge enjoys the opportunity to respond to the parties' and participants' observations".⁹
6. Indeed, as recognised by Pre-Trial Chamber II, an admissibility challenge is a matter of "delicacy [...] which goes to the heart of the States' sovereign rights".¹⁰ By extension, an appeal arising from a decision of an admissibility challenge also has an inherent impact on the sovereign rights of a State. As a result, the fulfilment of the

⁶ ICC-01/09-01/11 OA, para 10.

⁷ *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.

⁸ ICC-01/11-01/11-191, para. 8; ICC-01/11-01/11-288, para 11.

⁹ *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.

¹⁰ *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.

equality of arms principle in this unusual context is especially dependent upon the submission of further submissions by Libya at this juncture, not only because this would ensure that the Appeals Chamber is apprised of all material arguments, but also because, in relation to matters of such sensitivity, the appearance of fairness requires that every opportunity be made available to the government of the state, whose sovereign rights may be so deeply affected, to make its case known to the Chamber.

7. Furthermore, by setting a deadline of 13 August 2013 for the filing of such limited further submissions, the Appeals Chamber would ensure that the appeal proceeds with all due expedition. This proposed deadline for further submissions falls 7 calendar days prior to the deadline set out by the Appeals Chamber for the filing of observations by the Office of Public Counsel for Victims¹¹ and so would avoid any delay at all being caused to the appellate proceedings.

IV. NATURE OF PROPOSED FURTHER SUBMISSIONS

8. In the event that leave is granted to file further submissions, Libya would not use these submissions to merely disagree with arguments made by the Prosecution and Defence in their Responses nor to develop arguments which are already before the Appeals Chamber but rather would confine its submissions to addressing only matters raised by the Prosecution and Defence Responses which are either erroneous or in relation to which the Chamber is not apprised of the Government's submissions.
9. Further submissions would clarify the rationale and necessity for the reliance upon *ex parte* evidential materials on appeal¹² - materials which were specifically ordered by the Pre-Trial Chamber to be filed on an *ex parte* basis in the underlying admissibility proceedings in order to uphold Libyan law and the Government's protective measures for witnesses in the domestic investigation. They would also deal with the array of legally and factually erroneous submissions which are contained in paragraphs 19 to

¹¹ *Prosecutor v Gaddafi and Al-Senussi*, Appeals Chamber Order in relation to the filing of victims' observations and the request pursuant to rule 103 of the Rules of Procedure and Evidence, 16 July 2013, ICC-01/11-01/11-383 (OA4).

¹² Cf. Defence Response, paras. 58-62, 128-129.

40 of the Defence response in support of its request that the Government's grounds of appeal be summarily dismissed (thus circumventing consideration of the merits of the Government's arguments). Finally, such further submissions would address the particular issues itemised in the sections below arising from the Prosecution and Defence Responses to each of the Government's four grounds of appeal:

A. Ground 1 - The Pre-Trial Chamber erred in law by holding that a number of investigative steps covering discrete aspects of the case failed to satisfy the standard of 'investigation of the same case'

i. Purported distinction between evidentiary and substantive requirements

10. Mr. Gaddafi argues that "the term 'scope' was not employed [by the Pre-Trial Chamber] as a legal term of art, but as a factual description of the failure of Libya to demonstrate – as an evidentiary matter – precisely who and what the investigation was about".¹³ The Prosecution also makes comparable (but slightly divergent) arguments.¹⁴ Further submissions would address (i) whether the Pre-Trial Chamber's decision does indeed refer to the evidentiary requirements for the purpose of establishing what the investigation is about at all (as opposed to the level of sameness required for the purposes of the 'same case' test); and (ii) the relevance of the approach taken to the evidentiary issue to the substance of the assessment of sameness. The submissions of the Government at the point of submitting the appeal do not address this issue (nor could the need to do so have been foreseen prior to receipt of the Prosecution and Defence Responses).

ii. Alleged conflict between Grounds 1 and 2 of the appeal

11. Mr. Gaddafi contends that in Ground 2 of the appeal, "Libya relies on an interpretation which is inconsistent with its argument on Ground One and one consistent [*sic.*] with a correct interpretation of the Chamber's use of 'actual contours' and 'scope'".¹⁵ Further submissions would clarify the proper relationship between grounds one and two.

¹³ Defence Response, para. 68. See also paras. 69-76; 96, 97.

¹⁴ Prosecution Response, para. 42.

¹⁵ Defence Response, para. 77.

iii. Relevance of article 19(5)

12. Both the Prosecution and Gaddafi Responses address the Government's reference to article 19(5) of the Statute and the obligation to challenge admissibility at the earliest moment possible. These arguments raise an incorrect interpretation of the Government's submissions which could not have been foreseen at the point of submission of the document in support of the appeal. Further submissions would ensure that the Appeals Chamber is clearly apprised of the Government's submissions.

iv. Constituent "aspects" of a case

13. The Prosecution describes some of the Government's arguments on appeal as asserting that the domestic investigation need cover "some – not all – aspects of the case before the Court".¹⁶ This argument begs questions as to the meaning of "aspects" for this purpose. The Prosecution's contention that any investigation "must have certain contours or defining parameters"¹⁷ raises a similar question. One of the candidates for such "parameters" is the notion of "incidents", to which the Prosecution refers.¹⁸ However, the Prosecution also states, that "earlier Pre-Trial Chamber jurisprudence [...] did not clarify the notion of 'incident', nor was this notion referenced by the Appeals Chamber when it confirmed the correctness of the same person/same conduct test in the *Kenya* cases".¹⁹ In order for the Chamber to decide upon this issue, it is vital that it be apprised of the Libyan Government's submissions as to which "aspects" must be the same as between the domestic and international investigations. Further submissions would provide this clarity.

v. Relevance of ne bis in idem

14. The Prosecution bases a significant part of its Response upon the relevance of the *ne bis in idem* principle to the assessment of whether the domestic case is "substantially the same" as the international case.²⁰ The Government's appeal did not make mention of its position in relation to the relevance of the *ne bis in idem* principle in the present situation, in particular, where the domestic criminal process is at the investigation

¹⁶ Prosecution Response, para. 40, referring to Appeal, paras. 72, 74, 81. See also Prosecution Response, para. 47.

¹⁷ Prosecution Response, para. 43.

¹⁸ See also Prosecution Response, paras. 68-70.

¹⁹ Prosecution Response, para. 67.

²⁰ Prosecution Response, paras. 38, 54-66.

stage. These arguments merit full exposition, which could be done, in relation to this appeal, only in the context of further submissions.

vi. Effect of the stage of progress of the ICC investigation (in this case)

15. The Prosecution argues that the “Pre-Trial Chamber actually adopted a very broad interpretation of the ‘substantially the same conduct’ test” on the basis of the contents of the Warrant of Arrest and Article 58 Decision.²¹ The Prosecution conflates the ramifications of the progress made in the ICC’s investigation *in this particular case* with the standard imposed by the ‘substantially the same conduct’ test. Because the Government considers this submission to have been made in error, it could not have been addressed in its appeal. Nonetheless, it is vital that the Appeals Chamber be apprised of the appellant’s arguments in this regard.

vii. Aim of the Rome Statute

16. Mr. Gaddafi asserts that whilst there would have been no agreement at the Rome conference without complementarity, this “cannot be used as a basis to undermine or circumvent the manifestation of that agreement”.²² This reveals a profound aspect of the differences between the position of the Government in relation to the law of complementarity, and is of fundamental importance to the Appeals Chamber’s deliberations in respect of the present appeal. So stark is the difference between the Government’s position and that of the Defence, in this regard, that it could not have been foreseen, at the time of drafting the Document in Support of Appeal that this argument would arise. Further submissions would set out the Government’s position in relation to this issue, which is of central importance to the appeal.

17. The Prosecution also makes a number of arguments concerning the interpretation of the Statute – in line with the Vienna Convention on the Law of Treaties – which invoke the “Statute as a whole” and the aims thereof.²³ Among the Prosecution’s arguments is a characterisation of the Government’s position as regards the “overriding and unique object of the Statute or the Court’s complementarity regime” as “preservation of State

²¹ Prosecution Response, para. 48. See also, paras. 68, 69.

²² Defence Response, para. 84.

²³ Prosecution Response, para. 50.

sovereignty in the exercise of a State's own criminal jurisdiction".²⁴ Good cause for further submissions emerges from the need to correct this misconception, and to set out the Government's submissions as regard the object and purpose of the Rome Statute.

viii. Relevance of article 18(2) of the Rome Statute to cases arising from a Security Council referral

18. Mr. Gaddafi raises the argument that "the drafters of the Rome Statute elected to exclude Security Council referrals (such as this) from the scope of Article 18(2)".²⁵ Mr. Gaddafi contends that this "leaves significant doubt as to the application of [the presumption in favour of national jurisdictions] in cases triggered by a Security Council referral".²⁶ Leaving aside the inconsistency between this argument and previous submissions by the Defence, the Government contends that it should be permitted to provide further submissions to this new argument concerning article 18(2).

ix. Impact of article 19(4) of the Rome Statute

19. The Defence makes the following argument in relation to article 19(4), and the fact that (in contrast to the Prosecutor), a state may submit a new challenge to admissibility under article 19(4) only in exceptional circumstances:

*the alleged prejudice suffered by the challenging state of having to meet the additional requirement of "exceptional circumstances" is clearly outweighed by the prejudice in respect of the administration of justice and, more importantly, the rights of the accused to a fair and expeditious trial caused by any reversal of a decision of admissibility or inadmissibility because a Pre-trial Chamber adopts an unexacting or overly deferential approach.*²⁷

20. Further submissions would set out the reasons why the Defence's argument in respect of article 19(4) does not support its criticism of the Government's submissions.

x. The "risk to the administration of justice"

21. Mr. Gaddafi asserts that "contrary to the Libyan Government's arguments, lowering the evidential threshold concerning the existence of an ongoing investigation would in

²⁴ Prosecution Response, para. 75.

²⁵ Defence Response, para. 85.

²⁶ Defence Response, para. 85.

²⁷ Defence Response, para. 88.

fact increase the risk that the proper administration of justice will be frustrated”.²⁸ This entails both a misconception of the Government’s submissions, and an erroneous argument about the nature of the “risk” involved. Submissions in reply are required in order to make clear the nature of these errors.

B. Prosecution and Gaddafi Defence Responses to Ground 2

i. Proper characterisation of ground 2

22. Both the Prosecution and the Defence erroneously conclude in their Responses that the Government’s second ground of appeal is mistakenly argued as both an error of law and an error of fact but should in fact only be understood as an error of fact.²⁹ This misunderstanding derives from a failure to appreciate that the Chamber’s error was not merely one of an improper assessment as to the sufficiency of evidence but also the application of an incorrect legal approach (ie. the assessment of isolated pieces of evidence rather than an assessment of the totality of the evidence) and thus an error of law.³⁰ Further submissions by the Government on this issue would clarify this position and would be of assistance to the Chamber in determining the correct approach to this ground of appeal.

ii. Consideration of evidence from the Al-Senussi admissibility proceedings

23. The Prosecution and Defence Responses argue that the Chamber did not err in fact by not considering the materials submitted in the Al-Senussi admissibility challenge.³¹ However, both responses misunderstand that although the Pre-Trial Chamber was right to seek to make an individual admissibility decision for both Mr Gaddafi (and in the future an individual admissibility decision for Mr Al-Senussi) based on the evidence reviewed, it was incumbent upon it to consider the inherent linkages between the two cases for the Gaddafi admissibility decision due to the fact that both accused are to be tried in the same case in the Libyan proceedings. Further submissions by the Government will highlight for the Appeals Chamber the important linkages between

²⁸ Defence Response, para. 82 (emphasis in original).

²⁹ Prosecution Response, para. 187; Defence Response, para. 22.

³⁰ Prosecution Response, paras. 133-135.

³¹ Prosecution Response, paras. 90-100; Defence Response, paras. 117-129.

each individual item of evidence from the Al-Senussi admissibility proceedings which ought to have been taken into account and accorded appropriate evidential weight in the Gaddafi admissibility determination.

iii. Defence assertion that the Pre-Trial Chamber erred

24. The Defence asserts that the Pre-Trial Chamber committed a legal error in its definition of the term 'case' by construing it too broadly.³² It asserts this error in a misguided attempt to refute the Government's submissions as to the legal error committed by the Pre-trial Chamber in interpreting 'case' too narrowly. This argument is surprising in circumstances where no cross-appeal of the Admissibility Decision has been filed by the Defence. As there is no Defence appeal in existence, it could not have been anticipated by the Government when preparing its document in support of appeal. Further submissions on this issue would therefore be in the interests of justice so that the Chamber is apprised of the Government's position on the Defence's purported narrow interpretation of 'case'.

25. The Defence makes a similar argument with respect to the temporal limits for consideration of evidential materials by suggesting that the Pre-Trial Chamber erred in considering materials relating to August 2011.³³ Again, in the absence of a cross-appeal from the Defence, this was not an argument that could have been foreseen by the Government. Fairness therefore necessitates that the Government be given an opportunity to present submissions on this argument to the Chamber.

iv. Misconstruction of the evidential materials considered by the Chamber

26. On several occasions, the Defence Response misconstrues the evidence referred to by the Government in its Document in support of appeal³⁴ in order to erroneously suggest that such evidence does not provide evidential support for the submission that the Pre-Trial Chamber erred by failing giving insufficient weight to certain key documents. One example of this practice can be seen with respect to Annex 5 which, as the Defence states, "describes twenty armed black Africans dressed in desert camouflage boarding an aircraft on 16 February 2011". In the same footnote containing this description of

³² Defence Response, paras. 105-113.

³³ Defence Response, paras. 152-156.

³⁴ Defence Response, paras. 131, 135, 143, 161, 174.

Annex 5, the Defence asserts that "there is no indication that the men were mercenaries, just the fact that they are black ... the suggestion that black males are likely to be mercenaries is a racist myth". A plain reading of Annex 5 (and / or the Defence submissions on it) indicates that the reason why the men are said to be mercenaries is not due to racism, but follows from the fact that the men were armed and wearing desert camouflage uniforms. Further submissions by the Government are merited in order to dispel the errors caused by the Defence's persistent inaccurate portrayals of the evidence.

27. Another example of the Defence giving misleading accounts of the evidence can be seen with respect to Annexes 9 and 10 which the Defence allege are "highly dubious" in evidential value. In making this assertion that Defence submits that: Libya has conceded that Mr Gaddafi has never been before a South Tripoli court; Mr Gaddafi's confessions were extracted in coercive circumstances; Mr Gaddafi's confessions are mutually contradictory. All three statements are incorrect and require further submissions from Libya in order to ensure that the Chamber is fully apprised of the submissions of both parties before ruling on this issue.

28. An additional example of misrepresentation by the Defence as to the underlying evidence arises with respect to the witness summaries which the Defence wrongly asserts derive from coercive and illegal interrogation practices by volunteers and militias.³⁵ This is patently incorrect and basic fairness necessitates that Libya be granted an opportunity to provide further brief submissions drawing to the attention of the Appeals Chamber the evidence which was before the Pre-Trial Chamber which shows this assertion to be made in error.

v. Relevance of materials from African Court on Human and People's Rights

29. The Defence Response highlights, at length, the purported relevance of a recent Provisional Measures Order by the African Court of Human Rights relating to the pre-trial detention of Mr Gaddafi as well as other international jurisprudence and writings on pre-trial detention to the Pre-Trial Chamber's admissibility assessment.³⁶ Despite

³⁵ Defence Response, paras. 140-145.

³⁶ Defence Response, paras. 171-180.

the fact that Defence has not sought to appeal the admissibility decision, the Defence raises these matters in order to criticise the Pre-Trial Chamber for not considering such materials as part of its admissibility decision. Given that these matters did not form part of the Admissibility Decision, the Government has not had the opportunity to put submissions before the Appeals Chamber on this jurisprudence. Fairness accordingly dictates that the Government should be permitted to file further submissions in advance of the Chamber's decision on this issue.

vi. Allegations of no relevance to the appeal

30. The Defence makes a number of allegations in its Response in relation to matters which have no bearing at all upon the grounds of appeal and in relation to which, without further submissions from the Government, Libya has no means of refuting. These include allegations that Libya has failed to comply with Pre-trial Chamber orders to provide reports to the court when ordered to do so,³⁷ references to allegations made in *ex parte* filings in the underlying proceedings in relation to which the Libya Government has never before had notice³⁸ and allegations that counsel misinformed the Appeals Chamber in relation to their ability to receive instructions from the Prosecutor-General during various points in the admissibility proceedings.³⁹ These are all serious allegations, each of which alone would justify the Government being granted the opportunity to place further submissions before the Appeals Chamber in order to correct the record and to ensure that the Chamber is properly apprised of the arguments of the parties before ruling upon them.

vii. Incorrect information as to conduct of admissibility proceedings

31. The Defence Response presents an incorrect account of events occurring during the admissibility proceedings and submissions made by the Government to the Pre-Trial Chamber during those proceedings. Examples of these inaccuracies include submissions as to: the Government's invitation to view the case file in Tripoli as being *ex parte* in nature (and thus intended to exclude the defence)⁴⁰ and the Government's

³⁷ Defence Response, para. 181.

³⁸ Defence Response, para. 190.

³⁹ Defence Response, para. 196.

⁴⁰ Defence Response, para. 188.

submissions to the Pre-Trial Chamber about the mandate of the Prosecutor-General's office and the impact of the appointment of a new Prosecutor-General for the progress of the admissibility proceedings.⁴¹ The Prosecution also erred in its Response in recounting events relating to the Government's request for a final additional period of six weeks time to present additional evidence and in relation to the Court's proposed site visit to Tripoli to inspect the case file.⁴² These inaccuracies give the Appeals Chamber a skewed picture in relation to matters which are material to a full understanding of both the admissibility decision and the Government's grounds of appeal. It is therefore important for the Government to be given an opportunity to correct the record in order to ensure that the Chamber is accurately informed in relation to these matters.

C. Prosecution and Gaddafi Defence Responses to Ground 3

i. The fairness of the proceedings before the Pre-Trial Chamber

32. The Prosecution asserts that "[c]ontrary to the Appellant's allegations, the Chamber established a fair system for the conduct of the proceedings pursuant to Rule 58(2) and fairly considered the circumstances in Libya".⁴³ The Prosecution relies upon a number of opportunities provided to Libya to present evidence,⁴⁴ the Chamber's convening of an oral hearing⁴⁵ and other examples of the Chamber's flexibility when conducting the proceedings.⁴⁶ The Prosecution has failed to grasp the precise nature of the Appellant's complaint. Further submissions would address the specifics of the Prosecution's selective submissions and explain how the apparent flexibility shown by the Chamber was insufficient in the context of the *overall* conduct of the proceedings.

ii. Article 59 of the Criminal Procedure Code

33. The Defence advances the novel argument that Article 59 does not "act as an impediment to the confidential disclosure of evidential materials for purposes directly

⁴¹ Defence Response, paras. 196-201.

⁴² Prosecution Response, paras. 130-131.

⁴³ Prosecution Response, Para. 138 [internal cites omitted]. See also para 142.

⁴⁴ Example: Prosecution Response, Para. 139 [internal cites omitted].

⁴⁵ *Ibid.*

⁴⁶ *Ibid* and para. 141.

concerning judicial proceedings”.⁴⁷ It further expands these submissions with the claim that Libya has in fact acted contrary to its own submissions by disclosing information “completely, routinely and systematically” in various *fora*, including to Al Jazeera and to the ICC Prosecutor. According to the Defence, Libya has therefore “flouted this [legal] rationale”.⁴⁸ Further the Defence alleges, in the alternative, that Libya has violated a “positive obligation on States to ensure that it has procedures available under national law, in order to enable it to implement cooperation requests from the Court”.⁴⁹ Further submissions would address these misconceived and novel assertions.

iii. Due diligence by Libya

34. The Prosecution also asserts that Libya failed to take advantage of opportunities provided to it that may have facilitated the discharge of its burden of proof.⁵⁰ It is submitted that fairness dictates that Libya is provided with an opportunity to address and refute these unfair and erroneous assertions.

35. The Defence claims “Libya seeks to shift any deficiencies in its appreciation of the law from the responsibility of Counsel to the Chamber”.⁵¹ Further submissions would address this and refute this inflammatory allegation that seeks to suggest that Counsel have not discharged their ethical and legal obligations.

iv. Appointment of Prosecutor General

36. The Defence argues “Libya failed to show a connection between the appointment of the new Prosecutor-General and any concrete positive developments in the Gaddafi case or the Libyan justice sector at large. The Chamber was entitled to disregard this information because Libya had failed to demonstrate its significance to the factual matrix in existence at that point in time”.⁵² Further submissions would address this allegation and clarify the significance of this pivotal event to the proceedings.

⁴⁷ Defence Response, para. 214 – 216.

⁴⁸ Defence Response, para. 215-219.

⁴⁹ Defence Response, para. 220.

⁵⁰ Prosecution Response, Para. 141.

⁵¹ Defence Response, para. 224.

⁵² Defence Response, para. 221.

v. Appointment of local lawyers

37. The Prosecution claims that Libya failed to draw the attention of the Chamber to the significance of the fact that Mr. Gaddafi was able to instruct two domestic lawyers “to enable the Chamber to give it the proper weight”.⁵³ The Prosecution claims that “[i]t is not self evident that the lawyers who are representing Gaddafi in “incidental domestic proceedings” may be willing to represent him also in much more serious case (sic) concerning the alleged killings and persecution”.⁵⁴ Further submissions would address these issues and clarify the precise probative value of the information provided.

38. The Defence claims that Libya has also “failed to cite any information or evidence in the record concerning the apparent appointment of counsel for Mr. Gaddafi in connection with the national security proceedings in Zintan”.⁵⁵ Further, the Defence erroneously seeks to suggest that Libya has contradicted itself by arguing previously that Mr. Gaddafi’s representation by local lawyers had “no connection with the ICC case”.⁵⁶ Further submissions would address these manifestly inaccurate assertions. In addition, further submissions would address the new Defence argument that the appointment of a lawyer in the unrelated Zintan proceedings would be of “minimal” significance “at best” given that there was “no evidence that the lawyer had consented to represent Mr. Gaddafi in other proceedings or that she had even had a privileged meeting with Mr. Gaddafi”.⁵⁷

vi. Fair trial issues in Libya

39. The Defence also advances fresh arguments concerning various fair trial rights issues, including allegations that the Government has engaged in “blatant contravention of legal professional privilege”; “[r]etaliatory actions and intimidation of the Defence and Defence witnesses”; “[r]etaliatory actions against Mr. Gaddafi for attempting to express his wishes as concerns the admissibility proceedings and defend himself before the ICC”; and “a refusal to apply the December 2012 Supreme Court decision to

⁵³ Para. 144 [internal cites omitted].

⁵⁴ *Ibid.*

⁵⁵ Defence Response, para. 33 and 207.

⁵⁶ Defence Response, para. 207.

⁵⁷ Defence Response, para. 209.

the proceedings against Mr. Gaddafi *et al*".⁵⁸ It is submitted that further submissions are necessary to deal with these grave, largely new and false allegations.

vii. Burden and standard of proof

40. The Defence advances a novel argument to the effect that the Chamber had no discretion to provide a procedure whereby the standard and burden of proof and the applicable laws were clearly explained in advance of any decision.⁵⁹ Further submissions would address and refute these novel and misconceived arguments.

viii. Link between 'case' and 'inability'

41. The Defence claims that the Appellant's submissions concerning the propriety of linking the admission of evidence on the first limb ("the case") with the merits of the assessment of the second limb ("inability")⁶⁰ should be dismissed. The Defence claims "Libya has failed to set out the nature of the Chamber's alleged error in clear and comprehensible terms" and also failed to "explain how it was an error for the Chamber to determine that Libya's failure to satisfy the second step would be dispositive of the challenge".⁶¹ Further submissions would address these issues and explain further the nature of the Appellant's arguments.

D. Prosecution and Gaddafi Defence Responses to Ground 4

i. The erroneous interpretation and application of "unavailability"

42. The Prosecution purports to present an alternative, broader interpretation of "unavailability" to that presented by the Government in its appeal submissions. It does so by conducting a textual, contextual and teleological analysis. This includes a comparative analysis of the text in three languages, leading to the slightly curious English formulation that a national judicial system is "unavailable" when it "cannot be disposed of or is not accessible".⁶² The Prosecution further suggests that the relevant aspects of the national judicial system must be assessed with reference to terms such as "sufficiency", "effectiveness" or "adequacy", without giving detailed

⁵⁸ Defence Response, para. 210.

⁵⁹ Defence Response, para. 225. See also para. 232 – 236.

⁶⁰ See Appeal, para. 140.

⁶¹ Defence Response, para. 236-237.

⁶² Prosecution Response, para. 160.

consideration to what those terms mean.⁶³ Given the novelty and complexity surrounding the determination of “unavailability” and the reality that there has yet to be full legal argument on this question before any ICC Chamber, the Government seeks to make further submissions on this issue to assist the Chamber in determining the Appeal.

43. The Defence Response to Libya’s submissions regarding the erroneous interpretation and application of “unavailability” reveal a lack of understanding of them and their underpinning statutory provisions. The Defence disregards the statutory requirement for a causal link between a national system’s “unavailability” and whether the state is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.⁶⁴ The Defence thus misconstrue the Government’s arguments to such an extent that further submissions are warranted to ensure that the Appeals Chamber is fully apprised of the substance of the Government’s submissions.
44. In addition, the Defence submissions regarding inability are characterised by the inaccurate recollection/restatement of previous “concessions” purportedly made by the Libyan Government in the course of the admissibility proceedings. At one stage, the Defence goes so far as to suggest that the Government has failed to mention such concessions in breach of its duty to ensure that the Appeals Chamber has all the relevant information before it.⁶⁵ One such example is the Defence assertion that “Libya has expressly conceded in these proceedings that a trial in Zintan would not satisfy the admissibility criteria before the ICC.”⁶⁶ This statement is inaccurate and misleading. The reference cited in support of this contention is in fact a comment by President el-Magariaf, referred to in the admissibility hearing, in which he confirmed to the press on 22 September 2012 that there is no prospect of a trial taking place in Zintan due to inadequate courtroom facilities and the other infrastructure that will be needed for a trial.”⁶⁷ This does not amount to an express concession that a trial in Zintan would not or could not satisfy the admissibility criteria. The Government should be afforded an

⁶³ Prosecution Response, paras. 161-163.

⁶⁴ Defence Responses, paras. 243-4.

⁶⁵ Defence Response, para. 249

⁶⁶ Defence Response, para. 249.

⁶⁷ ICC-01/11-01/11-T-2-Red-ENG, pp. 19-20.

opportunity to make further submissions to the Defence misstatement of its position to ensure that the Appeals Chamber has a complete and accurate understanding of this issue.

45. Similarly, the Defence state that Libya conceded that “the absence of a defence counsel was related to systemic difficulties concerning the risk faced by defence lawyers, which rendered their assistance otherwise unavailable as concerns the trials of associates of the former regime”.⁶⁸ Again, this misstates the submissions made by the Libyan Government in this regard. Furthermore, the references in support of this reported “concession” include one of the Defence’s own previous filings⁶⁹ and a filing by the Government that it does not in fact make the concession alleged.⁷⁰ The Government ought to be afforded the opportunity to ensure that the correct information is placed before the Appeals Chamber by way of further submissions.

ii. Finding that the Libyan judicial system is ‘unable’ in particular material regards in relation to the case against Mr Gaddafi

46. The Defence submissions regarding the custody and transfer of Mr. Gaddafi are, again, characterised by inaccuracies and over-statements, which, cumulatively, and taken out of context, create an inaccurate reflection of the Government’s submissions before the Appeals Chamber. One such example, is the Defence reference to a February 2013 interview, referred to in an earlier defence filing, in which Prime Minister Zeidan purportedly “went so far as to expressly acknowledge that the Government had been unable to secure the transfer of Mr. Gaddafi to Tripoli because it lacked control over parts of Libya.” This is not an accurate reporting of the interview and fairness dictates that the Libyan Government is afforded the opportunity to properly address the points raised by the Defence regarding the custody and transfer of Mr. Gaddafi.
47. With regard to the issue of obtaining witness testimony, the Defence inappropriately invite the Appeals Chamber to consider the Chamber’s finding regarding the inability to obtain the testimony of two witnesses: “...in conjunction with Defence evidence that: key exculpatory witnesses would be unavailable to testify in Libya due to the

⁶⁸ Defence Response, para. 255

⁶⁹ ICC-01/11-01/11-281-Conf, paras. 258-268.

⁷⁰ ICC-01/11-01/11-258-Conf-Red, para. 97.

absence of effective protection programmes; Libyan witnesses had been subjected to intimidation, mistreatment and torture whilst detained in centres that fell outside the control of the Government; the names of key insider witnesses, some of whom were detained in Libya, had been publicly revealed by Libyan authorities; and key witnesses had been subjected to death threats and vexatious prosecutions and arrest warrants, due to their assistance to the Defence.”⁷¹ These allegations, which do not form any part of the Pre-Trial Chamber’s finding on Libya’s ability to obtain testimony, are seemingly designed to discredit and prejudice Libya’s appeal submissions. Accordingly, if they are to form any part of the Appeals Chamber’s consideration of the Appeal, fairness dictates that Libya is granted an opportunity to respond to these allegations.

48. Furthermore, the Defence submissions regarding witness protection and obtaining testimony entirely miss the Government’s point that the Impugned Decision failed to explain how any concerns regarding the ability to obtain particular testimony had any impact upon the actual progress of the investigation and that such a finding is necessary before finding a case admissible. By extension, if a case were declared inadmissible but, at a later stage, it became apparent that issues regarding witness protection meant that an investigation or prosecution was unable to proceed, then the Prosecutor could apply for a review of the decision. The Defence submissions reflect a fundamental misapprehension of the Government’s submissions, which should be clarified so that the Appeals Chamber makes its determination based on the fullest and most accurate submissions.

49. Finally, albeit under the subheading relating to ability to obtain testimony, the Defence makes the general point that “it was patently clear at the time that the Chamber issued its decision that Libya lacked the capacity to ensure the protection and security of Court participants, such as judges, counsel and witnesses.”⁷² However, this is not a finding that was made by the Pre-Trial Chamber and, again, if this is to form part of the Appeals Chamber’s determination of the appeal, Libya must be granted an

⁷¹ Defence Response, para. 278; See also, further assertions made at para. 284.

⁷² Defence Response, para. 289.

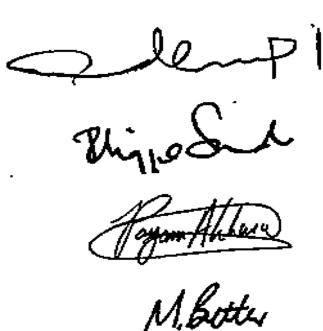
opportunity to make further submissions in respect of this unsupported assertion.

iii. "Genuineness" of the Libyan proceedings

50. The Prosecution asserts that the Government's submissions relating to "genuineness" were misguided because they considered its application to the first limb of the complementarity assessment.⁷³ This is patently incorrect and reveals a misapprehension of the Government's submissions regarding "genuineness", which were clearly made with reference to the second limb of the admissibility assessment, namely the Chamber's qualitative assessment of the investigative steps being undertaken by the Government. Fairness dictates that the Government be allowed to clarify its position regarding "genuineness" in order to avoid any misapprehension by the Appeals Chamber in its consideration of the Government's submissions.

V. RELIEF SOUGHT

51. Libya therefore respectfully requests that the Appeals Chamber exercise its discretion to grant Libya leave to file further submissions dealing with the above issues by 4:00pm on 13 August 2013. Respectfully submitted:



 Professor Ahmed El-Gehani
 Professor Philippe Sands QC
 Professor Payam Akhavan
 Ms Michelle Butler

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

Dated this 29th day of July 2013
 At London, United Kingdom

⁷³ Prosecution Response, para. 189.