



Original: **English**

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

Date: **5 August 2013**

THE APPEALS CHAMBER

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

SITUATION IN LIBYA

IN THE CASE OF

THE PROSECUTOR v. SAIF AL-ISLAM GADDAFI and ABDULLAH AL-SENUSSI

Public

Defence Response to the "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: Defence for Mr. Saif Al-Islam Gaddafi

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

States' Representatives

Professor Ahmed El-Ghani

Professor Phillipe Sands QC

Professor Payam Akhavan

Ms. Michelle Butler

Amicus Curiae

REGISTRY

Registrar

Mr. Herman von Hebel, Registrar

Deputy Registrar

Mr. Didier Daniel Preira, Deputy Registrar

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I. Introduction

1. Under the guise of a Regulation 28 application, Libya has requested (“the Request”)¹ to submit additional argumentation in order to reply to almost every argument raised in the Prosecution and Defence responses to Libya’s Admissibility Appeal.
2. Libya has not referred to any exceptional circumstances which would warrant the commencement of yet another round of admissibility submissions, nor has it explained why further submissions on such a broad array of topics are necessary for the proper disposal of the appeal.
3. None of the issues, which are the subject of the Request, involve matters that could be described as ‘new’ or ‘unforeseeable’.
4. To the contrary, Libya’s Request is predicated on its mere disagreement with the arguments and positions set out in the Prosecution and Defence Responses, and Libya therefore wishes to have a “second bite of the cherry” in order to bolster its Appeal.
5. In many cases, in an implicit recognition of the paucity of its justifications, Libya has sought to circumvent the need for the Appeals Chamber’s authorisation for further submissions by directly expounding, unsolicited and unauthorised, its various positions on the merits.
6. Moreover, on a formal level, Libya has failed to comply with the applicable page limit for such a procedural request.
7. The Request should therefore be dismissed in its entirety and *in limine*.

II. Submissions

The Request should be dismissed due to non-compliance with the Regulations of the Court

8. The Request is an independent procedural motion, which cannot be characterised as either a challenge or response concerning admissibility. The page limit is therefore governed by Regulation 37(1) of the Regulations of the Court, which prescribes a 20-page limit for filings.
9. As the Appeals Chamber has clarified, this page limit includes both the cover page and the notification page.²
10. Libya’s filing is 21 pages, and includes substantive argument on the 21st page. Libya has not requested authorisation to exceed the page limit, nor has any justification been provided for its necessity to do so.

¹ ICC-01/11-01/11-389.

² ICC-01/04-01/06-3002, para.7.

11. The Request therefore falls foul of Regulation 37(1). In light of the Appeals Chamber's enjoinder that Regulation 28 applications should not be permitted to negatively impact on the expeditiousness of the proceedings,³ the Request should be dismissed *in limine*, rather than re-filed.

The Request should be dismissed due to the fact that Libya is essentially requesting to file a Reply, rather than further submissions pursuant to Regulation 28

12. Although Libya has formulated its Request in form as a petition to submit further information pursuant to Regulation 28 of the Regulations of the Court, Libya is, in substance, requesting leave to file a reply.
13. The terminology employed by Libya to justify its Request mirrors that which it has previously employed in other requests for leave to reply. For example, Libya claims that there is "good cause" to grant the Request,⁴ as it would permit Libya to address issues which are either incorrect, or have been raised for the first time.⁵ Libya utilised identical language in its 20 February 2013 request for leave to reply to the responses of OPCD, OPCV and OTP concerning Libya's further submissions on admissibility.⁶ Similarly, Libya has cited case law pertaining to decisions concerning requests for leave to reply in order to justify its Request.⁷
14. The Request is also not confined to discrete or unique aspects, but encompasses the OTP and Defence submissions in their entirety.
15. As recognised by Libya,⁸ in rule 154 and 155 appeals, the appellant does not possess a right to apply for leave to reply.⁹
16. If the Regulations were intended to accord rule 154 and 155 appellants with the right to seek leave to reply to responses, then the Regulations would have included such a right. Instead, Regulation 28 sets out a different procedural avenue for Rule 154 and 155 appeals which does not employ the term 'reply,' nor is it procedurally similar to the system for seeking and granting leave to reply pursuant to Regulations 24(5) or 60(1) of the Regulations of the Court.
17. Whereas Pre-Trial and Trial Chambers have regularly authorised Regulation 24(5) replies, thus far, the Appeals Chamber has only invited further submissions pursuant

³ ICC-01/04-01/06-424, para.7.

⁴ Request, para.4.

⁵ Request, para.4

⁶ ICC-01/11-01/11-283, para.4.

⁷ See for example, Request, footnote 7.

⁸ Request, para.3.

⁹ ICC-01/04-01/06-424, para.5.

to Regulation 28(1) in limited instances, in very specific or “exceptional circumstances”.¹⁰

18. If Regulation 28 were to be interpreted and applied in the exact same manner as Regulation 24(4) requests for leave to reply, then it would create a distinction without a difference. The fact that the Regulations set out distinct procedures for requests for leave to reply as compared to decisions inviting further submissions evidences the clear intent that there should be a difference, and that the latter should not be employed as a vehicle for introducing replies into the interlocutory appellate scheme.
19. If the Appeals Chamber were to grant Libya’s Request, it would, as a matter of precedent, permanently conflate Regulation 28 with Regulation 24(5), and open the flood-gates for the interlocutory appellate phase to become a replica in both length and substance of first instance proceedings.

Libya has failed to meet the criteria for submitting further observations pursuant to Regulation 28(1)

The Legal Standard for Regulation 28

20. The standard utilised by the Appeals Chamber to vet Regulation 28 requests is stricter than that which applies to Regulation 24(5) requests for leave to reply. Whereas a Pre-Trial Chamber or Trial Chamber might grant leave to reply if it would assist them to issue a decision, the Appeals Chamber has set out the more stringent standard that it will only exercise its discretion to invite further submissions if it considers it to be “necessary for the proper disposal of the Appeal [...]” (emphasis added).¹¹
21. It is not sufficient to demonstrate that it would be desirable or even useful, to submit the information in question. The word ‘necessary’ clearly requires the appellant to demonstrate that, without the benefit of further submissions, the Appeals Chamber would be lacking crucial information or case law, which would be of decisive importance in relation to the Appeals Chamber’s consideration of the appellate issue.

¹⁰ For example, the Appeals Chamber invoked Regulation 28 to permit the Katanga Defence to submit additional appellate arguments in circumstances in which the Defence had initially misunderstood the issue certified for appeal due to the ambiguous language employed by the Pre-Trial Chamber, which was compounded by the predominantly *ex parte* proceedings utilised in the lead up to the Impugned Decision: ICC-01/4-01/07-476, paras. 19-20. In so doing, the Appeals Chamber explicitly referenced the “exceptional circumstances” which had given rise to the Defence application (para.20). In a later decision, the Appeals Chamber permitted the Prosecution to adduce further legal authorities, without any accompanying legal argumentation. The case law in question had been issued by the ICTY Appeals Chamber after the Prosecution had filed its appeal brief, and as such, was both new, and highly relevant to the Appeals Chamber’s disposal of the Appeal: ICC-01/04-01/07-522, para.16.

¹¹ ICC-01/09-01/11-239, para.10.

22. Although the Appeals Chamber has declined to invite further submissions in connection with issues which were already before the Appeals Chamber, or which constituted mere disagreements with the other party's submissions,¹² it is a false syllogism that the converse would necessarily apply. Rather, the Appeals Chamber's findings on this point should be construed as setting out an example of exclusionary criteria: that is, the appellant will be unable to demonstrate that the information is necessary for the Appeals Chamber's disposal of the appeal if it concerns a mere disagreement or information which is already before the Appeals Chamber. The Appeals Chamber may of course also find that the information is not necessary for the disposal of the appeal for other reasons.
23. It is therefore insufficient for Libya to justify its Request by arguing that the information does not concern a mere disagreement or that the issues were not previously raised before the Chamber.¹³ The fact that the issues are not automatically excluded from the ambit of Regulation 28 does not mean that they have met the criteria to be included within its ambit.
24. Finally, the Appeals Chamber has held that in issuing an order pursuant to Regulation 28(2), the Appeals Chamber must bear in mind "the principle of equality of arms and the need for expeditious proceedings".¹⁴
25. The Appeals Chamber's reference to equality of arms in this context should be understood to concern equality of arms as a shield and not a sword. The application of Regulation 28(1) should not overly distort the appellate proceedings in favour of the appellant, or unduly burden the responding parties. The Appeals Chamber will not invite further submissions pursuant to Regulation 28(1) in order to promote the rights of a particular party – the responsibility for advancing these rights rests first and foremost with the parties themselves.
26. As observed by Judge Pikis, "[t]he Regulations of the Court provide an equal opportunity to the parties to address the Appeals Chamber, envisaging a document in support of the appeal and a document in response thereto of equal length (regulations 65 (4) and (5) and 37 (1) of the Regulations of the Court)."¹⁵ Since "Regulation 65

¹² ICC-01/09-01/11-239, para.10.

¹³ Cf Request, para.4.

¹⁴ ICC-01/04-01/06-424, para.7.

¹⁵ ICC-01/04-01/06-424, Separate Opinion of Judge Pikis, para.7.

gives effect to the principle of equality of arms”, an appellant has no right to claim a second opportunity to address the Appeals Chamber.¹⁶

27. Contrary to Libya’s submission that it should be granted leave to address issues “in relation to which the Chamber is not apprised of the Government’s submissions”,¹⁷ Counsel for Libya have a strict duty of diligence,¹⁸ and cannot invoke Regulation 28 in order to mitigate any failure on their part to raise relevant arguments in their appeals brief, or to anticipate and preempt foreseeable responses.
28. It is also for this reason entirely irrelevant and inapposite for Libya to justify its Request by citing to ‘sovereign rights’, and the role of the State as the triggering force in admissibility challenges.¹⁹ By hearkening for the umpteenth time to sovereign rights, Libya is seeking once again to arrogate to itself rights which are greater than those which are accorded to any other party appearing before the ICC.
29. Due to the restricted nature of interlocutory appeals, all of the appeals which have been filed before the Appeals Chamber have concerned key rights of one of the parties appearing before it. That, in itself, is not a justification for filing additional submissions, for otherwise every appellant would have an automatic right to file additional submissions pursuant to Regulation 28.
30. In terms of the impact of the Request on the expeditiousness of the proceedings, although Libya has indicated its willingness to file submissions by 13 August 2013,²⁰ Libya’s stated willingness not to delay the admissibility proceedings is belied by the fact that it filed its request after the commencement of judicial recess, and in full knowledge that the parties would first have a right to respond to the Request itself.
31. Libya has also failed to provide any explanation as to why it was not in a position to submit its Request in a more timely manner, particularly as Libya was in the past able to submit a request for leave to reply to OPCD, OPCV and OTP responses to its further submissions, two days after the OPCD and OPCV filings.²¹
32. Finally, if Libya is authorised to file further submissions by approximately 13 August or afterwards, then it will have had the benefit of four weeks to prepare its submissions.

¹⁶ *Ibid.*, para.9.

¹⁷ Request, para.8.

¹⁸ ICC-01/04-01/07-2259, para.54.

¹⁹ Request, paras.5-6.

²⁰ Request, para.7.

²¹ The OPCD and OPCV filed on 18 February and the request for leave to reply was submitted on 20 February 2013. ICC-01/11-01/11-283.

33. The principle of equality of arms requires that the Prosecution and the Defence should be accorded a similar length of time to respond, which would in turn, divert Defence time and resources from its ability to prepare its response to the submissions of the OPCV, and further protract the admissibility proceedings.
34. The latter aspect is particularly concerning in light of announcements that Mr. Gaddafi's domestic trial is scheduled to commence in the first half of August 2013.²² Defence concerns regarding the possibility that it will culminate in the death penalty have been lent particular gravitas by reports that a Misrata Court ordered the imposition of the death penalty against a former Gaddafi official, who is closely related to Mr. Gaddafi.²³
35. Since it is impossible to reconcile a Regulation 28 application in this particular case with both equality of arms and the particularly urgent need to ensure an expeditious resolution to the admissibility proceedings, it would not be in the interests of justice to authorise the Request.

The particular issues fail to meet the standard for Regulation 28

Ground 1 Issues

Purported distinction between evidentiary and substantive requirements

36. Libya has failed to provide any explanation or justification as to why further submissions on this point are necessary for the disposal of the appeal. Such a necessity is not demonstrated by the mere fact that Libya failed to address this issue in its appeal brief.²⁴
37. In its Appeal, Libya asserted that the Pre-Trial Chamber had utilised the term 'scope' in the context of a new legal test. The Defence and the Prosecution disagreed with this assertion, and Libya failed to preempt their response in its arguments.
38. As the appellant, the burden fell on Libya to include arguments as to why the Chamber had employed this term as a legal test rather than in an evidentiary sense. It was also eminently foreseeable that the Prosecution and Defence might contest the argument that the Chamber had applied a new legal test.

²² ICC-01/11-01/11-359-AnxA.

²³ 'Libya: al-Gaddafi loyalists at risk of 'revenge' death sentences' *Amnesty International*, 2 August 2013, <http://www.amnesty.org/en/news/libya-al-gaddafi-loyalists-risk-revenge-death-sentences-2013-08-02>; R. Tombokti, 'Qaddafi Minister sentenced to death by Misrata Court', *Libya Herald*, 1 August 2013, <http://www.libyaherald.com/2013/08/01/gaddafi-minister-sentenced-to-death-by-misrata-court/>.

²⁴ Request, para.10.

39. The following findings of Judge Pikis are thus squarely applicable to Libya's claim that this issue was not addressed by Libya due to the fact that it was not foreseeable:

“Every argument relating to the subject-matter of the appeal as defined by the grounds of appeal is from the outset a relevant and foreseeable matter that may be made a subject of the address. Failure on the part of the appellant to deal with it in the document in support of the appeal does not dissociate it from the appeal nor does it qualify it as a new subject. To qualify as "new" [...], the argument must refer to a matter arising ex improviso.”²⁵

40. The Appeals Chamber should not exercise its discretion pursuant to Regulation 28 to invite further submissions for the simple reason that the appellant failed to meet its burden of argumentation.

Alleged Conflict between Grounds 1 and 2 of the appeal

41. Libya has justified its Request on this point by arguing that it would “clarify” the proper relationship between Grounds one and two.²⁶

42. Libya explicitly acknowledged that Regulation 28 should not be employed to develop prior submissions.²⁷ A request to clarify arguments is synonymous with a request to develop arguments. This aspect of the Request should thus be dismissed due to the fact that it is, in effect, a request to have a ‘second bite of the cherry’.

Relevance of Article 19(5)

43. As Libya concedes, it developed arguments concerning the interpretation of Article 19(5) in its Appeal Brief.²⁸ Libya's avowal that the Prosecution and Defence incorrectly interpreted Article 19(5) neither makes this issue new, nor unforeseeable. Indeed, the Defence submissions on this point had been incorporated into prior filings.²⁹

Constituent “aspects” of a case

44. Libya's arguments on this point are virtually incomprehensible, possibly because it is attempting to create an issue where none exists. Libya has referred to a difference in semantics, without providing an explanation as to how this difference is relevant to the

²⁵ ICC-01/04-01/06-424, Separate Opinion of Judge Pikis, para.1.

²⁶ Request, para.11.

²⁷ Request, paras.3 and 8.

²⁸ ICC-01/11-01/11-370-Conf-Red, para.63.

²⁹ See for example, ICC-01/11-01/11-281-Conf-Red, para.46; ICC-01/11-01/11-243-Conf, para. 50.

ability of the Appeals Chamber to dispose of the Appeal. Moreover, the issue concerns matters which are *obiter dicta*: Libya has not appealed the Pre-Trial Chamber's definition of a case, and as such, it is unnecessary for the Appeals Chamber to receive further submissions on the meaning of the constituent 'aspects' of a case.

45. Once again, Libya is also requesting leave to 'clarify' issues which are already before the Chamber.³⁰ The request should thus be dismissed as it is simply a request to develop existing submissions.

Relevance of ne bis in idem

46. Although Libya did not reference '*ne bis in idem*' in its Appeal Brief, the Defence had previously raised arguments before the Pre-Trial Chamber concerning the implications of *ne bis in idem* for the definition of a case.³¹ The issue was therefore neither new nor unforeseeable. Libya has also failed to provide any explanation as to why further submissions are necessary for the proper disposal of the appeal.

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

47. This issue concerns a mere disagreement, as evidenced by Libya's attempt to justify further submissions by claiming that the Prosecution 'erred'.³² Moreover, as noted above, the fact that the responding party disagrees with or seeks to rebut the submissions of the appellant does not make the issue unforeseeable.

Aim of the Rome Statute

48. Libya has sought to justify its Request by referring to the stark difference in position between Libya and the Defence as concerns this issue.³³ A difference in position is simply a disagreement by another name. Libya has therefore failed to justify this aspect of its Request.
49. The issue concerning the correct interpretation of complementarity in light of the object and purpose of the Rome Statute was also canvassed exhaustively before the Pre-Trial Chamber,³⁴ and by Libya in its Appeal Brief.³⁵ The issue is, therefore, neither new nor unforeseeable.

³⁰ "Further submissions would provide this clarity" (Request, para.13).

³¹ ICC-01/11-01/11-281-Conf-Red, paras.50-53.

³² Request, para.15.

³³ Request, para.16.

³⁴ See for example, ICC-01/11-01/11-130-Red, paras.2-3; ICC-01/11-01/11-190-Conf-Corr, paras. 28-29.

³⁵ See for example, ICC-01/11-01/11-370-Conf-Red, para.70.

Relevance of Article 18(2) to cases arising from a Security Council referral

50. Libya has failed to provide any justification as to why further submissions on this issue are necessary for the proper disposal of the Appeal. Moreover, the issue to which it pertains - the presumption in favour of national jurisdictions – was raised repeatedly by Libya in its Appeal Brief.³⁶ The Defence arguments are therefore not new in the sense of raising a new matter which was not previously before the Appeals Chamber.

Impact of Article 19(4) of the Rome Statute

51. Libya has requested to submit further observations for the sole purpose of enabling Libya to demonstrate that the Defence submissions concerning Libya's Appeal Brief are incorrect.³⁷ Libya has therefore implicitly conceded that the issue is already before the Appeals Chamber, and that its request to adduce further submissions is predicated on a mere disagreement.

The risk to the administration of justice

52. Libya's request to "make clear"³⁸ (i.e. clarify) certain matters is once again, a request to further develop arguments which are already before the Appeals Chamber. Libya has also provided no justification as to why further submissions are necessary for the proper disposal of the Appeal.

Ground Two

Proper characterisation of Ground Two

53. Again, Libya has requested to "clarify" (i.e. further elaborate) submissions which are before the Appeals Chamber, and in so doing, seeks to accord itself an opportunity to better submissions, which were flawed by vagueness. For example, although Libya asserted in its Appeal that the Pre-Trial Chamber had failed to evaluate the evidence as a whole, it did not cite any examples of this alleged failure, nor did it refer to any incorrect legal findings of the Chamber as concerns this matter. Since Regulation 28 should not be exploited as a vehicle for correcting a party's lack of diligence, this aspect of the Request should be dismissed.

³⁶ ICC-01/11-01/11-370-Conf-Red, paras. 46, 55 -56, 74.

³⁷ "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", Request, para.20.

³⁸ Request, para.21.

Consideration of evidence from the Al-Senussi admissibility proceedings

54. Interlocutory appeals are not appeals *de novo*, and as such, Libya cannot use its appellate pleadings to correct the deficiencies of its submissions at first instance.
55. Libya has requested to present further submissions concerning the linkages between the Al-Senussi evidence and the Gaddafi admissibility challenge. Since the burden falls on the party challenging admissibility to demonstrate the relevance of the material it wishes to rely upon, Libya should have provided information as to the linkages between such evidence and the Gaddafi admissibility challenge to the Pre-Trial Chamber.
56. If the Appeals Chamber were to accept such submissions on appeal, rather than determining whether the Pre-Trial Chamber committed any errors as concerns the evidence and information before it, it would be adjudicating upon the issues as a Chamber of first instance. Since the issue concerns alleged procedural and factual errors rather than a legal error (i.e. whether the Chamber erred in its factual determination that the evidence concerning Mr. Al-Senussi did not demonstrate that Libya was investigating Mr. Gaddafi for the ICC case, and its exercise of discretion by refusing to allow Libya to introduce new evidence after its March 2013 reply), it would be particularly inappropriate for the Appeals Chamber to substitute its discretion for that of the Pre-Trial Chamber.

Defence assertion that the Pre-Trial Chamber erred

57. By arguing that the Defence arguments on these issues have been submitted in order to refute Libya's stance that the Chamber's definition of a case was too narrow,³⁹ Libya has conceded that the Defence argumentation concerned an issue which was already before the Appeals Chamber. Contrary to the assertions of Libya, the Defence was not attempting to introduce a cross-appeal, it was merely addressing the fact that even if the Pre-Trial Chamber had erred in its definition of a case, this error had benefitted Libya, and as such, the error did not affect the outcome of the Admissibility Decision.
58. Since it is a fundamental pre-requisite that the appellant must demonstrate that any errors impacted on the outcome of the Decision, the position of the Defence cannot be construed as being unforeseeable.
59. Similarly, the Defence submissions concerning the temporal scope of the case related to the question as to whether any errors by the Pre-Trial Chamber affected the

³⁹ Request, para. 24.

outcome of the Decision. The particular Defence arguments on this point had also been raised at first instance, and therefore could not conceivably be described as ‘unforeseen’.⁴⁰

Misconstruction of the evidential materials considered by the Chamber

60. Libya submissions on this point concern mere disagreements with the Defence position: its justification is predicated on the sole fact that it considers the Defence arguments to be ‘erroneous’ or a ‘misconstruction’ of Libya’s evidence.
61. The particular Defence arguments referred to by Libya were also raised at first instance,⁴¹ and as such, are neither new nor unforeseeable.
62. Moreover, notwithstanding the fact that the Appeals Chamber has not yet granted Libya leave to address these issues, Libya has entered into the merits of its disagreement with the Defence,⁴² and in so doing, has sought to improperly influence the Appeals Chamber’s adjudication of this issue. This in itself, constitutes grounds for dismissing the Request.⁴³

Relevance of materials from the African Court of Human and Peoples’ Rights

63. Libya’s arguments on this point completely misconstrue the submissions of the Defence. The Defence referred to the Decision of the African Court on Provisional Measures and other case law in order to demonstrate the reasonableness of the Pre-Trial Chamber’s decision not to further protract the admissibility proceedings. This particular issue had been raised by Libya as an appellate sub-ground,⁴⁴ and the Defence submissions on this point mirrored legal argumentation (and specific case law) which had been placed before the Pre-Trial Chamber.⁴⁵ The issue is therefore neither new nor unforeseeable.
64. It is therefore entirely incorrect to assert that Libya did not have an opportunity to address this jurisprudence in its Appeal. Libya has also failed to justify why further submissions on this issue are necessary for the proper disposal of the Appeal.

⁴⁰ See for example, ICC-01/11-01/11-190-Conf-Corr, paras. 71, 77; ICC-01/11-01/11-281-Conf-Red, para.158.

⁴¹ ICC-01/11-01/11-281-Conf-Exp, paras. 76,90-93, 116, 198.

⁴² Request, para. 26.

⁴³ ICC-01/04-01/06-824, para. 68.

⁴⁴ Appeal Brief, paras. 110-115.

⁴⁵ ICC-01/11-01/11-190-Conf-Corr, paras. 289-291; ICC-01/11-01/11-308, para.15; ICC-01/11-01/11-332, para.63.

Allegations of no relevance to the appeal

65. If, as is asserted by Libya, the Defence allegations are ‘irrelevant’ to the Appeal,⁴⁶ then it follows that it would not be necessary for the Appeals Chamber to receive further submissions on these issues in order to dispose of the Appeal.

66. It follows that Libya has raised this issue in its Request solely to put forward its view on the merits, i.e. to argue that certain Defence arguments are irrelevant. By so doing, Libya circumvented the proscription on replies by putting its arguments on the merits directly before the Appeals Chamber. This manner of proceeding is highly improper, and should not be countenanced by the Appeals Chamber.

Incorrect information as to conduct of admissibility proceedings

67. Libya’s arguments concerning this point focus solely on what it considers to be errors in the submissions of the Defence and the Prosecution, thereby underscoring that this request is premised on a ‘mere disagreement’ as concerns matters which are already before the Appeals Chamber.

68. Libya has already been accorded a full opportunity to “ensure that the Chamber is accurately informed in relation to these matters”.⁴⁷ Consequently, it has failed to demonstrate that the receipt of further submissions is necessary for the proper disposal of the Appeal.

Article 59 of the Criminal Procedure Code

69. Libya has misinformed the Appeals Chamber by characterising the Defence arguments on Article 59 of the Libyan Criminal Procedure Code as ‘novel’.⁴⁸ The Defence raised these arguments in its February 2013 submissions,⁴⁹ and related procedural motions.⁵⁰ Libya had been granted the opportunity to address these arguments in its March 2013 reply, and would have drafted its Appeal Brief in full awareness of the Defence position on Article 59. It is therefore neither necessary nor appropriate for the Appeals Chamber to invoke Regulation 28 to allow Libya to rectify its own lack of diligence, namely that of failing to address the Defence’s known position on Article 59, by providing it with an opportunity to elaborate on existing arguments.

⁴⁶ Request, para. 30.

⁴⁷ Cf Request, para.31.

⁴⁸ Request, para.36.

⁴⁹ ICC-01/11-01/11-281-Conf-Red, paras.37-38.

⁵⁰ ICC-01/11-01/11-261-Conf, paras.28-34; ICC-01/11-01/11-202, footnote 12.

Due diligence by Libya

70. There is something ironic about a party claiming that it is necessary to make further submissions in order to establish that it has always acted with due diligence. Libya's due diligence or lack thereof will be apparent to the Appeals Chamber from the material before it. This aspect of the Request should be dismissed due to Libya's failure to demonstrate that further submissions on this issue are necessary for the proper disposal of the Appeal.

Appointment of Prosecutor-General

71. Libya's request to 'clarify' its submissions on this issue⁵¹ should be dismissed due to the fact that it is in reality, a request to elaborate on existing submissions. Libya has also failed to demonstrate that further submissions on this issue are necessary for the proper disposal of the Appeal.

Appointment of local lawyers

72. Libya's Request as concerns this issue is predicated on its wish to 'clarify' its previous submissions in order to respond to the Prosecution's arguments, and allegedly to demonstrate the erroneous nature of the Defence submissions.⁵² The Request is therefore squarely based on Libya's wish to elaborate its previous submissions and to engage in a mere disagreement with the Defence.
73. It is also not a 'new' argument for the Defence to explain how Libya failed to demonstrate the relevance of a certain event, which Libya has relied on in its Appeal Brief, for example, by referring to Libya's failure to provide evidence that the lawyer had consented to represent Mr. Gaddafi in relation to the ICC-related case, or had been able to meet with Mr. Gaddafi in a privileged setting. In particular, given that the Defence had repeatedly raised its concern regarding the difficulties faced by Mr. Gaddafi as regards his ability to enjoy privileged communications with a lawyer,⁵³ it is not credible for Libya to suggest that its failure to specify whether the local lawyer had been able to represent Mr. Gaddafi in anything other than in a purely superficial manner in unrelated proceedings was either a 'new' or 'unforeseen' issue.

⁵¹ Request, para. 36.

⁵² Request, para. 37.

⁵³ See for example, ICC-01/11-01/11-190-Conf-Corr, paras. 196-199; ICC-01/11-01/11-281-Conf-Red, paras. 203-205.

Fair trial issues in Libya

74. Libya has provided absolutely no justification as to why further submissions are necessary in order to properly dispose of the Appeal.
75. Moreover, contrary to Libya's assertion that the arguments are "largely new", ⁵⁴ all of the arguments set out in the Defence response had been set out in submissions to the Pre-Trial Chamber in the context of litigation concerning the Zintan proceedings. ⁵⁵ Since Libya itself decided to rely upon aspects of this litigation in order to bolster its Appeal Brief (i.e. the appointment of a local lawyer in relation to the national security proceedings), it was eminently foreseeable that the Defence would in turn, rely upon other aspects of this litigation in order to respond.

Burden and standard of proof

76. As set out above, a Defence argument responding to an issue put forth by Libya in its Appeal, i.e. the Pre-Trial Chamber's putative obligation to provide guidance concerning the applicable law, cannot be characterised as a 'new issue'. By raising this issue, Libya was on notice as concerns the foreseeability that the Defence would refute it. Libya's request to "address" and "refute" ⁵⁶ these arguments also does not constitute a valid justification for further submissions.

Link between 'case' and 'inability'

77. Libya has requested to make further submissions on this issue in order to make further submissions. ⁵⁷ Such circular argumentation patently fails to satisfy the burden of demonstration as to why such further submissions are necessary for the proper disposal of the appeal.

Ground 4

The erroneous interpretation and application of "unavailability"

78. Libya's justification for adducing further submissions in relation to the Prosecution position is predicated on its view that the Prosecution's interpretation of

⁵⁴ Request, para.39.

⁵⁵ Each matter set out in paragraph 209 is cross-referenced to first instance submissions.

⁵⁶ Request, para.40.

⁵⁷ Request, para.41.

“unavailability” differs from Libya’s.⁵⁸ A request to address a difference in views is in essence, an impermissible request to address a mere disagreement.

79. Libya’s argument that there has “yet to be full legal argument on this question before any ICC Chamber” is also both incorrect and irrelevant.

80. Libya benefitted from multiple opportunities to adduce ‘full legal argument on this question’, including in its 1 May 2012 challenge, the October 2012 admissibility hearings, its January 2013 further submissions, and its March 2013 reply concerning the further submissions.⁵⁹ Libya canvassed the issue in an extensive manner in its Appeal Brief.⁶⁰ There is therefore no lacuna in argumentation before the Appeals Chamber, which would trigger the application of Regulation 28.

81. It also an intrinsic element of appellate review that the Appeals Chamber will be seised of issues which have not been the subject of extensive first instance adjudication, or any prior appellate adjudication. If this sufficed to trigger the applicability of Regulation 28, then almost every appeal would trigger a right to submit further observations concerning Regulation 28.

82. Libya’s request to address Defence submissions on this point are once more predicated on Libya’s mere disagreement with these arguments.⁶¹ Libya has also utilised this filing in order to delve improperly into the merits of the issue,⁶² which in itself, justifies the dismissal of the Request.

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

83. Libya’s request to further address the issue of the custody and transfer of Mr. Gaddafi is premised on its difference in opinion concerning the correct or plausible interpretation of evidence which was before the Pre-Trial Chamber.⁶³ The Appeals Chamber should not invite further submissions on a matter which consists of a mere disagreement.

84. In arguing that it was inappropriate for the Defence to refer to the plethora of Defence evidence before the Pre-Trial Chamber on the issue of witness protection and security,

⁵⁸ Request, para.42.

⁵⁹ ICC-01/11-01/11-130-Conf, paras.9-15, 96-101; ICC-01/11-01/11-T-2-CONF-ENG, pages 45-46; ICC-01/11-01/11-258-Conf-Red, pages 39-51; ICC-01/11-01/11-293-Conf, paras.60 -61, 96, pages 45-51.

⁶⁰ ICC-01/11-01/11-370-Conf-Red, pages 75-79.

⁶¹ Request, paras.43-47.

⁶² Rather than waiting for the Appeals Chamber’s authorisation to submit further information or observations as to why the Defence arguments concerning Libya’s concession that the convocation of the trial in Zintan would not satisfy the admissibility criteria, Libya proceeds to explain why it considers this position to be erroneous (Request, para.44). Libya has also addressed the merits of the issue raised at paragraph 45 of the Request.

⁶³ Request, para.46.

Libya reveals its complete lack of understanding of the nature of appellate review. In assessing whether it was reasonable for the Pre-Trial Chamber to conclude that Libya faced difficulties as concerns its ability to obtain the testimony of witnesses, the Appeals Chamber is required to assess this conclusion in light of the evidence which was before the Pre-Trial Chamber at the time. It was also unnecessary for the Pre-Trial Chamber to cite each and every item of evidence that might have been relevant to this conclusion,⁶⁴ in particular, if – as has been advocated by Libya – the Pre-Trial Chamber should have assessed the evidence as a whole.

85. Accordingly, in raising the appellate ground that the Pre-Trial Chamber erred in its finding on this point, the burden fell on Libya to demonstrate that no reasonable Chamber could have made such a finding on the basis of the admissibility record (which included the Defence evidence and argumentation, which is the subject of Libya's complaint). Libya should therefore not be granted recourse to Regulation 28 in order to correct any deficiencies in its appellate pleadings.
86. In the guise of requesting authorisation to 'clarify' submissions which were already before the Appeals Chamber,⁶⁵ Libya has also sought to preempt the need for such authorisation by providing 'clarification' on the merits of the issue. Such a prejudicial way of proceeding warrants the summary dismissal of the Request.
87. Finally, as concerns Defence appellate submissions regarding Libya's lack of capacity to ensure the protection and security of Court participants, the Pre-Trial Chamber had in fact noted the Defence submissions on this point in the Admissibility Decision,⁶⁶ and had, moreover, referenced the issue of protection of Court participants in its findings concerning Libya's ability to secure legal representation for Mr. Gaddafi.⁶⁷ The Defence's appellate arguments on this point were directly relevant to the Pre-Trial Chamber's Admissibility Decision, and as such were entirely foreseeable to Libya.
88. As with all of the other issues which are the subject of the Request, Libya enjoyed multiple opportunities to demonstrate at first instance that the Defence submissions were either incorrect or unsubstantiated. Regulation 28 is not the appropriate vehicle for rectifying any failure by Libya to do so.

Genuineness of the Libyan proceedings

⁶⁴ ICC-01/04-01/06-773, para.20; ICC-02/11-01/11-278-Red, para.49.

⁶⁵ Request, para.48.

⁶⁶ ICC-01/11-01/11-344-Red, paras. 162, 171, and 173.

⁶⁷ ICC-01/11-01/11-344-Red, para. 212.

89. Libya's assertion that the Prosecution argument is "incorrect" and that it should be allowed an opportunity to "clarify its position" fully reveals that the Request is premised on mere disagreements, and unjustified attempts to elaborate existing submissions.

III. Relief Sought

90. For the reasons set out above, the Defence for Mr. Saif Al-Islam Gaddafi respectfully requests the Honourable Appeals Chamber to dismiss the Request in full.

A handwritten signature in black ink, appearing to read "John Jones", is centered on the page.

John R.W.D. Jones QC, Counsel for Mr. Saif Al-Islam Gaddafi

Dated this, 5th Day of August 2013

At London, United Kingdom