

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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**

Confidential

Prosecution Response to “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’s Gaddafi’”

Source: Office of the Prosecutor

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

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INTRODUCTION

1. The Government of Libya ("Libya") seeks to provide submissions clarifying certain matters arising from the Prosecution's and Defence's responses to Libya's appeal against Pre-Trial Chamber I's decision finding the case against Saif Al-Islam Gaddafi ("Mr. Gaddafi") admissible. The Prosecution submits that the request should be largely rejected because Libya's submissions will constitute a reiteration of arguments already put forward in its appeal and will not assist the Appeals Chamber in the determination of the matter before it.
2. The Prosecution however submits that Libya may be permitted to provide submissions on the relevance of the principle of *ne bis in idem* to the assessment of whether the conduct investigated domestically is "substantially the same" as the conduct investigated by the ICC. This topic was largely developed by the Prosecution in its Response for the first time and Libya's submissions may be of assistance to the Appeals Chamber and will not constitute a repetition of prior arguments.

PROCEDURAL BACKGROUND

3. On 31 May 2013, Pre-Trial Chamber I found the case against Gaddafi admissible before the Court and reminded Libya of its obligation to surrender Mr. Gaddafi ("Decision").¹
4. On 7 and 24 June 2013, Libya appealed the Decision and requested suspensive effect of the Pre-Trial Chamber's order to surrender Mr. Gaddafi ("Appeal").²

¹ ICC-01/11-01/11-344-Red.

5. On 16 and 18 July 2013, the Prosecution³ and the Defence⁴ filed their responses to Libya's Appeal.
6. On 18 July 2013, the Appeals Chamber rejected Libya's request for suspensive effect.⁵
7. On 29 July 2013, Libya requested to provide further submissions on 13 August to clarify matters arising from the Prosecution's and Defence's Responses which are purportedly not correct or are raised for the first time ("Request").⁶ Libya argues that the principle of equality of arms and appearance of fairness calls for the Appeals Chamber's grant the Request.⁷

APPLICABLE LAW

8. The Appeals Chamber has stated that no applications for replies may be filed pursuant to Regulation 24(5) to responses to documents in support of the appeal for appeals brought under Rules 154 or 155.⁸ The Appeals Chamber may however act pursuant to Regulation 28, upon request or upon its own motion,⁹ and permit the filing of additional submissions.
9. The Appeals Chamber has allowed parties to provide further submissions if those were necessary for the proper disposal of the

² ICC-01/11-01/11-350OA4 and ICC-01/11-01/11-370-Conf-ExpOA5. The public redacted version was filed on 25 June 2013 (ICC-01/11-01/11-370-Red2OA4).

³ ICC-01/11-01/11-384-RedOA4 ("Prosecution Response").

⁴ ICC-01/11-01/11-386-RedOA4 ("Defence Response").

⁵ ICC-01/11-01/11-384-Red.

⁶ ICC-01/11-01/11-289OA4, para.4.

⁷ Request, paras.5-6.

⁸ ICC-01/04/06-424 OA3, para. 6. Cited in ICC-01/04-01/07-148 OA, para. 3; ICC-01/05-01/08-1846 OA9, para. 6; ICC-01/09-01/11-239 OA, para. 8, ICC-01/09-02/11-206 OA, para.8.

⁹ ICC-01/04-01/07-476 OA2, paras.17-18.

appeal¹⁰ and/ or if they may be of assistance to the Appeals Chamber in deciding on the appeal.¹¹ The submissions should not constitute a re-iteration of the arguments the appellant put forward in the appeal.¹²

10. Moreover, depending on the issue under appeal and the context of the preceding litigation, the Appeals Chamber has permitted additional submissions in the interest of justice due to the importance of the issue in appeal and restrictions on the appellant due to the ex parte nature of part of the proceedings.¹³

SUBMISSIONS

11. Libya identifies a large list of issues arising from the Prosecution's and Defence's Responses which, it submits, need to be addressed because they are either incorrect¹⁴ or are raised for the first time.¹⁵ Libya also seeks to supplement its original submissions with respect to certain topics.¹⁶
12. The Prosecution notes that most of the purported clarifications will constitute a re-iteration of arguments already put forward by Libya in its

¹⁰ ICC-01/04/06-424OA3, para.7; ICC-01/04-01/07-476OA2, paras.16-18; ICC-01/09-78 OA, para.15. The Appeals Chamber will consider the principle of equality of arms and the need for an expeditious proceeding.

¹¹ ICC-01/04-01/07-522OA3, para.16.

¹² ICC-01/09-78 OA, para.15.

¹³ ICC-01/04-01/07-476OA2, para.20.

¹⁴ Request, paras.10, 15, 16-18 (principle of complementarity); 21 (on lowering the evidentiary threshold); 24 (broad notion of case); 25 (temporal limits for consideration of evidentiary material); 26-28 (misconstruction of evidentiary material); 31; 33 (article 59 Libyan criminal procedure code); 34-35 (Libya did not avail itself of opportunities to provide submissions); 40 (burden or standard of proof); 44 (Zintan proceedings); 45 (lawyer); 46 (statement of Prime Minister).

¹⁵ Request, paras.12; 29 (materials of African Court on Human and People's Rights); 30 (allegations of no relevance to the appeal); 39 (fair trial issues in Libya); 47 (issues of witnesses in Libya).

¹⁶ Request, paras.11,13 (meaning of "aspects"); 19-20 (on Article 19(4)); 22 (on the nature of the error raised in the second ground of appeal); 23 (on the linkage of the Saif case and the Senussi case); 32 (nature of third ground); 36 (appointment Prosecutor General); 37-38 (appointment lawyers in the Zintan case); 41 (link between case and inability); 42-43 (on unavailability); 48-49 (on the ability to obtain testimony and protect witnesses); 50 (genuineness).

Appeal¹⁷ or will entail an improper litigation of factual issues before the Appeals Chamber¹⁸ in disregard of the rules governing appeals proceedings. In particular, new evidence on appeal can only be introduced in exceptional circumstances;¹⁹ and the Appeals Chamber will only intervene to disrupt factual findings or discretionary decisions of the Pre-Trial Chamber in the case of a clear error, namely where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it,²⁰ or if the Chamber abused its discretion.²¹ Further, the intervention of the Appeals Chamber is corrective and not *de novo*²² and the Appeals Chamber will defer or accord a margin of appreciation to the Chamber's appreciation of the evidence.²³ Therefore, those submissions are not necessary and will not assist the Chamber in the determination of the matter before it.

13. The Prosecution however considers that submissions from Libya on the relevance of the *ne bis in idem* principle to the assessment of whether the conduct investigated locally is "substantially the same" as that before the ICC may assist the Appeals Chamber.²⁴ Although the Prosecution made submissions before the Pre-Trial Chamber on the notion of "case" and "substantially the same conduct" as articulated by the Appeals Chamber in the Kenya cases,²⁵ it did not rely on the jurisprudence of the principle of *ne bis in idem*. Reference to the usefulness of this principle and its

¹⁷ See above fns.14, 16 .

¹⁸ See above fn. 15.

¹⁹ ICC-01/05-01/08-962OA3, para.32. See the Prosecution's submissions on this matter in its response to Lubanga's appeal against the Article 74 Judgement : ICC-01/04-01/06-2969-Red A5, paras.37-46.

²⁰ ICC-01/04-01/10-283 OA, para.17.

²¹ ICC-01/09-01/11-336 OA, para.15; ICC-01/09-02/11-342 OA, para.15.

²² Ibid.

²³ ICC-01/04-01/06-2582OA18, para. 56 ; ICC-01/04-01/10-283OA, paras.1,17;ICC-01/05-01/08-1626-RedOA7, para.45; ICC-01/05-01/08-2151-Red OA10, para.16.

²⁴ Request, para.14.

²⁵ ICC-01/11-01/11-276-Red, paras.28-31 ; ICC-01/11-01/11-167-Red, para.25.

jurisprudence was made for the first time on these proceedings in the Prosecution's Response,²⁶ and as a result of the Chamber's notion of "conduct" advanced in the Decision.²⁷ Libya's submissions on this topic will not constitute a repetition of previous arguments, and may assist the Appeals Chamber on having all relevant arguments before it to decide on the notion of case and "substantially the same conduct".

Relief Sought

14. For the reasons set out above, the Prosecution requests that the Request be rejected with the exception of submissions on the relevance of the principle of *ne bis in idem* in the Chamber's assessment on whether Libya is investigating "substantially the same conduct" as the ICC.



Fatou Bensouda,
Prosecutor

Dated this 5th day of August 2013

At The Hague, The Netherlands

²⁶ Prosecution Response, paras.54-67.

²⁷ Decision, paras.78-83.