



Original: **English**

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

Date: 30 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 “Observations on behalf of victims on the Government of Libya’s appeal against the decision of Pre-Trial Chamber I entitled ‘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

1. On 21 August 2013, the Office of Public Counsel for Victims (OPCV) submitted the “Observations on behalf of victims on the Government of Libya’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’” (“the OPCV Observations”).¹
2. In general, the Defence for Mr. Saif Al-Islam Gaddafi concurs with the arguments set out in the OPCV Observations.²
3. In particular, the Defence endorses the following OPCV arguments concerning the custody of Mr. Gaddafi (Ground 4 of the Admissibility Appeal):

“The Government appears to have changed its initial position, now claiming “that the Zintan Brigade is a Government-sanctioned local authority and that there is no distinction in international law between a central and local authority”. The Principal Counsel respectfully requests the Appeals Chamber to treat this assertion as new factual allegation which was not put forward before the Pre-Trial Chamber, and thus must be dismissed in limine. In advancing new factual allegations on appeal, the Government is, in effect, asking the Appeals Chamber to depart from its normal function so as to be and to be placed in the position of having to exercise the powers of the Pre-Trial Chamber. This approach is procedurally unsound. The Government cannot constantly be allowed to alter the factual basis for its Admissibility Challenge so as to defeat the fairness of the proceedings.”³

4. As concerns the complete dissonance between the position of the Libyan Government advanced before the Pre-Trial Chamber and that which has been raised for the first time on appeal, the Defence notes that in its Reply of 4 March 2013, the Government made the following express concessions:

¹ ICC-01/11-01/11-411-Red.

² The Defence disagrees with the assertion of the OPCV that Annex 5 to the further submissions “could be used in support of the fact that the Libyan investigation covers the use of mercenaries” (OPCV Observations, para. 53). The Defence notes, however, that the OPCV has highlighted the lack of specificity of the information in this Annex, and affirmed the correctness of the Chamber’s findings in relation to this Annex (OPCV Observations, para. 53). The OPCV has also acknowledged that “armed black Africans in uniform” cannot, without more, be equated to mercenaries (OPCV Observations, para. 53).

³ OPCV Observations at para. 78.

- i. That the Government did not yet exercise control over all of its detention centers, as exemplified by the fact that several detention centers were not under the full control of the judicial police;⁴ and
 - ii. That the Zintan Brigade detaining Mr. Gaddafi was not composed of judicial police, and that as such, it was necessary for Brigade's members to have training as judicial police in order to qualify them to detain Mr. Gaddafi in Tripoli.⁵
- 5. The only reasonable conclusion that would have been open to the Pre-Trial Chamber on the basis of these submissions was that the Libyan Government had acknowledged that at the time of the admissibility proceedings, Mr. Gaddafi was not detained under the authority or full control of the Government.
- 6. As correctly stated by the OPCV, the Appeals Chamber can only base its decision on the basis of the information which was put before the Pre-Trial Chamber.⁶ The Appeals Chamber must therefore disregard the Libyan Government's revisionist attempts to endorse Mr. Gaddafi's continued detention in Zintan, which fly in the face of the unequivocal meaning of their submissions to the Pre-Trial Chamber.

Relief Sought

The Defence for Mr. Saif Al-Islam Gaddafi respectfully requests the Honourable Appeals Chamber to reject the Admissibility Appeal.

⁴ ICC-01/11-01/11-293-Conf at para. 122

⁵ "The Libyan Government will shortly begin implementation of its newly devised proposal for the members of the Zintan brigade responsible for guarding Saif Al-Islam Gaddafi in Zintan to be trained and regularised so as to form part of the judicial police which would then guard him upon his transfer to a central government controlled prison in Tripoli." ICC-01/11-01/11-293-Conf at para. 50.

⁶ ICC-01/11-01/11-234 at paras. 12-13.

A handwritten signature in black ink, appearing to read 'John Jones', written in a cursive style.

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

Dated this, 30th Day of August 2013

At London, United Kingdom