

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/11-01/11 OA 4

Date: 12 September 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 document

Decision on the Libyan Government's request to file further submissions



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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Mr Fabricio Guariglia

Counsel for Saif Al-Islam Gaddafi
Mr John R.W.D. Jones
Ms Sarah Bafadhel

States Representatives
Mr Ahmed El-Gehani
Mr Philippe Sands

Counsel for Abdullah Al-Senussi
Mr Ben Emmerson
Mr Rodney Dixon

Office of Public Counsel for victims
Ms Paolina Massidda

REGISTRY

Registrar
Mr Herman von Hebel

A handwritten signature in black ink, appearing to be 'H. von Hebel', is located in the bottom right corner of the page.

The Appeals Chamber of the International Criminal Court,

In the appeal of Libya against the decision of Pre-Trial Chamber I entitled “Decision on the admissibility of the case against Saif Al-Islam Gaddafi” of 31 May 2013 (ICC-01/11-01/11-344-Red),

Having before it 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”’ of 29 July 2013 (ICC-01/11-01/11-389),

Renders unanimously the following

DECISION

- (i) Libya is instructed to file submissions on specific issues arising from the responses of the Prosecutor and of Mr Gaddafi 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’” by 16h00 on 23 September 2013. Such submissions shall not be longer than 20 pages.
- (ii) The Prosecutor, Mr Gaddafi and the victims may respond to the submissions filed pursuant to paragraph (i) by 16h00 on 30 September 2013. The responses shall not be longer than 20 pages each.
- (iii) Libya, the Prosecutor and Mr Gaddafi may respond to the observations of victims filed pursuant to paragraph (ii) by 16h00 on 4 October 2013. The responses shall not be longer than 20 pages each.



REASONS

I. BACKGROUND

1. On 7 June 2013, Libya filed “The Government of Libya’s Appeal against Pre-Trial Chamber I’s ‘*Decision on the admissibility of the case against Saif Al-Islam Gaddafi*’”¹ (hereinafter: “Appeal”).
2. On 24 June 2013, Libya filed 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*’”² (hereinafter: “Document in Support of the Appeal”).
3. On 16 July 2013, the Prosecutor filed 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*’”.³ On 18 July 2013, Mr Gaddafi filed 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*’”⁴ (hereinafter: “Prosecutor and Defence Responses to the Document in Support of the Appeal”, collectively).
4. On 29 July 2013, Libya filed 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”*’”⁵ (hereinafter: “Request”) seeking leave, under regulation 28 of the Regulations of the Court, to file further submissions clarifying certain matters arising from the Prosecutor and Defence Responses to the Document in Support of the Appeal. Libya, in particular, wishes to file submissions in respect of matters raised in the Prosecutor and Defence Responses to the Document in

¹ ICC-01/11-01/11-350 (OA 4).

² ICC-01/11-01/11-370-Conf-Exp (OA 4). The public redacted version was filed on 25 June 2013 (ICC-01/11-01/11-370-Red2 (OA 4)).

³ ICC-01/11-01/11-384-Red (OA 4) (hereinafter: “Prosecutor’s Response to the Document in Support of the Appeal”).

⁴ ICC-01/11-01/11-386-Red (OA 4) (hereinafter: “Defence Response to the Document in Support of the Appeal”).

⁵ ICC-01/11-01/11-389 (OA 4).



Support of the Appeal, which it claims are either erroneous or which are raised for the first time.⁶ Libya submits that:

[A]n 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 equality of arms 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 appraised 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

5. Libya submits that its submissions would “clarify the rationale and necessity for the reliance upon *ex parte* evidential materials on appeal”⁸ as well as address inaccuracies related to Mr Gaddafi’s request that the Government’s grounds of appeal be summarily dismissed.⁹ Further, Libya identifies a range of issues arising from the Prosecutor and Defence Responses to the Document in Support of the Appeal that it submits are either incorrect, raised for the first time or in need for clarification.¹⁰

6. On 31 July 2013, the Appeals Chamber issued the “Order in relation to the Libya’s request for leave to file further submissions in relation to its appeal against the ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’”,¹¹ granting Mr Gaddafi and the Prosecutor until 5 August 2013 to respond to the Request.

7. On 5 August 2013, Mr Gaddafi filed the “Defence Response to the ‘Libyan Government’s Request to file further submissions clarifying matters raised in the Prosecution and Defence Responses to the ‘Document in Support of Libya’s Appeal against the ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’””¹² (hereinafter: “Defence Response to Request”). First, Mr Gaddafi submits that the Request should be dismissed because Libya did not comply with regulation 37 (1) of the Regulations of the Court, which prescribes a 20-page limit for

⁶ Request, paras 4, 8.

⁷ Request, para. 6.

⁸ Request, para. 9.

⁹ Request, para. 9.

¹⁰ Request, paras 10-50.

¹¹ ICC-01/11-01/11-391 (OA 4).

¹² ICC-01/11-01/11-393 (OA 4).

filings, as the Request was 21 pages long.¹³ Second, Mr Gaddafi submits that the terminology and substance of the Request, as well as the justification provided for it, reveal that Libya is essentially requesting leave to file a reply, rather than further submissions pursuant to regulation 28 of the Regulations of the Court.¹⁴ Third, Mr Gaddafi submits that Libya has failed to meet the criteria for submitting further observations pursuant to regulation 28 (1) of the Regulations of the Court as it has not demonstrated that further submissions are “necessary”, in the sense that, without the submissions, the Chamber would lack “crucial information or case law, which would be of decisive importance in relation to the Appeals Chamber’s consideration of the appellate issue”.¹⁵ Mr Gaddafi notes that further submissions cannot be invited in order to “promote the rights of a particular party” and thus, it is “entirely irrelevant and inapposite for Libya to justify its Request by citing ‘sovereign rights’”.¹⁶ Further, Mr Gaddafi claims that granting the request is not in the interests of justice.¹⁷

8. On 5 August 2013, the Prosecutor filed the “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 Gaddafi’””,¹⁸ submitting that the request should be largely rejected because most of Libya’s submissions “constitute a reiteration of arguments already put forward in its appeal” and will not assist the Appeals Chamber or “will entail an improper litigation of factual issues before the Appeals Chamber in disregard of the rules governing appeals proceedings”.¹⁹ However, the Prosecutor conceded 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.²⁰

¹³ Defence Response to Request, paras 8-11.

¹⁴ Defence Response to Request, paras 12-19.

¹⁵ Defence Response to Request, paras 20-23, 36-89.

¹⁶ Defence Response to Request, paras 25-29.

¹⁷ Defence Response to Request, paras 30-35.

¹⁸ ICC-01/11-01/11-394 (OA 4) (hereinafter: “Prosecutor’s Response to Request”).

¹⁹ Prosecutor’s Response to Request, paras 1, 11-12.

²⁰ Prosecutor’s Response to Request, paras 2, 13.



9. On 9 September 2013, Libya filed the “Renewed request to make further submissions responding to those of the Prosecution and Defence”²¹ (hereinafter: “Renewed Request”), requesting that the Appeals Chamber grant Libya 14 days following the issuance of a decision permitting further submissions. In the Renewed Request, Libya reiterated that there is “good cause” for granting the Request that the submissions will “correct inaccuracies or respond to new arguments” in the Prosecutor and Defence Responses to the Document in Support of the Appeal,²² that granting the Request would “ensure that the principle of equality of arms is upheld”,²³ in particular in relation to the sovereign rights of Libya,²⁴ and that such an approach would be consistent with the Appeals Chamber’s approach in granting certain parties and participants the right to make further observations in the present case.²⁵

II. MERITS

10. The Appeals Chamber decides to grant the Request pursuant to regulation 28 of the Regulations of the Court.

11. As a preliminary matter, the Appeals Chamber notes that the Request is not in conformity with regulation 37 (1) of the Regulations of the Court because it exceeds the page limit of 20 pages by half a page. Nevertheless, the Appeals Chamber accepts the Request pursuant to regulation 29 of the Regulations of the Court. The Request is merely a procedural document, seeking an order of the Appeals Chamber for further submissions. Furthermore, the content of this document will not be considered by the Appeals Chamber when deciding on the merits of the appeal. It is therefore in the interests of justice to accept the Request.

12. In relation to the merits of the Request, the Appeals Chamber recalls its previous jurisprudence that establishes that the Regulations of the Court “do not foresee replies to responses to documents in support of the appeal for appeals under rules 154 and 155”.²⁶ Nevertheless, the Appeals Chamber has also held that, “should

²¹ ICC-01/11-01/11-436 (OA 4).

²² Renewed Request, para. 5.

²³ Renewed Request, para. 6.

²⁴ Renewed Request, para. 7.

²⁵ Renewed Request, paras 3, 6.

²⁶ *Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the Prosecutor’s ‘Application for Leave to Reply to “Conclusions de la défense en réponse au mémoire d’appel du Procureur””, 12 September 2006, ICC-01/04-01/06-424 (OA 3), para. 6.

the arguments that are raised in a response to a document in support of the appeal make further submissions by the appellant necessary for the proper disposal of the appeal, the Appeals Chamber will issue an order to that effect pursuant to regulation 28 (2) of the Regulations of the Court, bearing in mind the principle of equality of arms and the need for expeditious proceedings”.²⁷ Therefore, the question before the Appeals Chamber is whether Libya should be allowed to file additional submissions pursuant to regulation 28 of the Regulations of the Court.

13. The Appeals Chamber has carefully considered the Request. It notes that Libya wishes to address several issues enumerated over 20 pages. The Appeals Chamber grants the Request because there is a need for clarification, but requires Libya to limit its submissions to 20 pages. In light of this, the Appeals Chamber emphasises that submissions under regulation 28 of the Regulations of the Court are not intended to reiterate a position or demonstrate mere disagreements with the position of another party. The Appeals Chamber also stipulates that Libya must not repeat arguments it has already submitted in its responses to the observations of victims and of Ms Hosseinioun.

14. In conclusion, the Appeals Chamber decides that Libya shall file its submissions by 16h00 on 23 September 2013. The Prosecutor, Mr Gaddafi and the victims represented by Ms Paolina Massidda will be given the opportunity to file a response by 16h00 on 30 September 2013. Libya, the Prosecutor and Mr Gaddafi may respond to the observations of victims by 16h00 on 4 October 2013.

Done in both English and French, the English version being authoritative.



Judge Anita Ušacka
Presiding Judge

Dated this 12th day of September 2013

At The Hague, The Netherlands

²⁷ *Ibid.*, para. 7.