

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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No.: ICC-01/11-01/11
Date: 30 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**

Confidential

Observations on “the Libyan Government’s further submissions in reply to the Prosecution and Gaddafi Responses to ‘Document in Support of Libya’s Appeal against the “Decision on the admissibility of the case against Saif Al-Islam Gaddafi””

Source: Office of Public Counsel for Victims

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

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I. PROCEDURAL HISTORY

1. On 31 May 2013, Pre-Trial Chamber I issued the "Decision on the admissibility of the case against Saif Al-Islam Gaddafi" (the "Admissibility Decision"), in which it declared the case against Mr Gaddafi admissible and rejected Libya's challenge to the admissibility of the case.¹

2. On 25 June 2013, the Government of 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'" (the "Document in support of the Appeal").² The Prosecution and the Defence filed their responses to the Document in support of the Appeal (the "Responses") respectively on 16 and 18 July 2013.³

3. On 20 August 2013, the Principal Counsel of the Office of Public Counsel for Victims (the "OPCV" or the "Office"), acting as legal representative of victims for the purpose of article 19 proceedings, filed its "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 Said Al-Islam Gaddafi'"⁴ (the "OPCV Response").

¹ See the "Decision on the admissibility of the case against Saif Al-Islam Gaddafi" (Pre-Trial Chamber I), No. ICC-01/11-01/11-344-Conf-Exp, 31 May 2013.

² See 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'", No. ICC-01/11-01/11-370-Conf-Red OA4, 25 June 2013 (the "Document in support of the Appeal").

³ See the "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'", No. ICC-01/11-01/11-384-Conf OA4, 16 July 2013 and the "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'", No. ICC-01/11-01/11-386-Conf OA4, 18 July 2013.

⁴ See 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'", No. ICC-01/11-01/11-411-Conf OA4, 20 August 2013.

4. On 22 August 2013, Ms Mishana Hosseinioun filed her observations, requesting the Appeals Chamber to find that Libya is unable to investigate and prosecute Mr Gaddafi, and that he should be transferred immediately to the ICC.⁵

5. On 9 September 2013, Libya filed its "Renewed request to make further submissions responding to those of the Prosecution and Defence", requesting that the Appeals Chamber grant Libya 14 days to file further submissions.⁶

6. On 12 September 2013, the Appeals Chamber issued the "Decision on the Libyan Government's request to file further submissions", wherein it instructed the Government of Libya to file submissions on issues arising from the Responses, and authorised the victims to respond to said submissions by 30 September 2013.⁷

7. On 23 September 2013, Libya filed "[t]he Libyan Government's further submissions in reply to the Prosecution and Gaddafi Responses to 'Document in Support of Libya's Appeal against the "Decision on the admissibility of the case against Saif Al-Islam Gaddafi'"'"⁸ (the "Submissions").

8. In accordance with the Appeals Chamber's Decision of 12 September 2013, the Principal Counsel of the OPCV files the following observations on behalf of victims having communicated with the Court in respect of the case.

9. In accordance with regulation 23*bis*(2) of the Regulations of the Court, this submission is filed "Confidential" following the original classification chosen by

⁵ See the "Observations on behalf of Mishana Hosseinioun pursuant to Rule 103", No. ICC-01/11-01/11-414 OA4, 22 August 2013.

⁶ See the "Renewed request to make further submissions responding to those of the Prosecution and Defence", No. ICC-01/11-01/11-436 OA4, 9 September 2013.

⁷ See the "Decision on the Libyan Government's request to file further submissions" (Appeals Chamber), No. ICC-01/11-01/11-442 OA4, 12 September 2013.

⁸ See the "The Libyan Government's further submissions in reply to the Prosecution and Gaddafi Responses to 'Document in Support of Libya's Appeal against the "Decision on the admissibility of the case against Saif Al-Islam Gaddafi'"'"', No. ICC-01/11-01/11-454-Conf OA4, 23 September 2013 (the "Libya's Submissions").

the Libyan Government. However, the Principal Counsel considers that the present document does not contain any information that should be kept confidential and therefore requests the Appeals Chamber to authorise its re-classification as "Public".

II. SUBMISSIONS

10. Libya's Submissions give rise to multiple legal issues. First, they deal with specific matters arising from the Prosecution and Defence Responses, which pertain to the correctness and propriety of the Admissibility Decision. To a large extent, the arguments put forward either restate (although in different terms) arguments previously made by the Appellant before the Chamber; or constitute mere disagreements with the positions advanced by the parties. As such, these Submissions are of limited relevance to the resolution of the appeal and must therefore be rejected.

11. On the other hand, Libya's Submissions go beyond addressing the issues raised in the Responses. The Government utilises the Chamber's leave pursuant to regulation 28 the Regulations of the Court as an opportunity to make new factual allegations and present additional evidence on appeal. In particular, Libya requests the Chamber to accept minutes of a hearing purportedly held by the Accusation Chamber on 19 September 2013, as a further confirmation that its national investigation is on-going and progressing. Moreover, the Government seeks an extension of time to file other supplementary materials and make further submissions thereon. In doing so, the Government diverts from the "clarification" purpose for which the application for further Submissions was granted. For the reasons set out below, it is submitted that this part of the Submissions, concerning the request for admission of new evidence and extension of time, is procedurally improper and should therefore be dismissed *in limine*.

A. Repetition of arguments already made before the Chamber

12. For the most part, Libya's Submissions reiterates arguments that were developed either in its initial filing, *i.e.* the Document in support of the Appeal, or in the subsequent responses to the Victims' Observations and the observations of Ms Hosseinioun. Indeed, many of the points raised by Libya with respect to the four grounds of appeal were discussed extensively in the Document in support of the Appeal. This includes the questions relating to the interpretation of the "earliest opportunity",⁹ the meaning of the term "conduct"¹⁰ and the requisite degree of "sameness".¹¹

13. In its Submissions, Libya fails to identify issues of facts or law that appear to have been overlooked in earlier filings and which may materially influence the outcome of the present proceedings. As Libya states that the purpose of the Submissions is to clarify some aspects of previous submissions and address "misunderstandings" and "misrepresentations" in the parties' Responses, the Principal Counsel does not find it necessary to provide new observations on the clarifications made by the Appellant. In this respect, the Principal Counsel relies on her previous submissions as set out in the OPCV Response.¹²

B. The Request for admission of new evidence on appeal is unfounded

14. Libya relies on rule 149 of the Rules of Procedure and Evidence as a basis for the filing of additional evidence on appeal.¹³ It also makes reference to the "*Appeals*

⁹ See the Document in support of the Appeal, *supra* note 2, para. 63.

¹⁰ *Idem.*, paras. 50 *et seq.*

¹¹ *Ibid.*

¹² See 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'", *supra* note 4.

¹³ See Libya's Submissions, *supra* note 8, para. 8.

Chamber's inherent competence" in support of its request for leave to submit extracts of the investigation dossier within a timeframe of over two months.¹⁴

15. Clearly, rule 149 of the Rules of Procedure and Evidence which Libya refers to does not give an appellant the unfettered right to introduce new evidence in the appellate proceedings. This provision specifies that rules on "*submission of evidence in the Pre-Trial and Trial Chambers shall apply mutatis mutandis to proceedings in the Appeals Chamber*". It is apparent that this rule is complementary to other specific provisions governing the submission of evidence on appeal. The transposition of procedural rules applicable to proceedings at first instance is not an automatic process. It requires, first, the consideration of all provisions and rules dealing specifically with appellate proceedings. This notably includes rule 62 of the Regulations of the Court, which details the requirements for adducing supplementary evidence and, most importantly, makes the admission of such evidence conditional upon the Appeals Chamber's prior authorisation.

16. As to the argument raised by Libya regarding the "inherent competence" of the Chamber, the Principal Counsel notes that the Appeals Chamber has previously emphasised that its intervention is simply corrective in nature, in that it will not undertake a *de novo* review of the admissibility decision.¹⁵ The Appeals Chamber made it clear that it will interfere with an admissibility decision only in the event that the Pre-Trial Chamber "*misappreciated the facts, took into account irrelevant facts or failed to take into account relevant facts*".¹⁶

¹⁴ *Idem*.

¹⁵ See the "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'" (Appeals Chamber), No. ICC-01/09-01/11-307 OA, 30 August 2011, para. 56 and the "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'" (Appeals Chamber), No. ICC-01/09-02/11-274 OA, 30 August 2011, para. 55.

¹⁶ *Idem*.

17. These judicial pronouncements obviously preclude the challenging party from modifying the factual basis of the admissibility challenge after it has reached the appeal stage. Because of the corrective nature of the Appeals Chamber's intervention, addressing new factual allegations goes beyond the scope of the proceedings on appeal. As the Appeals Chamber previously observed, its function is to "*determine whether the determination by the Pre-Trial Chamber on the admissibility of the case [...] was in accord with the law*";¹⁷ and not whether the case is admissible at the time of the appeal. This is also the reason why the scope of appellate review is limited to the facts that occurred before the issuance of the Admissibility Decision. Indeed, contrary to Libya's submissions,¹⁸ the Appeals Chamber should consider the facts as they existed at the time of the proceedings "*on the admissibility challenge before the Pre-Trial Chamber and not to the subsequent proceedings on appeal*".¹⁹ Consequently, the Government's request for admission of Annex A to the Submissions is unfounded, as it relates to domestic judicial activities which post-date the pre-trial proceedings.

18. Moreover, the Principal Counsel opposes Libya's request for the admission of additional evidence, including extracts from the Accusation Chamber Dossier. Assuming *arguendo* that the Appeals Chamber was to accept new factual submissions from Libya, the issue litigated on appeal would no longer be whether the Pre-Trial Chamber erred in the Admissibility Decision; but rather whether, based on new evidence, the Appellant is in a position to substantiate its own allegations. Such a result implies that an admissibility decision could be quashed without fault or error on the part of the Pre-Trial/Trial Chamber, which in turn contravenes the jurisprudence of this Court. The Government's intent to attain this

¹⁷ See the "Decision on the 'Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber's Decision on Admissibility'" (Appeals Chamber), No. ICC-01/09-01/11-234 OA, 28 July 2011, para. 11. See also the "Decision on the 'Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber's Decision on Admissibility'" (Appeals Chamber), No. ICC-01/09-02/11-202 OA, para. 10 (the "Decision on the investigation report").

¹⁸ See Libya's Submissions, *supra* note 8, para. 10.

¹⁹ See the Decision on the investigation report, *supra* note 17, para. 9.

result is further evidenced by its failure to indicate the specific grounds to which the proposed evidence relate, as required by regulation 62 of the Regulations of the Court.

C. Libya's Submissions on appeal amount to a second admissibility challenge

19. In the Submissions, the Government implicitly recognises that the items of evidence it seeks to introduce should have been submitted to the Pre-Trial Chamber. However, Libya contends that the materials in question could not be provided to the Court at an earlier stage because of legal "*obstacles*" posed by article 59 of the Libyan Code of Criminal Procedure.²⁰ It explains that because of "*Article 59 of the Libyan Code of Criminal Procedure it [was] prevented from disclosing the evidence against Mr. Gaddafi during the investigative phase of proceedings*".²¹ Libya goes on further suggesting that materials provided during the pre-trial phase of the proceedings were subject to an express exemption to this requirement by the Minister of Justice.²²

20. The reasons advanced by the Government to justify its failure to adequately substantiate its own allegations before the Pre-Trial Chamber are unconvincing. Libya could not have reasonably expected to successfully challenge the admissibility of the case against Mr Gaddafi while knowing that the totality of its evidence is subject to confidentiality obligations or disclosure restrictions, and as a consequence, may not be used in the proceedings before the Court. On the matter, the Principal Counsel notes that confidentiality dictated by national legislation as such does not constitute a proper basis for the non-disclosure of evidentiary materials to the Court. A State cannot simply rely on its national law to refrain from disclosing information or documents to the Court. In the present instance, this

²⁰ See Libya's Submissions, *supra* note 8, para. 5.

²¹ *Idem*, para. 4.

²² *Ibid.*

constitutes a clear violation of Libya's obligations by virtue of the Security Council Resolution 1970 (2011) and cannot excuse its failure to substantiate the Admissibility Challenge in a timely manner. Even in the event that such disclosure may prejudice national security interests,²³ it remains for the Court, pursuant to article 72 of the Rome Statute, to determine whether the relevant materials can be used in the proceedings before it. As Libya has not availed itself of the procedure set out in article 72 of the Rome Statute, its contentions with respect to confidentiality should be dismissed. In any event, the Government's recognition of the need to adduce further evidence confirms, rather than weakens, the Pre-Trial Chamber's conclusions as to the level of specificity and sufficiency of evidence presented before it throughout the pre-trial phase of the proceedings. Moreover, the Government's request for admission of new evidence is inconsistent with its previous assertion before the Pre-Trial, *"that it has offered sufficient evidence in support of its Application to find that the case against Mr. Gaddafi is inadmissible before the Court"*.²⁴

21. In fact, the Libyan Government, through its Submissions, is effectively asking the Appeals Chamber to be given a second chance to make its case. While this is possible under the Court's legal framework, the Government should not conflate the bringing of an appeal against a Pre-Trial decision on admissibility with the bringing of a second challenge to the admissibility of the case. Indeed, proceedings on appeal do not constitute *"a mere continuation of proceedings before the Pre-Trial Chamber, but rather a separate and distinct stage of the proceedings"*.²⁵ If Libya believes that it is now in a position to provide sufficient evidence to demonstrate

²³ This is unlikely to be the case in light of the fact that Libya now offers to present the evidence in question to the Appeals Chamber.

²⁴ See the "Libyan Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi", No. ICC-01/11-01/11-258-Conf, 23 January 2013, para. 114 (we emphasise).

²⁵ See the "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberté [sic] provisoire de Thomas Lubanga Dyilo'" (Appeals Chamber), No. ICC-01/04-01/06-824 OA7, 13 February 2007, para. 43. See also the Decision on the investigation report, *supra* note 17, para. 10.

the inadmissibility of the case, it should follow the procedure set out in article 19(4) of the Rome Statute. Accordingly, it would be for the Pre-Trial Chamber to decide on admissibility anew, subject to the requirements set out in article 19(4) of the Rome Statute. New factual submissions on admissibility cannot however be made on appeal for the first time, as Libya seeks to do. In this regard, the Principal Counsel reiterates the view that an admissibility challenge must be assessed on the basis of the facts as they exist at the time the challenge is filed.²⁶ Such requirement would ensure that the challenging party include all supporting evidence and relevant materials in the initial filing, which in turn enhance the fairness and expeditiousness of admissibility proceedings.

22. Lastly, the Principal Counsel notes the Government's submissions in relation to the adjournment of the proceedings until 3 October 2013 to ensure Mr Gaddafi's attendance.²⁷ This request must be viewed in the larger context of political instability and volatile security situation in Libya. Indeed, numerous reports reveal the increasing risks posed by militias and non-regular armed groups, as well as the numerous obstacles to the adoption of a law on transitional justice.²⁸ These events have a direct bearing on Mr Gaddafi's trial and may only serve to confirm the correctness of the factual findings made by the Pre-Trial Chamber with respect to Libya's ability to conduct a genuine investigation. Moreover, the Principal Counsel notes that during the hearing held in Tripoli's South Court on 19 September 2013, Mr Gaddafi was not present and is to stay in Zintan for the time

²⁶ See the transcription of the hearing held on 9 October 2012, No. ICC-01/11-01/11-T-2-RED-ENG ET, 9 October 2012, p.66, lines 17 *et seq.* See also the "OPCV's observations on 'Libyan Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi'", No. ICC-01/11-01/11-279, 18 February 2013, paras. 17 *et seq.*

²⁷ See Libya's Submissions, *supra* note 8, para. 47.

²⁸ See Centre d'actualités de l'ONU, "L'ONU demande le soutien de la communauté internationale au rétablissement de l'état de droit en Libye", 16 September 2013, available at: <http://www.un.org/apps/newsFr/storyF.asp?NewsID=31050&Cr=Libye&Cr1> and Reuters, « Chaotic Libya appeals for help to restore security », 17 September 2013, available at: <http://www.reuters.com/article/2013/09/17/us-libya-oil-idUSBRE98G0QK20130917>.

being since “*the problem of being brought [in Tripoli] has not been solved*”, according to Prosecution official Siddiq Ahmed Issour.²⁹

23. To the extent that Libya’s Submissions seek to introduce new facts on appeal, the Principal Counsel respectfully requests the Appeals Chamber to dismiss the Submissions *in limine*.

Respectfully submitted.



Paolina Massidda
Principal Counsel

Dated this 30th day of September 2013

At The Hague, The Netherlands

²⁹ See The Guardian, “Gaddafi’s son, intelligence chief and PM among defendants in crucial trial: Most important trial in Libya's post-Gaddafi era switched to maximum security prison in Tripoli over fears of violence”, 19 September 2013, available at: <http://www.theguardian.com/world/2013/sep/19/gaddafi-son-pm-trial>.