



Original: English

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

Date: 9 January 2014

THE APPEALS CHAMBER

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

**SITUATION IN LIBYA
IN THE CASE OF**

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

Public

**Libyan Government's Response to the "Request on behalf of Abdullah Al-Senussi to
File Further Submissions Pursuant to Regulation 28"**

Source: The Government of Libya, represented by:
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Professor James Crawford SC
Mr. Wayne Jordash
Ms. Michelle Butler

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

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I. INTRODUCTION

1. The Libyan Government hereby files its Response to the “Request on behalf of Abdullah Al-Senussi to File Further Submissions Pursuant to Regulation 28” (“Request”), which was filed on 19 December 2013.¹ The Defence seeks:
 - a. Admission of new evidence before the Appeals Chamber (purportedly containing the “most up to date position concerning the visit of the Defence to Mr. Al-Senussi in Tripoli” and “recent developments in relation to further evidence concerning the mistreatment of Mr. Al-Senussi in detention in Al-Hadba prison”)²; and
 - b. Additional submissions relating to matters raised in Libya’s “Response to the ‘Document in Support of Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I’s ‘Decision on the admissibility of the case against Abdullah Al-Senussi’” and the “Prosecution’s Response to the ‘Document in Support of Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I’s ‘Decision on the admissibility of the case against Abdullah Al-Senussi.’”³
2. Libya does not object to 1(b): the filing of additional submissions related to matters raised in the aforementioned Responses. However, the Government objects to 1(a): the request for the admission of new evidence before the Appeals Chamber. Rather than addressing and substantiating alleged errors of fact or law that materially affected the impugned Decision, this application seeks to circumvent the Pre-Trial Chamber’s ruling that the case was inadmissible through reiterating previous arguments and requesting the Appeals Chamber to consider the issues *de novo*. It is submitted that this is an inappropriate use of the appellate jurisdiction and, for the reasons set out below, the Request ought to be rejected.

¹ ICC-01/11-01/11-493.

² The Request, para. 1.

³ *Ibid.*

II. SUBMISSIONS

a. Denial of equality of arms

3. The Request for admission of new evidence must be viewed in the context of the Appellant's previous attempt to introduce new evidence in the appeal. This, like the present request, constitutes an attempt to re-litigate matters *as if* before the Pre-Trial Chamber, rather than submitting the Pre-Trial Chamber's decision to corrective appellate review. The effect of permitting the Appellant's Request would be to deny the Libyan Government due process.
4. In the "Document in Support of Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I's 'Decision on the admissibility of the case against Abdullah Al-Senussi'" (Document in Support of Appeal),⁴ the Appellant sought to admit new evidence purportedly relevant to Ground 1 of the Appeal to "show that Mr. Al-Senussi is not being treated humanely and fairly".⁵ On this occasion the Appellant, *inter alia*, sought admission of "two confidential and ex parte annexes (Annexes 1 and 2) and one public annex (Annex 3) – a photograph of Mr. Al-Senussi taken at his [Accusation] hearing on 3 October 2013" and "other ex parte and confidential materials which are directly relevant".⁶
5. Similarly, in the Request, the Appellant seeks to have admitted new evidence that is not only undisclosed to Libya (or to the Appeal's Chamber), but which the Al-Senussi Defence have themselves neither obtained nor seen. Not only this, but they do not even have sufficient awareness of the contents of the proposed material to confirm whether it will consist of one or several statements, as demonstrated by the ambiguous reference to "statement/s". As noted in the Request, the "Defence is in the process of obtaining witness statement/s for submission to the Appeals Chamber at the earliest opportunity" and is "taking all possible steps to be able to

⁴ ICC-01/11-01/11-474, 4 November 2013.

⁵ *Ibid*, Ground 2, paras. 137 - 160.

⁶ *Ibid*, para. 152.

submit the new evidence to the Appeals Chamber as soon as possible”.⁷ . Despite these evidential uncertainties, the Appellant seeks to rely upon the evidence to continue to make serious allegations against the Libyan government concerning the alleged mistreatment of Mr. Al-Senussi in detention and violations of due process and fair trial rights,⁸ as well as to have the Appeals Chamber rule upon its admissibility in order to draw inferences on the merits of the appeal.

6. As noted by the Libyan Government with regard to the *ex parte* evidence filed by the Defence as part of its Document in Support of Appeal, it “would be entirely unfair to allow new evidence to play any part in overturning the Admissibility Decision or referring it the Pre-Trial Chamber, as requested by the Defence, without disclosure of the evidence to the Libyan government and the other parties in the proceedings. The Chamber will also, no doubt, be mindful of both the impact upon perceptions of the Court in Libya, and the undesirable precedent set, by allowing the admission of secret evidence for consideration in what may be perceived as the international community’s judgment of the progress of post-revolutionary Libya”.⁹ “Notwithstanding any other limitations that ought to be placed upon the admission of evidence in this way, clearly it can be admitted only if it is relevant and if the Appellant demonstrates due diligence”.¹⁰ Obviously, having unseen evidence admitted on an appeal would add to this on-going risk of unfairness.
7. It is entirely premature to seek the admission of new evidence, accompanied by serious allegations of misconduct, without being in possession of the evidence and having disclosed the evidence to the other parties in the proceedings. This is the absolute minimum required to provide due process, equality of arms *and* to demonstrate due diligence, relevance and decisiveness – the minimum threshold steps to allow admission. It is plainly unsatisfactory to deprive the parties of any

⁷ The Request, para. 13.

⁸ Ibid, para. 12.

⁹ Response to the ‘Document in Support of Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I’s ‘Decision on the admissibility of the case against Abdullah Al-Senussi, para. 112.

¹⁰ Ibid, para. 113.

opportunity to scrutinise the purported evidence in advance of argument .

8. In this regard, it is worth noting the Appellant's approach in its first application for admission of new evidence in these appellate proceedings (ie. in the Document in Support of Appeal). According to the Appellant, the application was filed *ex parte* due to the "severe risks" to the safety of witnesses. The Appellant further submitted that there was "nothing preventing Libya from filing submissions and evidence in response if it wishes to refute the allegations of mistreatment and the violations of Mr. Al-Senussi's fundamental rights in detention".¹¹ As with the current Request to submit new evidence, this claim must be scrutinised with care. It is normal practice in international criminal law to deal with such risks through careful redactions, not through a refusal to disclose the evidence to the parties whose interests are impacted. Similarly, it is normal practice to seek the admission of new evidence only after the intended new evidence has been obtained, scrutinised with care before relying upon it (to support highly critical allegations), and provided to the relevant parties. The Appellant has failed to explain why these basic tenets of due process ought not to be accorded to Libya or the appellant process.

b. Failure to Demonstrate Decisiveness of the Proposed New Evidence

9. As noted by Libya in its Response to the Document in Support of the Appeal, the Appellant urged the Appeals Chamber to be "guided by the jurisprudence of the *ad hoc* International Tribunals" with regard to the admission of new evidence. As Libya noted, at a minimum therefore,

the Appeals Chamber should consider whether the party tendering the evidence has shown that it sought to make appropriate use of all mechanisms of protection and compulsion, available under the Statute and the Rules, to bring evidence before the Pre-Trial Chamber. If the evidence was available at the first instance, or could have been discovered through the exercise of due diligence, the Appeals Chamber may still allow it to be admitted on appeal providing the

¹¹ The Request, para. 15.

*moving party establishes that its exclusion would amount to a miscarriage of justice.*¹²

10. Therefore, the Appellant's application to admit evidence, not yet in its possession, accompanied by a vague claim that unexplained security issues meant that it "has not been possible to obtain the evidence any sooner",¹³ and a claim that Libya can nonetheless meaningfully engage with the Request (and that the Appeals Chamber can fairly assess the application) lacks sufficient basis and should be rejected. The Appellant has not attempted to address the threshold tests, in particular to show by reference to the contents of the new evidence why it could not be obtained previously or how a miscarriage of justice would be occasioned if it were not admitted.

11. Similarly, in relation to the Request to submit information "about the recent developments over the past few weeks in seeking to gain access to Mr. Al-Senussi and to respond to any further reports which the Registrar may submit on this matter which shall be provided to the Appeals Chamber",¹⁴ the Defence fail to explain how this information is essential to a correct determination of the appeal. In particular, the Appellant fails to articulate why the Appeals Chamber is unable to decide the appeal without this new evidence or how a miscarriage of justice would result without it. There is no indication of any such reason in the assertion that the "lack of any visit or contact with Mr. Al-Senussi is a key ground of appeal, and it is thus vital that the Appeals Chamber is informed of the very latest position before determining the appeal".¹⁵ Equally, it is plainly insufficient to merely assert that the evidence goes to the issue of "the reasonableness of the efforts of the Libyan Government to finalise arrangements for a visit by counsel for Mr. Al-Senussi in the ICC proceedings"¹⁶ and it is "thus essential for the Appeals Chamber to be informed

¹² Libyan Response, para. 114.

¹³ The Request, para. 13.

¹⁴ Ibid, para. 9.

¹⁵ Ibid, para. 10.

¹⁶ Ibid, para. 10.

of the most up to date position, and what impact this has on the appeal, for the proper determination of the appeal”.¹⁷

12. Accordingly, the Appellant’ Request for the admission of new evidence should be rejected. The Request fails to demonstrate, with reference to actual evidence, the required due diligence or articulate with any meaningful degree of specificity the decisiveness of the evidence to the specific arguments in the appeal. Asserting that the evidence provides further support for previous arguments without further explanation merely seeks to reiterate arguments that have been correctly and fairly rejected at first instance.

III. RELIEF REQUESTED

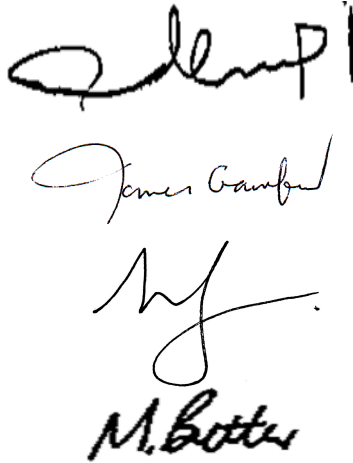
13. For the reasons set out above, the Libyan Government respectfully submits that the Appeals Chamber should:

- a. Reject the Request for admission of new evidence before the Appeals Chamber;
- b. Order that any new submissions, if permitted, with regard to matters raised in Libya’s “Response to the ‘Document in Support of Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I’s ‘Decision on the admissibility of the case against Abdullah Al-Senussi’” and the “Prosecution’s Response to the ‘Document in Support of Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I’s ‘Decision on the admissibility of the case against Abdullah Al-Senussi’”¹⁸ be filed with the Chamber prior to the 13 January 2014; and
- c. Set a date for Libya to respond to the new submissions.

¹⁷ Ibid.

¹⁸ The Request, para. 1.

Respectfully submitted:



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in the case of Abdullah Al-Senussi*

Dated this 9th day of January 2014
At London, United Kingdom