

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

No.: ICC-01/11-01/11
Date: 10 January 2014

THE APPEALS CHAMBER

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

SITUATION IN LIBYA

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

Public

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

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 Defence for Mr Abdullah Al-Senussi ("the Appellant") requests to provide additional submissions on the arrangements of its legal visit to Al-Senussi, to submit additional evidence, and to reply to Libya and the Prosecution responses to the appeal against the admissibility decision ("Request"). The Appellant's Request should be rejected. The Appellant inappropriately seeks to introduce new information about facts which postdate the admissibility decision, to admit new evidence which has not yet been collected, and to reiterate arguments previously made.

Procedural Background

2. On 11 October 2013, Pre-Trial Chamber I found the case against the Appellant inadmissible before the Court under Article 17(1)(a) ("Decision").¹
3. On 17 October 2013, the Appellant filed its notice of appeal against the Decision and requested suspensive effect of the Decision.² On 4 November 2013, the Appellant filed its document in support of the appeal against the Decision ("Appeal").³
4. On 7 November 2013, the Appellant requested leave to file a consolidated reply to all the responses to its request for suspensive effect.⁴ On 22 November 2013, the Appeals Chamber rejected both the Appellant's requests for suspensive effect and to reply.⁵

¹ ICC-01/11-01/11-466-Red.

² ICC-01/11-01/11-468-RedOA6.

³ ICC-01/11-01/11-474OA6.

⁴ ICC-01/11-01/11-475OA6.

⁵ ICC-01/11-01/11-480OA6.

5. On 26 November 2013, the Prosecution⁶ and the Government of Libya⁷ filed their responses to the Appeal (“Responses”).
6. On 19 December 2013, the Appellant sought leave to file further submissions pursuant to Regulation 28 (“Request”).⁸

Submissions

7. In its Request, the Appellant seeks (a) to update the Appeals Chamber on recent developments concerning Libya’s failure to arrange a legal visit to Al-Senussi;⁹ (b) to admit new evidence – yet to be obtained - regarding the alleged mistreatment of Al-Senussi in detention;¹⁰ and (c) to address matters raised by Libya and the Prosecution in their responses to the Appeal.¹¹ For the reasons developed below, the Request should be dismissed.

(a) The Appellant’s additional submissions on the legal visit fall outside the scope of the appellate proceedings and should be rejected

8. The Appellant requests to provide information to the Appeals Chamber about developments “over the past few weeks”¹² regarding its attempt to gain access to Al-Senussi. The Appellant further seeks to respond to any further reports that the Registry may submit.¹³ This request should be rejected as it concerns facts that postdate the Decision and therefore fall outside the scope of the appellate review.

⁶ ICC-01/11-01/11-483OA6. A corrigendum was filed the following day. See ICC-01/11-01/11-483-Corr OA6.

⁷ ICC-01/11-01/11-482OA6.

⁸ ICC-01/11-01/11-493OA6.

⁹ Request, para.9.

¹⁰ Request, paras.12-16.

¹¹ Request, paras.17-38.

¹² Request, para.9.

¹³ Request, para.9.

9. As the Appeals Chamber has repeatedly stated, its review of interlocutory decisions is “corrective in nature and not *de novo*”.¹⁴ The jurisprudence is clear that new facts should not result in a *de novo* consideration of the admissibility challenge during appellate proceedings. This principle has been further reiterated by the Appeals Chamber in the *Kenya* cases when it held that: “[a]s a corrective measure, the scope of proceedings on appeal is determined by the scope of the relevant proceedings before the Pre-Trial Chamber.”¹⁵ In these cases, the Appeals Chamber specifically found that “[t]he instant proceedings before the Pre-Trial Chamber concluded with the issuance of the Impugned [Admissibility] Decision. Facts which postdate the Impugned Decision fall beyond the possible scope of the proceedings before the Pre-Trial Chamber and therefore beyond the scope of the proceedings on appeal.”¹⁶ As a result, the Appeals Chamber concluded that “events which fall outside the scope of the relevant pre-trial or trial proceedings fall outside the scope of the appeal concerning those proceedings and should be rejected *in limine*.”¹⁷
10. The Appellant’s request to submit “information about recent developments over the past few weeks”¹⁸ is necessarily an attempt to submit facts which postdate the Decision. Therefore, these submissions fall outside the scope of the appeal and should be rejected. The Appellant can nevertheless submit any new information regarding the legal visit before the Pre-Trial Chamber, which has not indicated that its prior order to the Registry and Libya to

¹⁴ See for instance, ICC-02/05-03/09-295OA2, para.20; ICC-01/04-01/10-283OA, para.15; ICC-01/05-01/08-631-RedOA2, para.62.

¹⁵ ICC-01/09-02/11-202OA, para.12 and ICC-01/09-01/11-234OA, para.13.

¹⁶ ICC-01/09-02/11-202OA, para.12 and ICC-01/09-01/11-234OA, para.13.

¹⁷ ICC-01/09-02/11-202OA, para.9 and ICC-01/09-01/11-234OA, para.10.

¹⁸ Request, para.9.

make the necessary arrangements for a privileged visit ceased to have effect.¹⁹

(b) Appellant's request to submit evidence which it does not possess is premature

11. The Appellant further requests to submit "an update" on evidence regarding the alleged mistreatment of Al-Senussi while in detention, and indicates that it is in the process of obtaining witness statements²⁰ Thus, the Appellant, at least as of the filing of the Request, had not obtained this evidence.²¹ As the purported new evidence is not adequately identified in the Request, it is impossible to determine whether it relates to facts that post-date the Decision and that would therefore fall outside the scope of the appeal proceedings.²² It is similarly impossible to determine the relevance of the information and provide informed submissions regarding its admissibility on appeal, should the facts pre-date the Decision. The Request is, at this stage, premature.
12. Further, the Request falls short of the requirements of Regulation 62 of the Regulations of the Court which requires the party seeking to introduce additional evidence in appeal to set out (a) the evidence to be presented, and (b) the ground of appeal to which the evidence relates and the reasons why the evidence was not adduced before the Trial Chamber.²³

¹⁹ ICC-01/11-01/11-456.

²⁰ Request, paras.12-16.

²¹ Request, para.13.

²² See above paras.9-10.

²³ Regulation 62 appears to refer to appeals under Rule 150. Regulations 64 and 65 do not regulate the submission of evidence in appeals under Rules 154 and 155. The Prosecution however submits that the corrective nature of the appeal proceedings permit that the requirements set out in Regulation 62 be meaningfully transposed to interlocutory appeals. Those constitute basic requirements to permit the Appeals Chamber to determine the relevance of the additional evidence to an appeal. The Appeals Chamber has considered whether the requesting party had indicated that the material was unavailable in the proceedings before the Trial Chamber in a prior decision where

(c) The Appellant's request to reply to the Prosecution Response constitutes disagreement and should be rejected

13. The Appellant also seeks to file submissions on matters raised by Libya and the Prosecution in their Responses to its Appeal which are purportedly incorrect,²⁴ or raised for the first time.²⁵ The Appellant primarily refers to submissions advanced by Libya and only wishes to respond to the Prosecution's submissions regarding witness protection.²⁶ In particular, the Prosecution submitted in the Prosecution Response that the Decision was consistent with the need to determine the admissibility of a case on the basis of the facts, as they exist, at the time of the admissibility proceedings. At the time of the proceedings before the Pre-Trial Chamber, the case had not reached the trial stage and there was no indication of the witnesses that the Defence wished to call. Hence, it is difficult to predict what impact that the current lack of clarity as to the existence and effective functioning of a witness protection program in Libya might have on a trial in the future.²⁷
14. The Appellant submits that the lack of a list of potential Defence witnesses is irrelevant and constitutes a "farcical submission [when] Mr. Al-Senussi has been denied any legal representation and denied access to his Defence team".²⁸
15. Thus, the Appellant merely disagrees with the Prosecution's position and does not demonstrate how further submissions on this matter can assist the

it rejected the presentation of additional evidence in an appeal under Rule 154. See ICC-01/05-01/08-962OA3, para.32.

²⁴ Request, para.30.

²⁵ Request, paras.22, 23, 25, 27, 32, 34, 37.

²⁶ Request, paras.31-32.

²⁷ Prosecution Response, para.109.

²⁸ Request, para.32.

Appeals Chamber in the disposal of the appeal.²⁹ Rather, the Appellant's submissions will constitute a reiteration of the arguments already put forward in its appeal.³⁰ This is contrary to the purpose of Regulation 28. The Appeals Chamber has stated that submissions under Regulation 28 "are not intended to reiterate a position or demonstrate mere disagreements with the position of another party."³¹ On these grounds, the Appellant's Request should be rejected.

Conclusion

16. For the foregoing reasons, the Prosecution requests that the Appellant's Request be rejected.



Fatou Bensouda
Prosecutor

Dated this 10th day of January 2014

At The Hague, The Netherlands

²⁹ In this regard, while it is noted that the Appeals Chamber has allowed parties to provide further submissions if those were necessary for the proper disposal of the appeal (ICC-01/04-01/06-424OA3, para.7; ICC-01/04-01/07-476OA2, paras.16-18; ICC-01/09-78OA, para.9) and/ or if they may be of assistance to the Appeals Chamber in deciding on the appeal (ICC-01/04-01/07-522OA3, para.16), the submissions should not constitute a reiteration of the arguments the appellant put forward in the appeal (ICC-01/09-78OA, para.9).

³⁰ The Prosecution notes that the rest of the Appellant's submissions also appear to largely rehearse what the Appellant already submitted in its Appeal. *See for instance* Request, paras.21-22 (legal visit); paras.23-25 (Article 106 of the Libyan code of criminal procedure); paras.26-30 (lack of legal representation); paras.31-32 (lack of adequate witness protection); and paras.33-34 (due process violations).

³¹ ICC-01/11-01/11-442OA4, para.13.