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No.: ICC-01/11-01/11
Date: 24 February 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
With Public Annex A**

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

Source: Office of the Prosecutor

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The Office of the Prosecutor

Fatou Bensouda
James Stewart
Julian Nicholls

Counsel for Saif Al-Islam Gaddafi

John R.W.D. Jones
Sara Bafadhel

Counsel for Abdullah Al-Senussi

Benedict Emmerson
Rodney Dixon

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

The Office of Public Counsel for Victims

Paolina Massidda
Sarah Pellet
Mohamed Abdou

**The Office of Public Counsel for the
Defence**

States Representatives

Ahmed El-Gehani
James Crawford SC
Wayne Jordash
Michelle Butler

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Prosecution hereby responds to the Further Submissions filed by the Defence for Mr Abdullah Al-Senussi ("the Appellant") on 14 February 2014. None of the submissions advanced, or the material submitted, shows an error in Pre-Trial Chamber I's decision finding the case against Al-Senussi inadmissible before the Court. Therefore, the Appeal should be dismissed

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) ("Admissibility Decision").¹
3. On 17 October 2013, the Appellant filed his notice of appeal against the Decision and requested its suspensive effect.² On 4 November 2013, the Appellant filed his document in support of the appeal against the Decision ("Appeal").³
4. On 26 November 2013, the Prosecution⁴ and the Government of Libya⁵ filed their responses to the Appeal.
5. On 19 December 2013, the Appellant sought leave to file further submissions pursuant to Regulation 28 of the Regulations of the Court ("Request").⁶
6. On 20 December 2013, the OPCV filed its observations on the Appeal ("OPCV Observations").⁷

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-01/11-01/11-483OA6. A corrigendum was filed the following day. *See*, ICC-01/11-01/11-483-CorrOA6 ("Prosecution's Response").

⁵ ICC-01/11-01/11-482OA6 ("Libya's Response").

⁶ ICC-01/11-01/11-493OA6.

7. On 9 and 10 January 2014, Libya and the Prosecution filed, respectively, their responses to the Appellant's Request.⁸
8. On 13 January 2014, the Appellant filed his response to the OPCV Observations, attaching three annexes, one *ex parte* ("Appellant's Response to OPCV Observations").⁹ On 20 January 2014, Libya requested the dismissal *in limine* of the Appellant's Response¹⁰ and, on 27 January, Libya filed an addendum attaching a letter in relation to Al-Senussi's treatment in detention ("Libya's Addendum").¹¹
9. On 6 February 2014, the Appeals Chamber granted the Appellant's Request to provide further submissions in relation to those matters set out at paragraphs 22 to 27 and 29 to 38 of the Request.¹² The Appeals Chamber noted that the remainder of the Request, and the Appellant's Response to OPCV Observations and Libya's Addendum, constituted an application to file additional evidence and that it would consider those matters at the same time as Ground Two of the Appeal, which similarly requested the admission of new evidence.¹³
10. On 14 February 2014, the Appellant filed his "Further Submissions on behalf of Abdullah Al-Senussi Pursuant to Regulation 28" ("Further Submissions") which attached a report from Human Rights Watch dated 13 February 2014 ("HRW's Report").¹⁴

⁷ ICC-01/11-01/11-494OA6.

⁸ ICC-01/11-01/11-497OA6 and ICC-01/11-01/11-498OA6.

⁹ ICC-01/11-01/11-500OA6.

¹⁰ ICC-01/11-01/11-502OA6.

¹¹ ICC-01/11-01/11-503OA6.

¹² ICC-01/11-01/11-508OA6, para.18.

¹³ ICC-01/11-01/11-508OA6, para.20.

¹⁴ ICC-01/11-01/11-513-RedOA6.

Submissions

11. The Prosecution will only address the Appellant's arguments insofar as they require additional submissions not included in the Prosecution's Response. First, the Prosecution will address the Appellant's submissions regarding the lack of effective witness protection programs in Libya; second, it will correct certain of the Appellant's submissions which are inaccurate or unsupported; and third, it will respond to the Appellant's request to submit HRW's Report as additional evidence before the Appeals Chamber.

I. The Pre-Trial Chamber's assessment of the witness protection programs in Libya was reasonable

12. The Prosecution submitted in its Response that despite the absence of effective witness protection programs, the Pre-Trial Chamber's conclusion that Libya was not unable under Article 17(3)¹⁵ was reasonable because, at that stage, it was difficult to predict the impact of such absence on Libya's ability to obtain evidence for the subsequent proceedings.¹⁶ The Prosecution noted that there was no list of prospective defence witnesses and, therefore, a determination as to the required protective measures had not been made.¹⁷ In response, the Appellant argues that "the impact of the lack of any witness protection programs can readily be predicted", that the absence of a list of defence witnesses is "completely irrelevant", and that "[t]he simple point is that Libya has not established that such programs are in place to ensure that it is willing and able to conduct Mr. Al-Senussi's trial in Libya".¹⁸ The Appellant is therefore asking the Chamber to find, based on the current facts, that a future defence counsel for Al-Senussi in the domestic

¹⁵ Admissibility Decision, para.301.

¹⁶ Prosecution's Response, para.109.

¹⁷ Prosecution's Response, para.109.

¹⁸ Further Submissions, para.13.

proceedings will be unable to obtain the necessary evidence to carry out his defence due to the lack of witness protection programs.

13. The Appellant's submissions ignore that the admissibility of a case must be determined based on the facts as they exist at the time of the admissibility proceedings.¹⁹ While the Chamber must assure itself that Libya will be able to overcome current identifiable obstacles that may render it unable to proceed with the Al-Senussi trial, the Chamber cannot engage in speculative assessments on how domestic proceedings might evolve. At this stage, the lack of an effective witness protection program has not been an obstacle to obtaining evidence nor is there any indication that the collection of evidence will cease or be hindered by the current lack of such a program.²⁰

II. The Further Submissions contain inaccuracies

14. The Appellant makes several inaccurate or unsupported submissions. First, the Appellant's statement that "Libya has no genuine intention of ever permitting Defence Counsel to have access to Mr. Al-Senussi. This shows that Libya is not willing and able to bring Mr. Al-Senussi to justice"²¹ is incorrect. Although Libya has not yet facilitated a visit by defence counsel, this does not necessarily mean that Libya is unable and/or unwilling within the terms of Article 17(2) and (3). The conditions set forth in these provisions must be met in order to make a determination of unwillingness and inability, and failure to organize counsel's visit thus far does not support such a conclusion, although it clearly indicates that Libya has failed to comply with an order of the Pre-Trial Chamber.

¹⁹ ICC-01/04-01/07-1497 OA8, para.56; ICC-02/11-01/11-436-Red, para.23.

²⁰ Admissibility Decision, para.298. See Prosecution's Response, paras.109-111.

²¹ Further Submissions, para.4.

15. Second, contrary to the Appellant's submissions, the Prosecution did not submit that Libya had changed its interpretation of Article 106 of the Code of Criminal Procedure.²² The Prosecution stated that the Appellant and Libya gave different interpretations of that provision, and that Libya was silent as to whether interrogation of suspect persons after they had expressly asked for a lawyer was in violation of Article 106, as appears to be the case for Al-Senussi.²³
16. Third, the Appellant refers to the death of a former Gaddafi official, Al-Hadi Imbairesh, in a Zintan prison "where it was alleged that he was tortured".²⁴ However, the open source referred to by the Appellant does not indicate that Imbairesh was tortured; it says that a "[s]pokesperson for Zintan Local Council Omar Matooq told the Libya Herald that Imbairesh died from pancreatic and liver cancer. He denied rumours that he had been tortured in the Zintan jail where he was held."²⁵
17. Fourth, the Appellant refers to jurisprudence from the Human Rights Committee ("HRC") and the European Court of Human Rights ("ECtHR"), most of which was already cited in his Appeal,²⁶ to rebut Libya's submission that "international human rights law does not dictate that a trial is irretrievably prejudiced by the absence of a lawyer at the early pre-trial stage".²⁷ While the jurisprudence he cites supports the Appellant's contention that the right to legal assistance arises at an early stage in proceedings, particularly in cases involving the death penalty,²⁸ these cases

²² Further Submissions, para.9 referring to Prosecution's Response, para.55.

²³ Prosecution's Response, para.55.

²⁴ Further Submissions, para.14.

²⁵ Imprisoned senior Qaddafi-era official dies from cancer, Libya Herald, 10 January 2014: <http://www.libyaherald.com/2014/01/10/imprisoned-senior-qaddafi-era-official-dies-from-cancer/#axzz2t5uq5IXB> . See, Further Submissions, fn.32.

²⁶ Appeal, paras.66-69.

²⁷ Further Submissions, para.15 referring to Libya's Response, para.55.

²⁸ Further Submissions, paras.16-17.

do not show that discontinuance of the domestic proceedings is the necessary and sole remedy. Rather, the cases give due regard to the concrete prejudice caused in light of the facts of the case and the availability of other remedies depending on the stage of the proceedings.²⁹

18. Further, the conclusion of the UN Human Rights Council's Working Group that the discontinuance of Mr Gaddafi's case was the only adequate remedy³⁰ is irrelevant for the Court's admissibility determination in the Appellant's case. The Working Group's mandate is, *inter alia*, to investigate cases of deprivation of liberty imposed arbitrarily or otherwise inconsistently with the relevant international standards.³¹ In contrast, the Pre-Trial Chamber had solely to determine whether the requirements of Article 17 were met with respect to Al-Senussi.
19. In any event, even if there has been a breach of Libyan law, and/or of internationally recognised principles of due process, Libya cannot be found unwilling on that ground alone. As previously submitted,³² the chapeau and the three subparagraphs of Article 17(2) are conjunctive. Similarly, the two requirements in Article 17(2)(c) are also cumulative. Considering the facts of this case, the Pre-Trial Chamber reasonably found that the two cumulative requirements in Article 17(2)(c) are not met and that the investigations into

²⁹ For example, in *Wright and Harvey v. Jamaica*, Communication No 459/1991, 27 October 1995, para.12, the HRC recommended the release of two persons serving life sentences at the time of the application on the grounds that neither had received sufficient legal representation at crucial stages of their proceedings (at Mr Wright's preliminary hearing and on Mr Harvey's appeal). Alternatively, in *Ocalan v. Turkey*, Application No 46221/99, Judgment, 12 May 2005, para.210, the ECtHR endorsed a re-trial, at the applicant's request, as an appropriate remedy where the delay in receiving access to legal counsel – and limited access thereafter – had affected the applicant's ability to defend himself and had resulted in his making several incriminating statements to authorities. On different facts, the ECtHR, in *Magee v. United Kingdom*, Application No 28135/95, Judgment, 6 June 2000, para.55, indicated that a case in which the applicant was denied access to counsel for 48 hours pursuant to anti-terrorism legislation and heavily interrogated before providing authorities with a detailed and incriminating statement, held that it was not for the Court to "speculate on whether the outcome of the applicant's trial would have been different had he obtained access to a solicitor" earlier. Rather, the Court concluded that a finding that the applicant's rights had been violated constituted sufficient just satisfaction.

³⁰ Further Submissions, paras.18-19.

³¹ See: <http://www.ohchr.org/EN/Issues/Detention/Pages/WGADIndex.aspx>.

³² Prosecution's Response, paras.24-25.

Al-Senussi's case are not being conducted in a manner inconsistent with the intent to bring him to justice due to the adequate, tangible and progressive investigative steps taken.³³ Further, any alleged violation does not meet the threshold required to show that the national efforts are a travesty of justice as to warrant the Court's intervention pursuant to Article 21(3).³⁴

20. The Prosecution cannot provide meaningful submissions on the summary of witness statements filed by the Appellant before the Appeals Chamber on 13 January 2014,³⁵ since the statements themselves have not been made available to the Prosecution. While the filing of summaries and redacted documents may be necessary to ensure the safety of witnesses in certain cases, a Chamber must make such a determination on a *case-by-case* basis.³⁶ Further, the applicant must demonstrate that non-disclosure is necessary with respect to a party/participant.³⁷ The Appellant has not demonstrated how the witnesses would be endangered as a result of the disclosure of their accounts and identities to the Prosecution. Although the Prosecution does not object to the Appeals Chamber considering the information in this particular case, the single page summary provided does not permit the Prosecution to provide meaningful submissions with respect to the credibility of the statements, and their impact on the Pre-Trial Chamber's Admissibility Decision.

³³ Admissibility Decision, para.292 referring to paras.161 and 211.

³⁴ Prosecution's Response, paras.29-30.

³⁵ ICC-01/11-01/11-500-Anx1.

³⁶ ICC-01/04-01/07-475 OA, para.66.

³⁷ ICC-01/04-01/06-773 OA5, para.21 (on the necessity of the protective measure) and ICC-01/04-01/07-475 OA, para.71 (on the existence of an objectively justifiable risk to the safety of the person concerned arising from the disclosure to the *defence*). Thus, the Appellant needed to demonstrate that there was a similar risk arising from the disclosure of that information to the Prosecution.

III. HRW's Report

21. The Appellant attaches as Annex 1 a HRW's Report dated 13 February 2014, which describes interviews conducted by HRW's staff with Al-Senussi, Saif Al-Islam Gaddafi, and former Prime Ministers Al-Baghdadi Al-Mahmoudi and Abuzaid Dorda on 23 January 2014. This effectively constitutes an application to file additional evidence on appeal, even though the Appeals Chamber only granted leave to the Appellant to provide submissions on specific issues.³⁸
22. In addition, the Appellant has not met all the conditions necessary for the admission of additional evidence on appeal. The Report and its contents are relevant to the Appellant's First Ground of Appeal,³⁹ and it could not have been obtained earlier by a counsel acting with due diligence, since the interviews were conducted on 23 January 2014.⁴⁰ However, the Report, even if it partially falls within the time frame of the admissibility proceedings, could not have had an impact on the Admissibility Decision. The information contained in the HRW's Report is similar to, albeit more detailed than, the information reported in a prior interview between Al-

³⁸ ICC-01/11-01/11-508OA6, para.18.

³⁹ Pursuant to Regulation 62 of the Regulations of the Court the Appellant should 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. There is no specific provision in the statutory framework that refers to the presentation of evidence in appeals under Rules 154 and 155. However, the requirements set out in Regulation 62 would also apply to requests to present additional evidence in appeal under Rules 154 and 155. These constitute basic requirements to permit the responding party and 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 it rejected the presentation of additional evidence in an appeal under Rule 154. See ICC-01/05-01/08-962 OA3 para.32.

⁴⁰ As the Prosecution has already submitted, it is perfectly appropriate that the Appeals Chamber's interpretation and application of Regulation 62 be guided by the requirements set out in ICTY/R Rule 115, which governs the admission of evidence on appeal in those *ad hoc* tribunals, and related jurisprudence. In particular, additional evidence will only be admitted if: (a) it was not available at trial to duly diligent Counsel; (b) it is relevant and credible; and (c) it could have been a decisive factor in the decision. See *Archbold, International Criminal Courts*, 3rd edition (2009), pp.1460-1461; see also L. Bianchi and I. Onsea, *Additional Evidence on Appeal, Review Proceedings, and the Remedy of Reconsideration* in: K. Khan, C. Buisman and C. Gosnell, *Principles of Evidence in International Criminal Justice* (2010), p.726. The corrective nature of the proceedings on appeal, as well as the general wording of the first version of ICTY Rule 115, support this position.

Senussi and HRW conducted on 15 April 2013.⁴¹ Both the Appellant⁴² and Libya⁴³ relied on this interview in their earlier submissions and the Pre-Trial Chamber considered it in its Admissibility Decision.⁴⁴ The Pre-Trial Chamber reasonably found that, despite this information, Libya was not unwilling and unable within the terms of Article 17(2) and (3). The HRW's Report could likewise have no impact on the Admissibility Decision and accordingly should not be admitted in the appeal.

Conclusion

23. For the foregoing reasons, the Prosecution requests that the Appeal be rejected.



Fatou Bensouda
Prosecutor

Dated this 24th day of February 2014

At The Hague, The Netherlands

⁴¹ Human Rights Watch, "Libya: Ensure Abdallah Sanussi Access to Lawyer" (available at <http://www.hrw.org/news/2013/04/17/libya-ensure-abdallah-sanussi-access-lawyer>).

⁴² ICC-01/11-01/11-356, paras.124,138.

⁴³ ICC-01/11-01/11-403-Red2, paras.131-132, 152.

⁴⁴ Admissibility Decision, paras.231, 240, 264, 292.