

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 24 February 2014

THE APPEALS CHAMBER

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

SITUATION IN LIBYA

IN THE CASE OF

THE PROSECUTOR

v.

SAIF AL-ISLAM GADDAFI and ABDULLAH AL-SENUSSI

Public

Application on behalf of the Government of Libya for leave to reply to the 'Response on behalf of Abdullah Al-Senussi to the "Libyan Government's Request for the Appeals Chamber to dismiss *in limine* the new evidence submitted as part of the Al-Senussi Defence Response to the OPCV's Observations on its Document in support of its Appeal" filed on 20 January 2014 and the "Addendum to Libyan Government's Request for the Appeals Chamber to disregard the new evidence submitted as part of the Al-Senussi Defence Response to the OPCV's Observations on its Document in support of its Appeal" filed on 27 January 2014'

Source: The Government of Libya in the case of Abdullah Al-Senussi represented by: Professor Ahmed El-Gehani, Professor James Crawford SC, Mr Wayne Jordash and Ms Michelle Butler

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

The Office of the Prosecutor

Ms Fatou Bensouda

Counsel for the Defence

Counsel for Abdullah Al-Senussi:

Mr Ben Emmerson QC

Mr Rodney Dixon

Ms Amal Alamuddin

Mr Anthony Kelly

Counsel for Saif Gaddafi

Mr John Jones QC

Ms Sarah Bafadhel

Legal Representatives of the Victims

Ms Paolina Massida

Ms Sarah Pellet

Mr Mohamed Abdou

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented

(Participation/Reparation)

Applicants

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

State's Representatives (in the case of Adbdullah Al-Senussi)

Amicus Curiae

Professor Ahmed El-Gehani

Professor James Crawford SC

Mr Wayne Jordash

Ms Michelle Butler

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations

Other

I. INTRODUCTION

1. The Government of Libya hereby files this application for leave to reply to the 'Response on behalf of Abdullah Al-Senussi to the "Libyan Government's Request for the Appeals Chamber to dismiss *in limine* the new evidence submitted as part of the Al-Senussi Defence Response to the OPCV's Observations on its Document in support of its Appeal" filed on 20 January 2014 and the "Addendum to Libyan Government's Request for the Appeals Chamber to disregard the new evidence submitted as part of the Al-Senussi Defence Response to the OPCV's Observations on its Document in support of its Appeal" filed on 27 January 2014' (the 'Response').¹

II. APPLICABLE LAW

2. Regulation 24(5) of the Regulations of the Court states, "participants may only reply to a response with the leave of the Chamber".² Further, the Appeals Chamber has discretion under Regulation 28 to order further submissions by parties or participants when it is "necessary for the proper disposal of the Appeal [...] bearing in mind the principle of equality of arms and the need for expeditious proceedings".³
3. In exercising its discretion, the Appeals Chamber has previously ruled that further submissions will not be ordered where those submissions merely involve disagreement with arguments offered in the Responses by the parties and / or the development of arguments already before the Appeals

¹ Decision on Mr Al-Senussi's request to file further submissions and related issues, ICC-01/11-01/11-508, 6 February 2014, para. 2.

² *Prosecutor v Lubanga*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Decision sur la demande de mise en liberte proviso ire de Thomas Lubanga Dyilo", ICC-01/04-01/06-824, 13 February 2007, para. 68.

³ ICC-01/09-01/11 OA, para 9.

Chamber.⁴ In the Gaddafi proceedings, the Pre-Trial Chamber has upheld the appropriateness of authorising Libya to file a reply to responses addressing admissibility issues, due to Libya's status as the "triggering force and main actor in [admissibility] proceedings".⁵

III. SUBMISSIONS

4. The need to correct inaccuracies or respond to new arguments raised in the participant submissions prior to a decision on the admissibility of the case constitutes good cause for the granting of leave to reply.⁶ The Response raises issues concerning the admissibility appeal, which are incorrect and may mislead therefore necessitating a reply from Libya in order to ensure that the Appeals Chamber has all the relevant information and submissions before it in respect of the Response.
5. If Libya is granted leave to reply, Libya would confine its submissions to the addressing only matters raised by the Response, namely to address the following submissions:
 - i. the Response disregards the Appeal Chamber's rulings and thereby threaten to undermine due process;
 - ii. the Al-Senussi Defence's new evidence is incapable of having a decisive effect on the Pre-Trial Chamber's decision;
 - iii. the Response fails to articulate any consistent view of the proposed new evidence;

⁴ ICC-01/09-01/11 OA, para. 10.

⁵ ICC-01/11-01/11-191, para. 8.

⁶ *Prosecutor v. Bemba*, Decision on the Defence's Request for Leave to Reply on the Motion for Provisional Release dated 24 November 2008, 27 November 2008, ICC-01/05-01/08-294; *Prosecutor v. Mbarushimana* Decision on the Prosecution's request for leave to reply to the "Defence Response to Prosecution's Request for the Review of Potentially Privileged Material", ICC-01/04-01/10, 24 February 2011.

- iv. the admission of the new evidence *ex-parte* would unfairly prejudice the rights of the Libyan Government; and
- v. the Response fails to establish that the new evidence could not have been obtained promptly with the exercise of due diligence.

IV. DUE PROCESS AND ADMITTING FRESH EVIDENCE

- 6. The Reply would outline the following submissions. Contrary to the approach adopted by the Al-Senussi Defence, the Appeals Chamber has not provided the Defence the opportunity to argue the substantive merits of the proposed new evidence. The Defence's claim that the Appeals Chamber has "indicated" that it will consider '...all of these issues and all of the new evidence filed by the parties' in its deliberations on ground 2 of the Appeal⁷ is a distortion of the Appeals Chamber's careful holding.
- 7. The Appeals Chamber stated that it would consider *submissions* that the Appeals Chamber *should have regard* to the additional evidence.⁸ At no point does the Appeals Chamber state that it will consider the issues *and* '...all of the new evidence filed by the parties in its deliberations in respect of Ground

⁷ Response on behalf of Abdullah Al-Senussi to the "Libyan Government's Request for the Appeals Chamber to dismiss *in limine* the new evidence submitted as part of the Al-Senussi Defence Response to the OPCV's Observations on its Document in support of its Appeal" filed on 20 January 2014 and the "Addendum to Libyan Government's Request for the Appeals Chamber to disregard the new evidence submitted as part of the Al-Senussi Defence Response to the OPCV's Observations on its Document in support of its Appeal" filed on 27 January 2014', ICC-01/11-01/11, 12 February 2014, ('Defence Response') para. 4 *citing* Decision on Mr Al-Senussi's request to file further submissions and related issues, ICC-01/11-01/11-508, 6 February 2014, para. 20.

⁸ Decision on Mr Al-Senussi's request to file further submissions and related issues, ICC-01/11-01/11-508, 6 February 2014, para. 20:

20. The Appeals Chamber observes that the remainder of the Request is, in effect, an application to file additional evidence, as are the further requests and filings, in relation to new evidence, contained in the Defence Response to Victims' Observations and the Addendum to Libya's Request of 20 January 2014 and the annexes thereto. As such, the Appeals Chamber will consider those matters in due course, at the same time as it addresses ground two of the Document in Support of the Appeal which, similarly, concerns submissions that the Appeals Chamber should have regard to additional evidence in its determination of this appeal.

2 of the Appeal.”⁹ Plainly, the Al-Senussi Defence’s submissions ought to have been predicated on whether there should be admission of the new evidence, not replete with tendentious arguments over its purported probative value to the impugned admissibility decision.

8. In their four introductory paragraphs, the Al-Senussi Defence adheres to the Appeals Chamber’s strictures, maintaining arguments on procedural grounds. However, thereafter, the Defence attempts to circumvent due process by arguing, *inter alia*:

- a. At paragraph 11: that Libya is seeking to have ‘...this critical new evidence ignored’ *and* is failing ‘...to address the *substance* of the allegations’ which the Defence alleges is relevant to the questions of willingness and inability.¹⁰
- b. At paragraph 13: that the “real issue” is whether ‘...Libya’s evidence should be given any weight by the Appeals Chamber’. And, that the medical report and letter submitted by the Libyan Government ‘...cannot be given any weight and adds nothing of any probative value in the Chamber’s assessment of the conditions’ that Mr. Al-Senussi is being detained and tried”.¹¹
- c. At paragraph 18: that the Libyan prosecutor who authored the letter and medical report was “dismissive and disrespectful of the admissibility proceedings”, therefore the evidence has no probative value.¹²
- d. At paragraph 19: that ‘...no weight can be accorded the [sic] documents filed by Libya in its Addendum’. And, that the “self-serving evidence by Libya is plainly insufficient to discharge Libya’s

⁹ Defence Response, para. 4.

¹⁰ Defence Response, para. 11 [emphasis added].

¹¹ Defence Response, para. 13.

¹² Defence Response, para. 18.

burden, particularly in light of the evidence that has been submitted by the Defence”.¹³

9. In light of the unambiguous nature of the Appeals Chamber’s decision, a reasonable inference arises that the Al-Senussi Defence’s overall approach amounts to a deliberate circumvention of due process. To safeguard the integrity of the proceedings, this should not be permitted.

V. THE AL-SENUSSI DEFENCE’S NEW EVIDENCE IS INCAPABLE OF HAVING A DECISIVE EFFECT ON THE PRE-TRIAL CHAMBER’S DECISION

10. The Reply would address the following submissions. The evidence proposed by the Defence is incapable of being decisive on the assessment of willingness or ability of the Libyan Government to bring Mr. Al-Senussi to justice.

Temporal Issues

11. As both the Prosecutor and the Libyan Government have argued, the evidence sought to be adduced concerns incidences of ill treatment post-dating the Decision.¹⁴ As the Prosecutor has stated, the Request should be rejected. It attempts to adduce fresh evidence about facts occurring after the Impugned Decision, which are outside the scope of the Appeals Chamber’s review.¹⁵

Even if reliable, the Defence Evidence Does Not Demonstrate any Pattern of Abuse

¹³ Defence Response, para. 19.

¹⁴ Libyan Government’s Request for the Appeals Chamber to dismiss *in limine* the new evidence submitted as part of the Al Senussi Defence Response to the OPCV’s Observations on its Document in support of its Appeal, ICC-01/11-01/11-502, 20 January 2014, para. 5.

¹⁵ Prosecution’s response to “Request on behalf of Abdullah Al-Senussi to file further submissions pursuant to regulation 28”, ICC-01/11-01/11-498, 10 January 2014, paras. 1, 8.

12. The summary relied on by the Defence highlights uncorroborated allegations of abuse on three occasions over approximately two years.¹⁶ Three allegations from one source is incapable of raising the allegation of ongoing, systemic or systematic mistreatment that might conceivably be relevant to the Pre-Trial Chamber's detailed and nuanced assessments concerning ability and willingness. At its highest, the evidence suggests sporadic acts by individuals that cannot be attributed to any system or mistreatment so as to impact on the relevant assessments.
13. Moreover, the Defence's allegations that the Libyan Government's medical report and letter (that expose the unreliability of the Defence's proposed new evidence) '...amount to nothing more than assertions by Libya without any supporting materials' and that '[t]hey are not capable of verification in the absence of other independent and reliable evidence'¹⁷ ignores the evidence emanating from Human Rights Watch ('HRW').¹⁸ As cited in the Libyan Government's Response of 26 November 2013, HRW reports that Mr. Al-Senussi has not complained of physical abuse and his conditions, he is quoted as saying, have been "reasonable".¹⁹ These remarks were made in the absence of prison staff or officials in the room.²⁰ Further, the HRW Report indicates that guards have been removed from the al-Hadba prison after upholding prisoners' complaints against them.²¹ It is the Defence's proposed new evidence that is nothing more than assertions devoid of any support.

¹⁶ Defence Response, para. 17.

¹⁷ Defence Response, para. 14 *et seq.*

¹⁸ HRW, 'Libya: Ensure Abdullah Senussi Access to Lawyer', 17 April 2013 <<http://www.hrw.org/news/2013/04/17/libya-ensure-abdallah-sanussi-access-lawyer>> ('HRW Report')

¹⁹ HRW Report.

²⁰ HRW Report.

²¹ HRW Report.

14. In these circumstances, it is incapable of raising a serious challenge to the impugned decision, let alone having a decisive impact upon it.

VI. THE DEFENCE FAILS TO ARTICULATE ANY CONSISTENT VIEW OF THE PROPOSED NEW EVIDENCE

15. The Reply would address the following submissions. The Defence's Response and their view of the proposed new evidence are inherently vague and contradictory. The Defence submits that the proposed new evidence of alleged mistreatment '...must be taken at its highest by the Appeals Chamber.'²² The Defence also avers that '[i]n these circumstances it would be fundamentally unjust if the new evidence was excluded *without inquiring any further from the witnesses*' [emphasis added].²³ Despite this, the Defence argues that the "new evidence is of such importance that the Appeals Chamber should refer it back to the Pre-Trial Chamber for consideration in the event that it could not be admitted in the Appeal".²⁴

16. Therefore, despite claiming that the evidence warrants a reversal of the impugned decision, the Defence accepts that taking the evidence at its highest, the Appeals Chamber should require an oral hearing so that the witness may be cross-examined.²⁵ Having been deprived of the actual evidence, the Libyan government is unable to comment further on why the Defence takes this contradictory position or why it doubts the cogency of the evidence thus far adduced.

²² Defence Response, para. 19.

²³ Defence Response, para. 9.

²⁴ Defence Response, para 9.

²⁵ Defence Response, para 19.

VII. THE ADMISSION OF THE NEW EVIDENCE *EX-PARTE* WOULD UNFAIRLY PREJUDICE THE RIGHTS OF THE LIBYAN GOVERNMENT

17. The Reply would address the following submissions. The admission of the Defence's evidence *ex parte* would prejudice the Libyan Government so a fair appellate proceeding would not be possible. The Defence, in essence, seeks to rely upon an anonymous witness, presumably even at any oral hearing. This effectively removes the opportunity for effective challenge of evidence that the Defence claims is of such pivotal importance that it is required to avoid a "miscarriage of justice".²⁶

18. Despite the self-serving claim by the Defence that the Addendum filed by the Libyan Government suggests that there is no inequality or unfairness between the two parties and that it is '...plainly capable of responding to the new evidence',²⁷ should the Defence's evidence be admitted, the Libyan Government would be unable to fully contest the reliability or credibility of the evidence or the motives and veracity of such a witness. Such belatedly produced evidence give rise to a number of questions that are pivotal to a proper understanding of the relevance and probative value of it, including whether the witness is desirous of a new life in the Netherlands;²⁸ whether they were associated with the Gaddafi Regime, or otherwise have compelling reasons to cooperate so as to avoid prosecution or flee Libya; why have they only provided he testimony at this time, and so on.

²⁶ Defence Response, Para. 10.

²⁷ Defence Response, paras. 3, 6, 13.

²⁸ This is a familiar occurrence at the International Courts and Tribunals: *See, for example*, Dr Mathias Holvoet and Dr Dersim Yabasun, 'Former ICC Defendant – Ngudjolo – Applies for Asylum in the Netherlands', available at <<http://www.ejiltalk.org/author/holvoetyabasun/>>

VIII. THE AL-SENUSSI DEFENCE FAILS TO ESTABLISH THAT THE NEW EVIDENCE COULD NOT HAVE BEEN OBTAINED PROMPTLY WITH THE EXERCISE OF DUE DILIGENCE.

19. The Reply would address the following submission. The Al-Senussi Defence submits that *ex parte* admission of evidence is justified as they have encountered “extreme” difficulties in collecting evidence.²⁹ In support of the wholly unsubstantiated claim that witnesses in the Al-Senussi case are being threatened or worse, the Defence cites to an U.S. Senate Select Committee report and an article from the Libya Herald.³⁰ Plainly, these are of little relevance to the issue at hand and the Defence fails to articulate any meaningful nexus.

20. At paragraph 37 of the Response, the Defence repeats, again without proper support, that they have encountered ‘...extreme difficulties faced’ in collecting evidence from witnesses.³¹ In support of this proposition, the Defence cite to their own pleadings that state that witnesses have a ‘...very real fear’ for their lives (from what, it is not specified), and that the Defence has needed to take ‘extraordinary steps’ (again, not specified) to obtain the information in a manner that ensures the safety of the individuals and families.³² There is nothing in these vague claims that is capable of rebutting a clear inference of a lack of due diligence sufficient to render the new evidence admissible.

IX. RELIEF SOUGHT

²⁹ Defence Response, para. 10.

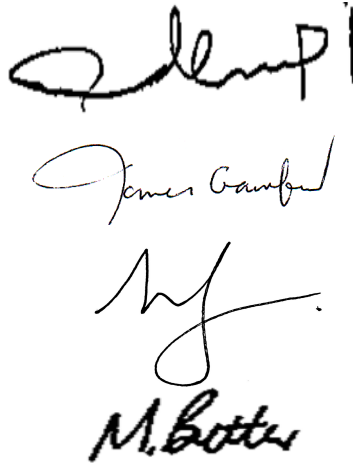
³⁰ Defence Response, para. 10, footnote 18.

³¹ Defence Response, para. 10.

³² Response on behalf of Abdullah Al-Senussi to the “Observations on 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’”, ICC-01/11-01/11-500, 13 January 2013, para. 37.

21. For the foregoing reasons, the Libyan Government respectfully requests the Appeals Chamber to grant Libya leave to reply to the Response.

Respectfully submitted:



Professor Ahmed El-Gehani

Professor James Crawford SC

Mr Wayne Jordash

Ms Michelle Butler

*Libyan ICC Coordinator and
Counsel on behalf of the Government of Libya
in the case of Abdullah Al-Senussi*

Dated this 24th day of February 2014

At London, United Kingdom