

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-01/11-01/11 OA 8**

Date: **6 December 2019**

THE APPEALS CHAMBER

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Howard Morrison
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa

**SITUATION IN LIBYA
IN THE CASE OF *THE PROSECUTOR v. SAIF AL-ISLAM GADDAFI***

Confidential

**Motion to Set Aside documents transmitted by the Libyan Cities and Tribes
Supreme Council**

Source: Office of the Prosecutor

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

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Introduction

1. The Prosecution requests the Appeals Chamber to set aside certain documents recently transmitted by the Libyan Cities and Tribes Supreme Council ("Supreme Council"), purportedly filed in response to an oral request made by the Appeals Chamber at the hearing of Mr Gaddafi's admissibility appeal on 12 November 2019 ("Oral Request").¹ In its Oral Request, the Chamber requested the Supreme Council to provide it with a copy of Libyan Supreme Court judgment in case 1518/53 concerning the distinction between *in presentia* and *in absentia* participation in Libyan criminal proceedings, which the Supreme Council's representative had referred to during the hearing.² On 22 November 2019, the Registry transmitted six documents submitted by the Supreme Council, purportedly in response to the Oral Request.³ Of those six documents, only one is the relevant judgment sought in the Oral Request ("Requested Judgment").⁴ Three of the documents are other Libyan Supreme Court judgments ("Additional Judgments").⁵ The remaining two documents are submissions unrelated to the Oral Request that are purportedly from Mr Gaddafi himself,⁶ and from the Supreme Council ("Additional Submissions").⁷

2. The Additional Submissions should be set aside as they manifestly exceed the scope of the Oral Request. The Oral Request was clearly not intended to provide the Supreme Council with a further opportunity to address the Chamber on issues relating to Mr Gaddafi's appeal—the Supreme Council had already fully availed itself of that opportunity as *amicus curiae* at the hearing and in its written observations filed before the hearing.⁸ While the Additional Judgments also fall outside the narrow scope of the Oral Request, which concerned only one judgment,

¹ [ICC-01/11-01/11-T-008-ENG](#), 36:10-16.

² [ICC-01/11-01/11-T-008-ENG](#), 35:5-14.

³ See ICC-01/11-01/11-685 ("Registry Report on Transmission of Documents"), paras. 1-2, 4, 7 and Annexes I to VI thereto.

⁴ ICC-01/11-01/11-685-AnxIII.

⁵ ICC-01/11-01/11-685-AnxIV; ICC-01/11-01/11-685-AnxV; ICC-01/11-01/11-685-AnxVI.

⁶ ICC-01/11-01/11-685-Conf-AnxI.

⁷ ICC-01/11-01/11-685-Conf-AnxII.

⁸ [ICC-01/11-01/11-T-008-ENG](#), 32:22-41:14; 93:1-96:2; ICC-01/11-01/11-679 ("Supreme Council Written Observations").

the Prosecution does not object to that material remaining on the case record to the extent that they are relevant to the Chamber's understanding of *in absentia* and *in presentia* verdicts in Libyan criminal law.

Confidentiality

3. This request is filed confidentially pursuant to regulation 23bis(2) of the Regulations of the Court as it refers to the contents of confidential filings.⁹

Procedural Background

4. During the hearing of Mr Gaddafi's admissibility appeal on 12 November 2019, the representative for the Supreme Council submitted:

MR SAAD: The supreme court has addressed the distinction between *in presentia* and *in absentia* rulings in many of its decisions. And I would like to recall only one example of that from 2006 from the challenge filed under number 1518/53. Quote: It is sufficient to qualify a ruling as an *in presentia* ruling if the defendant attends the session where this--where such trial has taken place, attends the session of the trial and if given the chance to defend himself as per Article 212 of the Code of Criminal Procedure and that such rulings shall be considered ruling *in presentia* on the merits of the person being deemed present whenever he is not able to attend such sessions where the case was supposed to end.¹⁰

5. The Appeals Chamber subsequently made the following Oral Request:

PRESIDING JUDGE EBOE-OSUJI: Counsel, one second, please. That judgment of the supreme court you just discussed, the one you say explains what trial *in presentia* means, do you have it, did you file it with the Court? Did you file that judgment, a copy of it? Even if it's in Arabic, do you have it?

⁹ Annexes I and II have been classified as confidential at the request of the Supreme Council. See [Registry Report on Transmission of Documents](#), paras. 5, 6.

¹⁰ [ICC-01/11-01/11-T-008-ENG](#), 35:5-14.

Or if you have a copy, you can also hand it up later for us, we would appreciate it.

MR SAAD: (Interpretation) Yes, I will work on that.

PRESIDING JUDGE EBOE-OSUJI: Thank you.¹¹

6. On 25 November 2019, the Registrar transmitted the six documents submitted by the Supreme Council purportedly in response to the Oral Request, comprising the Requested Judgment, the Additional Judgments and the Additional Submissions.¹²

Submissions

7. It is clear from the plain wording of the Oral Request that the Chamber sought only a copy of the specific Libyan Supreme Court judgment that the Supreme Council representative identified in his oral submissions during the hearing. The Requested Judgment is the only document submitted by the Supreme Council that conforms to that request. The Additional Submissions and Additional Judgments exceed the scope of the Oral Request and could be set aside on that basis alone. However, for the reasons set out below, the Prosecution objects only to the Additional Submissions remaining on the record in this case.

8. *First*, the Additional Submissions are manifestly outside the scope of the Oral Request. The first document of the Additional Submissions is an unsigned statement purportedly received by the Supreme Council from Mr Gaddafi himself.¹³ Leaving aside questions of the statement's authenticity and of the propriety of representations from Mr Gaddafi being submitted by an organisation that is not his legal representative on the record, the document has nothing to do with the rendering of *in absentia* verdicts in Libya. The second document of the Additional Submissions, entitled "Responses of Libyan Cities and Tribes Supreme Council", contains further submissions from the Supreme Council on issues relating to Mr

¹¹ [ICC-01/11-01/11-T-008-ENG](#), 36:10-16.

¹² [Registry Report on Transmission of Documents](#), paras. 1-2, 4, 7 and Annexes I to VI thereto.

¹³ ICC-01/11-01/11-685-Conf-AnxI, p. 1 (the document commences with the note: "We received this statement from Mr. Saif Al-Islam Muammar Gaddafi").

Gaddafi's admissibility appeal, including a repetition of the Council's oral submissions on *in absentia* verdicts,¹⁴ and additional "reference" material.¹⁵

9. *Second*, the Additional Submissions are belated, repetitive and unnecessary to the Chamber's determination of Mr Gaddafi's admissibility appeal. The Chamber has already been fully briefed on the appeal by the Parties and *amici curiae* through written submissions and the oral submissions made over the course of two hearing days, including by the Supreme Council which participated as *amicus curiae*.¹⁶ The Council should not be permitted to take advantage of the confined Oral Request to make further submissions on the appeal.

10. *Third*, as a matter of procedural fairness, the Chamber should not rely upon the Council's further unsolicited submissions and materials when the parties and participants to the appeal have not had any opportunity to address them.

11. *Finally*, while the Additional Judgments also fall outside the scope of the Oral Request, the Supreme Council submits them as further cases that it considers to be relevant to the issue of *in absentia* and *in presentia* verdicts in Libyan criminal law.¹⁷ To the extent that the Additional Judgments are indeed relevant to that issue, the Prosecution considers the material may be of some assistance to the Chamber in reaching its understanding of Libyan criminal law. The Prosecution also observes that the Additional Judgments are only copies of Libyan Supreme Court judgments and contain no submissions from the Council. On these bases, the Prosecution does not object to the Additional Judgments remaining on the record.

¹⁴ [ICC-01/11-01/11-T-008-ENG](#), 32:22-41:14; 93:1-96:2.

¹⁵ ICC-01/11-01/11-685-Conf-AnxII, pp. 1-10 (concerning "On Verdict Qualification", "On General Amnesty Law 6/2015", "Comments on Handling the Libyan File", "Presentation of Steadfast Positions Concerning the Appeal"), pp. 11-44 ("References").

¹⁶ [ICC-01/11-01/11-T-008-ENG](#), 32:22-41:14; 93:1-96:2; [Supreme Council Written Observations](#).

¹⁷ ICC-01/11-01/11-685-Conf-AnxII, p. 1 ("[...] [W]e present to you a host of Supreme Court Verdicts that substantiate our position to which we refer in a glance since we cannot mention them in full herein").

12. The Requested Judgment and all but one of the Additional Judgments have only been provided in Arabic.¹⁸ In light of Regulation 39(1) of the Regulations of the Court, the Prosecution requests that if the Chamber deems any of the judgments to be relevant to its determination of Mr Gaddafi's admissibility appeal, the Chamber place English or French translations of those judgments on the record for the benefit of the Parties.

Relief Sought

13. The Prosecution requests that the Additional Submissions be set aside as they manifestly exceed the scope of the Oral Request. Additionally, the Prosecution requests that the Chamber place English or French translations of the Requested Judgment and any of the relevant Additional Judgments on the record.



Fatou Bensouda, Prosecutor

Dated this 6th December 2019
At The Hague, The Netherlands

¹⁸ An English translation of the judgment in Annex VI is provided at ICC-01/11-01/11-685-Conf-AnxII, pp. 12-15. It appears in Arabic again at p. 15-16.