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

Date: 10 September 2013

THE APPEALS CHAMBER

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

SITUATION IN LIBYA

IN THE CASE OF

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

**Public Redacted
With Confidential Annex 1**

Defence Response to the “Libyan Government’s Request for leave to file Consolidated Reply to the Observations (on the Libyan Government’s further Submissions) filed by the Defence for Saif Al-Islam Gaddafi, the Office of the Prosecutor and the Office”

Source: Defence for Mr. Saif Al-Islam Gaddafi

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

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I. Introduction

1. A day before the deadline for its response to the observations of the Office of Public Counsel for Victims (OPCV), Libya requested to file a consolidated reply to the responses of the Prosecution, Defence and OPCV ("the Request").¹
2. Although this is framed as a request to file a 'reply' to the further submissions, it would in effect be Libya's third opportunity to substantiate its appeal – a sur-reply of sorts.
3. Libya previously acknowledged that there is no right to file a reply in relation to interlocutory appeals. The ambit of Regulation 28 would be unacceptably distorted if further submissions filed under this regulation could serve as a basis for introducing replies into the interlocutory appeal process.
4. The substantive issues, for which leave to reply is sought, have been fully litigated by all parties in this proceeding. Libya has exhausted its right to be heard in relation to every aspect of its own appeal.
5. By filing its request the day before its deadline for submitting observations concerning the OPCD response, Libya also failed to give sufficient time to the Appeals Chamber to rule on its request in advance of the deadline. It has provided no explanation as to why it did not submit its request earlier, or why it was necessary for it to 'consolidate' its response to OPCV with its putative reply to the Defence and the Prosecution.
6. Since Libya did not obtain authorisation in advance of its deadline for postponing its response to the OPCV, it has forfeited its right to file a response. To hold otherwise would allow Libya to benefit from its non-observation of the Court's deadlines.
7. Although Libya's request for suspensive effect was denied, Libya has not surrendered Mr. Gaddafi to the ICC, [Redacted].

¹ Libyan Government's Request for leave to file Consolidated Reply to the Observations (on the Libyan Government's further Submissions) filed by the Defence for Saif Al-Islam Gaddafi, the Office of the Prosecutor and the Office, ICC-01/11-01/11-462.

8. The continuation of domestic proceedings in the interim exposes Mr. Gaddafi and other persons participating in the domestic proceedings to the unnecessary risk of harm and prejudice.
9. The Defence for Mr. Saif Al-Islam Gaddafi therefore respectfully requests the Appeals Chamber to reject Libya's request to file a reply, and to issue a judgment on the admissibility challenge forthwith.

II. Submissions

- a) *It is not possible to file a reply to Regulation 28 submissions which concern Rule 154 or 155 appeals*
10. Libya is, once again, seeking to file additional submissions to the Appeals Chamber. Libya is not, however, seeking to 'clarify' or provide additional information to the Chamber. The Request therefore falls outside of the ambit of Regulation 28.
11. Libya's Request is also not a stand-alone procedural motion, which could potentially attract a right of reply pursuant to Regulation 24(5) of the Regulations of the Court.
12. The Request is, rather, intrinsically linked to Libya's appeal brief and the parties' responses, which fall within the specific legal framework of Section 4 of Chapter 3 of the Regulations of the Court. The Request therefore cannot be characterised as anything other than a reply or sur-reply to appellate arguments.
13. The Appeals Chamber previously authorised Libya to file further submissions in order to 'clarify' its appeal brief.² Libya's further submissions were thus, in effect, an addendum to this appeal brief, which therefore continue to be governed by the same legal framework as the initial appeal brief.
14. Accordingly, although Regulation 28 qualifies the legal framework set out in Section 4 of Chapter 3 to the extent that it allows the Appeals Chamber to seek

² ICC-01/11-01/11-442, para. 13.

clarification on any document filed under this Section, it does not create a separate legal framework which would justify invoking Regulation 24(5) of the Regulations of the Court.

15. This is consistent with the fact that the Appeals Chamber has cautioned that resort to Regulation 28 in appellate proceedings must take into consideration the “need for expeditious proceedings”.³ If Regulation 28 submissions filed in connection with a Rule 154 or 155 appeal brief automatically triggered the application of Regulation 24, then it would create a distinct set of proceedings within the appeal itself, which would inevitably prejudice the ability of the Appeals Chamber to render its judgement expeditiously.
16. It therefore follows that in the same manner that there is no right to file a reply to a Rule 154 or 155 appeal brief because Section 4 of Chapter 3 fails to provide for such a right,⁴ there is also no right to file a reply to Regulation 28 submission which concern a Rule 154 or 155 appeal brief, or to file a sur-reply.

b) In the alternative, Libya has failed to demonstrate the existence of ‘good cause’ to file a reply

17. Libya has thus far filed an appeal brief, a response to the observations of the OPCV, a response to the amicus submissions of Ms. Mishana Hosseinioun, and further submissions pursuant to Regulation 28. Although it was accorded an opportunity to file a response to the observations of the OPCV concerning Libya’s further submissions, Libya declined to exercise this right. In sum, Libya has been accorded five independent opportunities either to substantiate its appeal, or to respond to counter-arguments. In light of the fact that Libya has “had ample opportunity”⁵ to address the Appeals Chamber on all relevant issues, there is no basis for granting Libya a further right of reply.

³ ICC-01/04-01/06-424, para.7.

⁴ ICC-01/04-01/06-424, para. 6.

⁵ ICC-01/11-01/11-387, para.17.

18. The reasons underlying Libya's request also focus solely on Libya's disagreement with the positions put forward by the Prosecution, Defence and OPCV. The Appeals Chamber has declared that "submissions under regulation 28 of the Regulations of the Court are not intended to reiterate a position or demonstrate mere disagreements with the position of another party".⁶ If it is impermissible to invoke Regulation 28 in the first place to pursue a mere disagreement with the position of another party, then it follows that it would be equally impermissible to pursue to such a disagreement through a reply to Regulation 28 submissions.
19. It is particularly inappropriate to grant leave to file submissions which focus on mere disagreements within the context of appellate submissions. The Appeals Chamber will only overturn a decision if the appellant demonstrates that the Chamber at first instance committed a legal, factual or procedural error which materially impacted on the outcome of the decision. The cornerstone of the appellate proceedings is the impugned decision, and not the parties' submissions. It is thus both irrelevant and unhelpful to receive submissions which focus purely on points of disagreement between the parties.
20. Libya has also failed to demonstrate that there is good cause to reply to the particular issues, for which leave to reply is being sought. The Defence will address the specific issues concerning the observations of the OPCV separately.
21. In terms of the fact that Libya's further submissions violate Regulation 36(3) of the Regulations of the Court, this is an objectively verifiable fact: either Libya has violated the Regulation or it has not. Libya was ordered to file submissions of no more than 20 pages. The Regulations of the Court stipulate that there should be no more than 300 words per page on average. The Defence accepts that negligible or inadvertent violations can occur. But in light

⁶ ICC-01/11-01/11-442, para. 13.

of the magnitude of the violation (the total word count has been exceeded by over 1800 words), and the Appeals Chamber's express reference to the total page limit, it is plain that Libya's filing fails to comply with the Regulations of the Court to an unacceptable degree.

22. Any purported justification for transgressing these requirements should have been submitted before and not after the fact. A reply is not a corrigendum nor can it be used to correct a party's violations or failure to seek authorisation to exceed the page or word limit in a timely manner. The Chamber also has the discretion to rule on such a violation without first seeking further observations from Libya,⁷ particularly in circumstances in which such further observations would impact on the expeditiousness of the proceedings.
23. In terms of Libya's request to reply to the Prosecution's submissions that Libya has failed to comply with Regulation 62, again, it is impermissible for Libya to utilise a reply in order to correct its failure to comply with the Regulations of the Court.
24. In particular, Libya filed Annex A directly to the Chamber without seeking prior authorisation, as required by Regulation 62. Throughout its Further Submissions, Libya improperly referred to the contents of Annex A without such prior authorisation.
25. If Libya wishes now to invoke Regulation 62 through its putative reply, then it would be necessary for its Further Submissions to be struck from the record. Libya cannot purport to comply with the Court's legal framework whilst simultaneously benefitting from its non-compliance.
26. It would also violate the principle of adversarial proceedings for Libya to set out its argumentation concerning the applicability of Regulation 62 for the first time, in its reply. Regulation 62(2) explicitly sets out the right of the Prosecution, Defence and OPCV to be heard in relation to any application for the admission of evidence on appeal. This right would be diluted of any

⁷ ICC-02/05-01/09-151, paras.18-19.

meaning if Libya were to include its argumentation concerning the applicability of Regulation 62 and the admissibility of its evidence in a reply, to which the Prosecution, Defence and OPCV would have no right to respond.

27. Similarly, in terms of the argument that “Libya’s reply would address the circumstances in which new evidence may be admitted on appeal”,⁸ it would for the same reasons be procedurally impermissible for Libya to seek to meet its burden of argumentation through its reply, rather than its initial submissions.
28. Libya’s request to address the issue of whether its “request for time to translate and apply for admission of the Accusation Dossier is outside of appellate jurisdiction”⁹ is formulated in vague and unclear terms.
29. In terms of Libya’s request to address Libya law and Article 59 in its reply, it should be noted that Libya has benefitted from over seven formal opportunities to present its interpretation of the principle of “confidentiality of investigations” throughout the admissibility proceedings, and on almost every occasion, its interpretation has changed, often, in fundamental ways.
30. This is amply demonstrated by the fact that in its Further Submissions, Libya submitted that its invitation to view the case file in Tripoli “was not exclusive in the way the Defence alleged and was in fact extended to the Defence.”¹⁰ In support of this, Libya cites to a proposition from its March 2013 reply that the Pre-Trial Chamber view the ‘case file’ in Tripoli.¹¹ In its January 2013 submissions, Libya had stressed that this proposition encompassed the “entire case file”.¹²
31. If the invitation to the Chamber in fact encompassed the Defence, then it follows that Libya was willing to grant access to the Defence to view the entire case file (albeit only in Tripoli).

⁸ ICC-01/11-01/11-462, para.7(iv).

⁹ ICC-01/11-01/11-462, para.7(v).

¹⁰ ICC-01/11-01/11-454-Red, para.43.

¹¹ ICC-01/11-01/11-293-Red, para. 43.

¹² ICC-01/11-01/11-258-Conf-Red, para .70.

32. Nonetheless, in its Request, Libya has averred that,

“it is a legally wrong notion [...]that the defence could be provided with a copy of the investigative file (without witnesses’ names being redacted or hidden from view (as would have to have been arranged during the proposed site visit to Tripoli) prior to the case progressing to the Accusation Chamber”.¹³

33. Although Libya is now seeking to modify its proposal in order retrospectively to extend an invitation to the Defence, even this modification fails to accord with a different January 2013 submission, in which Libya emphasised that the rationale of the proposal was to enable the ICC ‘delegation’ to “view the entirety of the ICC case file together with the entirety of the Libyan case file.”¹⁴

34. Libya was obliged to discharge the burden of explaining the details of its proposals and legal submissions in a clear and consistent manner during the proceedings before the Pre-Trial Chamber. It is plainly unacceptable for Libya to introduce new qualifications and details *via* an appellate reply, particularly if these details and qualifications do not find any support or basis in the pleadings which were made before the Pre-Trial Chamber.

35. In this connection, in construing the parameters of Article 59 and the right of the Defence to access the case file, the Pre-Trial Chamber would have been entitled to rely on the fact that throughout the admissibility proceedings, Libya had referred to the identities of actual and potential Prosecution witnesses in both *inter partes* and public filings.¹⁵

36. Granting Libya leave to reply in order now to present that argument would only serve to further muddy the already murky waters concerning Article 59. The principle of adversarial proceedings would also, again, be completely overridden if Libya were permitted to reverse or fundamentally alter its

¹³ ICC-01/11-01/11-462, para. 7(vi).

¹⁴ ICC-01/11-01/11-265-Conf-Exp-Red, para. 9.

¹⁵ ICC-01/11-01/11-258-Anx3, p. 3; ICC-01/11-01/11-130-Conf-AnxC, p. 6.

position in a reply, to which the Defence, Prosecution and OPCV have no right to respond.

37. With respect to Libya's particular request to address the submissions of the OPCV and the Prosecution concerning the potential operation of Article 72 and the issue as to whether Libya can rely on domestic law in order to dilute its obligations under the Rome Statute, it should be noted that it was Libya that first raised the potential applicability of Article 72 in its submissions to the Pre-Trial Chamber.¹⁶ Libya's failure to comply with the procedural requirements of Article 72 was also explicitly drawn to Libya's attention during the proceedings before the Pre-Trial Chamber.¹⁷ Libya nonetheless failed to utilise the further procedural opportunities afforded to it to either correct or justify this failure.¹⁸
38. As concerns the issue as to whether Libya is obliged to ensure that its national law allows it to fulfil its obligations under the Rome Statute and Security Council Resolution 1970, it would be impermissible for Libya to advance any submissions on this point which differ from those which it has relied on before the Pre-Trial Chamber, albeit within the context of the Senussi admissibility challenge.
39. Libya has explicitly cited Article 88 of the Rome Statute for the purposes of convincing the Pre-Trial Chamber of its willingness to adhere to the tenets of the Rome Statute within its domestic law proceedings,¹⁹ and to justify why the ICC Prosecutor should consider sharing evidence and information with Libya.²⁰ It is therefore highly improper for Libya to argue before a different Chamber that it is legally incorrect that Article 88 is relevant to the issue of evidence-sharing between Libya and the ICC.

¹⁶ ICC-01/11-01/11-258-Conf-Red, para. 40.

¹⁷ See for example, ICC-01/11-01/11-261-Conf, paras. 25, 58,

¹⁸ See for example, ICC-01/11-01/11-265-Conf-Exp-Red or ICC-01/11-01/11-293-Conf.

¹⁹ ICC-01/11-01/11-403-Red2, para. 177.

²⁰ ICC-01/11-01/11-403-Red2, para.178.

40. Finally, if the Appeals Chamber were to grant Libya's vague and question-begging request to address the inaccuracies in the Prosecution and Defence responses in order to demonstrate that they are inaccurate,²¹ then it would be effectively ruling that there is a right to reply whenever an appeal or submission is opposed. The principle of adversarial proceedings is predicated on disagreement. Neither such disagreement nor the principle of equality of arms translate to an automatic right of reply in every case.²²

c) Libya has forfeited its right to file a response to the OPCV

41. In its Request, Libya has sought to file a consolidated response to the Prosecution, Defence and OPCV. Libya has provided no justification as to why it would be in the interests of justice to consolidate its response, nor has it explained why it was not in a position to submit its response to the OPCV, pending the Appeals Chamber's determination of its Request.

42. If Libya had been of the view that it required more time to file its response to the OPCV, then it should have submitted a request in sufficient time to enable the parties to be heard and for the Appeals Chamber to rule on the matter before the expiration of its deadline. For this reason, Trial Chamber II has deprecated the practice of submitting a request for extension of time in such a tardy manner that it

“present[s] the Chamber with a *fait accompli*. The purpose of regulation 35(2) is to allow for variations of deadlines, if good cause can be demonstrated. It must be stressed that this possibility must remain fully subject to the control of the Chamber, who has to balance the several different interests affected when a time limit is extended.”²³

43. Given that firstly, Libya did not have a legitimate expectation that the Chamber would rule on its Request before the expiration of its deadline, and

²¹ ICC-01/11-01/11-462, para.7(viii).

²² ICC-01/4-01/06-424, Separate Opinion of Judge Pikis, para. 7.

²³ ICC-01/04-01/07-1515-Corr, para.30.

secondly, Libya has failed to provide any other justification for failing to submit its response to the OPCD within the deadline, Libya has forfeited its right to file a response.

d) Granting Libya a right to reply would impact on the expeditiousness of the proceedings, and prejudice the Defence

44. Over four months have elapsed since the Pre-Trial Chamber issued its decision on the admissibility challenge. Although subject to an obligation to immediately surrender Mr. Gaddafi to the ICC, Libya has failed to do so.

45. [Redacted].²⁴

46. [Redacted].²⁵

47. The ICC would therefore undermine its own authority and the validity of its surrender order if it were to accede to requests by Libya, the net effect of which are to further prolong the proceedings and to allow Libya to pursue domestic processes which are predicated on Mr. Gaddafi not being surrendered to the ICC.

48. Before granting a Request which could be perceived to implicitly endorse Libya's failure to surrender Mr. Gaddafi to the ICC, the Appeals Chamber should also take into consideration the risks faced by participants in any domestic proceedings concerning Mr. Gaddafi.²⁶

III. Relief Sought

49. The Defence for Mr. Saif Al-Islam Gaddafi respectfully requests the Honourable Appeals Chamber to reject the Request.

²⁴ [Redacted]

²⁵ Attached as Confidential Annex 1.

²⁶ C. Freeman, 'Saif Gaddafi's lawyer concerned for her safety after kidnap of nephew', Daily Telegraph 4 October 2013, <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/10356314/Saif-Gaddafis-lawyer-concerned-for-her-safety-after-kidnap-of-nephew.html>

A handwritten signature in black ink, appearing to read 'John Jones', written in a cursive style.

John R.W.D. Jones QC, Counsel for Mr. Saif Al-Islam Gaddafi

Dated this, 10th Day of October 2013

At London, United Kingdom