

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/11-01/11 OA 6

Date: 6 February 2014

THE APPEALS CHAMBER

Before:

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

SITUATION IN LIBYA

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

Public document

**Decision on Mr Al-Senussi's request to file further submissions and related
issues**

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Mr Fabricio Guariglia

Counsel for Saif Al-Islam Gaddafi
Mr John R. W. D. Jones
Ms Sarah Bafadhel

States Representatives
Mr Ahmed El-Gehani
Mr James Crawford
Mr Wayne Jordash
Ms Michelle Butler

Counsel for Abdullah Al-Senussi
Mr Ben Emmerson
Mr Rodney Dixon

Office of Public Counsel for victims
Ms Paolina Massidda

REGISTRY

Registrar
Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

In the appeal of the Defence for Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I entitled “Decision on the admissibility of the case against Abdullah Al-Senussi” of 11 October 2013 (ICC-01/11-01/11-466-Conf),

Having before it the “Request on behalf of Abdullah Al-Senussi to File Further Submissions Pursuant to Regulation 28” of 19 December 2013 (ICC-01/11-01/11-493),

Renders unanimously the following

DECISION

1. The Defence for Mr Al-Senussi is instructed to file submissions on specific issues arising from Libya’s “Response to 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”” and the “Prosecution’s Response to 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”” by 16h00 on 14 February 2014. Such submissions shall not be longer than 15 pages.
2. Libya, the Prosecutor and the victims may respond to the submissions filed pursuant to paragraph 1 by 16h00 on 24 February 2014. The responses shall not be longer than 15 pages each.
3. The Defence for Mr Al-Senussi, Libya and the Prosecutor may respond to the observations of victims filed pursuant to paragraph 2 by 16h00 on 3 March 2014. The responses shall not be longer than 10 pages each.

REASONS

I. BACKGROUND

1. On 11 October 2013, Pre-Trial Chamber I issued the “Decision on the admissibility of the case against Abdullah Al-Senussi”¹ (hereinafter: “Impugned Decision”).
2. On 17 October 2013, lawyers acting on behalf of Mr Al-Senussi (hereinafter: the “Defence”) filed the “Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I’s ‘Decision on the admissibility of the case against Abdullah Al-Senussi’, and Request for Suspensive Effect”.²
3. On 4 November 2013, the Defence filed 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’”³ (hereinafter: “Document in Support of the Appeal”).
4. On 26 November 2013, Libya filed its “Response to 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’””⁴ (hereinafter: “Libya’s Response to the Document in Support of the Appeal”); and the Prosecutor filed the “Prosecution’s Response to 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’””⁵ (hereinafter: “Prosecutor’s Response to the Document in Support of the Appeal”).
5. On 19 December 2013, the Defence filed the “Request on behalf of Abdullah Al-Senussi to File Further Submissions Pursuant to Regulation 28”⁶ (hereinafter: “Request”), seeking leave under regulation 28 of the Regulations of the Court to file

¹ ICC-01/11-01/11-466-Conf. A public redacted version was filed on the same date (ICC-01/11-01/11-466-Red).

² ICC-01/11-01/11-468-Conf (OA6). A public redacted version was filed on the same date (ICC-01/11-01/11-468-Red (OA6)).

³ ICC-01/11-01/11-474 (OA 6).

⁴ ICC-01/11-01/11-482 (OA 6).

⁵ ICC-01/11-01/11-483 (OA 6). A corrigendum was filed on 27 November 2013 (ICC-01/11-01/11-483-Corr (OA 6)).

⁶ ICC-01/11-01/11-493 (OA 6).

further submissions in respect of three matters: first, an update of the situation regarding a visit by the Defence to Mr Al-Senussi; second, developments in relation to further evidence concerning Mr Al-Senussi's treatment in detention; and third, a number of matters raised in Libya's Response to the Document in Support of the Appeal and the Prosecutor's Response to the Document in Support of the Appeal to which the Defence wishes to respond.⁷ The Defence submits that these important issues "must be addressed for the proper and fair disposal of the Appeal".⁸

6. The Defence identifies the absence of any contact with Mr Al-Senussi as a key ground of appeal, which therefore warrants the Appeals Chamber being informed of the "very latest position" prior to determining the appeal; the Defence further stresses that the appeal should not be decided prior to a visit taking place and, in the absence of any such visit, the appeal should be granted.⁹

7. In relation to Mr Al-Senussi's treatment, the Defence refers to the request that it made in ground two of the Document in Support of the Appeal for new evidence to be admitted in the appeal, or for the Pre-Trial Chamber to reconsider its findings in light of the new evidence.¹⁰ The Defence recalls that it had stated that further inquiries were ongoing as a result of the new evidence and that the Defence reserved the right to seek to file any further evidence that it was able to acquire.¹¹ The Defence avers that, as a result of those inquiries, it has received further information concerning Mr Al-Senussi's treatment in detention, that it was not possible to obtain the information at an earlier date for reasons "apparent from the new evidence itself", and that it is "essential that this new evidence is considered [...] as it directly concerns Mr. Al-Senussi's treatment and well-being in detention. This issue is plainly fundamental to whether Libya is able and willing genuinely to try Mr. Al-Senussi [...]".¹²

8. As regards the matters contained in Libya's Response to the Document in Support of the Appeal and the Prosecutor's Response to the Document in Support of the Appeal, the Defence contends that certain submissions represent either a change in

⁷ Request, para. 1.

⁸ Request, para. 2.

⁹ Request, paras 10, 11.

¹⁰ Request, para. 12.

¹¹ Request, para. 12.

¹² Request, paras 13, 14.

Libya's position and/or constitute a new or erroneous argument raised by Libya (or, in one instance, by the Prosecutor);¹³ the Defence argues that further submissions should be permitted to "address these inaccuracies and new issues".¹⁴

9. On 20 December 2013, the Office of Public Counsel for victims filed 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'"¹⁵ (hereinafter: "Victims' Observations").

10. On 9 January 2014, Libya filed the "Libyan Government's Response to the 'Request on behalf of Abdullah Al-Senussi to File Further Submissions Pursuant to Regulation 28'"¹⁶ (hereinafter: "Libya's Response"). Libya submits that it does not object to further submissions being filed by the Defence related to matters raised in Libya's Response to the Document in Support of the Appeal and the Prosecutor's Response to the Document in Support of the Appeal, but does object to the "request for the admission of new evidence [...]".¹⁷

11. Libya submits that this latter request seeks to circumvent the Pre-Trial Chamber's ruling by reiterating previous arguments and requesting the Appeals Chamber to consider issues *de novo*.¹⁸ Libya submits that the request "must be viewed in the context of the [Defence's] previous attempt to introduce new evidence in the appeal",¹⁹ and that, similarly to that attempt, the request to admit new evidence about Mr Al-Senussi's treatment would deny due process if allowed as the evidence in question is undisclosed to Libya and is premature as, at the time of filing, it was not in the Defence's possession.²⁰ Referring, *inter alia*, to submissions that it made in Libya's Response to the Document in Support of the Appeal in relation to the admission of new evidence, Libya argues that the Defence had not addressed "why

¹³ Request, paras 17-38.

¹⁴ Request, para. 17.

¹⁵ ICC-01/11-01/11-494 (OA 6).

¹⁶ ICC-01/11-01/11-497 (OA 6).

¹⁷ Libya's Response, para. 2.

¹⁸ Libya's Response, para. 2.

¹⁹ Libya's Response, para. 3.

²⁰ Libya's Response, paras 4-8.

[the evidence] could not be obtained previously or how a miscarriage of justice would be occasioned if it were not admitted”.²¹

12. Libya further submits that the request in respect of further information regarding a visit between the Defence and Mr Al-Senussi fails to explain how the information is essential to a correct determination of the appeal, why the Appeals Chamber will be unable to decide without the evidence or how a miscarriage of justice would result if the evidence were not admitted.²²

13. On 10 January 2014, the Prosecutor filed the “Prosecution’s Response to ‘Request on behalf of Abdullah Al-Senussi to File Further Submissions Pursuant to Regulation 28’”²³ (hereinafter: “Prosecutor’s Response”). The Prosecutor submits that the Request should be rejected as it seeks to: introduce information about facts post-dating the Impugned Decision, which are thus outside the scope of appellate review;²⁴ admit uncollected new evidence, which is inadequately identified and renders the Request premature;²⁵ and reiterate arguments previously made, *inter alia* merely disagreeing with the Prosecutor’s position in relation to witness protection and failing to show how further submissions would assist in the resolution of the appeal.²⁶

14. On 13 January 2014, the Defence submitted the “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’””²⁷ (hereinafter: “Defence Response to Victims’ Observations”), with three attached annexes. Part of those submissions refer to and annex (i) a letter from Human Rights Watch in relation *inter alia* to Mr Al-Senussi’s treatment in detention, as a result of one of its reports having been referred to in the Impugned Decision;²⁸ and (ii) new evidence in relation to

²¹ Libya’s Response, paras 9-10.

²² Libya’s Response, para. 11.

²³ ICC-01/11-01/11-498 (OA 6).

²⁴ Prosecutor’s Response, paras 1, 8.

²⁵ Prosecutor’s Response, paras 1, 11.

²⁶ Prosecutor’s Response, paras 1, 15.

²⁷ ICC-01/11-01/11-500 (OA 6).

²⁸ Defence Response to Victims’ Observations, para. 29.

Mr Al-Senussi's treatment in detention,²⁹ a public summary of which refers to treatment prior to the date of the Impugned Decision,³⁰ and in respect of which:

The Defence requests the Appeals Chamber to admit this evidence with the new evidence filed with the Document in Support of Appeal. It corroborates the evidence already filed and together with this evidence clearly establishes that Mr. Al-Senussi cannot be brought to justice in Libya and that Libya is incapable of trying him. The Appeals Chamber has not ruled on the application to admit the new evidence. The new evidence in Annex 2 can thus be considered with the new evidence already before the Appeals Chamber, and Libya and the parties can be given an opportunity to respond to all of the new evidence.³¹

15. On 20 January 2014, Libya submitted 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"³² (hereinafter: "Libya's Request of 20 January 2014"). Libya argues that the new evidence that was submitted with the Defence Response to Victims' Observations was filed notwithstanding the fact that the Appeals Chamber had not yet ruled on the Request, which had sought permission to file this new evidence.³³ As a result, Libya submits that the Appeals Chamber should reject *in limine* any submissions in the Defence Response to Victims' Observations that are "based on such new evidence."³⁴ Libya refers to its previous objection to the new evidence, arguing that consideration of the new material, which was filed *ex parte*, "would be both unfair and improper".³⁵ Libya submits that if new evidence is to be considered, the evidence should be provided in full to Libya, and Libya should be given a proper time period in which to make inquiries and file submissions in response.³⁶ Libya further submits that the evidence falls outside the scope of the appeal as it concerns facts that post-date the Impugned Decision.³⁷

16. On 27 January 2014, Libya filed the "Addendum to Libyan Government's Request for the Appeals Chamber to disregard the new evidence submitted as part of

²⁹ Defence Response to Victims' Observations, para. 37.

³⁰ Defence Response to Victims' Observations, annex 1.

³¹ Defence Response to Victims' Observations, para. 38.

³² ICC-01/11-01/11-502 (OA 6).

³³ Libya's Request of 20 January 2014, para. 1.

³⁴ Libya's Request of 20 January 2014, para. 1.

³⁵ Libya's Request of 20 January 2014, para. 4.

³⁶ Libya's Request of 20 January 2014, para. 4.

³⁷ Libya's Request of 20 January 2014, para. 5.

the Al-Senussi Defence Response to the OPCV's Observations on its Document in support of its Appeal"³⁸ (hereinafter: "Addendum to Libya's Request of 20 January 2014"). Libya maintains that the new evidence submitted with the Defence Response to Victims' Observations should be rejected,³⁹ but files a letter in relation to the treatment of Mr Al-Senussi in detention, attaching an up-to-date medical report.⁴⁰ Libya avers that it "simply seeks to counter the prejudice that may arise from the submission of [the evidence submitted with the Defence Response to Victims' Observations], which [...] is now in the consciousness of the Court and the general public."⁴¹ As such, Libya submits that, if the new evidence, and submissions based thereon, in the Defence Response to Victims' Observations are accepted, the Appeals Chamber should admit the evidence that Libya submits with the present filing.⁴²

II. MERITS

17. The Appeals Chamber recalls its previous jurisprudence that establishes that

the Regulations of the Court "do not foresee replies to responses to documents in support of the appeal for appeals under rules 154 and 155". Nevertheless, the Appeals Chamber has also held that, "should the arguments that are raised in a response to a document in support of the appeal make further submissions by the appellant necessary for the proper disposal of the appeal, the Appeals Chamber will issue an order to that effect pursuant to regulation 28 (2) of the Regulations of the Court, bearing in mind the principle of equality of arms and the need for expeditious proceedings". Therefore, the question before the Appeals Chamber is whether [the participant making the request] should be allowed to file additional submissions pursuant to regulation 28 of the Regulations of the Court.⁴³ [Footnotes omitted]

18. Having carefully considered that part of the Request that seeks to respond to a number of submissions raised in Libya's Response to the Document in Support of the Appeal and the Prosecutor's Response to the Document in Support of the Appeal, the Appeals Chamber grants the Defence leave to make submissions in relation to those matters set out at paragraphs 22 to 27 and 29 to 38 of the Request. The Appeals

³⁸ ICC-01/11-01/11-503.

³⁹ Addendum to Libya's Request of 20 January 2014, para. 1.

⁴⁰ Addendum to Libya's Request of 20 January 2014, paras 1, 5.

⁴¹ Addendum to Libya's Request of 20 January 2014, para. 4.

⁴² Addendum to Libya's Request of 20 January 2014, para. 7.


⁴³ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "Decision on the Libyan Government's request to file further submissions", 12 September 2013, ICC-01/11-01/11-442 (OA 4), para. 12, citing *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the Prosecutor's 'Application for Leave to Reply to 'Conclusions de la défense en réponse au mémoire d'appel du Procureur'", 12 September 2006, ICC-01/04-01/06-424 (OA 3), paras 6, 7.

Chamber considers that such further submissions are justified and necessary in the present circumstances in light of the arguments as a whole that have been made on appeal. The Appeals Chamber further notes that Libya, to whom the majority of points under this part of the Request were directed, does not object to this.

19. The Appeals Chamber decides that the Defence shall file the above-mentioned further submissions by 16h00 on 14 February 2014. Such submissions shall not be longer than 15 pages. Libya, the Prosecutor and the victims represented by Ms Paolina Massidda are given the opportunity to file a response thereto by 16h00 on 24 February 2014. The responses shall not be longer than 15 pages each. The Defence, Libya and the Prosecutor may respond to the observations of victims by 16h00 on 3 March 2014. Those responses shall not be longer than 10 pages each.

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.

Done in both English and French, the English version being authoritative.



Judge Akua Kuenyehia
Presiding Judge

Dated this 6th day of February 2014

At The Hague, The Netherlands