

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: 22 February 2013

PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernández de Gurmendi, Presiding Judge
Judge Hans-Peter Kaul
Judge Christine Van den Wyngaert

SITUATION IN LIBYA

IN THE CASE OF

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

Public

Response to the “Libyan Government ‘s Request for leave to reply to Responses by OTP, OPCV and OPCD to Libyan Government’s further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi”

Source: Defence of 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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Other

1. The Government has been accorded multiple opportunities, over a significant period of time, to advance its admissibility challenge before the ICC.
2. In fact, in addition to the October 2012 admissibility hearings, the Government has submitted at least twenty-one filings, which advanced its factual or legal arguments concerning the admissibility of the case.¹
3. The Government has therefore had ample opportunity to meet its burden of challenging the admissibility of the case before the ICC.
4. The Government has also failed to advance any cogent arguments, which would warrant the filing of a reply.
5. In terms of the particular issues cited by the Government, the Government has not explained how the filing of a leave to reply would advance or assist the Chamber's ability to adjudicate the challenge. As found by the Appeals Chamber, it is not appropriate or necessary to grant leave to file a reply in relation to issues that "are already before the Appeals Chamber or, in the view of the Appeals Chamber, appear to be mere disagreements with [another party's] arguments."²
6. Although the Government has asserted that each of the parties have raised certain arguments for the first time,³ it failed to cite any examples of such arguments. Indeed, as concerns the particular subject matter of the present submissions and responses, the issues at stake had all been raised in the June and July responses of the participants.⁴ The Government was accorded a full opportunity to address these issues, during the October 2012 admissibility hearings.
7. The Pre-Trial Chamber also took the unprecedented step of explicitly defining the issues, which will form the crux of its decision, in its decision of 14 September 2012,⁵ and in greater detail, in its decision of 7 December 2012. Again, the Government was

¹ ICC-01/11-01/11-44-Anx1-Red; ICC-01/11-01/11-82, para. 2; ICC-01/11-01/11-102, para. 5; ICC-01/11-01/11-102, paras 5-6, 21-27 ; ICC-01/11-01/11-111-Red, paras 6, 13-17; ICC-01/11-01/11-130-Red; ICC-01/11-01/11-132, paras 6-14; ICC-01/11-01/11-144 ; ICC-01/11-01/11-149; ICC-01/11-01/11-160; ICC-01/11-01/11-192; ICC-01/11-01/11-205, para. 2, 10-16; ICC-01/11-01/11-213, paras 10-18; ICC-01/11-01/11-218-Conf; ICC-01/11-01/11-221-Conf , ICC-01/11-01/11-246, ICC-01/11-01/11-251, ICC-01/11-01/11-258-Conf-Red3, ICC-01/11-01/11-260, para. 3, 12-13, 17 ; ICC-01/11-01/11-264, paras 22-24 , 27-28 ; ICC-01/11-01/11-274.

² ICC-01/09-01/11-239 at para. 10.

³ ICC-01/11-01/11-283 at para. 4.

⁴ ICC-01/11-01/11-190-Conf-Corr, paras 67-88; 89-90; 98-99 ; 101-115; 122-136; 137-154; 156 ; 161-164; 167; 169-174; 176; 178; 180-187; 192-194; 197-209 ; 214; 220-226; 230; 234; 236-238; 246-248; 258 ; 310 i. ; 311-314 ; 356-357; 382-404 ; fn 55-56; fn 178.

OPCV's observations

ICC-01/11-01/11-166-Conf, paras 17-18; 20; 23; 26-28; 32-35; 42-49

⁵ ICC-01/11-01/11-207 at para. 14. These issues were further elaborated in an agenda for the hearing, which was distributed in advance to the parties and participants.

accorded a full opportunity to address these issues, at the October 2012 admissibility hearings, and in its subsequent filing of 23 January 2013.

8. The scope of the further submissions and responses was also framed by matters, which fell directly within the knowledge of the Government, such as questions concerning the status of the proceedings against Mr. Gaddafi, and the applicable domestic law. The Government is in a privileged position concerning its ability to address such matters, as compared to the parties and the OPCV. The Government has access to the domestic dossier against Mr. Gaddafi, it is fully aware of the domestic strategy and ancillary legal and political developments, and is furthermore, fully versed in applicable Libyan law.
9. If the Government did not address a certain matter in its submissions, it was because it chose not to so do, presumably for strategic reasons. In this connection, the Defence fully endorses the following arguments of the OPCV:⁶

An applicant may not, for example, deliberately refrain from making an argument on a foreseeable issue.⁷ Recourse to a reply in respect of such arguments or information is not only a waste of judicial time, it “deprive[s] the [responding party] of its right to respond.”⁸ A motion should not be written in a deliberately vague manner so as to gain a tactical advantage, by depriving the respondents of a proper and full opportunity to respond.

10. In terms of the latter aspect of the OPCV’s argument, a particular concern is that the Government has relied in both its 1 May 2012 and 23 January submissions on what appears to be inaccurate translations, or portions of Libyan law, which have been taken out of context, or which are not actually applicable to Mr. Gaddafi’s case. The Defence is therefore concerned that if the Government were to introduce new factual or legal arguments or provisions in its reply, the other parties and participants would not have the opportunity to correct any inaccurate or misleading information.
11. The Government’s reference to the fact that it has a ‘new Government’,⁹ is also completely irrelevant. Counsel have not provided any examples or explanation as to how the change in the composition of the Government has in any way impacted on their instructions or strategy, as concerns the admissibility of the case. The Libyan

⁶ ICC-01/11-01/11-155 at para. 7.

⁷ Citing “Decision on Defence Request for Leave to Submit a Reply” (Trial Chamber II), No. ICC-01/04-01/07-2792, 22 March 2011 (denying leave on the basis that the Chamber considered itself “*sufficiently informed*” on the issues concerned and that no “*new issue*” had been raised in the responses).

⁸ Citing *M. Nikolic v. The Prosecutor* (IT-02-60/1-A), Decision on Prosecution’s Motion to Strike, 20 January 2005, para. 32.

⁹ ICC-01/11-01/11-283 at para. 6.

focal point for the ICC, the Prosecutor-General, and Counsel for Libya have also remained the same throughout the proceedings. It is also worth noting that this very argument was recycled from the Government's May 2012 request for to file a reply,¹⁰ thus underscoring the continuity of strategy, which has existed irrespective as to the 'change' in Governments.

12. In presaging the possibility that it might permit filings, after an admissibility hearing, the Pre-Trial Chamber had also described such filings as "final written submissions on the Admissibility Challenge".¹¹
13. The Chamber effectively authorised the participants to submit final written submissions in relation to key issues, which arose during the October 2012 hearings, as formulated in the Chamber's decision of 7 December 2013. It was the Chamber's decision, which framed the subject matter of the filings, and not the Government's submissions.
14. In the same manner that replies are not permitted in connection with written submissions, which are filed after a confirmation hearing, there is no basis for permitting the Government of Libya to submit a reply in the current circumstances. The Government's right to file a reply in the admissibility proceedings had already been exhausted through its submissions at the October 2012 hearings.¹²
15. To hold otherwise would be to assimilate the Government's 23 January 2013 filing to a new challenge, which would obviously contravene the finding of the Chamber that:

an incomplete challenge which needs to be supplemented in due course cannot be considered as having been "properly made within the terms of article 19 of the Statute and rule 58 of the Rules". In this regard, the Chamber finds of relevance the finding of the Appeals Chamber that a State has the duty to ensure that its admissibility challenge is sufficiently substantiated by evidence, as it has no right to expect to be allowed to present any additional evidence after the initial challenge.¹³

16. Of further relevance is the caveat, which the Chamber attached to the possibility of allowing an admissibility hearing, and final written submissions:

[a]considerable period of time has been expended since the filing the

¹⁰ ICC-01/11-01/11-150 at para. 8.

¹¹ ICC-01/11-01/11-207 at para. 14.

¹² ICC-01/11-01/11-207 at para. 12. "At this stage, the Chamber considers it appropriate to convene a hearing where Libya will be given a further opportunity to provide its reply to the Responses orally together with submissions of the other parties and participants to the admissibility proceedings".

¹³ ICC-01/11-01/11-269 at para.32.

response of the OPCD on 24 July 2012 in an effort to allow counsel for Libya to obtain instructions and file a reply to the Responses. Throughout this time Saif Al-Islam Gaddafi has remained in detention in Libya and the Chamber is conscious of the need to resolve the issue of the admissibility of the case against him without further delay.¹⁴

17. The Chamber made this pronouncement in September 2012; these concerns are even more apposite five months later.
18. The admissibility proceedings have continued for almost ten months, which is considerably longer than the amount of time, which has been accorded in any other case at the ICC.¹⁵ The final submissions of the parties were already delayed by the fact that the Government did not seek authorisation to submit its evidence on an *ex parte* basis, in advance of the 23 January 2013 deadline.
19. The Defence has repeatedly stressed the need to reach a timely decision concerning the appropriate forum for Mr. Gaddafi's trial, in advance of the commencement of the domestic trial itself.¹⁶ The impact of the commencement of domestic trial proceedings on the rights of Mr. Gaddafi before the ICC, and the possibility of executing an eventual surrender request, remain equally grave irrespective as to whether the domestic proceedings purportedly relate to the ICC case, or concern the events surrounding Mr. Gaddafi's meeting with the ICC delegation on 7 June 2012. As the Chamber is aware, the trial phase of the latter proceedings has already commenced, with Mr. Gaddafi's first appearance before the Criminal Court on 17 January 2013.
20. Rule 58 enjoins the Pre-Trial Chamber to organise the admissibility proceedings in such a way as to ensure an expeditious resolution of the challenge, in a manner, which is consistent with the rights of the defendant.¹⁷ In the current circumstances, the need to obtain both an expeditious resolution of the admissibility challenge, and legal certainty concerning which entity will ultimately exercise jurisdiction over Mr. Gaddafi's trial and his corollary rights, trumps any procedural utility that could exist in relation to receiving an additional reply from the Government of Libya.

¹⁴ ICC-01/11-01/11-207 at para. 10.

¹⁵ ICC-01/11-01/11-243-Red at para. 52.

¹⁶ See for example, ICC-01/11-01/11-243-Red at paras. 74-80; ICC-01/11-01/11-197 at paras. 31-33; ICC-01/11-01/11-201 at paras. 31-42.

¹⁷ ICC-01/11-01/11-243-Red at paras. 38-39, 50-51; ICC-01/04-01/07-2259 at para. 43.

Relief Sought

21. For the reasons set out above, the Defence for Mr. Saif Al-Islam Gaddafi respectfully requests the Honourable Pre-Trial Chamber to reject the request of the Libyan Government to file a reply to the responses of the OTP, OPCV and Defence concerning the Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi.



Xavier-Jean Keïta, Counsel for Mr. Saif Al-Islam Gaddafi

Dated this, 22nd Day of February 2013

At The Hague, The Netherlands