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

Date: 28 January 2013

PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernandez 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

Libyan Government's Observations regarding the case of Abdullah Al-Senussi

Source: The Government of Libya, represented by:
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Professor Philippe Sands QC
Professor Payam Akhavan
Ms Michelle Butler

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

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Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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I. INTRODUCTION

1. Libya makes this submission in accordance with the Pre-Trial Chamber's 23 January 2013 *Decision on the Defence for Abdullah Al-Senussi's 'Urgent Application pursuant to Regulation 35'* ("Decision")¹ in which the Court has requested observations on the way Libya intends to fulfil its obligations to cooperate with the Court in relation to the arrest and surrender of Mr Al-Senussi.
2. Libya recalls that the 1 May 2012 Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute ("Application")² expressed an intention to challenge the admissibility of the case against both Mr. Gaddafi and Mr. Al-Senussi. The Application submitted evidence of national proceedings specifically relating to Mr. Al-Senussi as well as Mr. Gaddafi. At Libya's request, primarily because Mr. Al-Senussi was not in the custody of Libya at that time, the Pre-Trial Chamber held that the two cases were to be treated separately for the purposes of admissibility.³ In view of Mr. Al-Senussi's extradition from Mauritania on 5 September 2012 and the significant progress of the investigation against him, Libya once again notifies the Pre-Trial Chamber of its challenge to the admissibility of the case against Mr. Al-Senussi, and informs the Court that it will submit further supplemental evidence in this regard as soon as practicable.

II. SUBMISSIONS

A. Submissions relating to the admissibility challenge and postponement of surrender

3. Libya recalls that its Application included both the case against Mr. Gaddafi and Mr. Al-Senussi.⁴ The Application emphasized that:

¹ ICC-01/11-01/11-257.

² ICC-01/11-01/11-130.

³ ICC-01/11-01/11-134

⁴ ICC-01/11-01/11-130, para. 1.

*The Libyan Government regards the trial of Mr Gaddafi and Mr Al-Senussi as a matter of the highest national importance, not only in bringing justice for the Libyan people but also in demonstrating that the Libyan justice system is capable of proper investigation and prosecution, and that it can conduct fair trials (that meet all applicable international standards).*⁵

4. The Application further clarified that unlike Mr. Gaddafi, Mr. Al-Senussi was not in the custody of Libya at that point in time:

*Similar investigations relating to both financial crimes and crimes against the person were commenced by the Military Prosecutor on 3 April 2012 into the activities of Mr Al-Senussi following a Libyan delegation to Mauritania on 20 March 2012.*⁶

In this regard, and notwithstanding the close relationship between the two cases, the Application included a specific section on the “progress of the investigation against Mr. Al-Senussi”.⁷ It indicated in particular that although “Mr. Al-Senussi remains outside Libya and is not currently subject to any control by or contact on behalf of the Libyan authorities ... the investigation of his involvement in alleged crimes is proceeding with due commitment.”⁸

5. With respect to postponement of the arrest warrant, Libya clarified that:

*... the Article 95 submission to suspend the Surrender Request only applied to Mr. Gaddafi since Mr. Al-Senussi was not in Libya’s custody. As a consequence, it is the Libyan Government’s principal submission that the proper scope of this admissibility challenge, relates only to the case against Mr Gaddafi.*⁹

⁵ Id., para. 11.

⁶ Id., para. 23; see also para. 25.

⁷ Id., paras. 50-52.

⁸ Id., para. 50.

⁹ Id., para. 73.

6. Libya argued in the alternative that if the term “case” within the meaning of Article 19 referred to the proceedings against both accused persons as a whole, that “the Government of Libya has provided sufficient evidence concerning the investigation and prosecution of both individuals and hereby challenges the admissibility of the case against each and both of these two persons.”¹⁰ In this regard, the Application included a Report by Prosecutor General regarding OPCD and Abdullah Al-Senussi as well as a Report by Military Prosecutor regarding Abu Selim and Abdullah Al-Senussi.¹¹
7. In its Decision of 4 May 2012, the Pre-Trial Chamber held that the two cases would be treated separately for the purposes of admissibility:

*... the Chamber has considered Libya’s submissions as to the scope of the Article 19 application and considers that it must be understood to only concern the case against Mr Gaddafi. Accordingly, the Chamber will not consider the admissibility of the case against Mr Al-Senussi in resolving the Article 19 application.*¹²

8. Accordingly, with Mr. Al-Senussi in custody, Libya hereby reiterates its intention to challenge the admissibility of the case concerning Mr. Al-Senussi pursuant to Articles 19(2)(b), (5), and (6) of the ICC Statute, and to make a supplemental submission containing further information critical to the admissibility challenge as soon as practicable. As set forth in the Application, the challenge will be made on the grounds that Libya is investigating Mr. Al-Senussi before its national judicial system with respect to the allegations of crimes against humanity (including but not limited to murders and acts of persecution committed in Benghazi from 15 February 2011 until at least 20 February 2011) as

¹⁰ Id., para. 74.

¹¹ Annex E & F respectively (confidential).

¹² ICC-01/11-01/11-134.

set forth in the Article 58 Decision¹³ falling within the scope of Article 7 of the Statute.

9. Libya submits that for the purposes of Article 95 of the Statute, the Application constitutes an admissibility challenge pursuant to Article 19, notwithstanding the need for further supplemental submissions to be lodged in the near future, and consequently, that the order for the surrender of Mr. Al-Senussi may be postponed pending a determination by the Court.
10. Libya submits further that even if the Application is not considered an admissibility challenge *stricto sensu* under Article 95, that the order for surrender should be postponed nonetheless as an “appropriate measure for the conduct of proceedings” within the purview of Rule 58(2). In view of Libya’s imminent supplemental submissions, there is no justification for the surrender of Mr. Al-Senussi, given the lengthy legal proceedings and security arrangements that it would entail, as well as the serious disruption of the on-going national investigations which are approaching the accusatory phase.
11. In order to be able to properly brief counsel (who were only instructed in the case on Wednesday 23rd January 2013) and in order to prepare and translate the necessary investigative materials in support of its Application under article 19(2)(b), Libya respectfully notifies the Pre-Trial Chamber of its intention to make its further submissions no later than 60 days from the filing of these Observations (i.e. by 29 March 2013). This period of time will allow for a comprehensive submission that sets forth Libya’s arguments in full in relation to the admissibility challenge in order to fully assist the Pre-Trial Chamber in the proper determination of this challenge.

¹³ ICC-01/11-01/11-12.

B. Submissions relating to proposed commencement date of trial and allegations of “summary execution”

12. As outlined in Libya’s further submissions on the case against Mr. Gaddafi filed on 23 January 2013,¹⁴ in view of the close relationship between the allegations against senior Gaddafi regime officials, it is presently proposed that Mr. Al-Senussi will be tried in a joint trial together with others, including Mr. Gaddafi.

13. The current schedule for the joint trial is that the case will be transferred to the Chambre d’Accusation in the next few weeks. It is a matter for the Chambre d’Accusation to determine how long it will need to carefully examine the case file in order to ensure that: (a) the investigation has been properly conducted; (b) the charges put forward by the prosecutor are adequately supported by evidence; and (c) all the necessary conditions are in place for the trial to proceed fairly (including the appointment of defence counsel). The best estimate of the Libyan Government is that the Chambre d’Accusation’s examination of the case is likely to take approximately three months. It is not possible for Mr. Al-Senussi’s trial to commence prior to the conclusion of the Chambre d’Accusation proceedings being concluded and a lawyer being appointed to represent him.

14. Although at the time of the Application there was an intention to prosecute Mr. Al-Senussi in a military trial, this no longer appears to be the case, although a final decision has yet to be made in this regard. In any event, there is no imminent military trial against Mr. Al-Senussi.

15. Given that the civilian trial of Mr. Al-Senussi is not estimated to start until the middle of May at the earliest, and given the complexity of the allegations against him, and the repeated assurances of Libya concerning a fair trial, there is simply no possibility of a “summary trial” let alone a “summary execution” taking place before the end of January 2013 as has been suggested by counsel.¹⁵ Libya

¹⁴ ICC-01/11-01/11-258.

¹⁵ ICC-01/11-01/11-256.

is surprised by this exceptionally grave allegation which is wholly unsubstantiated. In effect, counsel is asking the Chamber to believe that Mr. Al-Senussi will be tried and executed by the end of January (ie. within three days of this submission). It is plainly unhelpful to the Court, to the parties, and the proper determination of an admissibility challenge to make such sensational claims without a shred of evidence, and then to require an immediate response by Libya.

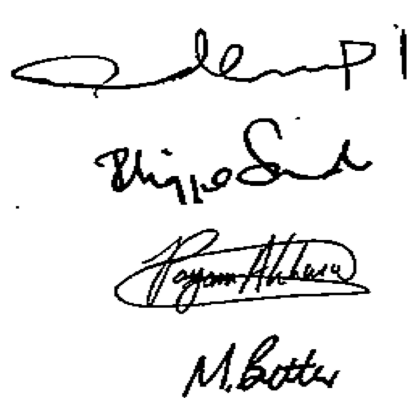
16. Similarly, counsel's allegations of "torture" from a supposedly "reliable" source are also completely unsupported by any evidence. Counsel cannot lightly make such grave accusations when it is unwilling to offer any proof to which Libya could respond. The only effect of such allegations is to try and cast doubt on Libya's good faith, whether before the Court or the media, in a manner unbecoming of these proceedings.

17. Finally, Libya also notes that counsel for Mr. Al-Senussi have additionally alleged that counsel have either not been properly instructed or have engaged in "serious professional misconduct" by not referring to the 17 January 2013 hearing in Mr. Gaddafi's national security case in the filing of 15 January 2013. For the avoidance of doubt, at the time of that filing, counsel was unaware of the proposed hearing to take place in Zintan on 17 January 2013. Counsel have since sought clarification on this issue and can confirm that the case relating to crimes against the person (which forms the basis of Libya's admissibility challenge) and the national security case against Mr. Gaddafi are completely separate trials which are being dealt with in entirely distinct national proceedings. Counsel were not informed of the Zintan hearing in advance as it was considered to be irrelevant to Libya's admissibility challenge before the ICC. Once again, such attacks are not helpful for the proper conduct of these proceedings.

III. CONCLUSION

18. The Libyan Government trusts that the information contained herein is of assistance to the Court.

Respectfully submitted:



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*Libyan ICC Coordinator and
Counsel on behalf of the Government of Libya*

Dated this 28th day of January 2013
At London, United Kingdom