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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

Response of the Libyan Government to the “Urgent Application on behalf of Abdullah Al-Senussi for Pre-Trial Chamber to order the Libyan Authorities to comply with their obligations and the orders of the ICC”

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

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I. INTRODUCTION

1. The Government of Libya hereby files its response to the “Urgent Application on behalf of Abdullah Al-Senussi for Pre-Trial Chamber I to order the Libyan Authorities to comply with their obligations and the orders of the ICC” (“Al-Senussi Application”).¹ This response is filed in accordance with the usual 21 day time limit for filing responses as ordered by the Pre-Trial Chamber in its Decision of 23 January 2013.²
2. Mr. Al-Senussi’s principal request is for the Chamber to refer Libya and Mauritania to the Security Council. This request is made after Counsel for Mr Al-Senussi had already written to the President of the Security Council (and copied this correspondence to the Permanent Representatives to the United Nations of all Members of the Security Council; the United Nations Assistant Secretary-General for Human Rights, His Excellency, Mr Ivan Simonovic; the High Commissioner for Human Rights, Her Excellency Ms Navi Pillay; and the President of the International Criminal Court, His Honour Judge Sang-Hyun Song) asking that the situation be placed on the Security Council’s agenda for urgent action.³
3. Alternatively, or in addition, Mr. Al-Senussi requests the Chamber to make a number of orders, some addressed to Libya, others to Mauritania. Mr. Al-Senussi requests that the Chamber order Libya (i) to transfer Mr. Al-Senussi to the custody of the ICC within 5 days;⁴ (ii) to cease within 5 days all actions and proceedings in respect of Mr. Al-Senussi’s case which could in any way impede his arrest and surrender to the ICC, including commencement of any national trial proceedings;⁵ and (iii) to facilitate within 5 days a secure and privileged visit to Mr. Al-Senussi by his counsel and family with all necessary immunities

¹ ICC-01/11-01/11-248.

² ICC-01/11-01/11-257, para. 13.

³ ICC-01/11-01/11-248, paras 4, 5, 25, 67.

⁴ ICC-01/11-01/11-248, para. 6, 25, 68, 69, referring to the Order of 10 December 2012.

⁵ ICC-01/11-01/11-248, para. 6, 25, 68, 69

and protections.⁶

4. Mr. Al-Senussi request that the Chamber order Mauritania to respond, within 5 days, explaining the circumstances surrounding its alleged breaches of international obligations.⁷ Mr Al-Senussi also requests that the Chamber make findings in respect of Mauritania's non-compliance.⁸
5. The basis for these requests is action allegedly taken by Libya and Mauritania, in breach of Security Council Resolution 1970⁹ (the obligation to co-operate with the ICC, the sanctions regime, and the prohibition upon transfer of Mr. Al-Senussi across international borders) and the International Covenant on Civil and Political Rights (ICCPR) (in particular, article 14).¹⁰
6. Mr. Al-Senussi argues that Libya's violations consist of the following:
 - i. Deliberate frustration of performance of Libya's international obligations, through imminent commencement of the trial of Mr. Al-Senussi and Mr. Gaddafi (within a month) in Libya;¹¹ and failure to transfer Mr. Al-Senussi to the ICC;¹²
 - ii. Provision of "aid and assistance" to Mauritania in transfer of Mr. Al-Senussi to Libya;¹³
 - iii. Violation of fair trial requirements (failure to provide Mr. Al-Senussi with access to a lawyer of his own choosing and to ensure that all persons are treated fairly and equally by the law and before the courts);¹⁴
 - iv. Failure to supply information to the Chamber in compliance with an

⁶ ICC-01/11-01/11-248, para. 6, 25, 68, 69

⁷ ICC-01/11-01/11-248, para. 68, 69

⁸ ICC-01/11-01/11-248, para. 29.

⁹ ICC-01/11-01/11-248, paras 3, 6, 16-18, 20, referring to Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah ALSENUSSI", ICC-01/11-12, 27 June 2011, p. 42; "Request to the Libyan Arab Jamahiriya for the arrest and surrender of Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI", ICC-01/11-01/11-6, 4 July 2011, p. 3-5;

¹⁰ ICC-01/11-01/11-248, paras 6(i)(d), 43-48.

¹¹ ICC-01/11-01/11-248, paras 2, 12, referring to official statement of 1 January 2013.

¹² ICC-01/11-01/11-248, paras 2, 6(i)(a), (e), 12, 14, 15.

¹³ ICC-01/11-01/11-248, paras 6(i)(d), 15.

¹⁴ ICC-01/11-01/11-248, para. 48.

order of the Chamber.¹⁵

7. As to the violations by Mauritania, Mr. Al-Senussi refers to Mauritania's failure to surrender Mr. Al-Senussi to the ICC upon capture;¹⁶ and its transfer of Mr. Al-Senussi to Libya.¹⁷
8. Mr. Al-Senussi argues that these violations entail the further obligations: performance of the international obligations concerned; cessation and non-repetition; and restoration of the situation that existed before violation.¹⁸
9. The Libyan Government observes that there has been a recent increase in filings in this case, no doubt due to the retention of new counsel for Mr Al-Senussi. Libya of course understands that counsel for Mr Al-Senussi will rightly want to explore all avenues of recourse for his client. However, it is hoped that in the future the Defence for Mr Al-Senussi will not file unfounded and repetitive applications before the Court containing serious allegations against the Libyan Government which are premised solely on inaccurate media reports. It is an unfortunate fact that inaccurate media reporting is frequent and inevitable and it is for this reason counsel are encouraged to properly substantiate all future allegations made to the Court, the Security Council, the UN Assistant Secretary-General for Human Rights and the UN High Commissioner for Human Rights.

II. SUBMISSIONS

A. *Legal basis for the relief sought by Mr Al-Senussi*

10. Mr Al-Senussi submits that the jurisdiction for the Court to grant all of his requests is based upon article 87(5) of the ICC Statute (together with articles 24, 25 and 103 of the United Nations Charter).¹⁹ Articles 24, 25 and 103 of the United Nations Charter do not deal in any way with the Court's jurisdiction to

¹⁵ ICC-01/11-01/11-248, para. 45.

¹⁶ ICC-01/11-01/11-248, para. 6(i)(b).

¹⁷ ICC-01/11-01/11-248, paras 6(i)(b), 37, 38.

¹⁸ ICC-01/11-01/11-248, para. 6(a).

¹⁹ ICC-01/11-01/11-248, para.1.

adjudicate upon Mr Al-Senussi's application, and are wholly irrelevant to this matter. Only Article 87(5) of the ICC Statute can be of any relevance in determining the Pre-Trial Chamber's power to grant the relief requested. Article 87(5) of the ICC Statute states as follows:

(a) The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.

(b) Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council. [Emphasis added]

11. Even if this article is applicable to the present situation (ie. assuming for a moment the existence of an ad hoc arrangement or agreement with the Court), pursuant to its terms, the measures sought (ie. referral to the Security Council) are available only where a state fails to comply with a request for assistance and even then the granting of a referral is a discretionary matter for the Court.

12. Although not referred to by Mr Al-Senussi, article 87(7) of the ICC Statute (which applies to all requests for assistance rather than merely those predicated on an ad hoc arrangement or agreement with the Court) is also of relevance to the determination of Mr Al-Senussi's request. That article stipulates:

Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council. [Emphasis added]

13. Article 87(7) makes clear that with respect to cooperation requests not made pursuant to an ad hoc arrangement or an agreement with the Court, any referral

to the Security Council is a purely discretionary matter for the Court and is predicated upon a prior finding by the Court that the State's failure to cooperate prevents the Court from exercising its functions and powers under the Statute.

14. It is Libya's submission that the correct provision for the Court to consider in ruling upon Mr Al-Senussi's request is article 87(7), not article 87(5) of the ICC Statute. This is because the request to Libya to arrest and surrender Mr Al-Senussi was predicated not on an ad hoc arrangement or an agreement with the Court, but rather on the terms of Security Council Resolution 1970 which "decided that the Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution".
15. Accordingly, before considering whether to grant Mr Al-Senussi's request to refer Libya's alleged non-compliance to the Security Council, the Pre-Trial Chamber is required first to rule that (a) Libya's alleged failure to cooperate prevents the court from exercising its functions and powers under the Statute; and (b) that it is appropriate in all the circumstances to exercise its discretionary power to report Libya to the Security Council.

B. Mr Al-Senussi's submissions concerning Mauritania

16. This response is filed on behalf of the Government of Libya. It would not be proper for the Libyan Government to make any submissions as to the alleged acts of Mauritania complained of by Mr Al-Senussi in his Application. Plainly, in the absence of submissions by Mauritania on such acts the Chamber cannot possibly make findings in respect of alleged violations by Mauritania of Security Council Resolution 1970 as sought by Mr Al-Senussi.²⁰
17. Even if Mr Al-Senussi's allegations regarding Mauritania were proven (a matter which would necessitate submissions by Mauritania, as well as scrutiny by the

²⁰ See, e.g., ICC-01/11-01/11-248, para. 29-35; 38, 39.

Pre-Trial Chamber of probative evidence tendered by Mr Al-Senussi, rather than mere assertions premised upon nothing more than two press articles),²¹ they do not entail violation *by Libya* of the Court's requests for assistance. If Mauritania had violated its international obligations, this would not in any event provide any basis for reporting Libya to the Security Council unless probative evidence was presented to the Chamber which established a failure, by Libya, to comply with the Court's requests for assistance.

C. *Mr Al-Senussi's submissions concerning Libya*

i. Libya has not failed to cooperate with the Court

18. Serious evidential issues apply to Mr. Al-Senussi's manifestly unsubstantiated allegations that Libya incited or provided "aid and assistance" to a violation of Resolution 1970 by Mauritania through the offer and payment of a sum of money in return for receipt of Mr. Al-Senussi.²² As outlined in Mr Al-Senussi's Application,²³ Libyan Government records establish that the payment of 250 million dinars to Mauritania which was approved by the Libyan General National Congress and recorded in a GNC Decision of 14 November 2012 (ie. more than 70 days following the extradition of Mr Al-Senussi to Libya from Mauritania), was made by way of bilateral aid "as a donation to the Mauritanian people". Indeed, the former Libyan Deputy Prime Minister, Mostafa Abu Shagur, who was in office at the time of Mr Al-Senussi's extradition, has confirmed that the payment made was consistent with Libya's many other investments in Mauritania and was made specifically in order to assist the Mauritanian economy.²⁴ In situations where even regional human rights courts have specific rules prohibiting individual complaints being based exclusively on

²¹ See ICC-01/11-01/11-248, footnote 26 and 28.

²² ICC-01/11-01/11-248, para. 37.

²³ ICC-01/11-01/11-248, paragraph 37, footnote 27.

²⁴ See 'Libya paid Mauritania \$200 million to extradite ex-spy chief: lawyer', Reuters, 15 January 2013, <http://www.reuters.com/article/2013/01/15/us-libya-icc-senussi-idUSBRE90E10620130115>.

media articles,²⁵ it is surprising that the Defence is requesting that the International Criminal Court adopt this low evidential threshold when making important decisions involving a potential referral of a State to the Security Council.

19. The Libyan Government also notes that even if Libya could somehow be shown to be responsible for a violation of international law arising from the extradition of Mr Al-Senussi to Libya from Mauritania (which is denied), the obligation under the law of state responsibility to restore the *status quo ante* could not in any event entail any order that Libya should immediately transfer Mr Al-Senussi to the ICC, as suggested in the Application.²⁶ Rather, it would entail no more than the return of Mr. Al-Senussi to Mauritania where it would then be for Mauritania to consider its international law obligations and decide afresh Mr Al-Senussi's place of detention.

20. For all of these reasons, Libya submits that there is no basis upon which a finding of a lack of cooperation by Libya can be made by the Pre-Trial Chamber. Further, it is manifestly unarguable that any lack of cooperation on the part of Libya is preventing the court from exercising its functions and powers under the Statute and that Libya should therefore be reported to the Security Council.

ii. Libya is in fact actively cooperating with the Court

21. As has been made clear in recent filings in Mr Al-Senussi's case the Libyan Government's ongoing cooperation with the Court is a matter of public record.

22. Contrary to this evidence of Libyan cooperation with the Court, the Defence complains, based on a 1 January 2013 media report of a press statement by Taha Bara (the spokesperson for the Libyan Prosecutor-General) of an imminent trial in Libya of Mr Al-Senussi and a statement by him that Libya is not bound to comply with the order to transfer Mr. Al-Senussi to the ICC. The Defence rely

²⁵ See eg. Article 54(6) of the African Charter on Human Rights.

²⁶ ICC-01/11-01/11-248, paras. 50-57.

upon this statement as evidence of defiance which “now demonstrates beyond doubt that Libya will not perform its obligations under international law unless it is expressly directed to do so by the Security Council”.²⁷ This submission is entirely without merit and should be rejected. The press statement patently does not demonstrate “beyond doubt” a refusal to comply with international obligations. The Libyan government does not dispute that it is bound by Security Council Resolution 1970.²⁸ Moreover, as outlined further below, Libya has demonstrated that it regards itself bound by this Resolution through its cooperation with the Court in both the Saif Al-Islam Gaddafi admissibility proceedings, as well as in the Abdullah Al-Senussi admissibility proceedings.

23. Clearly, even if the statement reported in the media were accurate, it could not of *itself* amount to a violation of the request for assistance. Erroneous statements of international law in public statements do not themselves amount to a substantive breach,²⁹ and nor does this statement evince any intention on the part of Libya to effect breaches of international legal obligations. Moreover, as has already been clearly explained in Libya’s 10 January 2013 submission to the Court in the case of Saif Al-Islam Gaddafi,³⁰ the news article referred to does not contain an accurate report of Libya’s position with respect to the commencement of the trial of either Saif Al-Islam Gaddafi or Abdullah Al-Senussi. Likewise, the press article does not accurately reflect the Libyan Government’s unequivocal recognition that it is bound by the terms of the surrender request due to the operation of Security Council Resolution 1970.

24. Other statements by the Defence that Libya has failed to comply with Court orders are also entirely incorrect.³¹ In compliance with the Court’s 10 December 2012 Decision,³² the Libyan Government filed governmental and medical reports on 14 January 2013 confirming Mr Al-Senussi’s arrival in Libya on 5 September

²⁷ ICC-01/11-01/11-248, para. 4.

²⁸ ICC-01/11-01/11-248, paras 21-24.

²⁹ See International Law Commission’s Articles on State Responsibility, article 1 & commentary, para. 1

³⁰ ICC-01/11-01/11-251.

³¹ See, e.g., ICC-01/11-01/11-248, para. 45.

³² ICC-01/11-01/11-241-Corr.

2012, his detention at the Al-Hadaba Detention Facility in Tripoli, and his good state of health.³³ Since that time, on 23 January 2013 the Libyan Government provided detailed information to the Court relating to the proposed joint trial of Saif Al-Islam Gaddafi and Abdullah Al-Senussi and others, confirming that such a trial is unlikely to commence until the middle of May at the earliest.³⁴ Similar submissions confirming that a trial of Abdullah Al-Senussi is not imminent were set out in a filing made in compliance with the Court's 23 January 2013 Decision³⁵ on 28 January 2013.³⁶

25. Libya's 28 January 2013 filing in fact clarified Libya's intention to continue to comply with its obligations to the Court in general, and the Court's request for arrest and surrender of Mr Al-Senussi in particular. With respect to the request for surrender, Libya confirmed that it was seeking postponement of the surrender request pursuant to article 95 of the Statute on the basis that (a) an intention to challenge admissibility with respect to the case of Abdullah Al-Senussi was notified to the Court on 1 May 2012; and (b) a supplemental submission containing further information critical to this admissibility challenge will be filed with the Court by 29 March 2013.

26. Libya also submitted in this filing that even if Libya's 1 May 2012 Application were not considered an admissibility challenge *stricto sensu* under Article 95, 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 can be no justification for the immediate 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.

³³ These materials were translated into English and distributed by the Registrar on 16 January 2013 in filing ICC-01/11-01/11-252-Conf.

³⁴ ICC-01/11-01/11-258.

³⁵ ICC-01/11-01/11-257.

³⁶ ICC-01/11-01/11-260.

27. Indeed, Libya's request to postpone the surrender of Mr Al-Senussi under article 95 is entirely consistent with the notion of complementarity (the very basis upon which cooperation with the Court as a whole was envisaged by the drafters of the ICC Statute) because it would not be efficient nor beneficial to the State or the Court to require compliance with a request where admissibility or jurisdiction were an issue and the matter had yet to be determined by the Court. The Court itself has recognized this sentiment and in its Decision of 1 June 2012 relating to the postponement of the order to surrender Saif Al-Islam Gaddafi, it stated that:

36. In this respect, the Chamber considers that the Court must fulfil its mandate in accordance with its legal framework and that the complementarity principle is a central aspect thereof and a key feature of the institution. The suspension of the investigation and the corresponding postponement of the cooperation requests is one major consequence of this principle. It would be untenable for the Court to insist on compliance with a request for arrest and surrender, even at the risk of hampering the national proceedings, while its own investigation is suspended.

37. In light of the above, the Chamber concludes that article 95 of the Statute is applicable to requests for arrest and surrender, pending determination of an admissibility challenge brought before the Court. Since it is the Chamber that has issued the warrant of arrest and the related request for surrender to the Court, the Chamber has the authority to decide that a state may postpone the execution of a surrender request to the extent that such a challenge has been properly made pursuant to article 19(2) of the Statute and rule 58(1) of the Rules.

28. Given this evidence of full and ongoing cooperation by Libya with the Court's requests, it would not be appropriate for the Pre-Trial Chamber to make a finding that Libya's lack of cooperation is preventing the court from exercising its functions and powers under the Statute. The fact that Libya has not yet transferred Mr. Al-Senussi to the ICC to date is not explained by a desire to

frustrate the possibility of fulfilment by Libya of its legal obligations as alleged by the Defence. It is explained, conversely, by the desire to fulfil the aims of the Rome Statute and its complementarity-based jurisdiction: that of genuine prosecution at the domestic level. Evidence of pursuit of domestic prosecution – in conjunction with cooperation with the Court– cannot rightly be regarded as a proper basis for reporting a State to the Security Council for non-compliance.

iii. Future submissions on Libya's extant admissibility challenge provide the proper forum for Mr. Al-Senussi's human rights arguments

29. The supplemental submissions to be filed on 29 March 2013 dealing with Libya's admissibility challenge with respect to Abdullah Al-Senussi (and corollative response by the Defence to the same) are the most appropriate forum in which to deal with the other submissions made in the Application dealing with matters of due process. The question of ensuring compliance with Libya's international obligations in general (for example, its compliance with certain provisions of the ICCPR) is not the function of the ICC. Article 87(5) and (7) specifically concern compliance with requests by the Court for assistance from a state.
30. To the extent that issues of due process impact upon the assessment of whether a burgeoning domestic criminal prosecution is "genuine", such arguments are properly to be addressed to the issue of admissibility, not compliance with requests. In this regard, Mr. Al-Senussi's submissions amount to an effort to make such arguments outside of the context of an admissibility challenge, thereby seeking to preclude the Libyan government from being properly heard on admissibility.
31. Mr. Al-Senussi asserts that Libya has breached the requirement, in article 14(3)(b) of the ICCPR to provide Mr. Al-Senussi with access to a lawyer of his own choosing. The Libyan government does not seek to prevent a secure and privileged visit to Mr. Al-Senussi by his counsel and is actively now considering

terms of an ICC protocol devised for this purpose by the Registrar.

32. Mr. Al-Senussi also asserts that Libyan criminal process also violates human rights law by not intending to ensure that all persons are treated fairly and equally by the law and before its courts.³⁷ The basis of Mr. Al-Senussi's assertion, in this regard, is Laws 35 and 38 of May 2012, which were passed by the NTC, and which provide for amnesty in certain situations, as regards otherwise possible prosecutions associated with the revolution. Such measures are clearly not indicative of a lack of willingness to conduct a genuine trial, or of a violation of international human rights law. Amnesty laws are an accepted part of the difficult processes of political transition. The Supreme Court of Spain, for example, specifically rejected the argument that such laws were incompatible with the European Convention on Human Rights.³⁸ In addition, Laws No 35 and 38 will have no impact on the trial of Abdullah Al-Senussi and are therefore irrelevant to the ICC's admissibility proceedings in this case.

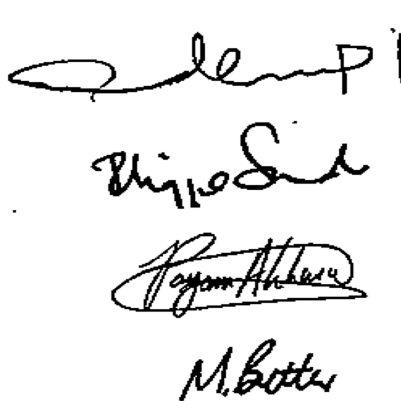
III. CONCLUSION

33. For these reasons, the Libyan Government respectfully requests the Chamber to reject Mr. Al-Senussi's application.

³⁷ ICC-01/11-01/11-248, para. 48.

³⁸ *Garzon* case, Supreme Court of Spain, Criminal Division, Judgment, Case No.: 79/2012, 9 February 2012.

Respectfully submitted:



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Dated this 1st day of February 2013

At London, United Kingdom