

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 10 April 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

Response of the Libyan Government to the “Renewed Application on behalf of Mr. Abdullah Al-Senussi to Refer Libya and Mauritania to the UN Security Council with Public Annex 1 and Confidential and Ex Parte (Registry only) Annexes 2 and 3”

Source: The Government of Libya in the case of Abdullah Al-Senussi represented by:
Professor Ahmed El-Ghani
Professor James Crawford SC
Mr Wayne Jordash
Ms Michelle Butler

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

The Office of the Prosecutor

Ms Fatou Bensouda

Counsel for the Defence

Counsel for Abdullah Al-Senussi:

Mr Ben Emmerson QC

Mr Rodney Dixon

Ms Amal Alamuddin

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented

Applicants

(Participation/Reparation)

The Office of Public Counsel for Victims

Ms Paolina Massidda

Ms Sarah Pellet

Mr Mohamed Abdou

The Office of Public Counsel for the Defence

Counsel for Saif Al-Islam Gaddafi:

Mr Xavier-Jean Keita

Ms Melinda Taylor

State's Representatives (in the case of Abdullah Al-Senussi)

Professor Ahmed El-Ghani

Professor James Crawford SC

Mr Wayne Jordash

Ms Michelle Butler

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Counsel Support Section

Deputy Registrar

Mr Didier Daniel Preira

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I. INTRODUCTION

1. The Government of Libya files this response to the “Renewed Application on behalf of Mr. Abdullah Al-Senussi to Refer Libya and Mauritania to the UN Security Council pursuant to Article 87 of the ICC Statute, the ICC’s jurisprudence, UN Security Council Resolution 1970, and Chapter VII and Articles 24, 25, and 103 of the UN Charter” filed on 19 March 2013 (“the Renewed Application”).¹
2. The Defence originally applied for Libya and Mauritania to be referred to the Security Council in its urgent Application of 9 January 2013, in which it argued, *inter alia*, that “intervention is now the only means of securing compliance by Libya with its international obligations”.² Prior to this application, Counsel for Mr. Al-Senussi, on the basis of the “exceptional and urgent circumstances of this case” and before it became “irretrievable”, informed 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 this situation be placed on the Security Council’s agenda for urgent action.³
3. In the renewed application, Defence for Al-Senussi asserts that “Libya should be reported without any further delay given that Libya has repeatedly failed to comply with the ICC’s orders and requests since September 2012 and given the grave violations of Mr. Al-Senussi’s human rights that continue while he is

¹ Renewed Application on behalf of Mr. Abdullah Al-Senussi to Refer Libya and Mauritania to the UN Security Council with Public Annex 1 and Confidential and Ex Parte (Registry only) Annexes 2 and 3 (“Renewed Application”), ICC-01/11-01/11-304, 19 March 2013.

² 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, ICC-01/11-01/11-248, 9 January 2013 (hereinafter Defence Urgent Application of 9 January 2013”), para. 4.

³ Ibid, para. 2.

detention”.⁴ The application repeats the following complaints:

- (a) That Libya had “failed to make any attempt to transfer Al-Senussi to the ICC and continues to detain him in Libya in violation of Security Council Resolution 1970 and the orders and requests of the ICC ... and has not taken any other action to arrange his surrender”;⁵
 - (b) That Libya has acted in breach of its international obligations by “assisting in the unlawful rendition of Mr. Al-Senussi from Mauritania to Libya in September 2012”;⁶
 - (c) That Libya has failed to make arrangements “for a privileged legal visit by appointed Defence Counsel”;⁷
4. The Government incorporates into the following response the arguments advanced in its response to the Defence Urgent Application.⁸ Libya strenuously denies any wrongdoing or non-compliance with its international law obligations, including any violation of Mr. Al-Senussi’s human rights. The Government denies any allegation that it is engaged in “tactics of delay, obfuscation and prevarication” or “consistent attempts to mislead the Chamber and the Registry as to its true intentions”.⁹ As the following response illustrates, this regrettable hyperbole (alongside the claim of “grave violations of ... human rights”) ought not to have found their way into a filing without a cogent evidential basis. The Government of Libya respectfully requests that this renewed application be dismissed.

⁴ Renewed Application, Para. 47.

⁵ Ibid, para. 4.

⁶ Ibid, para. 6.

⁷ Ibid, para. 5.

⁸ 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”, ICC-01/11-01/11-264, 1 February 2013 (hereinafter “Government Response of 9 January 2013”).

⁹ Defence Urgent Application of 9 January 2013, para. 8.

II. SUBMISSIONS

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

5. As Libya has argued previously, before considering whether to grant Mr Al-Senussi's request to refer Libya's alleged compliance to the Security Council, the Pre-Trial Chamber is required first to determine 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.¹⁰ The Defence accepts that it must in essence satisfy these threshold criteria.¹¹

B. Alleged grounds for referral of Libya to the Security Council

(1) Alleged Non-compliance with order for immediate surrender

6. The Defence has selectively quoted from the Pre-Trial Chamber's recent rulings in order to advance its claim that the Chamber had previously found "that Libya has failed to fulfil its obligations to the Court".¹² This is not correct. Even though the Chamber has noted some delay, the focus of judicial pronouncement has been on clarifying Libya's obligations and ensuring that Libya understands and explains how it intends to fulfil them.¹³ As discussed by the Defence at paragraph 2 of the Renewed Application, the Chamber concluded in its 6 February 2013 Decision that "Libya remains under obligation to comply with the Surrender Request, and, pending this fulfilment, is also under the corollary obligation not to put in place any action which would frustrate or otherwise

¹⁰ Government Response of 9 January 2013, para. 10 – 15.

¹¹ The Renewed Application, para. 15, citing Prosecutor v. Harun and Kushayb, Decision informing the United Nations Security Council about the lack of cooperation by the Republic of the Sudan, ICC-02/05-01/07-57, 25 May 2010.

¹² The Renewed Application, para. 19.

¹³ Example, Decision requesting Libya to provide observations concerning the Court's request for arrest and surrender of Abdullah Al-Senussi, ICC-01/11-01/11-254, 18 January 2013, p. 6.

hinder or delay the possibility of compliance with its obligations *vis-à-vis* the Court, including with its duty to surrender Mr Al-Senussi to the Court".¹⁴

7. The Government has consistently accepted these obligations and strenuously denies that it has put in place any action that would frustrate or otherwise hinder or delay the possibility of compliance with its obligations to the Court. As accepted by the Defence (prior to its response to Libya's Admissibility Challenge filed on 2 April 2013 ("the Admissibility Challenge"¹⁵)), the Government acknowledges that the "Libyan authorities continue to detain Mr. Al-Senussi, and are actively preparing to commence his trial".¹⁶ However, these preparations are not, as alleged by the Defence, "action which could hinder or delay his immediate transfer to the ICC".¹⁷ On the contrary, this is action consistent with the Government's challenge to the admissibility of the case, as well its broader transitional justice and rule of law obligations. It is submitted that any delay occasioned by the fulfilment of any obligation has not undermined the administration of justice, let alone, as asserted, prevented "the Court from executing the task entrusted to it by the Security Council".¹⁸
8. Moreover, having filed the Admissibility Challenge, the Government of Libya now exercises its right pursuant to article 95 of the Statute, for the postponement of the execution of the Court's request for the surrender of Abdullah Al-Senussi pending the determination of this admissibility challenge by the Court.¹⁹

¹⁴ Decision on the "Urgent Application on behalf of Abdullah Al-Senussi for Pre-Trial Chamber to order the Libyan Authorities to comply with their obligations to and the orders of the ICC", ICC-01/11-01/11-269, 6 February 2013, para. 36.

¹⁵ Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11-307, 2 April 2013.

¹⁶ The Renewed Application, para. 4.

¹⁷ Ibid, para. 4.

¹⁸ The Renewed Application, para. 15, citing Prosecutor v. Harun and Kushayb, Decision informing the United Nations Security Council about the lack of cooperation by the Republic of the Sudan, ICC-02/05-01/07-57, 25 May 2010.

¹⁹ Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11-307, 2 April 2013, at para 5.

(2) Alleged non-compliance with prohibition on inciting, aiding or assisting unlawful rendition

a. Mr Al-Senussi's submissions concerning Mauritania

9. The 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 Renewed Application. The Government refers the Chamber to its submissions in its response to the Defence Urgent Application of 9 January 2013.²⁰

b. Mr Al-Senussi's submissions concerning Libya

10. The Defence repeats the same allegations contained in the Defence Urgent Application of 9 January 2013. In that Application, the Defence requested the referral of Libya to the Security Council, on the basis of the claim, *inter alia*, that there were "strong grounds to submit that Mr. Al-Senussi was transferred to Libya extra-judicially as a rendition" and that "[t]he Chamber should consider, and having heard from Mauritania, rule upon the precise circumstances of Mr. Al-Senussi's transfer to Libya as it has a direct bearing on Libya's failure to surrender him to the ICC".²¹ On 1 February 2013, the Government responded to these allegations, denying any wrongdoing, noting the lawful extradition of Al-Senussi, and observing that the Defence allegations were premised on two newspaper articles.²² On the 6 February 2013, the Chamber ruled that "[i]n relation to these requests, the Chamber will determine in due course what actions may be required to ensure States' compliance with their obligations *vis-à-vis* the Court regarding the arrest and surrender of Mr Al-Senussi".

²⁰ See para. 16 – 17.

²¹ Defence Urgent Application of 9 January 2013, para. 38.

²² Government Response of 9 January 2013, para. 18 – 20.

11. Accordingly, the Court has not ruled in favour of the Defence proposal for a separate consideration of “the precise circumstances of Mr. Al-Senussi’s transfer to Libya” or outlined any steps that Libya must take with regard to this issue. The Defence demands for information (e.g., that Libya has “not explained how its involvement in securing his transfer... is legally justified; that “no evidence was submitted to substantiate this claim [that the money paid was a donation to the Mauritanian people, consistent with previous payments]” or that “Libya has provided no evidence or explanation for what occurred [with regard to Al-Mahmoudi]”),²³ even if accompanied by extravagant claims of wrongdoing, do not give rise to obligations. The Defence for Mr Al-Senussi conflates Libya’s duties to the Court with its own unsubstantiated requests for information.
12. Libya has fully complied with the *Chamber’s* requests for information, *inter alia*, the 10 December 2012 request to: (i) confirm the extradition of Mr Al-Senussi from Mauritania to Libya; and (ii) provide the name of the detention centre in which Mr Al-Senussi was being held, as well as information about his state of health, by Tuesday, 15 January 2013.²⁴ On 13 January 2013, the Government of Libya filed governmental and medical reports confirming Abdullah Al-Senussi’s arrival in Libya on 5 September 2012, his good state of health, and his detention at the Al-Hadba Detention Facility in Tripoli.²⁵ The Government further informed the Chamber that the investigation into the national case against Abdullah Al-Senussi was approaching completion.²⁶
13. Additionally, on 18 January 2013, the Court requested that the Libyan authorities provide “observations, no later than 1 February 2013, on the way

²³ The Renewed Application, para. 31 and 32.

²⁴ Corrigendum to the Order in relation to the request for arrest and surrender of Abdullah Al-Senussi, ICC-01/11-01/11-241-Corr, 10 December 2012, p. 5.

²⁵ These materials were submitted by the Government to the ICC Registry on 13 January 2013. They were subsequently entered into the court record by the Registry: Report of the Registry on the execution of the “Order in relation to the request for arrest and surrender of Abdullah Al-Senussi”, ICC-01/11-01/11-252, 15 January 2013; referred to in “Observations by Libya in response to the OPCD Notification of 8 January 2013”, ICC-01/11-01/11-251, 15 January 2013, at para 6.

²⁶ “Observations by Libya in response to the OPCD Notification of 8 January 2013”, ICC-01/11-01/11-251, 15 January 2013, at para 4.

Libya intends to fulfil its obligations to cooperate with the Court in relation to the arrest and surrender of Mr. Al-Senussi, and especially its duty to comply with the Surrender Request".²⁷ Following an application by the Defence, the Chamber shortened the time limit for the provision of observations to 28 January 2013.²⁸

14. On 23 January 2013, within submissions relating to the admissibility of the case against Saif Al-Islam Gaddafi,²⁹ Libya provided detailed information to the Chamber relating to the proposed joint trial of Saif Al-Islam Gaddafi and Abdullah Al-Senussi and others, including a timeline for those proceedings.³⁰
15. On 28 January 2013, the Government of Libya filed the "Libyan Government's Observations regarding the case of Abdullah Al-Senussi".³¹ This filing 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 Abdullah Al-Senussi in particular. The Government confirmed that a military trial of Abdullah Al-Senussi was not imminent,³² and any civilian trial was not estimated to begin until the middle of May at the earliest.³³
16. Aside from complying with requests for information, the Government has been conscientious in cooperating with the court and its organs, including the Prosecution. Only recently, the Prosecutor, in addressing the Security Council, noted, "the commitment of the Libyan authorities to respect the judicial process" and thanked "the Government of Libya for its commitment to working with the

²⁷ Decision requesting Libya to provide observations concerning the Court's request for arrest and surrender of Abdullah Al-Senussi, ICC-01/11-01/11-254, 18 January 2013.).

²⁸ Decision on the Defence for Abdullah Senussi's "Urgent Application pursuant to Regulation 35", ICC-01/11-01/11-257, 23 January 2013.

²⁹ Libyan Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi, ICC-01/11-01/11-258-Red2, 23 January 2013 ["Submission on Admissibility 23 January 2013"].

³⁰ Submission on Admissibility 23 January 2013, paras 59-60.

³¹ Libyan Government's Observations regarding the case of Abdullah Al-Senussi, ICC-01/11-01/11-260, 28 January 2013. ["Libyan Government's Observations 28 January 2013"].

³² Libyan Government's Observations 28 January 2013, para 14.

³³ Libyan Government's Observations 28 January 2013, para 15.

ICC and for its active engagement with the judicial process”.³⁴

17. Consistent with this view, the Government has taken far-reaching and exceptional measures to ensure that the Chamber has a comprehensive insight into the ongoing domestic proceedings to ensure a just determination of the Admissibility Challenge. This cooperation has included, *inter alia*, assisting the Prosecution with their own investigations in early 2011;³⁵ authorizing the provision of samples of evidence to the Court (despite Article 59 of Libya’s Criminal Procedure Code);³⁶ appointing a new Prosecutor-General with a mandate from the General National Congress;³⁷ and generally cooperating with the international community, including all UN agencies, to ensure accountability for all crimes, including those allegedly committed by Mr. Al-Senussi.³⁸

18. Accordingly, even if Libya could be shown to be responsible for a violation of international law as a result of the extradition of Mr. Al-Senussi as alleged (which is denied), it is submitted that there is no basis upon which the Pre-Trial Chamber can make a finding of a lack of cooperation by Libya.

19. Further, even if shown, it is doubtful that the alleged violation has any immediate (or more than marginal) relevance to the issues extant. Indeed, the Defence appears to impliedly accept this position in their concluding remarks in the Renewed Application.³⁹ Despite detailed reiteration of previous (inflammatory) allegations based on media reports, the Defence predicates its final request on the lack of surrender and alleged failure to provide access to Counsel – not on any alleged wrongdoing on the part of Mauritania or Libya with regard to the extradition. The allegations made early within the body of the Motion therefore appear designed to prejudice the proceedings or, at best,

³⁴ Admissibility Challenge, Para. 55, citing, “ICC Prosecutor Statement to the United Nations Security Council on the situation in the Libya Arab Jamahiriya, pursuant to UNSCR 1970 (2011)”, 07 November 2012: See also: Part III: Factual Submissions.

³⁵ Admissibility Challenge, Para. 196.

³⁶ Ibid, Para. 126.

³⁷ Ibid, Para. 138.

³⁸ Ibid, Part III: Factual Submissions, Part G: Capacity Building and International Assistance.

³⁹ Renewed Application, para. 41 – 47.

are tantamount to a distracting, fishing exercise.

(3) Alleged Non-compliance with order to arrange a privileged legal visit

20. Libya denies that it has failed to comply with the Chamber's Order of 6 February 2013 to facilitate a privileged legal visit of the Defence to meet with Mr. Al-Senussi in Libya.⁴⁰ In order to respond fully to the Defence allegations, the Government seeks the lifting of the *ex parte* status of Annexes 2 and 3 of the Defence Renewed Application. As indicated in the Renewed Application at paragraphs 36, the content of these Annexes appear to include various assertions concerning the alleged "emphatic" failure of Libya to take "any concrete action to ensure that the legal visit is arranged".⁴¹ It is submitted that Libya should be provided with a meaningful opportunity to respond and contest these claims.
21. Contrary to the Defence allegations in paragraph 37 and 38 of its Renewed Application, Libya has not attempted "to create the impression that Libya was at the material time (over six full weeks) involved in active and on-going discussions with the Registry to make the necessary arrangements for a privileged legal visit".⁴² On the contrary, Libya has acted with due expedition to ensure a privileged legal visit as soon as practicable.
22. On 21 February 2013, the Registry provided Libya with an English translation of the (draft) Memorandum of Understanding for Libya to consider and, if appropriate, agree to for the purpose of facilitating the visit. Upon receipt, Libya consulted with representatives of the Ministry of Justice and its external legal team. The draft, with appropriate amendments, now awaits approval by the new Prosecutor-General. As noted at paragraph 138 of the Admissibility Challenge, Mr Abdul Qader Juma Radwan was appointed by the General National Congress on 20 March 2013, and only commenced work in his new

⁴⁰ The Renewed Application, para. 35.

⁴¹ Ibid, para. 36.

⁴² Ibid, para. 38.

post on 27 March 2013.⁴³ As outlined at paragraph 179 of the Admissibility Challenge, this important change, designed to advance domestic prosecutions in Libya, has, in the short term, occasioned some delay with respect to finalising the Memorandum. The new Prosecutor-General will now address this issue as a matter of priority.

C. No basis for Libya to be referred to the Security Council

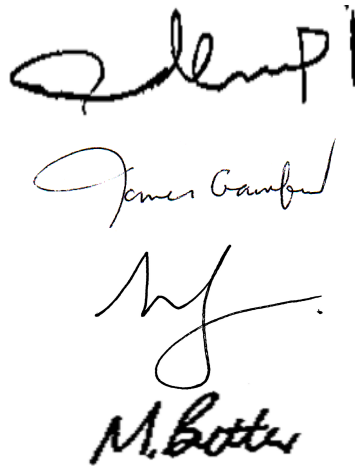
23. As argued above, Libya has not failed to cooperate with the Chamber with regard to any issue arising from Mr. Al-Senussi's extradition, or by failing to surrender Mr. Al-Senussi to the ICC or by failing to provide Mr. Al-Senussi with access to his Counsel. Accordingly, the proposition that Libya has failed to cooperate with the court and that this has prevented the court from exercising its functions or otherwise executing the task entrusted to it by the Security Council is manifestly unarguable.

III. CONCLUSION

24. For these reasons, the Government of Libya respectfully requests the Chamber to dismiss the Renewed Application to refer Libya to the UN Security Council.

⁴³ Notification by Libyan Government supplemental to its consolidated reply to the responses of the Prosecution, OPCD, and OPCV to its further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi, ICC-01/11-01/11-306, 28 March 2013.

Respectfully submitted:



The image shows four handwritten signatures stacked vertically. The first signature is in cursive and appears to be 'Ahmed El-Ghani'. The second signature is 'James Crawford'. The third signature is 'Wayne Jordash'. The fourth signature is 'M. Butler'.

Professor Ahmed El-Ghani
Professor James Crawford SC
Mr Wayne Jordash
Ms Michelle Butler

*Libyan ICC Coordinator and
Counsel on behalf of the Government of Libya
in the case of Abdullah Al-Senussi*

Dated this 10th day of April 2013
At London, United Kingdom