



Original: English

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

Date: 6 May 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 application for leave to reply to the "Response on behalf of Abdullah Al-Senussi to the Submission of the Government of Libya for Postponement of the Surrender Request for Mr. Al-Senussi"

Source: The Government of Libya in the case of Mr Abdullah Al-Senussi represented by:
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 Saif Al-Islam Gaddafi

Mr. John R.W.D Jones QC

Counsel for Abdullah Al-Senussi:

Mr. Ben Emmerson QC

Mr. Rodney Dixon

Ms. Amal Alamuddin

Mr. Anthony Kelly

Professor William Schabas

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

State's Representatives

Professor Ahmed El-Ghani

Professor James Crawford SC

Mr. Wayne Jordash

Ms. Michelle Butler

Amicus Curiae

REGISTRY

Registrar

Mr. Herman von Hebel

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 application for leave to reply to the “Response on behalf of Abdullah Al-Senussi to the Submission of the Government of Libya for Postponement of the Surrender Request for Mr. Al-Senussi”¹ (“the Response”)

II. APPLICABLE LAW

2. Pursuant to Regulation 24(5) of the Regulations of the Court “participants may only reply to a response with the leave of the Chamber”.² Under Regulation 34(c), the usual time limit for the filing of a reply (subject to the Court’s leave) is within 10 days of notification of the response. However, under Regulation 29 and Rule 101 of the Rules of Procedure and Evidence, the Chamber has discretion to make orders in relation to time limits which it must exercise having “regard to the need to facilitate fair and expeditious proceedings” (Rule 101) and as “necessary in the interests of justice” (Regulation 29).

III. SUBMISSIONS

3. Respectfully, whilst this request entails a slight extension to the usual deadline under Regulation 34(c), it is justified by recent and ongoing factual developments in the proceedings. Moreover, in the event that leave is granted to Reply, the Libyan Government, in the interests of expedition, intends to reply to the issues raised by the Response within seven days. Bearing in mind the importance of the issue and the assistance that might be derived from the Libyan Government’s full engagement on the issue, it is submitted, for the reasons below, that the Libyan Government ought to be granted an opportunity to reply within seven days.

¹ ICC-01/11-01/11-319.

² *Prosecutor v Lubanga*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Decision sur la demande de mise en liberte proviso ire de Thomas Lubanga Dyilo”, ICC-01/04-01/06-824, 13 February 2007, para. 68.

4. Before addressing the particular arguments raised by the defence for Mr. Al-Senussi, it should be noted that its filing is a 'Response' to a single paragraph from an admissibility challenge which is 206 paragraphs long and is accompanied by 30 annexes (taking up all but two pages of the entirety of the 100 page allowance for admissibility challenges). In this context, a reply is required to ensure that the Libyan Government has an adequate opportunity to make the Chamber aware of its position in relation to the arguments in the Response.
5. The Response raises, in summary form, a number of issues concerning the proper interpretation of article 95 and its application to postponement of a surrender request in view of an admissibility challenge. Mr. Al-Senussi advances, *inter alia*, the following arguments:
 - a. No Article 95 submission may be made because the admissibility challenge was not filed sufficiently promptly;³
 - b. Application of Article 95 is not an automatic right which follows from the filing of an admissibility challenge;⁴
 - c. Libya has not complied with various international law obligations, including, among others, allowing a privileged visit by Defence counsel to Mr. Al-Senussi;⁵
 - d. There is no support in the ICC regime for 'positive complementarity';⁶ and
 - e. Article 95 does not provide a basis for postponing surrender.⁷

³ Response, para. 35.

⁴ Response, paras 3(a), 45-47.

⁵ Response, paras 3(a), 37-44.

⁶ Response, para. 56.

⁷ Response, paras 59, 60. As Mr. Al-Senussi concedes, this argument has already been raised before, and dismissed by, the Chamber. It will not, therefore, be considered in this Reply.

6. The Response raises issues concerning the admissibility challenge in respect of the *Al-Senussi* case, and the application of Article 95, which are either incorrect or are raised for the first time. Several of these matters are also of relevance to the admissibility challenge in respect of the *Gaddafi* case. They necessitate a reply from Libya in order to ensure that the Chamber has all the relevant information and submissions before it in respect of Libya's admissibility challenges. The need to correct inaccuracies or respond to new and distinct issues of law and fact raised in the participant submissions prior to a decision on the admissibility of the case constitutes good cause for the granting of leave to reply.⁸
7. In the event that leave is granted to reply, Libya would not use any reply to repeat arguments already made in its previous submissions but rather would confine its submissions to addressing only matters raised by the Response.
8. Examples of submissions to which a reply is warranted include new and distinct issues of law and fact relating to the following:
 - a. **The assertion that the Libyan Government is seeking to inhibit privileged access by defence counsel to Mr. Al-Senussi.** Not only is this factually inaccurate, its legal relevance is mischaracterised in the Al-Senussi Response. Further, recent factual developments, that demonstrate without doubt that this is incorrect, justify submissions in reply from the Libyan Government;
 - b. **The assertion that 'positive complementarity' holds no place in the ICC legal regime.** This erroneous argument is of such profound importance

⁸ *Prosecutor v. Bemba*, Decision on the Defence's Request for Leave to Reply on the Motion for Provisional Release dated 24 November 2008, 27 November 2008, ICC-01/05-01/08-294; *Prosecutor v. Mbarushimana* Decision on the Prosecution's request for leave to reply to the "Defence Response to Prosecution's Request for the Review of Potentially Privileged Material" 24 February 2011.

to admissibility proceedings to alone justify a reply from the Libyan Government;

- c. **The level of discretion involved in the application by the Chamber of Article 95, given the submission of an admissibility challenge.** This goes to the heart of the Libyan Government's sovereign rights under the ICC Statute, and as a matter of fairness, it is vital that Libya be permitted to respond to the arguments in the Response on this topic.

9. Therefore, it is anticipated that a Reply by the Libyan Government will assist the Court's deliberations concerning Article 95. In the *Gaddafi* proceedings, the Pre-Trial Chamber upheld the appropriateness of authorising Libya to file a reply to responses addressing admissibility issues, due to Libya's status as the "triggering force and main actor in [admissibility] proceedings".⁹

10. The Libyan Government makes this request bearing in mind the Chamber's duties to balance the competing interests at stake – namely the need to ensure that the proceedings are fair in the sense that, *inter alia*, the parties enjoy the opportunity to respond to other parties' submissions (and the Chamber is assisted by having all the relevant information and arguments before it), and that the proceedings are expeditious and avoid unnecessary delays. A Chamber "must ensure that proceedings are fair in the sense that, *inter alia*, the Government lodging the challenge enjoys the opportunity to respond to the parties' and participants' observations", provided the proceedings remain "equally expeditious in order to avoid unnecessary delays of the entire proceedings".¹⁰

⁹ ICC-01/11-01/11-191, para. 8.

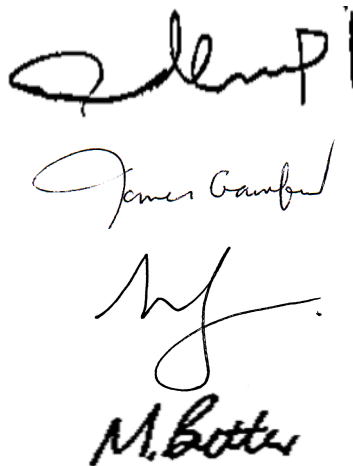
¹⁰ *Prosecutor v Ruto et al*, "Decision under Regulation 24(5) of the Regulations of the Court on the Motion submitted on behalf of the Government of Kenya", Pre-Trial Chamber II, 2 May 2011, ICC-01/09-01/11-76, para. 15.

IV. CONCLUSION

11. For these reasons, the Government of Libya respectfully requests the Chamber to:

- a. Grant it leave to Reply to the Response on behalf of Abdullah Al-Senussi to the Submission of the Government of Libya for Postponement of the Surrender Request¹¹ filed on 24 April 2013; and
- b. Set a deadline for this Reply of 7 days following determination of this Request.

Respectfully submitted:



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 6th day of May 2013
 At London, United Kingdom

¹¹ ICC-01/11-01/11-319.