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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 Request for leave to reply to the "Prosecution's Response to
"Application on behalf of the Government of Libya relating to Abdullah Al-Senussi
pursuant to Article 19 of the ICC Statute""**

Source: The Government of Libya in the case of Mr Abdullah Al-Senussi
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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

A. Request

1. Libya files this request for the following relief:
 - (i) leave to reply to the “Prosecution’s Response to ‘Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute’”¹ (“the Prosecution Response”); and
 - (ii) an order setting a reasonable deadline, following the 14 June 2013 deadline for observations on the Government’s Article 19 Challenge² (“Admissibility Challenge”), for the purposes of filing a consolidated reply (30 days is suggested).
2. These requests are made with a view to affording the Libyan Government an opportunity to file a consolidated reply, thereby requiring a delay in the deadline for filing a reply until the remainder of the Responses to the Government’s Article 19 Challenge³ (“Admissibility Challenge”) are notified to the Libyan Government pursuant to Regulation 31. Filing a consolidated reply would avoid duplication and enhance judicial economy, whilst allowing a comprehensive exploration and clarification of the (remaining) novel, contentious legal and factual issues.
3. If leave is granted to reply, but the Chamber considers any reply to the Prosecution Response should be filed prior to the receipt of the outstanding responses, the Government requests, in the alternative, 14 days in which to file the reply in order to ensure that the Government has adequate time to properly

¹ “Prosecution’s Response to “Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute””, ICC-01/11-01/11-321, 24 April 2013.

² “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. As to the deadline set by the Chamber, “Decision on the conduct of the proceedings following the “Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute””, ICC-01/11-01/11-325, 26 April 2013.

³ “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.

consider and respond to the voluminous and complex legal issues raised. For the reasons set out below, the requested additional time would “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” but remains “expeditious in order to avoid unnecessary delays of the entire proceedings”.⁴

B. Applicable Law

4. Regulation 24(5) of the Regulations of the Court states, *inter alia*, “participants may only reply to a response with the leave of the Chamber”.⁵ According to Regulation 34(c), if leave is granted, any reply “shall be filed within ten days of notification [...] of the response”.

II. SUBMISSIONS

5. The Prosecution states that “at this time the case against Mr Al-Senussi is inadmissible before the Court”.⁶ Although the Libyan Government agrees with this conclusion, the Prosecution Response raises a number of legal and factual issues that are novel and/or require a reply to ensure the correct interpretation of the jurisprudence with regard to the future of the current proceedings (including any implementation of ongoing monitoring) and the correct interpretation of Articles 17 and 19. Despite the Prosecution’s agreement with the Government on the core issue of admissibility, a reply would assist the Chamber by narrowing or clarifying the correct interpretation of the remaining contentious issues.

⁴ *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.

⁵ *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.

⁶ The Prosecution Response, para. 2.

6. For these reasons, the Government submits that good cause exists⁷ to grant leave to reply to address the following issues raised within the Prosecution Response.

i. Burden of Proof

7. The Prosecution argue that Libya's reliance upon European Court of Human Rights ("ECtHr") cases, as an illustration of the type of shifting burden of proof envisaged in Article 19 proceedings, is misplaced.⁸ The Response also argues that it is "particularly important that the State bear the burden... because it has superior, and often exclusive, access to the necessary information" and that this "is supported by the jurisprudence of the ECtHr"⁹. Any reply would address these new arguments, and the ECtHr authorities relied upon, with a view to correcting or clarifying the interpretation advanced by the Prosecution.

ii. Article 17 and the Same Person/Same Conduct Test.

8. The Prosecution advance new arguments concerning the correct interpretation of the "Same Person/Same Conduct Test".¹⁰ They argue, *inter alia*, that Libya's interpretation of the same case is "overly broad and appears to confuse the separate concepts of "case" and "situation".¹¹ The Response also argues that Libya's interpretation of the "same conduct" is erroneous.¹²
9. The Response purports to rely, *inter alia*, upon the "interplay" between Article 17 and 20(3);¹³ references to "the same conduct" in Articles 90(1), 90(7) and Rule 51;¹⁴ the impact of Libya's interpretation on the object and purpose of Articles 89(4)

⁷ *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 November 2011.

⁸ The Prosecution Response, para. 19.

⁹ The Prosecution Response, para. 20.

¹⁰ *Ibid*, Section 1.3.

¹¹ *Ibid*, Example, para. 21 – 29.

¹² Example, para. 31 – 37.

¹³ *Ibid*, para. 38 – 39.

¹⁴ *Ibid*, para. 40 – 43.

and 94;¹⁵ the drafting history of Article 17 and the approach to the term “case”;¹⁶ the US Supreme Court’s analysis of the ‘same transaction’ test;¹⁷ and international jurisprudence or commentary (German, Argentinian, US, ECtHR and European Court of Justice (“ECJ”) purportedly clarifying the interlink between “*ne bis in idem* and complementarity” and the meaning of “sameness”).¹⁸

10. It is accepted that these novel arguments, broadly understood, were advanced in response to submissions by the Libyan Government in its Admissibility Challenge.¹⁹ However, the Libyan Government’s position regarding the specific aspects of these arguments contained in the Prosecution Response was not and could not have been included in the Admissibility Challenge thus warranting a reply. As acknowledged by the Prosecution, at least with regard to the meaning of “substantially the same” conduct, the law is unsettled and “there appears to be some confusion with respect to the “conduct” limb of the test”.²⁰ A reply would assist in ensuring that the Chamber has the benefit of full argument on the new issues raised, as well as those that relate to unsettled areas of law of fundamental importance to the correct interpretation of Article 17 and 19.

iii. Is Libya Investigating the Same Case?

11. Although the Prosecution accepts that Libya is investigating the same case as that before the ICC,²¹ it asserts that “there are a few incidents that it does not appear to be investigating from the samples provided”.²² A reply would address this submission and detail how its current investigation encompasses these purported omissions.

¹⁵ Ibid, para. 43.

¹⁶ Ibid, para. 44 – 45.

¹⁷ Ibid, para. 54 - 56

¹⁸ Ibid, Example para. 57 – 69.

¹⁹ See e.g., Admissibility Challenge, Part II: Applicable Law.

²⁰ Ibid, para. 57 – 69.

²¹ Ibid, Section 2.1.

²² Ibid, para. 78.

iv. Mr Al-Senussi's Access to Counsel and Right to be Informed of the Charges

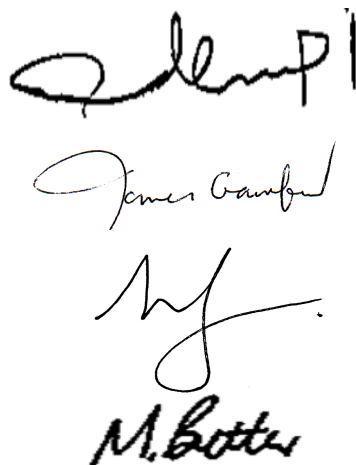
12. The Prosecution discuss assertions purportedly made by Mr Al-Senussi to representatives of Human Rights Watch concerning his lack of access to counsel and not being informed of the charges.²³ The Libyan Government wishes to explain and respond in full to these serious allegations. It is respectfully submitted that the Government ought to be provided with an opportunity to address these assertions and ensure that the Chamber has the most up-to-date information concerning the concerted and ongoing measures undertaken to ensure and protect Mr Al-Senussi's fair trial rights.

III. RELIEF SOUGHT

13. Libya therefore respectfully requests that the Pre-Trial Chamber grant Libya:
- (i) leave to reply to the Prosecution Response; and
 - (ii) a delay in the deadline for filing a reply until 30 days after the 14 June 2013 deadline for Responses to the Government's Admissibility Challenge, such as to allow the Government to file a consolidated reply.
14. In the alternative, if leave is granted to reply but the Chamber considers any reply should be filed prior to the receipt of the outstanding responses, the Government requests 14 days following determination of this request in which to file a reply to the Prosecution Response.

²³ Ibid, para. 81.

Respectfully submitted:



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Dated this 6th day of May 2013

At London, United Kingdom