

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 10 May 2013

PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernández 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

**Decision on Libya's application for leave to reply to the Defence of
Abdullah Al-Senussi**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Fatou Bensouda

James Stewart

Counsel for Saif Al-Islam Gaddafi

John R.W.D. Jones

Counsel for Abdullah Al-Senussi

Benedict Emmerson

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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States Representatives

Ahmed El-Gehani

James Crawford

Wayne Jordash

Michelle Butler

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Deputy Registrar

Didier Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Pre-Trial Chamber I (the “Chamber”) of the International Criminal Court (the “Court”) issues the following decision on the “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’ (the “Application”).¹

1. On 27 June 2011, the Chamber issued the “Decision on the ‘Prosecutor’s Application Pursuant to Article 58 as to the Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi’”,² and warrants of arrest for, *inter alia*, Abdullah Al-Senussi (“Mr Al-Senussi”).³

2. On 4 July 2011, the Registrar filed the “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”, requesting Libya to arrest and surrender to the Court, *inter alia*, Mr Al-Senussi (the “Surrender Request”).⁴

3. On 2 April 2013, Libya filed its “Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute”, challenging the admissibility of the case against Mr Al-Senussi (“Admissibility Challenge”).⁵ In the Admissibility Challenge, Libya also notifies the Chamber that “the Libyan Government exercises its right to postpone the order for surrender of Abdullah Al-Senussi, pursuant to article 95 of the Statute, pending a determination of [Libya’s] Article 19 admissibility challenge in relation to Abdullah Al-Senussi”.⁶

¹ ICC-01/11-01/11-330.

² ICC-01/11-01/11-1.

³ ICC-01/11-01/11-4.

⁴ ICC-01/11-01/11-5.

⁵ ICC-01/11-01/11-307-Conf-Exp. A confidential redacted version and a public redacted version are also available.

⁶ *Ibid.*, para. 206.

4. On 24 April 2013, the Defence of Mr Al-Senussi filed 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” (the “Response”),⁷ requesting the Chamber “(i) to reject Libya’s argument that it is entitled to postpone the surrender request pursuant to Article 95 and (ii) to confirm its order for the immediate surrender of Mr. Al-Senussi to the ICC”.⁸ In support of this request, the Defence argues, *inter alia*, that: (i) application of article 95 of the Rome Statute (the “Statute”) does not automatically follow from the filing of the Admissibility Challenge;⁹ (ii) there is no legal basis for Libya to retain custody of Mr Al-Senussi while the Admissibility Challenge is pending given that Libya “obtained custody of Mr. Al-Senussi from Mauritania in September 2012 in violation of Security Council Resolution 1970 and the order and requests of the ICC for Mr. Al-Senussi to be surrendered to the ICC”,¹⁰ “Libya has continued to act in violation of [its] obligations [...] in failing to transfer Mr. Al-Senussi to the ICC”,¹¹ and “Libya has violated the Chamber’s orders by failing to arrange a privileged legal visit for Defence Counsel to Mr. Al-Senussi”;¹² (iii) the Admissibility Challenge has not been “promptly” made and, as such, cannot trigger postponement of the Surrender Request under article 95 of the Statute; (iv) Mr Al-Senussi’s presence is required at the seat of the Court “to advance proceedings on admissibility and because it is the only way to give effect to his rights under the Court’s Statute and Rules”;¹³ and (v) “Libya misunderstands the nature of its

⁷ ICC-01/11-01/11-319.

⁸ *Ibid.*, para. 63.

⁹ *Ibid.*, paras 3(a) and 45 to 47.

¹⁰ *Ibid.*, para. 3(a).

¹¹ *Id.*

¹² *Ibid.*, para. 3(b).

¹³ *Ibid.*, para. 58.

relationship with the Court” in referring to the notion of “positive complementarity” in the Court’s legal regime.¹⁴

5. On 6 May 2013, Libya filed the Application, requesting leave to reply to the Response on the ground that “[t]he Response raises issues concerning the admissibility challenge in the *Al-Senussi* case, and the application of Article 95, which are either incorrect or raised for the first time” and, as such, “necessitate a reply from Libya in order to ensure that the Chamber has all the relevant information and submissions before it”¹⁵ and is assisted in its deliberations concerning the application of article 95 of the Statute.¹⁶ In particular, Libya submits that “[e]xamples of submissions to which a reply is warranted include new and distinct issues of law and fact relating to the following: a. [t]he assertion that the Libyan Government is seeking to inhibit privileged access by defence counsel to Mr. Al-Senussi [...]; b. [t]he assertion that ‘positive complementarity’ holds no place in the ICC legal regime [...]; [and] c. [t]he level of discretion involved in the application by the Chamber of Article 95, given the submission of an admissibility challenge”.¹⁷ Finally, Libya requests the Chamber, in case leave to reply is granted, to set a deadline for this reply of seven days following determination of the Application.¹⁸

6. The Chamber notes that, pursuant to regulation 24(5) of the Regulations of the Court, “[p]articipants may only reply to a response with the leave of the Chamber”.

7. As noted by Libya in the Application,¹⁹ the Defence Response raises a number of arguments in relation to a single paragraph of the Admissibility

¹⁴ *Ibid.*, para. 56.

¹⁵ Application, para. 6.

¹⁶ *Ibid.*, para. 9.

¹⁷ *Ibid.*, para. 8.

¹⁸ *Ibid.*, para. 11.

¹⁹ *Ibid.*, para. 4.

Challenge, in which Libya notifies the Chamber of the exercise of its right to postpone the Surrender Request, implicitly arguing that no prior authorisation of the Chamber is required in order for the State to avail itself of article 95 of the Statute following the filing of an admissibility challenge. However, in light of arguments raised by the Defence to the effect that prior authorisation of the Chamber is needed and that, in the circumstances of the case, said authorisation must be denied, Libya requires the Chamber to be given an adequate opportunity to make the Chamber aware of its positions in relation to the specific arguments advanced in the Response.

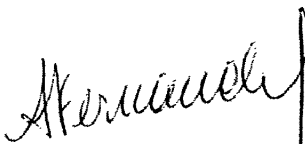
8. In these circumstances, and considering the importance of the issue under consideration which involves respect of the State's sovereign rights and requires due consideration of the relationship between the Court and the States under the Statute, the Chamber considers that it is appropriate to grant Libya leave to reply to the Response. The filing of a reply will also enable the Chamber to have before it all the relevant information and arguments from the parties prior to its determination of the matter *sub judice*.

9. As far as the time limit for such reply is concerned, the Chamber is of the view that seven days following the present decision, as requested by Libya, appears proportionate, with a view to ensuring the fairness of the present proceedings and avoiding unnecessary delays.

FOR THESE REASONS, THE CHAMBER

GRANTS Libya leave to reply to the Response by Monday, 20 May 2013.

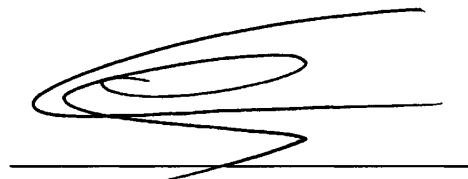
Done in both English and French, the English version being authoritative.



Judge Silvia Fernández de Gurmendi
Presiding Judge



Judge Hans-Peter Kaul



Judge Christine Van den Wyngaert

Dated this 10 May 2013

At The Hague, The Netherlands