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

Date: **3 July 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 Document**

**Defence Response on behalf of Mr. Abdullah Al-Senussi to “Libyan Government’s Request for leave to reply to the Prosecution’s Additional Submissions and the Defence and OPCV Response to ‘Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute’”**

**Source:** Mr. Abdullah Al-Senussi, represented by Ben Emmerson QC, Rodney Dixon, Amal Alamuddin, Anthony Kelly, and Prof. William Schabas

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

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**Legal Representatives of the Applicant**

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**Unrepresented Applicants for  
Participation/Reparation**

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Defence**

**States Representatives**  
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Professor James Crawford SC  
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**Amicus Curiae**

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**REGISTRY**

**Registrar**  
Mr. Herman von Hebel

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## **Introduction**

1. The Defence for Mr. Abdullah Al-Senussi submits this Response to the “Libyan Government’s Request for leave to reply to the Prosecution’s Additional Submissions and the Defence and OPCV Response to ‘Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute’” filed on 26 June 2013.<sup>1</sup>
2. The Defence’s Response is filed pursuant to Regulation 24(1) and Regulation 34(b) of the Regulations of the Court.

## **Submissions**

3. Libya has requested leave to reply to several issues raised in the Defence’s Response concerning the evidence submitted by Libya in support of its assertion that it is investigating the same case as before the ICC; Libya’s inability genuinely to conduct the proceedings within its national system; the application of the “unwillingness” requirement; and Libya’s submissions in respect of “positive complementarity.”<sup>2</sup>
4. The Defence submits that Libya has failed to demonstrate in its application that there is good cause for it being granted leave to reply to any specific issues that could not have been addressed in its Admissibility Application. The Chamber is requested to take into account that Libya was required in its Admissibility Application to set out its grounds and all of the supporting evidence in full. As has been held by the Chamber “it is for the challenging State to ensure that the challenge is sufficiently substantiated by evidence”<sup>3</sup>. A reply should not be permitted as a means of supplementing the Admissibility Application itself. Libya has not established that there are any particular issues which it could not have, or has not, addressed in full in its Admissibility Application.

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<sup>1</sup> “Libyan Government’s Request for leave to reply to the Prosecution’s Additional Submissions and the Defence and OPCV Response to ‘Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute’”, ICC-01/11-01/11-372, 26 June 2013 (hereinafter “Leave to Reply of 26 June 2013”).

<sup>2</sup> Leave to Reply of 26 June 2013, paras 9-17.

<sup>3</sup> Decision on the admissibility of the case against Saif Al-Islam Gaddafi, ICC-01/11-01/11-344-Red, 31 May 2013, para. 136.

5. Furthermore, Libya has requested that it should be given until 14 August 2013 to file a consolidated reply.<sup>4</sup> While acknowledging that, subject to leave being granted in accordance with Regulation 24(5), a reply shall be filed within 10 days of being notified of the response, Libya has asserted that it should be given until 14 August - two calendar months or 61 days from the Responses - to submit a reply “due to the extensive and complex nature of the Responses ... and the unavoidable delays caused by the need to translate significant parts of such Responses into Arabic in order to obtain instructions upon them.”<sup>5</sup>
6. The Chamber has previously stated that affording a State the right to reply must be “equally expeditious in order to avoid unnecessary delays of the entire proceedings.”<sup>6</sup> The Defence submits that in the circumstances of the present case, if leave to reply were granted in respect of any particular matters raised in the Responses, Libya should not be permitted two months until 14 August 2013 to file any reply. Libya has not established that such a lengthy period of time is justified, and it would unnecessarily delay the proceedings as a whole for no good reason.
7. It should be taken into account that Libya’s application for leave to reply has been filed out of time after the expiry of the 10 day period provided for in Regulation 24(5). Libya has already had since 14 June 2013 to review the Defence Response as well as the Responses from the Prosecution and the OPCV.<sup>7</sup> Libya has given no explanation for why preparation of any reply should be any different to Libya’s other filings in which it has been able to conduct reviews and obtain instructions within the required deadlines.
8. The length of time requested by Libya fails to take account of Mr. Al-Senussi’s right to an expeditious resolution of the admissibility proceedings. Given the conditions of his detention in Libya, in which he has no access to his lawyers or independent

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<sup>4</sup> Leave to Reply of 26 June 2013, para. 35.

<sup>5</sup> Leave to Reply of 26 June 2013, paras. 34-35.

<sup>6</sup> Decision on the ‘Libyan Government’s Request for Leave to reply to Responses by OTP, OPCV and OPCD to Libyan Government’s further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi, ICC-01/11-01/11-288, 26 February 2013, para. 10.

<sup>7</sup> Defence Response on behalf of Mr. Abdullah Al-Senussi to “Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute”, ICC-01/11-01/11-356, 14 June 2013; Observations on behalf of victims on the “Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute”, ICC-01/11-01/11-353-Conf, 14 June 2013; Prosecution’s Additional Observations to the “Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute” , ICC-01/11-01/11-355, 14 June 2013.

medical care, and the deteriorating security situation<sup>8</sup>, it is imperative that the admissibility of his case is determined as soon as possible. Libya has failed to comply with any of the orders of the Chamber to surrender Mr. Al-Senussi, and it delayed filing its Admissibility Application and only eventually did so as a last resort when again ordered by the Chamber immediately to surrender Mr. Al-Senussi<sup>9</sup> and after the Defence had filed its renewed application to refer Libya to the Security Council.<sup>10</sup>

9. Most importantly, the urgency of finalising the admissibility proceedings is underlined by the announcement of the national prosecutor in Mr. Al-Senussi's case, Mr. Al-Seddik Al-Sur's, on 17 June 2013 that his case would proceed to trial in "the first half of August" 2013.<sup>11</sup> Libya should not be permitted to delay the filing of any reply until 14 August in order that it can in effect circumvent the ICC's admissibility proceedings by commencing a national trial regardless of the ICC's determination.
10. The Defence submits that if leave is granted in respect of any particular matter, the Chamber should order that Libya files any reply within 7 days. This will ensure that the proceedings are conducted expeditiously and with no further delays. Libya has had ample opportunity since 14 June 2013 to review the Defence's submissions, and in any event, as submitted above, Libya should have included all of its arguments and supporting evidence in its Admissibility Application which it only filed on 2 April 2013. Libya had over 6 months since it had custody of Mr. Al-Senussi to prepare and

<sup>8</sup> For example, only recently the chief of the Al-Ruiymi prison in Tripoli was murdered. This is the prison in which Mr. Al-Senussi's daughter, Anoud, is being detained. See Prison chief murdered in Tripoli, Libya Herald, 25 June 2013 (<http://www.libyaherald.com/2013/06/25/prison-chief-killed-in-tripoli/>).

<sup>9</sup> 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 and the orders of the ICC", ICC-01/11-01/11-269, 6 February 2013.

<sup>10</sup> 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, ICC-01/11-01/11-304, 19 March 2013.

<sup>11</sup> Video and draft translation of press conference of 17 June 2013, ICC-01/11-01/11-358-AnxA. See also, Kadhafi's son to stand trial in August: Libya prosecutor, AFP, 17 June 2013 (<http://www.google.com/hostednews/afp/article/ALeqM5hf0VWzFZ0xmEaVROYan6arfqRKYw?docId=CNG.804f72867c9bda4f148b64bf4c290b6e.461>); Gaddafi's son to stand trial in August, gulfnews.com, 17 June 2013 (<http://gulfnews.com/news/region/libya/gaddafi-s-son-to-stand-trial-in-august-1.1198551>); Gadhafi's son to stand trial in August, Libya prosecutor says, The Daily Star, 18 June 2013 (<http://www.dailystar.com.lb/News/Middle-East/2013/Jun-18/220703-gadhafis-son-to-stand-trial-in-august-libya-prosecutor-says.ashx#axzz2WgDly4I7>); Libya to try Seif al-Islam Gaddafi in August, Alarab Online, 17 June 2013 (<http://www.alarab.co.uk/english/display.asp?fname=%5C2013%5C06%5C06-17%5Czalsoz%5C923.htm&dismode=x&ts=6/17/2013%205:34:49%20PM>); Libya acquits Gaddafi aides in Lockerbie case, Oman Tribune (<http://www.omantribune.com/index.php?page=news&id=146566&heading=Other%20Top%20Stories>); Gaddafi's son to stand trial in August, BBC, 19 June 2013 (<http://www.bbc.co.uk/news/world-africa-22945159>); Gaddafi officials acquitted but stay behind bars, Times Live, 17 June 2013 (<http://www.timeslive.co.za/africa/2013/06/17/gaddafi-officials-acquitted-but-stay-behind-bars>).

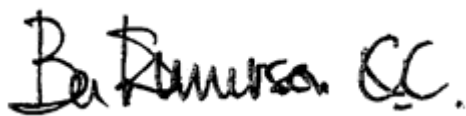
file all necessary submissions and materials relevant to the admissibility of the case before the ICC.

11. Libya has submitted that “the admissibility assessment must address the present status of the case”<sup>12</sup>. However, as the ICC’s case law has made clear, a State is required to submit all relevant evidence as part of its admissibility challenge. There is no requirement that a State should be permitted to file additional evidence at any later stage.<sup>13</sup> The Defence submits that this is another reason for not providing Libya with a lengthy period of time for any reply in which Libya could submit a ‘new’ or revised admissibility challenge.

### **Conclusion**

12. Accordingly, the Defence submits that Libya has not established a clear and proper basis for granting leave to reply on any particular issues that have not, or could not have, been addressed in its Admissibility Application. In the event that the Chamber does grant leave to reply on any specific matters, the Defence respectfully requests that in the circumstances of the present case, Libya should be required to reply expeditiously and within no longer than 7 days of the Chamber’s order.

Counsel on behalf of Mr. Abdullah Al-Senussi,



**Ben Emmerson QC**

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<sup>12</sup> The Libyan Government’s Response to Gaddafi Defence ‘Request for Urgent Appeals Ruling’, ICC-01/11-01/11-371, 25 June 2013, para. 15.

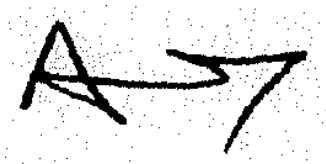
<sup>13</sup> Decision on the admissibility of the case against Saif Al-Islam Gaddafi, ICC-01/11-01/11-344-Red, 31 May 2013, para. 136, 137; Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", ICC-01/09-01/11-307, 30 August 2011, para. 100.

A handwritten signature in black ink, appearing to be 'Rodney' followed by a long horizontal stroke.

**Rodney Dixon**

A handwritten signature in black ink, clearly legible as 'Amal Alamuddin'.

**Amal Alamuddin**

A handwritten signature in black ink, appearing to be 'Anthony' followed by a stylized 'K'.

**Anthony Kelly**

A handwritten signature in black ink, appearing to be 'William Schabas'.

**Professor William Schabas**

Dated 3<sup>rd</sup> July 2013

London, United Kingdom