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

Date: 5 August 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 Response to "Defence Application on behalf of Mr. Abdullah Al-Senussi concerning Libya's Announcement of Trial Date in August 2013"

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

1. The Libyan Government hereby files its response to the “Defence Application on behalf of Mr. Abdullah Al-Senussi concerning Libya’s Announcement of Trial Date in August 2013” (“Defence Application”).¹

2. The Government is aware that this Response has been filed one day after the requisite time limit. The holy month of Ramadan commenced in the Islamic world on 9th of July and will conclude on 7th of August. During this period, hours of work in Libya are dramatically reduced due to the requirements of intense prayer and fasting which the Libyan people (including Libyan Government officials) adhere to. This has complicated the receipt of instructions and finalisation of the filing. The Government accordingly seeks the Court’s indulgence to extend the time limit to today, pursuant to Regulation 35 (2). The Government notes that, given the nature of the Defence Application, the fact of the short delay is unlikely to have caused any prejudice to the Defence.

3. The Government invites the Court to reject the Defence request for relief as set out in paragraph 24 of its Application: that the Court require Libya to provide assurances that it will comply in full with the Chamber’s orders and requests and also provide an undertaking not to commence Mr. Al-Senussi’s trial in Libya until the admissibility proceedings have been finally determined by the ICC.² The Government does so on the basis that there is no legal basis for the Defence to make such a request or for the Court to grant it and, furthermore, that there is no discernible need for such assurances bearing in mind the Government’s ongoing obligations to the Court. The Government asserts that the Defence is seeking to expand the statutory obligations of the Libyan Government in a way that is neither necessary nor permissible.

¹ ICC-01/11-01/11-380

² Defence Application, para. 6. See also paras 15, 21, 24.

4. With regard to the Defence request for clarification from the Libyan Government regarding the trial process, if the Court is minded to grant the Request, the Government invites the Chamber to grant it six weeks within which to provide such information.

II. SUBMISSIONS

5. The Defence states that its application is made pursuant to Rule 58(2) and Article 93. However, it fails to substantiate how either of those provisions gives rise to any legal basis for the Court to order an undertaking from a Government, either affirming obligations to which it is already subject or making specific statements regarding the conduct of domestic criminal proceedings. This is because no such basis exists.
6. Rule 58(2) relates to the conduct of the admissibility proceedings before the Chamber and cannot properly be interpreted to extend to granting the Court the power to require undertakings from a sovereign state regarding the conduct of its domestic proceedings. The Defence did not provide any legal support for its Request that Libya undertake not to commence Mr Al-Senussi's trial in Libya. There is nothing in the Statute that prevents a State from continuing its domestic proceedings notwithstanding the fact of an admissibility challenge and there is certainly nothing in the Statute that would permit the Chamber to seek an undertaking from a State not to commence a domestic trial. Indeed, the Defence seems to concede this at paragraph 22 of its Application when it states that it is 'of course cognisant of the Chamber's finding that Libya's continuation of domestic criminal proceedings pending the admissibility decision does not *per se* "amount to a violation of Libya's obligation to cooperate with the Court"'. This is patently inconsistent with the Defence request in the paragraph immediately preceding that Libya be required "to undertake not to commence Mr. Al-Senussi's trial in Libya" and completely negates the validity of that request. It also makes a

nonsense of the Defence assertion that the “very purpose of the admissibility proceedings would be defeated if Libya proceeded with Mr. Al-Senussi’s trial before the admissibility of the case at the ICC was determined”.³

7. Article 93 sets out the Court’s powers to make requests for assistance in relation to ICC investigations and prosecutions. Pursuant to article 19(2) of the Statute, the ICC OTP’s investigation of Mr. Al-Senussi is suspended pending the determination of the admissibility challenge. The Defence reliance on article 93 is misconceived and provides no support for the Defence requests at all.
8. Moreover, the Defence request for an undertaking not to commence Mr. Al-Senussi’s trial in Libya, whether at the accusation or trial stages is a matter that is within the remit of the independent Libyan judiciary. The Defence suggestion that the Government should issue an undertaking purporting to bind the judiciary as to how it ought to proceed with regard to Mr. Al-Senussi disregards (or reflects a misunderstanding of) the separation of powers between the executive and the judiciary and the importance of this principle for the rule of law.
9. The Defence also requests that the Chamber require confirmation from Libya that the postponement of the surrender order against Mr. Al-Senussi does not provide “the green light for Libya to try Al-Senussi and keep him on its territories in order to try him” and that Libya should be required to acknowledge that the surrender order against Mr. Al-Senussi remains valid and has only been temporarily suspended.⁴ Further, the Defence seeks an order for an undertaking from Libya that it will immediately surrender Mr Al Senussi to the Court in the event that his case is declared admissible. As such, the Defence appears to particularise its more general request that Libya give assurances that it will

³ Defence Application, para 23.

⁴ Defence Application, para. 15.

comply in full with the Chamber's orders and requests.⁵ The Government reiterates its submissions above that there is no legal basis for such a request and that there is nothing in the Statute that prohibits the Government from continuing its domestic proceedings whilst the admissibility proceedings are ongoing. Furthermore, even if the Court did find that there was some legal basis for seeking such confirmation or undertaking (which is not accepted), it is difficult to see what legal status or impact such confirmation or undertaking would have and how it would add anything to the Government's existing obligations to cooperate with the Court. The Libyan Government remains fully aware of its obligations under the Statute. Accordingly, there is no discernible benefit or basis for requiring a further assertion from the Government that it will comply with its continuing obligations under the Statute.

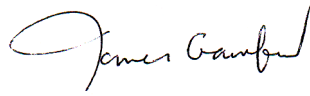
10. If the Chamber is minded to grant the Defence request for an order seeking clarification of matters arising from the reported statements about the impending trial date, the Government asks that it is granted 6 weeks from today's date for compliance.

III. RELIEF SOUGHT

11. The Government of Libya therefore respectfully requests that the Chamber:
 - a. Extend the time limit by one day for the receipt of this Response pursuant to Regulation 35 (2);
 - b. Reject the Defence requests for undertakings regarding Libya's domestic proceedings and confirmation of its existing and ongoing obligations to the Court;
 - c. Grant the Government 6 weeks from today's date to provide information clarifying the reported impending trial date of Mr. Al-Senussi.

⁵ Defence Application, para. 6.

Respectfully submitted:



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Dated this 5th day of August 2013
At London, United Kingdom