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

Date: **9 August 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 Application on behalf of Abdullah Al-Senussi for Leave to Reply to the “Libyan Government’s Response to ‘Defence Application on behalf of Mr. Abdullah Al-Senussi concerning Libya’s Announcement of Trial Date in August 2013’” and Defence Request for this Application and the Defence Application of 10 July 2013 to be decided on an urgent basis

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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Unrepresented Victims

**Unrepresented Applicants for
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Introduction

1. The Defence for Mr. Abdullah Al-Senussi files this application to request leave to reply to the “Libyan Government’s Response to ‘Defence Application on behalf of Mr. Abdullah Al-Senussi concerning Libya’s Announcement of Trial Date in August 2013’” filed on 5 August 2013.¹ The Defence originally filed its Application on 10 July 2013 requesting the Pre-Trial Chamber urgently to order Libya to provide certain information and assurances in light of Libya’s official announcement of 17 June 2013 about commencing Mr. Al-Senussi’s trial in the first half of August.²
2. This Application is filed pursuant to Regulation 24(5) of the Regulations of the Court which states that “Participants may only reply to a response with the leave of the Chamber.”³
3. The Defence requests that this Application is decided as a matter of urgency. In the event that leave to reply is granted, the Defence can immediately file its Reply so that the Chamber can decide on the Application of 10 July 2013. The Defence requests that the Chamber determine the present Application and the original Application of 10 July on an urgent basis given that according to Libya’s official announcement the national trial is due to commence in the coming days, in “the first half of August”.
4. The Defence’s original Application, and the present one, are submitted in the context of proceedings in which Libya has not shown a genuine commitment to comply with the orders of the Court. The submissions by the Defence, and many observers, throughout the proceedings that Libya is unwilling and unable to dispense genuine, secure and fair trials are being borne out. Judicial officers are being threatened and assassinated. Former Gaddafi regime members are being subjected to unfair trials and the death penalty. Libya has also refused to surrender Mr. Al-Senussi’s co-accused, Saif Al-Islam Gaddafi, despite the Court’s orders to do so. In these circumstances it is

¹ Libyan Government’s Response to “Defence Application on behalf of Mr. Abdullah Al-Senussi concerning Libya’s Announcement of Trial Date in August 2013”, ICC-01/11-01/11-395, 5 August 2013 (“Libya’s Response of 5 August 2013”).

² Defence Application on behalf of Mr. Abdullah Al-Senussi concerning Libya’s Announcement of Trial Date in August 2013, ICC-01/11-01/11-380, 10 July 2013 (“Defence Application of 10 July 2013”).

³ Regulation of the Court, Reg 24(5). See *Prosecutor v. Lubanga*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”, ICC-01/04-01/06-824, 13 February 2007, para. 68.

critical that the Court is provided with the latest information relevant to the Defence's Application and that it rule on it as soon as possible.

Submissions

5. On 10 July 2013 the Defence for Mr. Abdullah Al-Senussi filed an application pursuant to Rule 58(2) and Article 93 which requested the Pre-Trial Chamber to order Libya to clarify and confirm:⁴

- “Whether a timetable has been fixed for the national proceedings and if so what this is;”
- “Whether the hearing in the first half of August that is referred to in the announcement on 17 June 2013 will be part of the accusation phase or the trial phase, and if the latter, how this can comply with Libyan law and the suspect's due process rights;”
- “That Libya accepts that the Chamber's Decision of 14 June 2013 concerning 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 will not make any further statements to this effect as the surrender order has only been temporarily postponed pending the outcome of the admissibility proceedings before the ICC;” and
- “That Libya accepts that the national proceedings against Mr. Al-Senussi are entirely dependent on the outcome of the admissibility proceedings before the ICC and that accordingly Libya undertakes (i) to surrender immediately Mr. Al-Senussi to the ICC in the event that his case is declared admissible before the ICC, irrespective of the stage reached in the national proceedings, and (ii) not to commence the trial of Mr. Al-Senussi in Libya until the admissibility proceedings are finally determined by the ICC.”⁵

⁴ Defence Application on behalf of Mr. Abdullah Al-Senussi concerning Libya's Announcement of Trial Date in August 2013, ICC-01/11-01/11-380, 10 July 2013.

⁵ Defence Application on behalf of Mr. Abdullah Al-Senussi concerning Libya's Announcement of Trial Date in August 2013, ICC-01/11-01/11-380, 10 July 2013, para. 24.

6. On 5 August 2013, Libya filed its Response to the Defence Application and asserted that the Chamber should “[r]eject the Defence requests for undertakings regarding Libya’s domestic proceedings and confirmation of its existing and ongoing obligations to the Court”⁶, and in the alternative should “[g]rant the Government 6 weeks from today’s date [5 August] to provide information clarifying the reported impending trial date of Mr. Al-Senussi.”⁷ Libya claimed that no basis exists under Rule 58(2) or Article 93 for the Chamber to order Libya to provide the clarifications and assurances sought.⁸

7. The Defence submits that there have been new and additional developments since the Defence filed its Application on 10 July 2013 which are highly relevant to the Application and which the Defence urges the Chamber to take into account in considering the Application. The Defence therefore requests that the Chamber grant the Defence leave to reply so that these developments can be raised and addressed before the Chamber. Libya’s Response also raises novel and highly questionable legal points that require a reply from the Defence. This includes the assertion that Libya could not be asked to provide undertakings that Libya alleges could influence the judiciary’s ability to conduct the national trial as it determines, and the suggestion by Libya that the Defence Application seeks to expand the obligations of the Libyan Government under the ICC Statute.

8. If the Defence is granted leave to reply, the Defence would provide the Chamber with information and submissions about the following recent developments which have a direct bearing on the issues that are the subject of the Defence’s Application:
 - Libya has started to impose the death penalty against former senior officials of the Gaddafi regime. A former Gaddafi Minister of Education, Ahmed Ibrahim, was sentenced to death before a Misrata Court on 31 July 2013 on charges similar to those alleged against Mr. Al-Senussi.⁹

⁶ Libyan Government’s Response to “Defence Application on behalf of Mr. Abdullah Al-Senussi concerning Libya’s Announcement of Trial Date in August 2013”, ICC-01/11-01/11-395, 5 August 2013, para. 11(b).

⁷ Libyan Government’s Response to “Defence Application on behalf of Mr. Abdullah Al-Senussi concerning Libya’s Announcement of Trial Date in August 2013”, ICC-01/11-01/11-395, 5 August 2013, para. 11(c).

⁸ Libyan Government’s Response to “Defence Application on behalf of Mr. Abdullah Al-Senussi concerning Libya’s Announcement of Trial Date in August 2013”, ICC-01/11-01/11-395, 5 August 2013, para. 5.

⁹ Gaddafi minister sentenced to death, BBC, 31 July 2013 (<http://www.bbc.co.uk/news/world-africa-23524134>);

- Amnesty International has just released a report which states that former supporters of Muammar Gaddafi are “at increased risk of the death penalty ... in the coming months” and which warns that death sentences could be imposed as “revenge” in the Libyan courts.¹⁰
 - The French lawyers of the former Prime Minister, Baghdadi Al-Mahmoudi, have reported that his trial in Libya is being conducted in an unnecessarily “*expeditious*” manner (i.e. too quickly so as to be unfair and in order to arrive at a verdict and sentence as rapidly as possible). They also report that they have not been able to get visas to travel to Libya to defend Mr. Al-Mahmoudi nor to get access to Mr. Al-Mahmoudi’s case file, “despite every possible attempt to do so with the Libyan authorities.”¹¹
 - A Human Rights Watch Report of 8 August 2013 analyses the assassinations of persons in police and security structures and the killing of judges and highlights that no-one has been prosecuted for any of these murders to date. The Report emphasises the Libyan Government’s failure to build a functioning justice system which faces many obstacles due to the prevailing security situation and lacks the means to summon witnesses without the use of force.¹²
9. It is important that the Chamber is fully informed of these developments before making its decision on the Defence’s Application. In its Response Libya does not deny that the announcement that triggered the Defence Application was made, nor does it seek to refute the contents of the announcement. This can be taken to constitute an admission that the official statement of the Libyan Government is that a trial will begin in a matter of days i.e. “the first half of August”. Yet in its Response Libya is refusing (i) to submit any information to the Chamber about the timetable for the national trial; (ii) to provide an unequivocal undertaking that it will surrender Mr. Al-Senussi to the ICC if so ordered irrespective of the stage reached in the national proceedings; (iii) to correct its false statement that it has been given the “green light”

¹⁰ Libya: al-Gaddafi loyalists at risk of ‘revenge’ death sentences, Amnesty International, 2 August 2013 (<http://www.amnesty.org/en/news/libya-al-gaddafi-loyalists-risk-revenge-death-sentences-2013-08-02>).

¹¹ Trial of Baghdadi Mahmudi raises fears of ‘revenge’ justice in Libya, middle east online, 6 August 2013 (<http://www.middle-east-online.com/english/?id=60599>).

¹² Libya: Wave of Political Assassinations, HRW, 8 August 2013 (<http://www.hrw.org/news/2013/08/08/libya-wave-political-assassinations>).

by the ICC to proceed with the national trial; and (iv) to wait for the ICC's decision on admissibility before commencing and potentially completing the national trial. Indeed, Libya has failed to provide any information to the Chamber about the current status of the national proceedings and any clarification of its announcement of 17 June 2013.

10. It is thus imperative that evidence of Libya conducting unduly expeditious trials of high-profile former Gaddafi officials in which the death penalty is now being imposed, is placed before the Chamber. The principal reason for the Defence's Application is to prevent the commencement and completion of a national trial before the ICC has determined the admissibility of Mr. Al-Senussi's case. It would render the ICC's proceedings meaningless if Libya were to be permitted to commence Mr. Al-Senussi's trial in mid-August and complete it and impose the death penalty before the ICC had finally determined whether the case was admissible for trial before the ICC.
11. Further, the new and additional information shows that Libya's alternative request to be allowed 6 weeks to provide the necessary clarifications and assurances to the Chamber would be far too long. According to Libya's announcement, the trial is due to commence in a few days. Leave to reply should be granted urgently so that this matter can be addressed in light of the recent developments.
12. The Chamber should also be informed of the findings about the inability of the Libyan judicial system to function in the face of regular threats to lawyers, judges and prosecutors, and the attacks on state institutions including prisons.¹³ These are matters which Libya should address were the Chamber to order it to clarify the current position and to provide the necessary assurances to ensure that a travesty of justice does not occur and that the ICC's admissibility proceedings are not rendered moot.
13. Libya has asserted in its Response that "it is difficult to see what legal status or impact such confirmation or undertakings would have and how it would add anything to the Government's existing obligations to cooperate with the Court."¹⁴ The recent developments further highlight that it is absolutely vital for the status of the national

¹³ Libya: al-Gaddafi loyalists at risk of 'revenge' death sentences, Amnesty International, 2 August 2013 (<http://www.amnesty.org/en/news/libya-al-gaddafi-loyalists-risk-revenge-death-sentences-2013-08-02>).

¹⁴ Libya's Response of 5 August 2013, para. 9.

proceedings to be clarified and for it to be made clear beyond any doubt that the ICC has not ordered that Libya is entitled to try and sentence Mr. Al-Senussi in Libya. The national proceedings are subject to the ICC's admissibility determination and Libya must be prevented from conducting an unduly and unfairly expeditious domestic proceeding that is not genuine, impartial and secure in which Mr. Al-Senussi is sentenced to death before the ICC has finally decided on the admissibility of the case and whether it will be tried before the ICC.

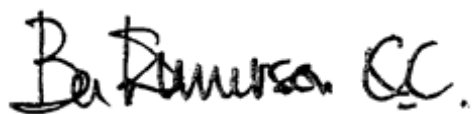
14. In the event that the Defence is granted leave to reply, the Defence will reaffirm that the Chamber has a "broad discretion"¹⁵ under Rule 58(2) to regulate the admissibility proceedings including all matters that are integral to these proceedings. The issues set out above and those raised in the Application are central to the admissibility proceedings. The timetable and schedule of the national proceedings and how they relate to the ICC's proceedings are plainly fundamental to Libya's admissibility challenge, and fall squarely within the Chamber's powers to "take appropriate measures for the proper conduct of the proceedings" as provided for in Rule 58(2). The Defence submits that leave to reply should be granted so that the Chamber can receive all information relevant to its determination under these provisions.

Conclusion

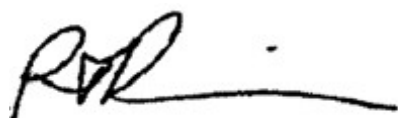
15. For these reasons, the Defence for Mr. Al-Senussi submits that there is good cause shown to be granted an opportunity to reply to Libya's Response of 5 August 2013 in respect of the particular matters identified above. The Defence therefore respectfully requests leave to reply to Libya's Response pursuant to Regulation 24(5).
16. The Defence requests that this Application and its primary Application of 10 July 2013 are decided as a matter of urgency in light of Libya's announcement that the national trial of Mr. Al-Senussi is due to commence in the coming days.

¹⁵ 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, para. 8.

Counsel on behalf of Mr. Abdullah Al-Senussi,



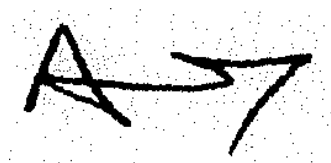
Ben Emmerson QC



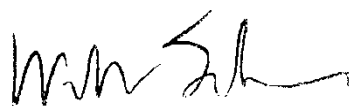
Rodney Dixon



Amal Alamuddin



Anthony Kelly



Professor William Schabas

Dated 9th August 2013

London, United Kingdom