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

Date: 16 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

Response to “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: The Government of Libya, 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. Counsel for Libya file this Response to the “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” filed on 9 August 2013 (“Application and Request”).¹ The Al-Senussi Defence thereby seeks (i) to reply to the Libyan Government’s Response of 5th August²; and (ii) an urgent decision in respect of both the application for leave to reply and the Al-Senussi Defence’s Application of 10 July 2013³ (which sought responses to various assertions by the Al-Senussi Defence concerning the Libyan domestic criminal process).
2. The Government hereby submits that the Chamber should reject the application for leave to reply on the basis that it does not demonstrate good cause to justify the filing of a reply. Consequently, the Chamber should find that the Defence has not demonstrated any basis for the Application for leave to Reply to be decided urgently. Further, the Defence has not provided any basis for the Application of 10 July 2013 to be decided urgently.

II. SUBMISSIONS

A. MERITS OF REPLY IMPROPERLY INCLUDED IN APPLICATION FOR LEAVE TO REPLY

3. Despite the Appeals Chamber’s express disapproval of the practice of filing a substantive reply prior to leave being granted and warning that this practice

¹ ICC-01/11-01/11-398.

² [“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 (“Libyan Government’s Response of 5th August”).

³ “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 (“Application of 10 July 2013”).

may, in and of itself, give rise to the rejection of an application for leave,⁴ the Defence Application for a reply includes the substantive reply arguments within it.⁵ Having claimed that a Reply is necessary because it “is important that the Chamber is fully informed of [...] [certain] developments”,⁶ the Defence includes these purportedly relevant developments in the Application. In so doing, it appears to bypass the proper authorisation process by placing substantive arguments immediately before the Chamber, with a view to influencing the ultimate decision and/or, given its timing, the eventual admissibility decision. As such, the Application for leave to Reply, and its associated applications for urgent decisions, should be rejected.

B. NO GOOD CAUSE SHOWN TO WARRANT A REPLY

4. In order to obtain authorisation to file a reply, a party generally needs to demonstrate good cause⁷ or that there was an issue that arose from the response which could not have been anticipated in their initial submission.⁸ Allowing the applicant the opportunity to reply does not always enhance the fairness of proceedings and indeed the opposite can be the case where an applicant has deliberately refrained from making a reasoned and evidenced argument on a foreseeable issue.⁹
5. The Al-Senussi Defence argues that it is in the interests of justice that the Defence be permitted to file a reply in order to: (i) raise purportedly “new and additional developments since the Defence filed its Application on 10 July 2013¹⁰

⁴ *Prosecutor v Lubanga*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber entitled “Decision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”, ICC-01/04-01/06-824, 13 February 2007, para 68.

⁵ Application of 10 July 2013, paras. 8-13.

⁶ Application of 10 July 2013, para. 8.

⁷ ICC-01/05-01/08-294.

⁸ ICC-01/04-01/07-2792.

⁹ ICTY, *Prosecutor v. Nikolic* (IT-02-60/1-A), Decision on Prosecution’s Motion to Strike, 20 January 2005, para. 32.

¹⁰ 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.

which are highly relevant to the Application and which the Defence urges to take into account in considering the Application”;¹¹ and (ii) to address purportedly “novel and highly questionable legal points that require a reply from the Defence”.¹² Such “legal points” include, according to the Al-Senussi Defence, arguments 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 that “the Defence Application [of 10 July 2013] seeks to expand the obligations of the Libyan Government under the ICC Statute”.¹³

6. In both instances, the Defence application is misconceived and ought to be dismissed.
7. First, with regard to the purported new developments, there is nothing that bears upon the Defence’s original application, let alone being of such critical importance that they have to now be considered and give rise to urgency. To the contrary, the Defence merely reproduces highly selective commentary accompanied by un-sourced judgments concerning Libya’s transitional justice endeavors¹⁴ within the Libya judicial system, presumptively claiming that it must be relevant.¹⁵
8. Accordingly, the Defence has failed to demonstrate that this material is relevant or probative of any issue relevant to the Defence Application of 10 July 2013. Rather than being probative of any existing issue, this strained attempt to link references to the death penalty with the ongoing domestic proceedings investigating Mr. Al-Senussi’s alleged crimes is manifestly unhelpful. This is particularly clear given that the Government has made clear on many occasions that the trial of Mr. Al-Senussi cannot commence until an Accusation Chamber

¹¹ Application and Request, para. 7

¹² *Ibid*, para. 7.

¹³ *Ibid*, para. 7.

¹⁴ Example, Application and Request, para. 4.

¹⁵ Example, Application and Request, para. 8.

has approved the case. In circumstances where his case has not yet been referred to an Accusation Chamber, there is plainly no need for urgency.

9. Second, the purportedly “novel and highly questionable legal points that require a reply from the Defence”, are that Libya should not be required to provide assurances concerning the domestic proceedings and that the Defence seeks to expand the obligations of the Libyan Government under the ICC Statute.¹⁶ These arguments are neither novel nor unforeseeable by the Defence. To the contrary, instead of waiting for any prospective reply, the Defence ought to have fully explained the legal basis for its request in its 10 July 2013 Application. As pointed out in the Libyan Government’s Response of 5th August, the Defence “fails to substantiate how either [Rule 58(2) or Article 93] gives rise to any legal basis for the Court to order an undertaking from a Government [...]”.¹⁷
10. It was entirely foreseeable that the Defence (or any moving party) would be required to explain the legal basis for a Request. Permitting replies, to allow applicants to do what ordinarily should be done in the original application, does not enhance the expedition or the fairness of proceedings.
11. Furthermore, even if the Court did find the purportedly new developments relevant, or sufficiently probative to give rise to urgency, the Government reiterates – as it did in its Response¹⁸ - that it is fully cognisant of its existing obligations to cooperate with the Court and those that arise under the Statute. Accordingly, there is no discernible benefit or basis for requiring the grant of any relief.

¹⁶ Application and Request, para. 7.

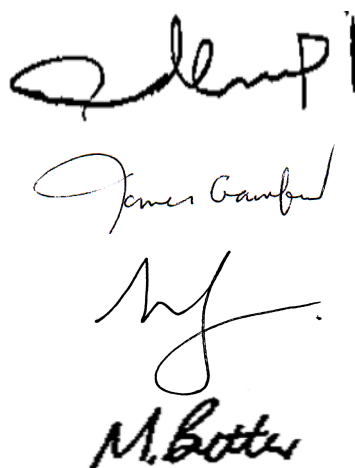
¹⁷ Libyan Government’s Response of 5th August, para. 5.

¹⁸ Libyan Government’s Response of 5th August, para. 9.

III. RELIEF REQUESTED

12. In conclusion, the Government submits that granting the Defence a right of reply would not advance or assist the Chamber's ability to adjudicate on the Defence Application of 10 July 2013. As no good cause for a reply has been shown, the Libyan Government respectfully requests that the Chamber reject the application for leave to reply and the associated applications for decisions on an urgent basis.

Respectfully submitted:



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 Professor James Crawford SC
 Mr Wayne Jordash
 Ms Michelle Butler

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 Counsel on behalf of the Government of Libya
 in the case of Abdullah Al-Senussi*

Dated this 16th day of August 2013
 At London, United Kingdom