



Original: English

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

Date: 26 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 Mr. Abdullah Al-Senussi to refer Libya to the Security Council with Confidential Ex Parte (Chamber only) Annex 1”

Source: The Government of Libya, represented by:
Professor Ahmed El-Gehani
Professor James Crawford SC
Mr. Wayne Jordash
Ms Michelle Butler

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

The Office of the Prosecutor

Ms. Fatou Bensouda

Counsel for the Defence

Counsel for Saif Al-Islam Gaddafi:

Mr. John R.W.D Jones QC

Ms. Sarah Bafadhel

Counsel for Abdullah Al-Senussi:

Mr. Ben Emmerson QC

Mr. Rodney Dixon

Ms. Amal Alamuddin

Mr. Anthony Kelly

Professor William Schabas

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

Ms. Paolina Massidda

Ms. Sarah Pellet

Mr. Mohamed Abdou

The Office of Public Counsel for the Defence

State's Representatives

Professor Ahmed El-Ghani

Professor James Crawford SC

Mr. Wayne Jordash

Ms. Michelle Butler

REGISTRY

Registrar

Mr. Herman von Hebel

Counsel Support Section

Deputy Registrar

Mr. Didier Daniel Preira

Victims and Witnesses Unit

Detention Section

I. INTRODUCTION

1. The Libyan Government submits this Response to the “Defence Application on behalf of Mr Abdullah Al-Senussi to refer Libya to the Security Council with Confidential Ex Parte (Chamber only) Annex 1” (“Application”).¹
2. In its Application, the Defence for Mr Al-Senussi requests that the Pre-Trial Chamber:
 - a. Find Libya in non-compliance with its Order of 6 February 2013 to arrange “a visit of the appointed counsel for Mr Al-Senussi to his client on a privileged basis as soon as practicable”; and
 - b. Refer Libya to the United Nations’ Security Council so that appropriate action can be taken by the Security Council to enforce the ICC’s Order.
3. The Application contains no legal reasoning or argument with respect to the basis of the relief sought other than to refer to Articles 87(5), 87(7) and the Court’s “inherent powers”.² As the Government has noted with respect to previous applications by the Al-Senussi Defence team for Libya to be referred to the United Nations Security Council, before granting a request for a such referral, the Pre-Trial Chamber is first required to determine that:
 - a. Libya’s alleged failure to cooperate prevents the court from exercising its functions and powers under the Statute; and
 - b. That it is appropriate in all the circumstances to exercise its discretionary power to report Libya to the Security Council.³
4. The Pre-trial Chamber has emphasised that “a determination of whether to make a finding of non-cooperation and refer the matter to the Security Council

¹ ICC-01/11-01/11-399.

² Application, paragraph 27.

³ ICC-01/11-01/11-310, paragraph 5; ICC-01/11-01/11-264, paragraphs 10-15. The Al-Senussi Defence does not dispute this: see ICC-01/11-01/11-304, paragraph 15; ICC-01/11-01/11-310, paragraph 5 (This submission was not sought to be countered by way of reply: ICC-01/11-01/11-312).

is discretionary in nature”.⁴

5. The Government does not dispute the binding nature of the Chamber’s 6 February 2013 Order, or that a privileged visit with Mr Al-Senussi has not yet taken place. However, the Government submits that in light of the delays occasioned by the need to conclude a ‘Memorandum of Understanding between Libya and the ICC on the activities of the Court in the Territory of Libya’ with the ICC Registrar it would not be appropriate in all the circumstances to find Libya in non-compliance with its Order. Indeed, it is Libya’s position that it has been working actively with the Registrar to conclude this agreement in order to facilitate such a visit. In these circumstances, Libya has not failed to cooperate with the Court and it is manifestly unarguable that the Court has been prevented from exercising its functions or otherwise executing the task entrusted to it by the Security Council. Accordingly, the Pre-Trial Chamber should reject the Application.

II. SUBMISSIONS

A. Alleged grounds for referral of Libya to the Security Council

1) Alleged non-compliance with order to facilitate a privileged visit as soon as practicable

6. At the outset, it is notable that the Pre-Trial Chamber has, in recent weeks, already made a determination on the precisely the same questions as those which are the subject of the present Application. In a Decision issued less than two months before the filing of the Application, the Pre-trial Chamber ruled that:

In relation to the privileged visit to Mr Al-Senussi, the Chamber notes that according to the latest information received from the Registrar on 3 May 2013, Libya, on 19 April 2013, transmitted to the Court the draft Memorandum of

⁴ ICC-01/11-01/11-354, paragraph 43.

Understanding between the Court and Libya with a number of comments before finalisation, and indicated, inter alia, that “the Libyan Government invite[s] the defense team for Mr Al-Senussi to visit Libya forthwith at any time convenient for them”. In these circumstances, the Chamber considers it unwarranted to resort at the moment to a finding of non-cooperation before the Security Council. The Chamber however notes that to date the privileged legal visit to Mr Al-Senussi is yet to take place. Should the circumstances ultimately evolve into indicating that Libya will fail to cooperate with the Court in the arrangement of the privileged legal visit to Mr Al-Senussi, the Chamber will determine what measures would be necessary to ensure compliance on the part of Libya with the Chamber’s order to that effect.⁵

7. On this basis the Pre-Trial Chamber ordered that it:

Rejects the request of the Defence of Mr Al-Senussi to make a finding of non-cooperation by Libya and refer the matter to the Security Council.⁶

8. Despite the relatively limited passage of time between the Chamber’s previous ruling on this issue and the Defence’s Application, it is now claimed that Libya “has not taken the necessary steps to cooperate and to arrange a legal visit”.⁷

The principal basis for this claim appears to be that:

Libya has failed to finalise and agree the Memorandum of Understanding on Privileges and Immunities (MOU) which would permit Counsel to travel to Libya for a privileged visit as ordered by the Chamber. The Defence emphasises that Libya has been in possession of the draft MOU since March 2012 when it was provided with the draft by the Registry. Since then the Registry has been actively working to finalise the MOU but Libya has still not signed the agreement. Instead, Libya has raised several reasons to delay finalising the

⁵ ICC-01/11-01/11-354, paragraph 45.

⁶ ICC-01/11-01/11-354.

⁷ Application, paragraph 12.

*agreement as detailed in Annex 1.*⁸

9. It is regrettable that Annex 1 has been filed on a Confidential and Ex Parte basis (Chamber only). This approach deprives Libya of due process and undermines transparency. It is wholly unsatisfactory to invite the Chamber to take punitive or last resort measures without providing Libya with the full complement of allegations, the evidence in support and a corresponding opportunity to refute each allegation. As regards the latter, Libya strenuously refutes each claim contained within those aspects of the Application made public.

10. First, Libya was not provided with an English translation of the (draft) Memorandum of Understanding in March 2012, as argued in the Application. This occurred, rather, on 21 February 2013.

11. Second, since that time Libya has been working actively with the Registry to finalise the MOU. On 19 April 2013 – a very short time after the appointment of the new Prosecutor-General, Mr Radwan – the Government transmitted to the Registrar the draft Memorandum of Understanding between the Court and Libya with a number of comments and suggested amendments before finalisation, and indicated, *inter alia*, that “the Libyan Government invite[s] the defense team for Mr Al-Senussi to visit Libya forthwith at any time convenient for them”.

12. Third, the Government did not receive the Registry’s response to the Government’s comments and suggested amendments until 18 June 2013 – some two months after the Government sent the draft MOU to the Registry with its comments. In the same way that it took two months for the relevant organs of the ICC to progress the negotiations with respect to this type of bilateral agreement, it is unsurprising that it has taken a State a similar period of time to

⁸ Application, paragraph 13.

consider and act upon the Registry's response. The Chamber will of course be mindful that the MOU details the modalities of the relationship between Libya and all the organs of the Court, including defence counsel, and the privileges and immunities attaching to those individuals. Due to the ramifications of events taking place in Zintan in the summer of 2012, this was obviously not a straightforward agreement for the Government or the Registry to conclude. In order to ensure that similar or related difficulties may be avoided in future, it is appropriate for both parties to the proposed bilateral agreement to carefully consider the validity of its terms before signing.

13. Fourth, the Registry has recently confirmed that a delegation from the Government (including the Minister of Justice, Mr Salah Margani and the Prosecutor-General, Mr Abdel Radwan) will come to the Netherlands for meetings with the Registrar on 29 August 2013. It is anticipated that the Government will sign the MOU with the Court during these meetings and that the visit of the defence team for Mr Al-Senussi to Libya will be an essential aspect of these discussions.⁹

14. Apart from the alleged delay in concluding an MOU with the Registry, the Defence criticises Libya for stipulating certain conditions applicable for any visit to Libya by defence counsel.¹⁰ These conditions are that the delegation: include a Libyan lawyer, be subject to Libyan domestic law, make its request for a visit through the Registry, provide a copy of its power of attorney to the relevant authorities, and obtain visa approval for such a visit. The Defence argues that these conditions "serve to delay", "make any visit impossible" and "effectively block[...] any visit".

15. These submissions are wholly without merit. The conditions of which the Defence complain merely seek compliance by the Defence with Libyan law. In

⁹ ICC-01/11-01/11-413.

¹⁰ Application, paragraphs 16-20.

the absence of a signed Memorandum of Understanding between the Court and the Government which sets out in detail the particular modalities which are to apply to future visits from defence counsel to Libya, there is nothing improper or inappropriate about Libya requiring defence counsel to adhere to Libyan law during such a visit.

16. The attendance of a Libyan lawyer during a privileged visit is a professional conduct requirement applicable to all lawyers representing clients across Libya. The same applies to the need to request for the provision of a power of attorney prior to giving access to a suspect or accused detained in a Libyan prison. Furthermore, the visa requirements, including having to obtain a visa before travelling to the country and to make the request, stipulating the anticipated dates of any proposed visit, through the Registry's Cooperation Division are legitimate requirements that would be reasonably imposed by all non-State parties to the ICC Statute in advance of such a visit. It may well be that the final version of the MOU which is signed between Libya and the Registry ultimately provides some exemptions to certain requirements of Libyan law for the defence team's visit. But, in advance of such exemptions being agreed in detail with the Registry it is wholly unreasonable for the Defence to complain about being subject to Libyan law during professional visits to Libya.

17. In sum, contrary to the Defence submissions, Libya has been actively engaged – together with the Registry - in trying to secure compliance with the Court's order to facilitate a privileged visit to Mr Al-Senussi as soon as practicable. It therefore cannot be said to have failed to cooperate with the Court.

2) Relevance of announcements as to proposed trial dates and sentences set down in other trial proceedings in Libya

18. The Defence also argues in its Application that the need for a visit "has been even more critical" in light of:

- a. an announcement made in June 2013 that Mr Al-Senussi would be tried in Libya in the first half of August; and
- b. the handing down of a death sentence by a Libyan trial court on a former minister of the Gaddafi regime.¹¹

19. It is plain that neither of these events has any bearing on whether or not Libya can be said to have failed to cooperate with the Court so as to prevent the Court from exercising its functions or otherwise executing the task entrusted to it by the Security Council. As Libya has pointed out in many of its previous filings, the trial of Mr Al-Senussi cannot commence prior to a lawyer being appointed to represent him and prior to his charges being confirmed by an Accusation Chamber.¹² As his case is yet to progress to the Accusation Chamber for review of the evidence, there is no imminent prospect of trial. Moreover, as has also been clarified on several occasions in public filings before the Court, prior to the death penalty being imposed in any case in Libya, it is mandatory for the case to be reviewed by the Supreme Court.¹³ It is therefore patently incorrect to imply, as the Defence has sought to do, that Mr Al-Senussi is at risk of the death penalty before he has the opportunity to meet with a lawyer.

III. CONCLUSION

20. As set out above, Libya has not failed to cooperate with the Chamber by failing to provide Mr. Al-Senussi with access to his Counsel. Accordingly, the proposition that Libya has failed to cooperate with the court and that this has prevented the court from exercising its functions or otherwise executing the task entrusted to it by the Security Council is manifestly unarguable.¹⁴ There is no reason for the Chamber to exercise its discretion to refer Libya to the Security Council. The Libyan Government, therefore,

¹¹ Application, paras 24-26.

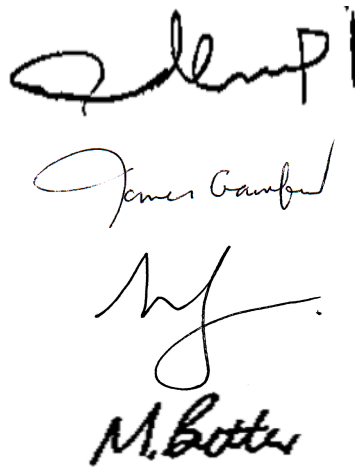
¹² See for example: ICC-01/11-01/11-307, para 175.

¹³ See for example: ICC-01/11-01/11-307, para 134.

¹⁴ Cf. Application, paras 21-23.

respectfully invites the Pre-Trial Chamber to reject the Application.

Respectfully submitted:



Professor Ahmed El-Ghani
Professor James Crawford SC
Mr Wayne Jordash
Ms Michelle Butler

*Libyan ICC Coordinator and
Counsel on behalf of the Government of Libya
in the case of Abdullah Al-Senussi*

Dated this 26th day of August 2013
At London, United Kingdom