



Original: **English**

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

Date: **3 September 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**

**Application for Leave to Reply to the “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,’” filed on 26 August 2013**

**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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**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 Other  
Section**

## **Introduction**

1. The Defence for Mr. Abdullah Al-Senussi files this application to request leave to reply to the “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,’” dated 26 August 2013.<sup>1</sup> The Defence originally filed its Application on 9 August 2013 requesting that the Pre-Trial Chamber (i) find Libya in non-compliance with the Chamber’s Order of 6 February 2013 to arrange for appointed Counsel to be allowed a privileged and confidential legal visit to Mr. Al-Senussi as soon as practicable, and (ii) refer Libya to the United Nations’ Security Council.<sup>2</sup>
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.”<sup>3</sup>
3. The Defence requests leave to reply for two reasons:
  - a. In its Response, Libya asserted that the Defence application should be rejected because its officials were meeting with the ICC Registry last week on 29 August 2013 to sign the MOU that could facilitate a legal visit.<sup>4</sup> This meeting has now taken place, but Libya did not sign any MOU which would permit the Defence’s visit. The Defence seeks leave to update the Chamber with its submissions on these developments which have taken place after the Defence filed its Application, but which are relevant to the determination of the Application.

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<sup>1</sup> 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”, ICC-01/11-01/11-417, 26 August 2013 (hereinafter “Libya’s Response of 26 August 2013”).

<sup>2</sup> Defence Application on behalf of Mr. Abdullah Al-Senussi to refer Libya to the Security Council with Confidential *Ex Parte* (Chamber only) Annex 1, ICC-01/11-01/11-399, 9 August 2013 (hereinafter “Defence Application of 9 August 2013”).

<sup>3</sup> 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.

<sup>4</sup> Libya’s Response of 26 August 2013, para. 13.

- b. On 27 August 2013, Libya publicly announced that Mr. Al-Senussi “will be presented on September 19 before the Court of first instance in Tripoli”<sup>5</sup>. Yet, in its Response (filed only one day before this announcement), Libya provided no such details of any timetable for the trial, and claimed that there is “no imminent prospect of trial” in requesting the Chamber to reject the Defence’s Application.<sup>6</sup> The Defence therefore wishes to provide the Chamber with the details of Libya’s latest announcements about the start of the trial against Mr. Al-Senussi. This information directly supports the Defence’s submission that the need for a legal visit is even more critical and urgent, and that Libya’s failure to facilitate such a visit and the delays it has caused should be reported to the Security Council so that appropriate action can be taken to enforce the Chamber’s Order.
4. Accordingly, the Defence submits that there is good cause for it to be granted an opportunity to reply on these issues before the Chamber determines the Defence’s Application of 9 August 2013 to refer Libya to Security Council for non-compliance.

### **Submissions**

#### ***Update on the MOU***

5. The Defence seeks leave to reply to Libya’s submission in its Response 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.”<sup>7</sup>

<sup>5</sup> Pre-Trial of Gadhafi’s Son Next Month in Tripoli, Naharnet, 27 August 2013 (<http://www.naharnet.com/stories/en/95781-pre-trial-of-gadhafi-s-son-next-month-in-tripoli>); Libya to Try Gadhafi’s Son Next Month, AP, 27 August 2013 ([http://hosted.ap.org/dynamic/stories/M/ML\\_LIBYA?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT](http://hosted.ap.org/dynamic/stories/M/ML_LIBYA?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT)); See also, [http://www.lana-news.ly/ara/news/view/29868/إعادة\\_تصديق\\_اليوم\\_في\\_الخبز\\_في\\_اليوم\\_ب\\_تصديق\\_إعادة](http://www.lana-news.ly/ara/news/view/29868/إعادة_تصديق_اليوم_في_الخبز_في_اليوم_ب_تصديق_إعادة) and <https://www.facebook.com/photo.php?v=388040881321688&set=vb.122749571141269&type=2&theater>.

<sup>6</sup> Libya’s Response of 26 August 2013, para. 19.

<sup>7</sup> Libya’s Response of 26 August 2013, para. 13.

6. The Defence has been informed by the Registry that although the meeting took place last week, Libya did not sign any MOU.
7. As the Defence emphasised in its Application, Libya's agreement to an MOU that would guarantee a confidential and privileged legal visit is central to any visit being able to take place, as ordered by the Chamber. Libya has again failed to facilitate such a visit by not signing the necessary MOU. The Defence, therefore, requests to be permitted to address this matter in its Reply, particularly because Libya relied in its Response on the meeting with the Registry last week to argue that the Defence Application should be refused.

***New announcement about the domestic proceedings***

8. The Defence requests leave to reply to be able to inform the Chamber of Libya's latest announcement about the timetable of the national proceedings against Mr. Al-Senussi. These new developments could not have been anticipated in the Application and they directly impact on the merits of the Application.
9. The Defence seeks leave to inform the Chamber in its Reply of the following recent developments:
  - On 27 August 2013 the Libyan Prosecutor-General announced that "[t]he prosecutor's office has decided to try 30 people linked to the former regime, including Seif al-Islam Gadhafi (and former spy chief) Abdullah al-Senussi;"<sup>8</sup> and that "[t]his affair will be presented on September 19 before the court of first instance in Tripoli."<sup>9</sup>

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<sup>8</sup> Pre-Trial of Gadhafi's Son Next Month in Tripoli, Naharnet, 27 August 2013 (<http://www.naharnet.com/stories/en/95781-pre-trial-of-gadhafi-s-son-next-month-in-tripoli>); Libya to Try Gadhafi's Son Next Month, AP, 27 August 2013 ([http://hosted.ap.org/dynamic/stories/M/ML\\_LIBYA?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT](http://hosted.ap.org/dynamic/stories/M/ML_LIBYA?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT)).

<sup>9</sup> Pre-Trial of Gadhafi's Son Next Month in Tripoli, Naharnet, 27 August 2013 (<http://www.naharnet.com/stories/en/95781-pre-trial-of-gadhafi-s-son-next-month-in-tripoli>); Libya to Try Gadhafi's Son Next Month, AP, 27 August 2013 ([http://hosted.ap.org/dynamic/stories/M/ML\\_LIBYA?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT](http://hosted.ap.org/dynamic/stories/M/ML_LIBYA?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT)).

- During the same press conference, Prosecutor Mr. Al-Seddik al-Sur announced that Mr. Al-Senussi had made confessions about allegedly collaborating in the production of car bombs in the city of Benghazi.
- On 27 August 2013, following the Prosecutor-General's press conference, Professor El-Gehani (named Counsel on behalf of Libya before the ICC) appeared on a Libyan television news program in which he answered questions about the Prosecutor-General's press conference, the status of the domestic investigation and proceedings, and again stated that Mr. Al-Senussi would be tried in Libya, in disregard of the ICC's admissibility proceedings.<sup>10</sup>

10. The Defence submits that this new information should be taken into account before the Chamber makes its determination. The information is relevant to the Defence's Application and should be received by the Chamber in the Defence's Reply for the following reasons.

11. First, the announcement of a hearing on 19 September contradicts Libya's submission in its Response of 26 August (the day before the Prosecutor-General's press conference) that "[a]s his case is yet to progress to the Accusation Chamber for review of the evidence, there is no imminent prospect of trial."<sup>11</sup> This assertion was made by Libya to argue in its Response that the timetable of the current domestic proceedings is irrelevant to the present Application as there is no urgency to arrange a visit. In making these submissions, Libya provided the Chamber with no indication that the very next day the Libyan authorities would announce that Mr. Al-Senussi's case would imminently be referred to the Accusation Chamber for hearing on 19 September.

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<sup>10</sup> ICC-01/11-01/11-424-AnxA, and ICC-01/11-01/11-424-AnxB.

<sup>11</sup> Libya's Response of 26 August 2013, para. 19. Also, on 16 August 2013, just 10 days prior Libya informed the Chamber that "[i]n circumstances where his case has not yet been referred to an Accusation Chamber, there is plainly no need for urgency." See, 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"", ICC-01/11-01/11-406, 16 August 2013, para. 8.

12. The Defence submits that it is misleading for Libya to inform the Court that domestic proceedings are not imminent and that “there is plainly no need for urgency”<sup>12</sup> when on the following day Libya announced that the case will be heard on 19 September. Libya cannot claim that its Counsel were unaware that this announcement would be made the day after its Response was filed as Professor El-Gehani who appears as Counsel and ICC Co-ordinator / focal point on behalf of Libya in the proceedings before the ICC was interviewed on national television on 27 August about the announcement and answered questions about the hearing scheduled for 19 September.

13. Second, Prosecutor Al-Seddik al-Sur’s announcement that Mr. Al-Senussi had apparently made confessions should be taken into account by the Chamber. As previously submitted,<sup>13</sup> Mr. Al-Senussi has repeatedly asked the Libyan authorities to see a lawyer<sup>14</sup> during the pre-trial / pre-Accusation phase proceedings but has been denied access to a lawyer. This constitutes a clear violation of Article 106 of the Libyan Criminal Procedure Code.<sup>15</sup> Mr. Al-Senussi has not had access to a lawyer during the entire period of his detention in Libya (for almost one year), and has been denied access to his appointed Counsel since January 2013 (for over nine months), but has nevertheless been repeatedly interrogated<sup>16</sup>. Libya now claims that he has made confessions.

14. The Defence submits that it is vital that the Chamber receive the information about the Libyan prosecutor’s announcement which revealed the purported confessions. The Libyan investigative proceedings are plainly in violation of Mr. Al-Senussi’s rights under Libyan law and under the ICC Statute.<sup>17</sup> Libya has not only failed to facilitate a legal visit for Mr. Al-Senussi’s appointed Counsel, but has proceeded with

<sup>12</sup> 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””, ICC-01/11-01/11-406, 16 August 2013, para. 8.

<sup>13</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, para. 124.

<sup>14</sup> ICC: Libya’s Bid to Try Gaddafi, Sanussi, HRW, 13 May 2013, Question 34 (<http://www.hrw.org/news/2013/05/13/qa-libya-and-international-criminal-court#40>).

<sup>15</sup> Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11-307-Red2, 2 April 2013, para. 146.

<sup>16</sup> Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11-307-Red2, 2 April 2013, para. 165; See, ICC-01/11-01/11-307-Conf-Anx3-Red. See also, 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, paras. 43, 125, 129, 132, 138.

<sup>17</sup> See, Article 106 of the Libyan Criminal Procedure Code and Rome Statute Article 55(1)(a) and 55(2)(c).

interrogations after Mr. Al-Senussi requested a lawyer in the absence of counsel and before his appointed Counsel could communicate with him. Libya's refusal to comply with the Chamber's Order of 6 February 2013 (for over 8 months) has resulted in the violation of Mr. Al-Senussi's rights under Libyan law and the ICC Statute. The information thus supports the Defence's submission that Libya's failure to facilitate a legal visit as ordered by the Chamber has prevented the Court from exercising its functions and powers under the Statute and that Libya should be reported to the Security Council.

15. Third, Professor El-Gehani stated in his interview in response to the question of "how can Libya benefit from stopping the transfer of Saif and Senussi to The Hague?" that "Saif and Senussi" would be tried in Libya and that "there are over 29 accused, who will be tried together."<sup>18</sup> This interview should be placed before the Chamber in the Defence's Reply as it also demonstrates that the Libyan authorities have no intention of complying with the orders of the Court. Here Libya's Counsel and ICC Co-ordinator / focal point has stated publicly that Mr. Al-Senussi will be tried in Libya.

16. Furthermore, Libya has misrepresented the Defence's submissions about the difficulties that the Defence have experienced in trying to obtain Libyan visas. Libya asserts that the Defence is wrongly complaining about Libya's requirement that the Defence "obtain visa approval for such a visit."<sup>19</sup> Libya states that "having to obtain a visa before travelling to the country ... [is a] legitimate requirement ... that would be reasonably imposed by all non-State parties to the ICC Statute in advance of such a visit."<sup>20</sup> The Defence seeks leave to correct this argument as the Defence does not dispute that visas may be required – the problem is that Libya has refused even to accept the Defence's applications for visas despite the ICC's request for assistance.<sup>21</sup> This is a matter which is relevant to establishing Libya's non-compliance with the Chamber's Order.

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<sup>18</sup> See, ICC-01/11-01/11-424-AnxA.

<sup>19</sup> Libya's Response of 26 August 2013, para. 14.

<sup>20</sup> Libya's Response of 26 August 2013, para. 16.

<sup>21</sup> Defence Application of 9 August 2013, paras. 16-18.

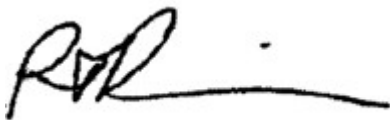
**Conclusion**

17. For all 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 26 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).

Counsel on behalf of Mr. Abdullah Al-Senussi,



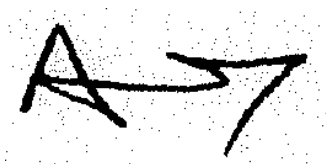
**Ben Emmerson QC**



**Rodney Dixon**



**Amal Alamuddin**



**Anthony Kelly**

A handwritten signature in black ink, appearing to read 'Wm Schabas', with a stylized flourish at the end.

**Professor William Schabas**

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

London, United Kingdom