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

Date: 23 September 2013

THE APPEALS CHAMBER

Before: Judge Anita Usaka, Presiding Judge
Judge Sang-Hyun Song
Judge Sanji Mmasenono Monageng
Judge Akua Kuenyehia
Judge Erkki Kourula

**SITUATION IN LIBYA
IN THE CASE OF**

***THE PROSECUTOR v.
SAIF AL-ISLAM GADDAFI and ABDULLAH AL-SENUSSI***

Public

Libyan Government Response to “Appeal on behalf of Mr Abdullah Al-Senussi against the ‘Decision on Libya’s postponement of the execution of the request for arrest and surrender of Abdullah Al-Senussi pursuant to article 95 of the Rome Statute and related Defence request to refer Libya to the UN Security Council’”

Source: The Government of Libya, represented by:
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Mr. Wayne Jordash
Ms Michelle Butler

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 submits this Response to the “Appeal on behalf of Mr Abdullah Al-Senussi against the ‘Decision on Libya’s postponement of the execution of the request for arrest and surrender of Abdullah Al-Senussi pursuant to article 95 of the Rome Statute and related Defence request to refer Libya to the UN Security Council’” (“Response”).

II. REQUEST FOR VARIATION OF TIME LIMIT

2. The Libyan Government respectfully requests a variation of the time limit for filing this Response pursuant to regulation 35(2) of the Regulations of the Court. Although the Government’s Response was due to be filed with the Court on Friday 20 September 2013,¹ there is good cause to extend this time limit by one working day to allow receipt of this Response on Monday 23 September 2013. Regrettably, Counsel for the Libyan Government were unable to file this application for an extension of time within regulation 35(2) time limit. This is because, prior to 19 September 2013, the Government’s domestic legal team were fully engaged in preparing materials for the transfer of the cases of Abdullah Al-Senussi and Saif Al-Islam Gaddafi to the Accusation Chamber. On Friday 20 September 2013, this involved travelling in order to deliver by hand a paper copy of the Accusation Chamber dossier (in Arabic) to Counsel for the Libyan Government. As a consequence of this activity, Counsel were unable to obtain essential instructions on the substance of the Response (or, similarly, on the application for an extension of time) for reasons outside of their (and Libya’s) control. Counsel and Libya regret the delay. However, it is submitted that the reasons outlined constitute good cause for the variation of the time limit under regulation 35, particularly as the substance of the submissions and the minimal delay are such that no prejudice will be caused to any of the parties to the proceedings or any issue in dispute.²

¹ Pursuant to Regulation 65(5) and Article 82(1)(d).

² See for example, ICC-01/04-01/10-117; ICC-02/11-01/11-97.

III. RESPONSES BY THE OTP AND THE GADDAFI DEFENCE

3. The Government notes at the outset the Responses submitted by the Office of the Prosecutor and the Defence for Saif Al-Islam Gaddafi on 20 September 2013 (“Prosecution Response”³ and “Gaddafi Response”⁴ respectively).
4. The Government of Libya fully supports the submissions made in the Prosecution Response and, in the interest of brevity, will not seek to repeat those submissions in this filing. In sum, Libya agrees with the Prosecution that for the reasons set out in the Prosecution Response the Appeals Chamber should reject the Appeal in its entirety.
5. Additionally, the Government disputes the standing of the Defence for Mr Gaddafi to file the Gaddafi Response in these appellate proceedings. The submissions made in the Gaddafi Response as to standing⁵ do not identify a proper basis to advance a response to an appeal by the Al-Senussi Defence on matters concerning the Al-Senussi Admissibility Proceedings. The two examples cited by the Gaddafi Defence in footnote 1 are not analogous to the present issue and provide little justification for the Defence’s intervention.⁶ One relates to proceedings before the ICTY. It concerns a “conflict of interest” issue that further demonstrates its marginal relevance to the proper procedure to be followed before the ICC and the Defence’s assertion of standing. The other relates to a conjoined case before the ICC that had reached the confirmation stage of proceedings for all of the defendants and in which each of the defendants had physically appeared before the Court. That is a very different situation from the one at hand where neither defendant has appeared before the Court, any confirmations proceedings are in the future, and the connection between the cases is largely speculative.
6. Moreover, the submissions by the Gaddafi defence as to the impact of the Appeals Chamber’s decision in respect of the surrender of Mr Al-Senussi on the

³ ICC-01/11-01/11-449.

⁴ ICC-01/11-01/11-448.

⁵ ICC-01/11-01/11-448, paras 7-14.

⁶ ICC-01/11-01/11-448, para 8.

Mr Gaddafi's case are in error.⁷ The Court may hold separate confirmation proceedings with respect to the two suspects so that there is no impact on scheduling caused by one suspect making a first appearance before the Court at a different time from another suspect. Likewise, it is plain that the Gaddafi Defence would have the opportunity to seek to appeal any further decision made by the Pre-Trial Chamber with respect to the obligation to surrender Mr Gaddafi at that stage of proceedings. It is therefore incorrect to imply that the present appeal will be determinative of Mr Gaddafi's rights or in any way prejudice his rights and the Appeals Chamber is accordingly invited to disregard the Gaddafi Response in its entirety.

IV. SUBMISSIONS

7. In its Appeal the Defence for Mr Al-Senussi submits that the Pre-trial Chamber erred by:
 - a. Finding that Libya had filed the admissibility challenge "at the earliest opportunity"; and
 - b. Refusing to consider other arguments advanced by the defence in its assessment of Libya's admissibility challenge, in particular:
 - i. Libya's alleged track record of non-compliance with orders of the Court;
 - ii. whether Libya has demonstrated that it intends to surrender Mr Al-Senussi if so ordered at the conclusion of the admissibility proceedings; and
 - iii. whether postponement of the surrender request would undermine the protection of Mr Al-Senussi's rights under the Statute.
8. Each of these flawed submissions will be dealt with in turn.

⁷ ICC-01/11-01/11-448 paras 9-14.

1) The Chamber correctly held that Libya filed its admissibility challenge at the earliest opportunity within the terms of article 19(5)

9. As the Defence concedes in the Appeal, the Pre-Trial Chamber did give detailed consideration to whether the Admissibility Challenge was filed at the earliest opportunity as required by article 19(5) and for the purposes of determination whether to postpone the surrender request under article 95.⁸ The Defence submissions amount to a mere disagreement with the Pre-Trial Chamber's conclusions. They cannot be properly said to establish or even argue a clear error of reasoning based upon the evidence that was before the Chamber. As the Government pointed out in its submissions before the Pre-Trial Chamber with respect to article 95,⁹ the facts surrounding the timing of the Libyan Government's admissibility challenge are complex and are set out in paragraphs 2, 10-17, 136-138, 152-158, 167-169, 175, 176, 180-193 of the Al-Senussi Admissibility Challenge.¹⁰ Those facts are very different to those underlying the Gaddafi case, not least due to the lengthy delays involving in extraditing the accused to Libya, the delays caused by the change of Government necessitated by Libya's first democratic election in five decades in the second half of 2012, and the length of time it took for the investigative proceedings in the Al-Senussi case to reach a stage (following the extradition of the Defendant) when an admissibility challenge could be made at the earliest opportunity without being premature. Indeed, the importance of the jurisprudence cautioning against making premature admissibility challenges was specifically referred to by the Government in its submissions before the Pre-Trial Chamber,¹¹ and was also a matter which was given due consideration by the Pre-Trial Chamber in the Impugned Decision.¹²

⁸ ICC-01/11-01/11-439, para 12, referring to Impugned Decision, paras 36, 37, 30, 32.

⁹ ICC-01/11-01/11-339, para 7.

¹⁰ ICC-01/11-01/11-307.

¹¹ ICC-01/11-01/11-339, paras 4-5.

¹² Impugned Decision, para 32.

2) The Chamber correctly disregarded the Defence's submissions on Libya's purported violations, declared intentions not to comply and Mr Al-Senussi's rights under the Rome Statute

10. Contrary to the submissions of the Defence, the Pre-trial Chamber was correct to refuse to consider other arguments advanced by the Defence in its assessment of Libya's admissibility challenge. As the Government observed in its submissions before the Pre-Trial Chamber, there is a close link between article 95, the complementarity regime and the Chamber's resulting lack of discretion in relation to article 95 due to the role of article 95 in upholding states' rights. It is for this reason that once a challenge is properly made within the terms of article 19 of the Statute that the court does not have discretion to refuse a requested State's election to postpone surrender pursuant to article 95. If the position were otherwise the central tenet of complementarity would be subverted.¹³ The non-discretionary nature of article 95 in these circumstances was correctly recognised by the Pre-Trial Chamber in the Impugned Decision – once a Chamber verifies that an admissibility challenge is properly made, postponement of the execution of a surrender request falls exclusively within the prerogatives of the requested State and accordingly any other arguments (which do not relate to whether an admissibility challenge was properly made) are of no relevance to a determination of the applicability of article 95.¹⁴
11. It would have been entirely unreasonable for the Pre-trial Chamber to regard the purely prejudicial and unverified submissions by the Defence pertaining to Libya's purported violations and alleged intentions not to comply and Mr Al-Senussi's rights under the Statute as relevant to its interpretation of article 95. As the Triffterer commentary to article 95 makes clear, this provision is a straightforward one which protects a State's rights to proceed with its own investigation (or to choose not to do so) until a decision is made on admissibility:

¹³ ICC-01/11-01/11-339, paras 4-24.

¹⁴ Impugned Decision, paras 25, 27 and 34.

“While an admissibility or jurisdiction challenge is pending before the Court, the requested State may postpone the execution of a request be it for surrender or for another form of cooperation. The requested State may proceed with its own investigations according to its national law or take no action in the matter, until the question is resolved. This practical provision makes it clear that a State need not invest time and effort into a request, when it may be determined that the case is not admissible or that the Court does not have jurisdiction.”¹⁵

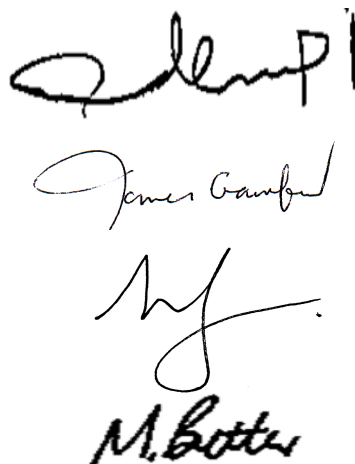
12. Accordingly, the Defence for Mr Al-Senussi has not established that the Pre-Trial Chamber made a clear error, or reached a conclusion it could not have reasonably reached on the evidence before it. Conversely, the Pre-trial Chamber correctly concluded that an admissibility challenge in respect of Mr Al-Senussi was properly made by Libya within the meaning of article 19(5) and that requested States have a right to suspend execution of cooperation requests pending an admissibility determination pursuant to article 95 of the Statute.

V. CONCLUSION

13. The Libyan Government, therefore, respectfully invites the Appeals Chamber to reject the Appeal.

¹⁵ Kress and Prost on article 95 in Triffterer, ‘Commentary on the Rome Statute of the ICC’, at page 1594.

Respectfully submitted:



The image shows four handwritten signatures stacked vertically. The first signature is in black ink and appears to be 'Ahmed El-Gehani'. The second signature is in blue ink and appears to be 'James Crawford'. The third signature is in black ink and appears to be 'Wayne Jordash'. The fourth signature is in black ink and appears to be 'Michelle Butler'.

Professor Ahmed El-Gehani
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 23rd day of September 2013
At London, United Kingdom