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

Date: **2 May 2012**

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

**Motion on Behalf of the Government of Libya
Requesting an Oral Hearing in Respect of its Admissibility Challenge Pursuant to
Article 19 of the ICC Statute**

Source: The Government of Libya, represented by:
Professor Philippe Sands QC
Professor Payam Akhavan
Ms Michelle Butler

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

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Ms. Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section **Other**

I. Introduction

1. The Government of Libya respectfully submits this Motion to request an oral hearing in respect of its Article 19 application challenging the admissibility before the Court of the case concerning Saif Al-Islam Gaddafi and the case concerning Abdullah Al-Senussi. It is submitted that an oral hearing is required in light of the far-reaching importance of this issue for the Libyan people and the international community as well as the transitional context prevailing in Libya at present. Such a hearing will ensure a perception of public involvement and transparency and will provide an opportunity for the Court to hear directly from the State representatives of Libya in further elaboration of the on-going national proceedings.

II. Procedural History

2. On 26 February 2011, the Security Council of the United Nations adopted Resolution 1970, referring the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the ICC Prosecutor, pursuant to article 13(b) of the ICC Statute.¹ On 3 March 2011, the Prosecutor decided to open an investigation,² and on 16 May 2011, after a very brief investigation – of less than two and a half months – the Prosecutor sought arrest warrants against Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi for alleged criminal responsibility for the crimes against humanity of murder and persecution.³ On 27 June 2011, Pre-Trial Chamber I accepted this application.⁴
3. Saif Al-Islam Gaddafi was captured in Libya on 19 November 2011.⁵

¹ United Nations Security Council, Resolution 1970 (2011), UN Doc. S/RES/1970, adopted by the Security Council at its 6491st meeting, 26 February 2011 [“Resolution 1970”].

² *Situation in the Libyan Arab Jamahiriya*, “Decision Assigning the Situation in the Libyan Arab Jamahiriya to Pre-Trial Chamber I”, Presidency, 4 March 2011, ICC-01/11-1 (with annex).

³ *Situation in the Libyan Arab Jamahiriya*, “Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi”, Pre-Trial Chamber I, 16 May 2011, ICC-01/11-4-Red (with annexes).

⁴ *Situation in the Libyan Arab Jamahiriya*, “Decision on the ‘Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi’”, Pre-Trial Chamber I, 27 June 2011, ICC-01/11-12.

⁵ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Implementation of the “Decision to Add Document to Case Record”, Registry, ICC-01/11-01/11-34-Anx, 29 November 2011, annex 1.

Abdullah Al-Senussi was captured in Mauritania on 17 March 2012.⁶ Prosecutorial and investigative officers of the Libyan Government commenced investigations into the crimes against the person allegedly committed by both Saif Al-Islam Gaddafi and Abdullah Al-Senussi during the 2011 revolution on 8 January 2012 (following a decision to do so on 17 December 2011) and 3 April 2012 respectively. Those investigations are now at an advanced stage and are expected to be completed in the coming weeks.

4. On 22 March 2012, the Libyan Government notified the Chamber of its intention to challenge the admissibility of the case pursuant to article 19 of the Statute on 30 April 2012. Due to the ICC holiday on 30 April 2012 (during which the Registry was not open for receipt of filings), the Libyan Government's article 19 application was formally filed with the Court on 1 May 2012 (although it was sent to the Court on 30 April 2012).
5. For the reasons set out below, the government of Libya hereby requests the Pre-Trial Chamber to order an oral hearing for the purpose of ensuring a full and proper consideration of this challenge.

III. Law

6. Article 19 of the ICC Statute, and Rule 58 of the Rules, set out the rules applicable to the Libyan government's challenge to the admissibility of the case against Saif Al-Islam Gaddafi and Abdullah Al-Senussi. Libya's standing is confirmed by Article 19(2)(b), which allows challenges to admissibility to be made, *inter alia*, by a "State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case". Libya has jurisdiction over the case and is investigating, as set out in its Article 19 challenge.
7. Such challenges are commenced by a request or application to the Pre-Trial Chamber.⁷ The Pre-Trial Chamber is required to "decide on the procedure to be followed and may take appropriate measures for the proper conduct of the

⁶ <http://www.bbc.co.uk/news/world-africa-17413626>

⁷ See article 19(6), Statute; rule 58(1), (2), (3), Rules of Procedure & Evidence.

proceedings”.⁸ The Pre-Trial Chamber’s decision includes decisions on oral hearings.

IV. Submissions

8. This case is of historic importance for the Libyan people. It is also of considerable significance to and is being closely by the international community. The UN Secretary General has explicitly acknowledged the need to uphold the “principals of Libyan ownership”⁹ in his report of 22 November 2011 on Libya.¹⁰ Recognising that Libya is in a post-conflict phase and engaged in judicial sector reform as part of a “historic transition”,¹¹ the Secretary-General stated that “[t]o succeed, Libya must be given the space required to determine its future”, adding that “[i]n this context, the role of the United Nations should be to support Libyans in their efforts”.¹² He further stated that “the international community as a whole, will best support Libya ... by being responsive to Libya’s own emerging sense of its needs for international support”.¹³

9. In this light, the manner in which this admissibility challenge is addressed by the Court will inform the way the people of Libya perceive the legal process underlying the complementarity principle and the international community’s response to the democratic aspirations of the new Libya. The Libyan people are entitled to the greatest possible openness and transparency in the treatment of this admissibility challenge. A public hearing will help ensure a better understanding, and assist in establishing the perceived legitimacy, of the process.

10. Libya’s particular interest in these proceedings is further amplified by the fact

⁸ Rule 58(2), Rules of Procedure & Evidence.

⁹ Report of the Secretary-General, 22 November 2011, pp. 12, 16, 19.

¹⁰ United Nations Security Council, Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2011/727, 22 November 2011 [“Report of the Secretary-General, 22 November 2011”].

¹¹ Report of the Secretary-General, 22 November 2011, pp. 1, 11, 12.

¹² Report of the Secretary-General, 22 November 2011, pp. 11, 12.

¹³ Report of the Secretary-General, 22 November 2011, p. 19

it is not a party to the ICC Statute. In the absence of any opportunity for State representatives to participate in the assessment of whether the International Criminal Court should exercise jurisdiction over this matter, Libya submits that an oral hearing in relation to that question – with the direct interaction and opportunity to elaborate that such a hearing would involve - assumes an even greater importance. Even the strongest supporters of action by the UN Security Council, pursuant to Chapter VII of the UN Charter, recognise that such measures potentially involve a significant intrusion on the right of States to exercise their sovereign rights, including national criminal investigations and prosecutions as appropriate – that a State such as Libya is genuinely committed to pursuing.

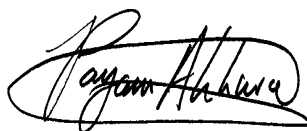
11. The Pre-Trial Chamber will recognise that the situation in Libya is only the second time that the ICC has gained jurisdiction by way of a resolution of the UN Security Council, pursuant to article VII of the UN Charter. In this regard, the application of the complementarity principle in the context of a transitional situation is of immense importance, and gives rise to certain fundamental questions that may require elaboration. An oral hearing will enable a dialogue between the Court and Libya to address these issues of far-reaching importance, and ensure that those most directly affected by these proceedings see for themselves – openly and publicly – the manner in which the legal questions involved are addressed.
12. Finally, an oral hearing offers the Pre-Trial Chamber a useful opportunity to interact with those Libyan authorities who are best placed to provide highly useful information to the Pre-Trial Chamber in relation to factors pertaining to admissibility, and to address questions that the Chamber may have in relation to the on-going progress of its investigation and / or the Libyan criminal justice system. This opportunity to provide supplemental information would enable more informed decision-making by the Pre-Trial Chamber than might be possible by dealing with the challenge through written pleadings alone.

13. Libya seeks an oral hearing *inter alia* to enable the Pre-Trial Chamber to hear directly from several pertinent sources, including the Prosecutor-General, who has investigated the case of Saif Al-Islam Gaddafi personally; and the Military Prosecutor who is leading the investigation of the case against Abdullah Al-Senussi.

14. These and other individuals play a central role in the development of the Libyan justice system in the immediate future (as well as in the middle and long-term). They are sources upon which the Pre-Trial Chamber may comfortably rely in assessing the capacity of the Libyan criminal justice system.

V. Relief requested

15. For the reasons set forth above, the Government of Libya respectfully requests that the Pre-Trial Chamber grant an oral hearing on Libya's Article 19 admissibility challenge.



Professor Philippe Sands QC

Professor Payam Akhavan

Michelle Butler

Counsel on behalf of the Government of Libya

Dated this 2nd day of May 2012

At London, United Kingdom