

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 26 April 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

Decision on the request of Abdullah Al-Senussi for leave to reply

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Fatou Bensouda

James Stewart

Counsel for Saif Al-Islam Gaddafi

John R.W.D. Jones

Counsel for Abdullah Al-Senussi

Benedict Emmerson

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Paolina Massidda

**The Office of Public Counsel for the
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States Representatives

Ahmed El-Gehani

James Crawford

Wayne Jordash

Michelle Butler

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Deputy Registrar

Didier Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Pre-Trial Chamber I (the “Chamber”) of the International Criminal Court (the “Court”) issues the following decision on the “Application on behalf of Abdullah Al-Senussi for leave to reply to the ‘Response of the Libyan Government to the Renewed Application on behalf of Mr. Abdullah Al-Senussi to Refer Libya and Mauritania to the UN Security Council with Public Annex 1 and Confidential and Ex parte (Registry only) Annexes 2 and 3’ of 10 April 2013” (the “Request”).¹

1. On 27 June 2011, the Chamber issued the “Decision on the ‘Prosecutor’s Application Pursuant to Article 58 as to the Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi’”,² and warrants of arrest for, *inter alia*, Abdullah Al-Senussi (“Mr Al-Senussi”).³

2. On 6 February 2013, the Chamber issued the “Decision on the ‘Urgent Application on behalf of Abdullah Al-Senussi for Pre-Trial Chamber to order the Libyan Authorities to comply with their obligations and the orders of the ICC’”,⁴ whereby the Chamber, *inter alia*: (i) ordered the Libyan authorities to proceed to the immediate surrender of Mr Al-Senussi to the Court; (ii) ordered the Libyan authorities to refrain from taking any action which could frustrate, hinder or delay Libya’s compliance with its obligation to surrender Mr Al-Senussi to the Court; and (iii) ordered the Registrar to make the necessary arrangement with the Libyan authorities for a privileged visit to Mr Al-Senussi by his Defence counsel.⁵

3. On 19 March 2013, the Defence for Mr Al-Senussi filed its “Renewed Application on behalf of Mr. Abdullah Al-Senussi to Refer Libya and Mauritania to the UN Security Council with Public Annex 1 and Confidential

¹ ICC-01/11-01/11-312.

² ICC-01/11-01/11-1.

³ ICC-01/11-01/11-4.

⁴ ICC-01-11-01/11-269.

⁵ *Ibid.*, p. 15.

and Ex parte (Registry only) Annexes 2 and 3” (the “Application”).⁶ The Defence requests the Chamber to refer and report Libya to the UN Security Council for the violation of a number of its obligations *vis-à-vis* the Court, including: (i) its obligation to arrange a privileged legal visit for the Defence to Mr Al-Senussi as ordered by the Chamber; (ii) its obligation to refrain from any action that would frustrate, hinder or delay the possibility of compliance with its duties to the Court; and (iii) its obligation to surrender Mr Al-Senussi to the Court.⁷

4. On 2 April 2013, Libya filed its “Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute”, challenging the admissibility of the case against Mr Al-Senussi (“Admissibility Challenge”).⁸

5. On 10 April 2013, Libya filed its response to the Application (the “Response”).⁹ On the discrete issues raised by the Defence, Libya submits that: (i) contrary to the Defence allegations, “Libya has acted with due diligence to ensure a privileged legal visit as soon as practical”;¹⁰ (ii) preparations for trial in Libya “are not [actions] which could hinder or delay [Mr Al-Senussi’s] immediate transfer to the ICC”;¹¹ and (iii) as a result of the filing of its Admissibility Challenge, Libya has the right, pursuant to article 95 of the Rome Statute (the “Statute”) to postpone the execution of the Court’s order for Mr Al-Senussi’s surrender pending the determination by the Chamber of the Admissibility Challenge.¹²

⁶ ICC-01/11-01/11-310.

⁷ *Ibid.*, para. 51.

⁸ ICC-01/11-01/11-307-Conf-Exp. A confidential redacted version and a public redacted version are also available.

⁹ ICC-01/11-01/11-310.

¹⁰ *Ibid.*, para. 21.

¹¹ *Ibid.*, para. 7.

¹² *Ibid.*, para. 8.

6. On 19 April 2013, the Defence for Mr Al-Senussi filed its Request for leave to reply to Libya's Response on three discrete issues, related to: (i) the arrangements of a privileged legal visit to Mr Al-Senussi by Defence counsel;¹³ (ii) Libya's alleged continuing violations of its obligations *vis-à-vis* the Court;¹⁴ and (iii) the relevance of the filing of the Admissibility Challenge and of article 95 of the Statute on the Application.¹⁵ The Defence submits that there is "good cause to reply in respect of each of the issues identified above, and to submit evidence that has become available since the filing of its [...] Application".¹⁶

7. On 23 April 2013, Libya filed its "Response to the 'Application on behalf of Abdullah Al-Senussi for leave to reply to the Response of the Libyan Government to the Renewed Application on behalf of Mr. Abdullah Al-Senussi to Refer Libya and Mauritania to the UN Security Council with Public Annex 1 and Confidential and Ex parte (Registry only) Annexes 2 and 3 of 10 April 2013'" ("Libya's Response to the Request").¹⁷ Libya requests the Chamber to reject the Defence request given that, "[a]s conceded by the Defence, the purpose of adducing [additional] evidence is not to challenge new matters arising in the Government's Response, but simply to 'ensure that the Chamber has the most current information on Libya's conduct of Mr Al-Senussi's case'".¹⁸ As far as the third issue identified by the Defence is concerned, Libya submits that "it was an issue that was reasonably foreseeable and could have been addressed by the Defence in its [...] Application".¹⁹

¹³ ICC-01/11-01/11-312, paras 4 to 6.

¹⁴ *Ibid.*, para. 7 to 9.

¹⁵ *Ibid.*, paras 10 to 12.

¹⁶ *Ibid.*, para. 13.

¹⁷ ICC-01/11-01/11-314.

¹⁸ *Ibid.*, para. 4.

¹⁹ *Ibid.*, para. 5.

8. The Chamber notes that, pursuant to regulation 24(5) of the Regulations of the Court, “[p]articipants may only reply to a response with the leave of the Chamber”.

9. As regards the first issue identified by the Defence in its Request (*i.e.* the status of the arrangements for the privileged visit to Mr Al-Senussi by his Defence counsel), the Chamber agrees with the Defence that, before disposing of the Application, it would indeed be beneficial to receive the most up to date information on the matter. However, considering that the task of liaising with Libya in order to arrange for the visit was entrusted by the Chamber to the Registry,²⁰ the Chamber finds it more appropriate that the relevant information be provided by the Registry, rather than by the Defence. In this regard, the Defence of Mr Al-Senussi submits that “[t]he Registry is also requested to provide a report on the current status of its dealings with the Libyan authorities on [the] issue [of the privileged legal visit]”.²¹ The Chamber also notes that Libya does not oppose that the Chamber “request an up-to-date report from the Registry regarding Libya’s cooperation” that would include the latest developments on the matter.²²

10. As far as the other two issues identified by the Defence are concerned, the Chamber is satisfied that the Defence has shown good cause to be permitted to file a reply to Libya’s Response. Indeed, as regards the second issue, the Defence submits that the assertions made by Libya in its Response are refuted by some additional evidence that has become available only after the filing of the Application, and, therefore, could not have been submitted along with the

²⁰ “Decision on the ‘Urgent Application on behalf of Abdullah Al-Senussi for Pre-Trial Chamber to order the Libyan Authorities to comply with their obligations and the orders of the ICC’”, ICC-01-11-01/11-269, p. 15.

²¹ Request, para. 5.

²² Libya’s Response to the Request, para. 6.

Application.²³ The same holds true also for the third issue, as arguments pertaining to Libya's claim that the Admissibility Challenge and article 95 of the Statute act as a bar to a referral to the Security Council could not have been raised together with the Application, given that, at the time, the Admissibility Challenge had not yet been filed. Indeed, contrary to Libya's assertion, it would have been speculative and premature on the part of the Defence to argue, at the time of the Application, that a potential future invocation of article 95 of the Statute by Libya would not impact on the relief sought in the Application.

11. In these circumstances, considering that the Defence seeks the Chamber's authorisation to present evidence and/or arguments which were either not available or otherwise not foreseeable at the time of the Application, the Chamber grants the Defence Request for leave to reply to Libya's Response in relation to: (i) the alleged "evidence of Libya's continuing violations";²⁴ and (ii) the impact on the Application of the filing of the Admissibility Challenge and the invocation of article 95 of the Statute by Libya.²⁵

FOR THESE REASONS, THE CHAMBER

GRANTS the Defence for Mr Al-Senussi leave to reply to Libya's Response limited to the issues identified in the present decision by **Friday, 3 May 2013**;

ORDERS the Registrar to provide a report on the status of the arrangements of the visit to Mr Al-Senussi by his Defence counsel by **Friday, 3 May 2013**.

²³ Request, para. 8.

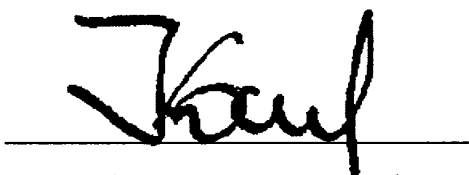
²⁴ *Ibid.*, paras 7 to 9.

²⁵ *Ibid.*, paras 10 to 12.

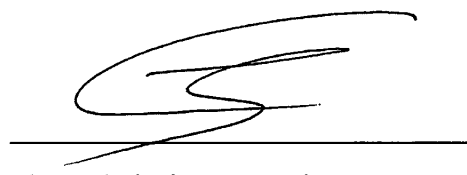
Done in both English and French, the English version being authoritative.

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Judge Silvia Fernández de Gurmendi
Presiding Judge

A handwritten signature in black ink, appearing to read 'Kaul', written over a horizontal line.

Judge Hans-Peter Kaul

A handwritten signature in black ink, appearing to read 'Christine Van den Wyngaert', written over a horizontal line.

Judge Christine Van den Wyngaert

Dated this Friday, 26 April 2013

At The Hague, The Netherlands