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

Date: **7 July 2014**

PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernández de Gurmendi, Single Judge

SITUATION IN LIBYA

IN THE CASE OF

THE PROSECUTOR

v.

SAIF AL-ISLAM GADDAFI and ABDULLAH AL-SENUSSI

Public Redacted Version

Response on behalf of Abdullah Al-Senussi to the “Application for Leave to Reply & Consolidated Reply on Behalf of the Libyan Government to Responses to the ‘Libyan Application for Extension of Time Related to Pre-Trial Chamber I’s ‘Decision requesting Libya to provide submissions on the status of the implementation of its outstanding duties to cooperate with the Court’”

Source: Mr. Abdullah Al-Senussi, represented by Ben Emmerson QC, Rodney Dixon QC, Amal Alamuddin, and Anthony Kelly

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

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Other

Introduction

1. The Defence for Mr. Abdullah Al-Senussi hereby files its Response to the “Application for Leave to Reply & Consolidated Reply on Behalf of the Libyan Government to Responses to the ‘Libyan Application for Extension of Time Related to Pre-Trial Chamber I’s ‘Decision requesting Libya to provide submissions on the status of the implementation of its outstanding duties to cooperate with the Court’”, submitted on 13 June 2014.¹
2. This Response is filed pursuant to Regulation 24(1) and Regulation 34(b) of the Regulations of the Court.
3. The Defence submits that Libya’s application for leave to file a reply should be rejected *in limine* as it fails to comply with the requirements for the filing of an application for leave and for the granting of leave, and in any event, Libya’s submissions take the matter of arranging a legal visit no further forward at all. The documents filed (Annexes 1 and 2) say nothing new and nothing concrete. The plain fact is that no visit has been arranged by Libya and it would be quite impossible for a secure and privileged legal visit to take place in accordance with the terms of the Chamber’s Orders.

Submissions

Libya’s application should be dismissed in limine

4. The Defence submits that Libya’s Leave to Reply should be dismissed *in limine* for failing to provide any reasons to show good cause to grant leave to reply. Furthermore, without first obtaining the authorisation of the Chamber, Libya has impermissibly provided the substantive arguments within its application for leave to reply, and has used this application to make further submissions to the Chamber when all submissions should have been included in Libya’s response to the Chamber’s

¹ Application for Leave to Reply & Consolidated Reply on Behalf of the Libyan Government to Responses to the ‘Libyan Application for Extension of Time Related to Pre-Trial Chamber I’s ‘Decision requesting Libya to provide submissions on the status of the implementation of its outstanding duties to cooperate with the Court’, ICC-01/11-01/11-557-Red, 13 June 2011.

Order of 15 May 2014 to provide submissions on its implementation of the Chamber's outstanding Orders to arrange a legal visit.

5. Regulation 24(5) of the Regulations of the Court provides that "Participants may only reply to a response with the leave of the Chamber."²
6. The case law of the Court establishes that a party applying for leave to reply should set out the reasons why it is claimed that there is good cause that could justify any need for a reply.³
7. In addition, the Appeals Chamber has held that the practice of filing substantive submissions before leave may be granted can result in the application for leave being dismissed. The Appeals Chamber stated that it "disapproves of a practice of the filing of a substantive reply prior to leave being granted by the Appeals Chamber, which in and of itself may also give rise to the rejection of an application for leave."⁴
8. Libya has improperly filed its substantive reply along with additional documents (Annexes 1 and 2)⁵ (without providing the Chamber with any reasoning that shows good cause for leave to be granted) *before* receiving any authorisation from the Chamber to make its submissions. Libya's submissions are an unfair attempt to make further submissions and to seek to get additional documents before the Court in order to try to avoid being reported to the Security Council for non-compliance when no legal visit has been arranged or could be arranged as ordered by the Chamber.
9. Libya has had nearly a year and half since the Chamber's Order to provide all necessary information to the Chamber and the Registry and to put in place all necessary arrangements so that the legal visit could actually happen while the admissibility proceedings were underway before the Pre-Trial Chamber and thereafter the Appeals Chamber. These lengthy proceedings are now virtually at an end without a single visit to the accused by his lawyers having been permitted.

² Regulations of the Court, Reg. 24(5).

³ Decision on the Defence's Request for Leave to Reply on the Motion for Provisional Release dated 24 November 2008, ICC-01/05-01/08-294, 27 November 2008, para. 3;

⁴ 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.

⁵ ICC-01/11-01/11-557-Anx1; ICC-01/11-01/11-557-Anx2.

10. For these reasons, the Defence submits that Libya's application for leave to reply should be rejected *in limine*.

Libya's submissions concerning a legal visit should be rejected

11. In any event, and should the Chamber decide to take any of Libya's submissions into account, Libya's submissions and the two documents it has filed are of no value at all.

12. As highlighted above, Libya has failed to organise the legal visit for nearly a year and a half. The admissibility proceedings before the ICC are now at an end. Such a visit could and should have been arranged in all of this time if Libya genuinely intended to do so. Instead, it is astonishing that a substantial amount of time has been consumed in the filing of numerous written submissions and documents about this issue which has in the end produced nothing concrete when all that Libya had to do was arrange a legal visit for the accused. Even at this extremely late stage, the documents submitted by Libya do not show that any visit has been organised, and they certainly do not establish that Libya is capable of arranging a secure and privileged legal visit during which the immunity of ICC lawyers will be fully respected, as required by the Chamber's Orders. It is noteworthy that only a few days ago, security staff of EU officials were arrested by the Libyan authorities, despite the immunity they should enjoy.⁶ These circumstances make it impossible to rely on any assurances and measures offered by Libya to facilitate a legal visit that would comply with the conditions required by the Chamber.

13. Annex 1, which is a letter from the Attorney-General concerning the legal visit⁷, takes the matter of arranging a legal visit no further forward. All it says is that a visit "will" be facilitated. Libya has been saying this for over a year since the Defence first requested a visit.⁸

⁶ Forces loyal to Libya's Haftar claim arrest of foreign 'spies', Middle East Eye, 4 July 2014 (<http://www.middleeasteye.net/news/forces-loyal-libyas-haftar-claim-arrest-foreign-spies-1727936687>).

⁷ ICC-01/11-01/11-557-Anx1.

⁸ See, Response of the Libyan Government to 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-01/11-01/11-264, 1 February 2013, para. 31; Libyan Government's Response to Urgent Defence Request of 21 January 2013, ICC-01/11-01/11-274, 11 February 2013, para. 14; Libyan Government's consolidated reply to the responses of the Prosecution, OPCD, and OPCV to its further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi, ICC-01/11-01/11-293-Red, 4 March 2014, para. 13; Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the

14. The letter goes on merely to state that the visit “*shall be conducted according to the legal systems applied in Libya and according to the system of obtaining the entry visa to the Libyan territories issued by out embassy abroad.*”⁹ It does not even confirm that any visas will be granted for the visit. Indeed, all that Libya says is that the Defence should now *apply* for visas: the “effect of this letter is to make clear that the next step in facilitating such a visit is for the Al-Senussi defence team to apply through the normal official channels, that is through their local embassy, for a visit visa”¹⁰.
15. Most importantly, the letter says nothing about any visit actually being arranged with the dates and modalities being in place and explained. There is no point in seeking to apply for any visas without a visit having been organised in accordance with the terms of the Chamber’s Order. This is what Libya was ordered to do, but which it has failed to put in place. The visa application procedure through the ICC and at Libya’s Consulate would require the applicant to specify the dates of any visit. In any event, as explained in the Defence’s Response of 5 June 2014 and as set out below, Libya is wholly incapable of facilitating a secure and privileged legal visit in which the immunity and safety of ICC lawyers could ever be guaranteed.
16. Libya claims that “[i]n the absence of a specifically arranged appointment, it is plainly unreasonable for the Defence to expect *at this time* further practical detail than these already detailed” and “[a]ny such further arrangements which may become necessary would be made only when a particular visit is in the process of being organised.”¹¹ But this is exactly what Libya was ordered to do by the Chamber and Libya should have by now complied. Permitting the accused to be visited by his lawyers *during* the legal proceedings is the most basic of legal rights, which plainly should have been respected by Libya. Libya’s latest filing is yet another attempt to waste more time and to delay ever arranging a visit while trying to avoid being reported to the Security Council for non-compliance.

ICC Statute, ICC-01/11-01/11-307-Red2, 2 April 2013, para. 179; 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”, ICC-01/11-01/11-310, 10 April 2013, paras. 20-22.

⁹ ICC-01/11-01/11-557-Anx1.

¹⁰ Libya’s Leave to Reply, para. 33(a).

¹¹ Libya’s Leave to Reply, para. 33.

17. As the Chamber is aware, the Defence has previously applied for visas when Libya had then indicated that it would facilitate a visit, as it has now said again it “will” do (Annex 1). However, when it came actually to considering the applications the Libyan Consulate in London rejected the Note Verbales issued by the Registry as insufficient to receive the applications and grant the visas.¹²

18. It is of crucial importance to note that Libya’s submissions and the letter from the AG still provide no concrete information about the security arrangements necessary to facilitate a legal visit to satisfy the requirements of the Chamber’s Orders. [REDACTED]

19. Moreover, recent reports indicate that the security situation in Libya is only getting much worse, thereby heightening the present need for the most rigorous security assessment:

- On 6 June 2014, the UN High Commission for Human Rights condemned the assassination of the head of the International Committee of the Red Cross and stated that each day is becoming more difficult and dangerous for such individuals as human rights defenders and humanitarian workers.¹⁵
- On 9 June 2014, UNSMIL reported to the Security Council that the “security situation continues to impede the proper functioning of the justice system.”¹⁶ UNSMIL noted the “growing dangerous security void in

¹² ICC-01/11-01/11-304-Conf-Exp-Anx3.

¹³ [REDACTED]

¹⁴ [REDACTED]

¹⁵ Human Rights concerns over escalating violence in Libya, United Nations Radio, 6 June 2014 (<http://www.unmultimedia.org/radio/english/2014/06/human-rights-concerns-over-escalating-violence-in-libya/#.U7qc2PmSySo>).

¹⁶ Briefing by Tarek Mitri SRSG for Libya - Meeting of the Security Council 09 June 2014, para. 13 (<http://unsmil.unmissions.org/Default.aspx?tabid=3543&ctl=Details&mid=6187&ItemID=1826267&language=en-US>).

Libya” and stated that “judges, journalists and other civilians, have been victims of a systematic and unrelenting campaign of targeted assassinations and other acts of aggression.”¹⁷

- Human Rights Watch reported that the “fragile security environment also raises serious concerns about whether officials can guarantee the safety of judicial personnel and others, including witnesses and defendants, during a trial.”¹⁸
- Amnesty International recently stated that “[j]udges and prosecutors have told Amnesty International that they have been threatened in cases against al-Gaddafi loyalists by families of victims or militias that demand harsh punishments and oppose releases.”¹⁹
- Amnesty International’s report stated in relation to defence lawyers in the proceeding against Mr. Al-Senussi that:

“Lawyers of some of the defendants in this case told Amnesty International that the current environment does not allow for a fair trial. Some refused to speak to the organization out of fear for their own safety. Others told Amnesty International that they refrain from visiting their clients in prison because of the intimidation they face from the guards. During the first hearing in the pre-trial stage, lawyers were threatened and attacked by an angry crowd of victims’ families. One lawyer was physically assaulted and as a result some lawyers refrained to attend a subsequent hearing. Since then the authorities have provided a bus for the transportation of lawyers to prison on trial dates, while the road leading to the compound is cut off during that time. Despite the introduction of these security measures, lawyers interviewed by Amnesty International in April 2014 told the organization that they continue to feel scared.”²⁰

¹⁷ Briefing by Tarek Mitri SRSG for Libya - Meeting of the Security Council 09 June 2014, para. 5. (<http://unsmil.unmissions.org/Default.aspx?tabid=3543&ctl=Details&mid=6187&ItemID=1826267&language=en-US>).

¹⁸ Libya: Fair Trial Concerns for Ex-Officials, HRW, 14 April 2014 (<http://www.hrw.org/news/2014/04/14/libya-fair-trial-concerns-ex-officials>).

¹⁹ Trial of former Libyan officials including Saif al-Islam al-Gaddafi and Abdallah al-Senussi, Amnesty International Questions and Answers, 26 April 2014, question 4 (<http://www.amnesty.org/en/library/asset/MDE19/003/2014/en/d3532c39-6150-48d0-84ef-69bf7840599a/mde190032014en.pdf>).

²⁰ Trial of former Libyan officials including Saif al-Islam al-Gaddafi and Abdallah al-Senussi, Amnesty International Questions and Answers, 26 April 2014, question 5 (<http://www.amnesty.org/en/library/asset/MDE19/003/2014/en/d3532c39-6150-48d0-84ef-69bf7840599a/mde190032014en.pdf>).

20. Libya has not taken seriously the concerns about the attacks on defence lawyers in the case against Mr. Al-Senussi, particularly the fact that Mr. Al-Senussi's previous lawyer was shot in the leg when leaving the trial hearing against Mr. Al-Senussi on 27 April 2014.²¹ Libya merely states that it "is not aware of any evidence suggesting this alleged incident occurred"²². This raises grave doubts about Libya's willingness and ability to organise a secure legal visit in accordance with the terms of the Chamber's Orders. [REDACTED]

21. Libya has also not addressed any of the concerns raised by the Defence in respect of whether the appropriate privileges and immunities could ever be implemented.²⁴ Multiple reports confirm that the Libyan authorities have failed to respect the terms of the UN's agreement on privileges and immunities as four UN officials were recently arrested and detained in Tripoli²⁵, and the UN trial monitor observing Mr. Al-Senussi proceedings was arrested and detained when entering the courtroom²⁶ resulting in UNSMIL discontinuing its trial monitoring program of Mr. Al-Senussi's proceedings.²⁷ As noted above, security staff for EU officials were also arrested only a few days ago.

²¹ Response on behalf of Abdullah Al-Senussi to the 'Prosecution Request for an Order to Libya', ICC-01/11-01/11-544, 8 May 2014, para. 8 and note 17, 18; Response on behalf of Abdullah Al-Senussi to the "Libyan Application for extension of time related to the Pre-Trial Chamber I's 'Decision requesting Libya to provide submissions on the status of the implementation of its outstanding duties to cooperate with the Court'", ICC-01/11-01/11-554-Conf, 5 June 2014, para. 22.

²² Libya's Leave to Reply, para. 32.

²³ [REDACTED]

²⁴ Response on behalf of Abdullah Al-Senussi to the 'Prosecution Request for an Order to Libya', ICC-01/11-01/11-544, 8 May 2014, para. 8 and note 17, 18; Response on behalf of Abdullah Al-Senussi to the "Libyan Application for extension of time related to the Pre-Trial Chamber I's 'Decision requesting Libya to provide submissions on the status of the implementation of its outstanding duties to cooperate with the Court'", ICC-01/11-01/11-554-Conf, 5 June 2014, paras. 5, 11-16.

²⁵ Briefing by Tarek Mitri SRSG for Libya - Meeting of the Security Council 09 June 2014, para. 17. (<http://unsmil.unmissions.org/Default.aspx?tabid=3543&ctl=Details&mid=6187&ItemID=1826267&language=en-US>). See also, <https://twitter.com/hananHRW/status/474484051617652737> and <https://twitter.com/reportingLibya/status/474496515332112384>.

²⁶ UN observer at Gaddafi trial held on suspicion of 'black magic', The Guardian, 14 May 2014 (<http://www.theguardian.com/world/2014/may/13/un-observer-gaddafi-trial-detained-suspicion-black-magic>).

²⁷ Briefing by Tarek Mitri SRSG for Libya - Meeting of the Security Council 09 June 2014, para. 16. (<http://unsmil.unmissions.org/Default.aspx?tabid=3543&ctl=Details&mid=6187&ItemID=1826267&language=en-US>).

22. [REDACTED]

23. It is disingenuous for Libya to submit a letter (Annex 2) seeking to gain credit from its claim that the national proceedings against the ICC staff members will be discontinued, as will the proceedings against Mr. Gaddafi in this regard. The letter and Libya's submissions do not establish that these charges have in fact now been dropped. They also do not explain why these charges have been pursued relentlessly for so long by the Libyan authorities. It would be wrong in these circumstances for Libya to gain any advantage from these (unverified) claims at this very late in the proceedings, especially when it was Libya who initiated and pursued these proceedings.

24. The Defence submits that Libya's track record of complete disregard for the terms of its agreements on privileges and immunities cannot be ignored. Given the ICC's duty to protect the lawyers and representatives involved in the Court's activities, it could not be expected that members of the Defence team should conduct a legal visit during which their safety and security would plainly be at risk and where the privileges and immunities that should be guaranteed to them would not be respected. Nor could the Court make any adverse finding against the Defence and the accused as a result of the Defence's insistence that Libya should address these matters in full compliance with the specific terms of the Chamber's Orders.

25. [REDACTED]

28 [REDACTED]

29 [REDACTED]

30 [REDACTED]

31 [REDACTED]

26. It is evident that Libya is not willing and capable of addressing any of these concerns which are of paramount importance and which are required to be satisfied by the Chamber's Orders. Libya should thus be reported to the Security Council for failing to arrange a secure and privileged legal visit in accordance with the Chamber's Orders.

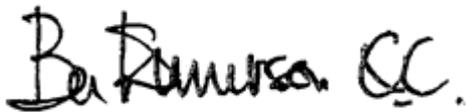
Relief requested

27. For all of the reasons above and as submitted in the Defence's Response of 5 June 2014, the Defence respectfully requests the Pre-Trial Chamber:

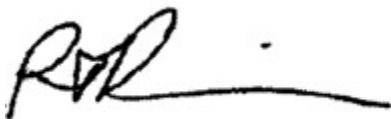
- (i) To reject Libya's application for leave to reply;
- (ii) To find that Libya is in non-compliance with the Chamber's Orders to facilitate a privileged and secure legal visit to Mr. Al-Senussi; and,
- (iii) To report Libya to the Security Council.

28. In addition, the Defence reiterates its request that the Chamber should in the circumstances order Libya to suspend the national trial proceedings against Mr. Al-Senussi until the Appeals Chamber has issued its judgment on appeal.

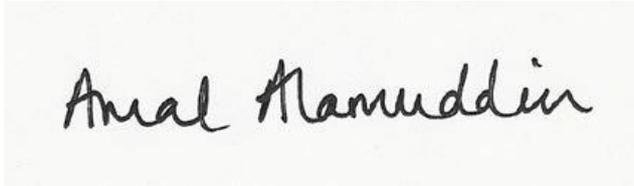
Counsel on behalf of Mr. Abdullah Al-Senussi,



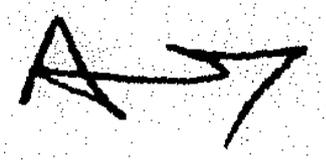
Ben Emmerson QC



Rodney Dixon QC

A handwritten signature in black ink on a light-colored background. The signature reads "Amal Alamuddin" in a cursive, flowing script.

Amal Alamuddin

A handwritten signature in black ink on a light-colored background. The signature consists of the letters "AK" in a stylized, blocky font.

Anthony Kelly

Dated 7th July 2014

London, United Kingdom