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

Date: **7 October 2013**

THE APPEALS CHAMBER

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

SITUATION IN LIBYA

IN THE CASE OF

THE PROSECUTOR

v.

SAIF AL-ISLAM GADDAFI and ABDULLAH AL-SENUSSI

Public Document

Response on behalf of Mr. Abdullah Al-Senussi to the Libyan Government's Regulation 35(2) Request within the "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: 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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Detention Section

Victims Participation and Reparations Section

Other

Introduction

1. The Defence for Mr. Abdullah Al-Senussi files this Response to the Libyan Government's request under Regulation 35(2) for a variation of the time limit for the filing of the "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'".¹
2. The Defence's Response is filed pursuant to Regulation 24(1) and Regulation 34(b) of the Regulations of the Court. It is limited to responding to Libya's request pursuant to Regulation 35(2)² and does not address the substance of Libya's Response.
3. On 23 September 2013, Libya filed its response to the Defence Document in Support of Appeal.³ Pursuant to Regulations 65(5) and 33(1)(d) this was due to be filed on 20 September 2013. Within its response Libya requested that the Appeals Chamber retroactively extend the time limit under Regulation 35(2) "to allow receipt of this Response on Monday 23 September 2013."⁴ Libya submitted that "there is good cause to extend this time limit" 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 to the Accusation Chamber" and that on 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". Counsel for Libya assert that as a result they "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."⁵

¹ 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, ICC-01/11-01/11-451, 23 January 2013 (hereinafter "Libya Response of 23 January 2013").

² Libya Response of 23 January 2013, para. 2.

³ 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, ICC-01/11-01/11-439, 9 September 2013.

⁴ Libya Response of 23 September 2013, para. 2.

⁵ Libya Response of 23 September 2013, para. 2.

4. The Defence submits that Libya's request for a variation of the time limit should be refused as it has not met the requirements of Regulation 35(2). Libya has provided no justifiable reason after its late filing for the granting of any extension of time to permit the late filing of its response after the event. Moreover, it is evident that Libya has used the extra time arising from its late filing to 'reply' to the filings of the Prosecution and of the Defence for Mr. Gaddafi⁶ which were already properly submitted by the deadline on 20 September 2013.⁷ Libya has thus gained a distinct advantage from filing out of time, which has not been afforded the other parties. The Defence therefore requests that Libya's request pursuant to Regulation 35(2) is rejected and that Libya's Response of 23 September 2013 is dismissed as being filed out of time.

Applicable law

5. Regulation 35(2) of the Regulations of the Court provides that:

"The Chamber may extend or reduce a time limit if good cause is shown and, where appropriate, after having given the participants an opportunity to be heard. After the lapse of a time limit, an extension of time may only be granted if the participant seeking the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control."

6. It is well-established in the ICC's jurisprudence that when a party submits an application to extend a time limit before the deadline has expired it is necessary to demonstrate "good cause" for the extension. The Appeals Chamber has held that "A cause is good, if founded upon reasons associated with a person's capacity to conform to the applicable procedural rule or regulation or the directions of the Court.

⁶ Defence 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', ICC-01/11-01/11-448; Prosecution's 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, ICC-01/11-01/11-449, 20 September 2013.

⁷ Libya Response of 23 September 2013, paras. 3-6.

Incapability to do so must be for sound reasons, such as would objectively provide justification for the inability of a party to comply with his/her obligations.”⁸

7. However, when an application to vary the time limit was not submitted *before* the expiry of the deadline, “the [party] is not required to show ‘good cause.’”⁹ Instead, the ICC’s jurisprudence has clarified that “in order to justify an extension after the lapse of a time limit, the party requesting late submission must establish that it was ‘unable to file the application within the time limit for reasons outside [its] control.’”¹⁰ The Appeals Chamber “has clearly held that the exception of regulation 35(2) (last sentence) is only available in case the applicant can show the existence of ‘exceptional circumstances’, such as incapacitating illness, to demonstrate that there is a reason outside his/her control.”¹¹
8. The Trial Chamber found that “a persistent shortage of resources, let alone the fact that transcribing and translating video material is especially time consuming, cannot be considered as an ‘exceptional circumstance’”¹² and “[i]t does not suffice that common day-to-day working methods did not allow earlier compliance with the time limit.”¹³ In addition, “persistent and well-known problems” of security situations can

⁸ *Prosecutor v. Lubanga*, Reason for the Decision of the Appeals Chamber on the request of counsel to Mr Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the Court of 7 February 2007' issued on 16 February 2007", ICC-01/04-01/06-834, 21 February 2007, Para 7.

⁹ *Prosecutor v. Katanga*, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", ICC-01/04-01/07-1336, 27 July 2009, para. 24.

¹⁰ *Prosecutor v. Katanga*, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", ICC-01/04-01/07-1336, 27 July 2009, para. 24 citing, Regulation 35(2), last sentence.

¹¹ *Prosecutor v. Katanga*, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", ICC-01/04-01/07-1336, 27 July 2009, para. 7 citing, *Prosecutor v. Lubanga*, Reason for the Decision of the Appeals Chamber on the request of counsel to Mr Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the Court of 7 February 2007' issued on 16 February 2007", ICC-01/04-01/07-834, 21 February 2007, Para 9-10.

¹² *Prosecutor v. Katanga*, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", ICC-01/04-01/07-1336, 27 July 2009, para. 7.

¹³ *Prosecutor v. Katanga*, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", ICC-01/04-01/07-1336, 27 July 2009, para. 24.

“not be considered an 'exceptional circumstance' in the sense of regulation 35(2), last sentence.”¹⁴

Submissions

9. The Defence submits that Libya has failed to demonstrate any “exceptional circumstance” to justify its failure to file an application to extend the time limit before the deadline expired as is required by Regulation 35(2) (last sentence). Libya claims that it has shown “good cause” to extend the deadline. However, as outlined above, the Court has held that when the deadline for a submission has expired, “the [party] is not required to show ‘good cause’”¹⁵ but “must establish that it was ‘unable to file the application within the time limit for reasons outside [its] control.’”¹⁶

10. Libya was aware from 9 September 2013 when the Defence filed its appeal that Libya’s response was due to be submitted on 20 September 2013. Libya had ample opportunity to request an extension of this deadline before it expired. The fact that there was a hearing on 19 September 2013 and that, as Libya submits, a hard copy of the dossier was flown to Counsel for Libya on 20 September 2013 provides no reason at all for Libya’s failure to file any request for an extension of time before 20 September 2013. This explanation does not constitute “exceptional circumstances” which made it impossible to file an application for an extension at any time before 20 September 2013 due to reasons outside of the control of Libya and its counsel.

11. At best, Libya’s explanation merely amounts to “common day-to-day working methods”¹⁷ or a “well-known problem”¹⁸ which Libya and its Counsel could have

¹⁴ *Prosecutor v. Katanga*, Decision on the disclosure of evidentiary material relating to the Prosecutor's site visit to Bogoro on 28,29 and 31 March 2009 (ICC-01/04-01/07-1305,1345,1360,1401,1412 and 1456), ICC-01/04-01/07-1515-Corr, 9 October 2009, para. 28.

¹⁵ *Prosecutor v. Katanga*, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", ICC-01/04-01/07-1336, 27 July 2009, para. 24.

¹⁶ *Prosecutor v. Katanga*, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", ICC-01/04-01/07-1336, 27 July 2009, para. 24 citing, Regulation 35(2), last sentence.

¹⁷ *Prosecutor v. Katanga*, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", ICC-01/04-01/07-1336, 27 July 2009, para. 24.

foreseen, and which the Court has previously found not to qualify as an “exceptional circumstance.” The Defence submits that Libya’s explanation, if accepted, would set a precedent for Libya to ignore its “obligations”¹⁹ to comply with the deadlines set by the Court and the ICC’s Rules and Regulations whenever domestic hearings and proceedings took place, and would undermine the purpose and provisions of Regulation 35(2).

12. Furthermore, it should be taken into account that Libya was able to make other filings before the hearing on 19 September 2013 and that it has provided no explanation why such filings could be made, based on instructions, but not a simple request for an extension of time to file its response in the appeal.²⁰

13. The Defence also emphasises that in addition to Libya’s failure to provide any proper reason for submitting its application after the deadline, Libya has taken advantage of its late filing by using the extra time to include in its response submissions in reply to the responses of the Prosecution and Defence for Mr. Gaddafi which had already been filed in time on 20 September.²¹ Libya should not be permitted to use the late filing of its response to include a reply to these filings within its response. The late filing has thus provided Libya with the opportunity in effect to file a ‘reply’ which it would not otherwise have had or been entitled to under the Rules but for its filing out of time in contravention of the Court’s Rules and Regulations. Contrary to Libya’s submissions²², its late filing has thus caused prejudice to the parties and the proceedings.

¹⁸ *Prosecutor v. Katanga*, Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28,29 and 31 March 2009 (ICC-01/04-01/07-1305,1345,1360,1401,1412 and 1456), ICC-01/04-01/07-1515-Corr, 9 October 2009, para. 28.

¹⁹ *Prosecutor v. Lubanga*, Reason for the ‘Decision of the Appeals Chamber on the request of counsel to Mr Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the Court of 7 February 2007’ issued on 16 February 2007”, ICC-01/04-01/07-834, 21 February 2007, Para 7.

²⁰ For example, Response to Defence “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’”, ICC-01/11-01/11-437, 9 September 2013; Response to Mr. Al-Senussi’s ‘Urgent Application pursuant to Regulation 35’, ICC-01/11-01/11-438, 9 September 2013; 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.

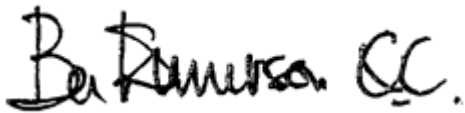
²¹ Libya Response of 23 January 2013, para. 3-6.

²² Libya Response of 23 September 2013, para. 2.

Conclusion

14. For all of the reasons above, the Defence for Mr. Al-Senussi respectfully requests that Libya's Regulation 35(2) request is refused for not meeting the requirements set out in Regulation 35(2) and the Court's jurisprudence, and that accordingly, Libya's Response of 23 September 2013 is dismissed as being filed out of time.

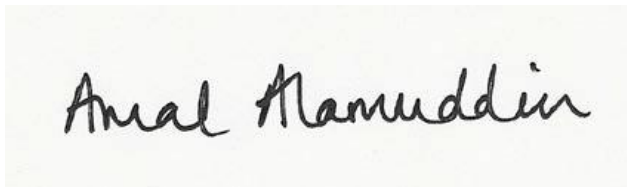
Counsel on behalf of Mr. Abdullah Al-Senussi,



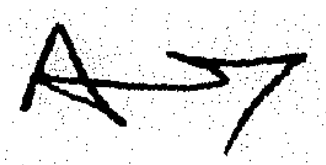
Ben Emmerson QC



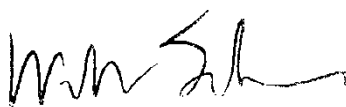
Rodney Dixon



Amal Alamuddin



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Professor William Schabas

Dated 7th October 2013
London, United Kingdom