



Original: **English**

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

Date: **19 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-SENSUSSI

Public Document

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

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

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

The Office of the Prosecutor
Ms. Fatou Bensouda, Prosecutor

Counsel for the Defence
Counsel for Abdullah Al-Senussi:
Mr. Ben Emmerson QC
Mr. Rodney Dixon
Ms. Amal Alamuddin
Mr. Anthony Kelly

Counsel for Saif Gaddafi:
Mr. John Jones QC

Legal Representatives of Victims

Legal Representatives of the Applicant

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States Representatives
Professor Ahmed El-Gehani
Professor James Crawford SC
Mr. Wayne Jordash
Mr. Michelle Butler

Amicus Curiae

REGISTRY

Registrar
Mr. Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. Counsel for Mr. Abdullah Al-Senussi file this Application to request 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,’” filed on 10 April 2013.¹ The Defence filed its renewed application for Libya and Mauritania to be reported to the Security Council on 19 March 2013 (“Renewed Application”).
2. This Application is filed pursuant to Regulation 24(5) of the Regulations of the Court which states that “Participants may only reply to a response with the leave of the Chamber.”²
3. In its response Libya has raised several arguments and allegations which are wrong and unfounded. The Defence submits that there can be no question that Libya has failed to comply with the Chamber’s repeated orders to surrender Mr. Al-Senussi to the ICC and to allow his counsel to have access to him in detention in Libya without delay. Libya was in breach of the ICC’s orders when the Defence first applied for Libya to be reported to Security Council on 9 January 2013.³ The Chamber re-iterated its orders thereafter, and still Libya has failed to comply with them.⁴ The Defence requests leave to reply to Libya’s claims that it has acted in accordance with its obligations under Security Council Resolution 1970 and the orders and requests of the ICC. There are three issues on which the Defence submits that there is good cause for it to be granted an opportunity to reply before the Chamber determines the Defence’s application for referral to the Security Council.

¹ 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 (hereinafter “Libya’s Response of 10 April 2013”).

² Regulation of the Court, Reg 24(5). See *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.

³ 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-01/11-01/11-248, 9 January 2013.

⁴ 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, 6 February 2013, p. 15.

Legal visit

4. Libya asserts that “[c]ontrary to the Defence allegations ... Libya has acted with due expedition to ensure a privileged legal visit as soon as practicable.”⁵
5. The Defence requests to be permitted to provide the Chamber with the most up to date position on this matter. The reality is that Libya has not made the necessary arrangements for the Defence to visit Mr. Al-Senussi, despite countless requests to do so over the past months since Defence Counsel have been appointed. The Defence seeks leave to present evidence of Libya’s failure to take any concrete steps to organise a privileged legal visit since the Defence filed its Renewed Application for referral to the Security Council (Libya having taken none before this filing). The Registry is also requested to provide a report on the current status of its dealings with the Libyan authorities on this issue.
6. It is vital that the Chamber is informed in full of the lack of any genuine progress in arranging a legal visit so that it can decide on whether Libya should be reported to the Security Council for failing to implement the Chamber’s order to facilitate a visit as soon as practicable. No dates for the visit have been proposed by the Libyan authorities, no visas have been granted to the Defence despite its requests at various embassies for such visas, no practical arrangements have been put in place, and Libya has not provided any response to the draft memorandum on privileges and immunities which it has had since March 2012 (and which it had not responded to at the time of the ICC’s visit to Mr. Saif Gaddafi in June 2012). In the Defence’s submission, the appointment of a new Prosecutor-General is a wholly inadequate reason to have made no plans or arrangements for several months for the Defence to have any contact whatsoever with Mr. Al-Senussi. The Defence can provide the most up to date details and latest evidence in respect of all of these matters in its Reply.

⁵ Libya’s Response of 10 April 2013, para. 21.

Evidence of Libya's continuing violations

7. In its Response Libya “strenuous[ly] denies ... any violation of Mr. Al-Senussi’s human rights.”⁶ Libya also states that the “Government has consistently accepted [its] obligations”⁷ concerning the surrender of Mr. Al-Senussi. Further, Libya denies “put[ting] in place any action that would frustrate or otherwise hinder or delay the possibility of compliance with its obligations to the Court”⁸ and states that preparations for trial in Libya “are not ... action which could hinder or delay his immediate transfer to the ICC.”⁹
8. The Defence seeks to reply to these statements by providing additional evidence that refutes the assertions made by Libya. This evidence has become available since the filing of the Renewed Application, and includes public statements made by Libyan officials in connection with Mr. Al-Senussi’s case. This material is highly relevant to the present application for referral to the Security Council, and could not have been submitted with the Renewed Application.
9. The Defence thus requests leave to file this evidence in a Reply so as to ensure that the Chamber has the most current information on Libya’s conduct of Mr Al-Senussi’s case. It is imperative that this information is taken into account by the Chamber in determining the Renewed Application.

Article 95 of the Statute

10. Since the filing of the Renewed Application, Libya has filed an application challenging the admissibility of Mr. Al-Senussi’s case before the ICC on 2 April 2013. In this application Libya has unilaterally asserted that it has the right to postpone the surrender request under Article 95 on account of its admissibility challenge. The Defence will respond to Libya’s submissions under Article 95, which it will treat as an application pursuant to the provisions of this Article. The deadline for filing this response is 24 April 2013. The Chamber has as yet not issued a scheduling order

⁶ Libya’s Response of 10 April 2013, para. 4.

⁷ Libya’s Response of 10 April 2013, para. 7.

⁸ Libya’s Response of 10 April 2013, para. 7.

⁹ Libya’s Response of 10 April 2013, para. 7.

pursuant to Rule 58 for the filing of submissions in response to the admissibility application.

11. Libya relies on the same arguments under Article 95 to assert that the Chamber should not report it to the Security Council for failure to comply with the Chamber's orders.¹⁰ While the Defence will set out its reasons for why the surrender request should not be postponed in its response to that part of Libya's filing of 2 April 2013, the Defence requests leave to reply to Libya's submission in the present application that its admissibility challenge and the provisions of Article 95 should act as a bar to it being reported to the Security Council. This is a distinct argument that the Defence could not have addressed in the Renewed Application as Libya had not by then filed its admissibility challenge. The Defence should therefore be permitted to reply to this argument before it is determined by the Chamber and to assist the Chamber in its deliberations.
12. In its filing of 28 January 2013 Libya requested that it be given until the end of March to file substantial submissions challenging the admissibility of Mr. Al-Senussi's case before the ICC.¹¹ The Chamber did not grant this request. Libya was ordered to immediately surrender Mr. Al-Senussi to the ICC. Yet, Libya disregarded the Chamber's order and proceeded to use the time until the end of March to prepare its admissibility application and has now filed it. To the extent that Libya claims that the filing of its admissibility application should prevent the Chamber from reporting Libya to the Security Council, the Defence submits that it should be given the opportunity to address this argument in the present application by way of a Reply.

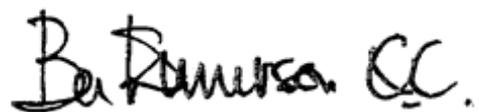
Conclusion

13. The Defence submits that it has shown 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 Renewed Application. The Defence thus requests leave to reply to Libya's Response of 10 April 2013 pursuant to Regulation 24(5).

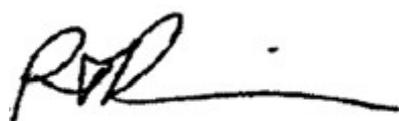
¹⁰ Libya's Response of 10 April 2013, para. 8 (emphasis added).

¹¹ Libyan Government's Observations regarding the case of Abdullah Al-Senussi, ICC-01/11-01/11-260, 28 January 2013, para. 11; See also, 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, 2 February 2013, para. 25.

Counsel on behalf of Mr. Abdullah Al-Senussi,



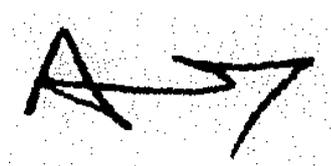
Ben Emmerson QC



Rodney Dixon



Amal Alamuddin



Anthony Kelly

Dated 19th April 2013
London, United Kingdom