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Date: **10 July 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 Document with Public Annex 1

**Defence Application on behalf of Mr. Abdullah Al-Senussi concerning Libya's
Announcement of Trial Date in August 2013**

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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Other

Introduction

1. The Defence for Mr. Abdullah Al-Senussi files this application to request the Chamber to seek clarification and assurances from Libya following the announcement on 17 June 2013 by the Libyan prosecutor's office about upcoming trial proceedings in Mr. Al-Senussi's case.
2. This application is made pursuant to Rule 58(2) which states that in admissibility proceedings the Pre-Trial Chamber "shall decide on the procedure to be followed and may, take appropriate measures for the proper conduct of the proceedings." The Chamber has previously stated that by virtue of this Rule it has a broad discretionary power to decide on the procedure to be followed in admissibility proceedings.¹ In addition, the Court has the authority to require States to comply with requests under Article 93 to facilitate the investigation and prosecution of crimes within the Court's jurisdiction.
3. On 17 June 2013, Mr. Al-Seddik Al-Sur, a prosecutor assigned to Mr. Al-Senussi's case,² gave a press conference for the prosecutor's office in which he announced that Mr. Al-Senussi, Mr. Saif Gaddafi and others would be tried for "crimes that were committed against the Libyan people during the Revolution."³ The press conference was video-recorded. The Defence have attached hereto as Annex 1 a link to the video recording of the press conference in Arabic and the English translation of the relevant parts of the conference.⁴

¹ Decision on the conduct of the proceedings following the 'Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute', ICC-01/11-01/11-325, 26 April 2013, para. 7.

² ICC-01/11-01/11-307-Conf-Anx5.

³ Annex 1, Video and draft translation of press conference of 17 June 2013.

See also, Kadhafi's son to stand trial in August: Libya prosecutor, AFP, 17 June 2013 (<http://www.google.com/hostednews/afp/article/ALeqM5hf0VWzFZ0xmEaVROYan6arfqRKYw?docId=CNG.804f72867c9bda4f148b64bf4c290b6e.461>); Gaddafi's son to stand trial in August, gulfnews.com, 17 June 2013 (<http://gulfnews.com/news/region/libya/gaddafi-s-son-to-stand-trial-in-august-1.1198551>); Gadhafi's son to stand trial in August, Libya prosecutor says, The Daily Star, 18 June 2013 (<http://www.dailystar.com.lb/News/Middle-East/2013/Jun-18/220703-gadhafis-son-to-stand-trial-in-august-libya-prosecutor-says.ashx#axzz2WgDly4I7>); Libya to try Seif al-Islam Gaddafi in August, Alarab Online, 17 June 2013 (<http://www.alarab.co.uk/english/display.asp?fname=%5C2013%5C06%5C06-17%5Czalsoz%5C923.htm&dismode=x&ts=6/17/2013%205:34:49%20PM>); Libya acquits Gaddafi aides in Lockerbie case, Oman Tribune (<http://www.omantribune.com/index.php?page=news&id=146566&heading=Other%20Top%20Stories>); Gaddafi's son to stand trial in August, BBC, 19 June 2013 (<http://www.bbc.co.uk/news/world-africa-22945159>); Gaddafi officials acquitted but stay behind bars, Times Live, 17 June 2013 (<http://www.timeslive.co.za/africa/2013/06/17/gaddafi-officials-acquitted-but-stay-behind-bars>).

⁴ Annex 1.

4. During the press conference, Mr. Al-Sur stated that,

- “[T]he investigation in this case will come to an end and that the case will be disposed of [or referred] in the near future, and its first hearing will be held ... in the first half of August.”
- “The case will be referred to the Accusation Chamber, which will examine it and then refer it to the Criminal Court – Appeals Circuit – in the Court of Tripoli, which is competent to examine this case.”
- “[T]he defendants are: Saif Al-Islam Muammar Gaddafi, Abdullah Al-Sennusi [and others]”.
- In response to the question whether “Saif Al Islam ... will ... be surrendered pursuant to [the ICC surrender] demand”, the prosecutor stated that “Saif Al-Islam and Abdullah Al-Senussi will definitely be tried in Libya, because it is the primary, the competent and the concerned jurisdiction. The International Criminal Court is a complementary and substituting jurisdiction.”
- “Yesterday [on 16 June 2013] the ICC gave the green light for Libya to try Al-Senussi and keep him on its territories in order to try him.” [Shortly before this press conference, on 14 June 2013, the Chamber had issued its decision postponing the surrender order on a temporary basis pursuant to Article 95.⁵]

5. In addition, over the past few days broadcasts have been appearing on Libyan television in which State officials, in response to public demands that Mr. Al-Senussi should be executed, have been assuring the public that Mr. Al-Senussi will be tried “by the end of Ramadan” (i.e. 8 August 2013).⁶ On this timetable, the end of the trial would coincide with the ICC’s summer recess.

⁵ 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-01/11-01/11-354, 14 June 2013 (hereinafter “Postponement Decision of 14 June 2013”).

⁶ The Defence has been informed of these broadcasts but none are presently available on YouTube or the internet.

Submissions

6. Given that the announcement on 17 June was made by the national prosecutor in Mr. Al-Senussi's case and that it directly impinges on the present admissibility proceedings before the ICC, the Defence submits that the Chamber should require Libya to clarify its position and provide the necessary assurances that it will comply in full with the Chamber's orders and requests.
7. Libya confirmed Mr. Al-Sur's announcement when it submitted to the Court on 28 June 2013 that it is a statement "of a kind associated with a normal domestic level criminal process in Libya or elsewhere."⁷ Libya did not seek to clarify or explain the announcement in any way.

Timetable and nature of proceedings

8. The prosecutor's announcement does not make clear whether the hearing to be held in the first half of August will be part of the accusation phase or trial phase.
9. In addition, the prosecutor stated, without further clarification, that the "case will be referred to the Accusation Chamber, which will hear it and then refer it to the Criminal Court... of Tripoli". In previous submissions Libya has sought to emphasise that the accusatory phase involves independent judges who review the prosecutor's submissions and then decide whether to commit a case for trial or not. According to Libya's previous submissions:

Th[e] [Accusatory] Chamber is a court of first instance and is composed of an independent and impartial judge who is appointed by the Supreme Council of Judicial Authority ... It is not possible for a trial to commence prior to the conclusion of the Accusation Chamber's procedure or without a lawyer being appointed to represent the Accused ... It is the role of the Accusation/Indictment Judge to review the investigation conducted by the Prosecutor-General's Office and if they find the evidence to be insufficient or illegally obtained, they must dismiss the case (Article 151 Criminal Procedure Code).⁸

⁷ Libyan Government's Response to "Defence Request for finding of Non-Compliance", ICC-01/11-01/11-374, 28 June 2013, para. 13, 14.

⁸ Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11-307-Red2, 2 April 2013, paras 129-130.

10. Libya has also repeatedly stressed that the distinction between the pre-trial and trial proceedings in Libya “is plainly of critical importance for the admissibility proceedings before the ICC”.⁹
11. It is not clear how the prosecutor’s statement that the Accusatory Chamber “will” submit the case to the Criminal Court of Tripoli is to be reconciled either with Libya’s previous submissions or the purported independence of the judicial process and the suspect’s presumption of innocence.
12. It is thus important for the present admissibility proceedings for Libya to inform the ICC of any timetable that has been set for the national proceedings and to explain the nature of the proceedings (trial or pre-trial) that are scheduled for the first half of August.
13. The Defence therefore requests that Libya should be required to clarify whether a timetable has been scheduled, and specifically whether the hearing in the first half of August that is referred to in the announcement on 17 June 2013 will be part of the accusation phase or the trial phase. Libya should also be required to clarify whether it intends to complete the trial by the end of Ramadan, as has been broadcast on national television.

Postponement of the surrender order

14. In its Decision of 14 June 2013 the Chamber “emphasise[d] that ... postponement [of the surrender order] is only temporary and that ... the arrest warrant issued by the Chamber against Mr Al-Senussi remains valid.”¹⁰ Mr. Al-Sur’s statement that the ICC “gave the green light for Libya to try Al-Senussi and keep him on its territories in order to try him” is plainly incorrect. It creates the false and misleading impression that the Chamber’s Decision of 14 June 2013 was a ruling in favour of Libya’s substantive admissibility challenge, when in fact the Decision only suspends the surrender request while the admissibility challenge is being considered and determined by the ICC.

⁹ Observations by Libya in response to the OPCD Notification of 8 January 2013, ICC-01/11-01/11-251, 15 January 2013, para. 5.

¹⁰ Postponement Decision of 14 June 2013, para. 40.

15. The Defence submits that it is essential for Libya to confirm that the Chamber's Decision does not provide a "green light" for it now to ignore the ICC and proceed to try Mr. Al-Senussi in Libya regardless of the ICC's decision on admissibility. The Defence therefore requests that the Chamber should require Libya to acknowledge that the surrender order against Mr. Al-Senussi remains valid and has only been temporarily suspended pending the outcome of the admissibility proceedings before the ICC. Libya should also be required to undertake that it will not make any further statements to the contrary or take any action to undermine any future surrender.

ICC's determination of Libya's admissibility challenge

16. Mr. Al-Sur stated that "Saif Al-Islam and Abdullah Al-Senussi will definitely be tried in Libya"¹¹. This statement completely ignores the admissibility proceedings that were launched by Libya itself that are presently being conducted before the ICC and it does not acknowledge that Libya's national proceedings are subject to the ICC's determination of Libya's own admissibility challenge.

17. Libya has previously stated on several occasions that Mr. Al-Senussi's trial will take place in Libya¹², and although Counsel for Libya have claimed that certain of these statements were inaccurately reported¹³, here again the Libyan prosecutor has stated that Mr. Al-Senussi will be tried in Libya as though no admissibility proceedings were underway and still to be determined. The video recording of the announcement leaves no doubt that these words were stated by the prosecutor in Mr. Al-Senussi's case.

18. It is both contradictory and disingenuous for Libya to claim before the ICC that it will co-operate with the Court in the admissibility proceedings, while on the other hand stating publicly that Mr. Al-Senussi will be tried in Libya regardless of the ICC's decision on the admissibility of the case. It is also evidence of Libya's continued disregard of the authority of the Chamber.

¹¹ Annex 1.

¹² Libya: Gaddafi's son and Al-Senussi on trial in a month's time, Al-Masry Al-Youm, 1 January 2013, and Saif Qaddafi and Abdullah Senussi will be put on trial in a month's time and in Libya, Libya Herald, 2 January 2013. See also, 3 April 2013 statement of Foreign Minister (<http://aawsat.com/details.asp?section=1&issueno=12545&article=723195&feature=#.UV1eK6JHJqw>; <http://www.dw.de/سيف-الاسلام-باق-في-ليبيا-وعائلته-تتوصل-على-اللاجوء-في-ناجع/a-16716499>).

¹³ 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. 9; Observations by Libya in response to the OPCD Notification of 8 January 2013, ICC-01/11-01/11-251, 15 January 2013, para. 3.

19. The Defence therefore requests that Libya should be ordered to correct the public announcement made by the prosecutor in Mr. Al-Senussi's case and to provide an undertaking to the ICC that it will comply with the ICC's surrender order in the event that its admissibility challenge is rejected, irrespective of the status of national proceedings against Mr. Al-Senussi.
20. Libya has previously assured the Chamber of its intention to cooperate fully with the Court in stating that Libya "regards itself bound by this Resolution [1970] through its cooperation with the Court in both the Saif Al-Islam Gaddafi admissibility proceedings, as well as in the Abdullah Al-Senussi admissibility proceedings."¹⁴ Libya has further confirmed its "intention to continue to comply with its obligations to the Court in general, and the Court's request for arrest and surrender of Mr Al-Senussi in particular."¹⁵ Libya has, however, never specifically undertaken that it would immediately surrender Mr. Al-Senussi should its admissibility challenge be dismissed. The Defence requests the Chamber to order Libya to provide such an undertaking in light of the recorded statements of the prosecutor in Mr. Al-Senussi's case that his trial will "definitely" take place in Libya which calls into question Libya's intention to surrender Mr. Al-Senussi.
21. Furthermore, the Defence requests the Chamber to require Libya to undertake not to commence Mr. Al-Senussi's trial in Libya, whether at the accusation or trial stages, until the admissibility proceedings have been finally determined by the ICC.
22. The Defence is of course cognisant of the Chamber's finding that Libya's continuation of domestic criminal proceedings pending the admissibility decision does not *per se* "amount to a violation of Libya's obligation to cooperate with the Court" but the Chamber has stressed that nevertheless "*Libya must ensure that its ongoing criminal proceedings do not hinder or delay Mr Al-Senussi's surrender to the Court should the case eventually be declared admissible.*"¹⁶ As noted above, Libya's actions and statements call into serious question its intent to surrender Mr. Al-Senussi if so

¹⁴ 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. 22.

¹⁵ 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. 25.

¹⁶ Postponement Decision of 14 June 2013, para. 36 (emphasis added).

ordered irrespective of the stage reached in its national proceedings. Indeed, the prosecutor in Mr. Al-Senussi's case has stated the opposite - that his trial will "definitely" take place in Libya, apparently on the basis that Libya has the "green light" from the ICC to proceed with the trial in Libya no matter what.

23. The very purpose of the admissibility proceedings would be defeated if Libya proceeded with Mr. Al-Senussi's trial before the admissibility of the case at the ICC was determined. It would mean that Mr. Al-Senussi could be tried and sentenced in Libya even if the ICC decides that the case should instead be tried before the ICC. And it would render meaningless Mr. Al-Senussi's rights before the ICC to have the admissibility challenge considered and decided by the ICC.

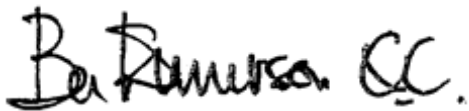
Relief Requested

24. In light of the announcement of 17 June 2013 and for all of the reasons above, the Defence respectfully requests that the Chamber should order Libya to clarify and confirm the following matters:

- Whether a timetable has been fixed for the national proceedings and if so what this is;
- Whether the hearing in the first half of August that is referred to in the announcement on 17 June 2013 will be part of the accusation phase or the trial phase, and if the latter, how this can comply with Libyan law and the suspect's due process rights;
- That Libya accepts that the Chamber's Decision of 14 June 2013 concerning the postponement of the surrender order against Mr. Al-Senussi does not provide "the green light for Libya to try Al-Senussi and keep him on its territories in order to try him", and that Libya will not make any further statements to this effect as the surrender order has only been temporarily postponed pending the outcome of the admissibility proceedings before the ICC; and

- That Libya accepts that the national proceedings against Mr. Al-Senussi are entirely dependent on the outcome of the admissibility proceedings before the ICC and that accordingly Libya undertakes (i) to surrender immediately Mr. Al-Senussi to the ICC in the event that his case is declared admissible before the ICC, irrespective of the stage reached in the national proceedings, and (ii) not to commence the trial of Mr. Al-Senussi in Libya until the admissibility proceedings are finally determined by the ICC.

Counsel on behalf of Mr. Abdullah Al-Senussi,



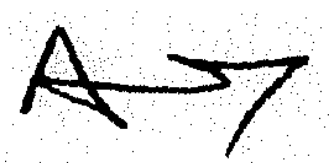
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Amal Alamuddin



Anthony Kelly



Professor William Schabas

Dated 10th July 2013

London, United Kingdom