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Date: **14 February 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

Defence Response on behalf of Mr. Abdullah Al-Senussi to Government of Libya's Application for Leave to Appeal 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"

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

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

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Introduction

1. The Defence for Mr. Abdullah Al-Senussi files this Response to the Libyan Government's Application of 12 February 2013 pursuant to Article 82(1)(d) for Leave to Appeal against the Pre-Trial Chamber's "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" of 6 February 2013.¹
2. The Defence Response is filed pursuant to Regulation 65(3) and Regulation 33 of the Regulations of the Court.
3. The Defence submits that the Application for Leave to Appeal should be rejected on the basis that Libya has not satisfied the specific and restrictive requirements of Article 82(1)(d) for interlocutory appeals to justify the Chamber granted leave to appeal its Decision of 6 February 2013. Libya's application argues the merits of a potential appeal without establishing the specific requirements for leave to appeal to be granted.

Applicable jurisprudence

4. ICC Chambers have repeatedly stated that applications for leave to appeal under Article 82(1)(d) are governed by the following principles: "(i) the restrictive character of the remedy provided for in article 82, paragraph 1 (d), of the Statute; (ii) the need for the applicant to satisfy the Chamber as to the existence of the specific requirements stipulated by this provision; and (iii) the irrelevance of or non-necessity at this stage for the Chamber to address arguments relating to the merit or substance of the appeal."²

¹ Government of Libya's Application for Leave to Appeal 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", ICC-01/11-01/11-277, 12 February 2013.

² For example see, *Prosecutor v. Kony*, Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, ICC-02/04-01/05-20-US-Exp, unsealed pursuant to Decision ICC-02/04-01/05-52 dated 13 October 2005, para. 15, and *Situation in the Republic of Kenya*, Decision on the Government of Kenya's Application for Leave to Appeal Pursuant to Article 82(1)(d) of the Rome Statute, ICC-01/09-86, 29 May 2012, para. 9.

5. It has been emphasised that interlocutory appeals under Article 82(1)(d) “were meant to be admissible only under the limited and very specific circumstances” stipulated in the Statute.³ It has been held that the Statute limits interlocutory appeals “to a few, strictly defined, exceptions”.⁴
6. The applicant is required to establish that the decision complained of involves an issue that “would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial,” and that an immediate resolution of such issue by the Appeals Chamber may “materially advance the proceedings”.⁵
7. The party applying for leave to appeal needs to demonstrate the existence of both of these requirements and “failure by the applicant to establish the first of such requirements will exempt the Chamber from considering whether the second has been met.”⁶
8. The first requirement “consists of two conditions: the issue on which the appeal is sought must significantly affect either the proceedings both in terms of fairness and in terms of expeditiousness (the ‘first limb’) or the outcome of the trial (the ‘second limb’).”⁷ It has thus been held,

“As a result, the mere fact that an issue is of general interest or that, given its overall importance, could be raised in, or affect, future pre-trial or trial proceedings before the Court is not sufficient to warrant the granting of leave

³ *Prosecutor v. Kony*, Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, ICC-02/04-01/05-20-US-Exp, unsealed pursuant to Decision ICC-02/04-01/05-52 dated 13 October 2005, para. 16.; See also, *Prosecutor v. Lubanga*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-02/04-168, 13 July 2006, para. 10.

⁴ *Prosecutor v. Kony*, Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, ICC-02/04-01/05-20-US-Exp, unsealed pursuant to Decision ICC-02/04-01/05-52 dated 13 October 2005, para. 19.; *Prosecutor v. Lubanga*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-02/04-168, 13 July 2006, para. 10.

⁵ Rome Statute, Article 82(1)(d). See also, *Prosecutor v. Kony*, Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, ICC-02/04-01/05-20-US-Exp, unsealed pursuant to Decision ICC-02/04-01/05-52 dated 13 October 2005, para. 20,21.

⁶ *Prosecutor v. Kony*, Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, ICC-02/04-01/05-20-US-Exp, unsealed pursuant to Decision ICC-02/04-01/05-52 dated 13 October 2005, para. 21.

⁷ Rome Statute, Article 82(1)(d). See also, *Prosecutor v. Kony*, Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, ICC-02/04-01/05-20-US-Exp, unsealed pursuant to Decision ICC-02/04-01/05-52 dated 13 October 2005, para. 21.

*to appeal. What the party seeking leave needs to demonstrate is that the issue at stake affects, first and foremost, the fairness and expeditiousness of the proceedings currently before the Chamber or the outcome of the related trial, as well as the impact (in terms of material advancement) of an immediate resolution of the issue on such proceedings. Failing such demonstration, leave to appeal cannot be granted”.*⁸

9. The existence of the requirements set forth in Article 82(1)(d) “is the sole factor of relevance in determining whether leave should be granted or not ... the arguments on the merits or the substance of the appeal are more appropriately for consideration and examination before the Appeals Chamber if and when leave to appeal has been granted.”⁹

The stringent requirements of Article 82(1)(d) are not satisfied

10. Libya asserts that the Chamber has committed an error of law by applying an incorrect interpretation of Articles 19 and 95 and of Rule 58 which Libya argues resulted in the Chamber erroneously finding that there was no admissibility challenge under consideration and that Libya remains under an obligation to comply with the surrender order for Mr. Al-Senussi.
11. As set out above, the ICC’s jurisprudence makes it clear that the merits of any potential appeal are irrelevant for the Chamber when considering whether to grant leave for an interlocutory appeal under Article 82(1)(d). Libya’s arguments which seek to suggest that the Chamber’s reasoning is erroneous amount to nothing more than Libya disagreeing with the findings of the Chamber.¹⁰ Libya has merely repeated many of the arguments it relied on in its Response of 1 February 2013. These

⁸ *Prosecutor v. Kony*, Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, ICC-02/04-01/05-20-US-Exp, unsealed pursuant to Decision ICC-02/04-01/05-52 dated 13 October 2005, para. 21. [emphasis added]

⁹ *Prosecutor v. Kony*, Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, ICC-02/04-01/05-20-US-Exp, unsealed pursuant to Decision ICC-02/04-01/05-52 dated 13 October 2005, para. 22.

¹⁰ Government of Libya’s Application for Leave to Appeal 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”, ICC-01/11-01/11-277, 12 February 2013, para. 25-42. See, *Prosecutor v. Lubanga*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-02/04-168, 13 July 2006, para. 9.

arguments concern the merits of the case and in no way establish that the stringent requirements of Rule 82(1)(d) have been satisfied.

12. The Defence submits, in any event, that Libya has not shown that the Chamber committed in any errors of law in finding that (i) Libya's submissions to date in respect of Mr. Al-Senussi are "not sufficient to trigger the applicability of article 95 of the Statute and justify a postponement of the execution of the Surrender Request" and (ii) that Rule 58 cannot be used as a legal basis in support of Libya's request for the postponement of the surrender of Mr. Al-Senussi. The Chamber properly concluded that Libya remains under an obligation immediately to surrender Mr. Al-Senussi to the ICC and is also under an obligation "not to put in place any action which would frustrate or otherwise hinder or delay the possibility of compliance with its obligations *vis-à-vis* the Court, including with its duty to surrender Mr. Al-Senussi to the Court".¹¹
13. The Chamber made these findings consistent with its previous findings in the cases concerning Mr. Al-Senussi and Mr. Saif Gaddafi. In particular, the Chamber correctly relied on its earlier determinations that (i) on Libya's own request, Libya's admissibility challenge of 1 May 2012 was only considered with respect to the case against Mr. Gaddafi (and indeed, the entire proceedings that followed only concerned the admissibility of Mr. Gaddafi's case), (ii) the execution of a surrender request may only be temporarily suspended under Article 19 to the extent that an admissibility challenge has been properly made pursuant to Article 19(2) and Rule 58(1) in respect of the specific case, and (iii) Rule 58 makes no mention of postponing a request for cooperation and cannot therefore be used as a legal basis by Libya in support of its request for a postponement of the surrender of Mr. Al-Senussi.
14. The Chamber also correctly relied on Libya's own acknowledgement that the admissibility challenge of 1 May 2012 needs to be supplemented "by further critical submissions" to find that the filing of 1 May "cannot be considered as a complete challenge to the admissibility of the case against Mr. Al-Senussi".¹² The Chamber thus rightly found that on Libya's own admission, an incomplete challenge that needs

¹¹ 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, para. 36.

¹² 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, para. 32.

to be supplemented cannot be regarded as having been “properly made within the terms of article 19 of the Statute and rule 58 of the Rules” (as it had found in Mr. Gaddafi’s case).¹³ Accordingly, regardless of whether the admissibility challenge of 1 May can be considered as an expression of Libya’s intention to challenge the admissibility of Mr. Al-Senussi’s case or as a “fractional admissibility challenge to be supplemented in due course”, as properly held by the Chamber, Libya’s submissions are insufficient to trigger the applicability of Article 95.¹⁴

15. Libya’s arguments on the requirements under Article 82(1)(d) are extremely limited. They are set out in three paragraphs at the end of the Application (see paras 43-45). These submissions do not in any way establish that the specific requirements for granting leave to appeal have been met. Libya again re-argues the merits of the case by asserting that the Decision of 6 February 2013 contradicts the principle of complementarity and will have a detrimental effect on the national justice system. There is no merit in any of these arguments which are advanced as general assertions without any substantiation (many of which have been argued before by Libya¹⁵).

16. Most importantly, they do not satisfy the requirements of Article 82(1)(d). Libya has not shown that any of these issues would significantly affect “the fair and expeditious conduct of the proceedings”, let alone that an immediate resolution by the Appeals Chamber could “materially advance the proceedings”. Instead, as has been found by the Chamber¹⁶, Libya has had ample opportunity and time to comply with the requests and orders of the Court to surrender Mr. Al-Senussi to the ICC and to explain its position before the Court in accordance with the provisions of the Statute and Rules. By seeking to appeal the Decision of 6 February 2013 without any foundation, Libya is further delaying, and not advancing, the proceedings.

¹³ 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, para. 7. See also, Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Rome Statute, ICC-01/11-01/11-163, 1 June 2012, para. 39.

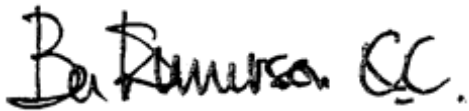
¹⁴ Government of Libya’s Application for Leave to Appeal the “Decision on the Urgent Application on behalf of Abdullah Al-Senussi for Pre-Trial Chamber to order the Libyan Authorities to comply with their obligations and the orders of the ICC”, ICC-01/11-01/11-277, 12 February 2013, para. 17(i).

¹⁵ See for example, Libyan Government’s Observations regarding the case of Abdullah Al-Senussi, ICC-01/11-01/11-260, 28 January 2013, para. 10.; and Government of Libya’s Application for Leave to Appeal the “Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi”, ICC-01/11-01/11-102, 10 April 2012, para. 27.

¹⁶ Decision on the Defence for Abdullah Al-Senussi’s "Urgent Application pursuant to Regulation 35", ICC-01/11-01/11-257, 23 January 2013, para. 12.

Conclusion

17. Counsel for Mr. Al-Senussi respectfully submit that Libya has not satisfied the strict requirements of Article 82(1)(d) for leave to appeal to granted, and hence Libya's application should be refused.
18. Libya should be required to surrender Mr. Al-Senussi to the ICC immediately and to desist from any further attempts to frustrate or delay the execution of the order of the Chamber for Mr. Al-Senussi to be transferred to the ICC.

**Ben Emmerson QC****Rodney Dixon**

Dated 14th February 2013
London, United Kingdom