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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

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’”

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:

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
Professor William Schabas

Counsel for Saif Gaddafi:
Mr. John Jones QC

Legal Representatives of Victims
Ms. Paolina Massida
Ms. Sarah Pellet
Mr. Mohamed Abdou

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
Ms. 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. The Defence for Mr. Abdullah Al-Senussi files this 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.’”¹
2. This Reply is filed pursuant to the Chamber’s “Decision on the request of Abdullah Al-Senussi for leave to reply”² in which the Chamber granted the Defence for Mr Al-Senussi leave to reply by 3 May 2013 in respect of two issues: “(i) the alleged ‘evidence of Libya’s continuing violations’; and (ii) the impact on the Application of the filing of the Admissibility Challenge and the invocation of article 95 of the Statute by Libya.”³
3. The Defence sets out below its submissions in reply on these two issues. The Defence submits that Libya’s admissibility application of 2 April 2013 and its reliance on Article 95 to seek to postpone the surrender of Mr. Al-Senussi to the ICC do not prevent the Chamber from reporting Libya to the Security Council for its past and continuing violations of Security Council Resolution 1970 and the orders and requests of the ICC. Libya has failed to comply at all with the ICC’s orders and requests, and has failed to provide any legitimate explanation for its violations in its Response of 10 April 2013. The additional evidence identified below lends further support to the Defence submissions that Libya has and continues to act in breach of its binding legal obligations and that Mr. Al-Senussi should be surrendered immediately to the ICC. This evidence directly refutes Libya’s claims in its Response that it is has consistently cooperated with the ICC, and is protecting Mr. Al-Senussi’s fundamental rights while in detention.

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 Response of 10 April 2013”).

² Decision on the request of Abdullah Al-Senussi for leave to reply, ICC-01/11-01/11-324, 26 April 2013 (hereinafter “Decision of 26 April 2013”).

³ Decision of 26 April 2013, para. 11.

4. For all of the reasons advanced in the Defence's Renewed Application of 19 March 2013⁴ and in this Reply, the Defence submits that (i) Libya and Mauritania should be referred immediately to the Security Council in accordance with the ICC's jurisprudence on referrals to the Security Council⁵ and (ii) the Chamber should confirm its order to surrender Mr. Al-Senussi to the ICC and request the Security Council to take appropriate action to enforce this order.

Libya should be reported to the Security Council for its serious violations despite filing an admissibility application and invoking Article 95

5. Libya submits that it should not be reported to the Security Council because it has filed an admissibility challenge and "now exercises its right pursuant to article 95 of the Statute, for the postponement of the execution of the Court's request for the surrender of Abdullah Al-Senussi pending the determination of this admissibility challenge by the Court."⁶
6. In its recent filing on 24 April 2013 in response to Libya's assertion that it is entitled to postpone the surrender request under Article 95 on account of its admissibility application, the Defence has submitted several compelling arguments against granting any suspension of the ICC's repeated orders to Libya to surrender Mr. Al-Senussi to the ICC,⁷ including that:
 - a. There is no legal basis under the Statute to postpone the surrender request in Mr. Al-Senussi's case pursuant Article 95 or for any other reason. Mr. Al-Senussi only ever came into the custody, and thus subject to the jurisdiction, of Libya as a result of the violations of the ICC's orders committed by Libya and Mauritania in transferring Mr. Al-Senussi to Libya and not to the ICC in September 2012. The only appropriate remedy is to require Mr. Al-Senussi to be transferred to the ICC where he should have been sent when first captured in Mauritania.⁸

⁴ 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-01/11-01/11-304, 19 March 2013 (hereinafter "Renewed Application of 19 March 2013").

⁵ See below para. 8.

⁶ Libya Response of 10 April 2013, paras. 4, 8.

⁷ Response on behalf of Abdullah Al-Senussi to the Submission of the Government of Libya for Postponement of the Surrender Request for Mr. Al-Senussi, ICC-01/11-01/11-319, 24 April 2013 (hereinafter "Defence Response of 24 April 2013").

⁸ Defence Response of 24 April 2013, paras. 34-41.

- b. In these circumstances, an interpretation of the cooperation provisions, including Article 95 that is consistent with the object and purpose of the cooperation regime should never result in a surrender request being suspended when it has been systematically ignored from the beginning of the case. Libya should not be rewarded for taking custody of Mr. Al-Senussi and keeping custody of him in violation of the ICC's orders.⁹
 - c. The complementarity provisions of the Statute do not permit the surrender request to be postponed, and Article 19(9) in particular assumes that the surrender order will remain valid even though an admissibility application has been filed.¹⁰
 - d. Libya has failed to give any assurance that it will not take any steps that could hinder Mr. Al-Senussi's immediate transfer to the ICC and has instead stated that he will not be surrendered to the ICC.¹¹
 - e. It is impossible for the Defence to have any contact with Mr. Al-Senussi in Libya as Libya has failed to arrange a legal visit and in any event all ICC missions to Libya are suspended. Mr. Al-Senussi's presence in The Hague would guarantee that he would have access to his lawyers for representation in all proceedings.¹²
7. The Defence's primary submission, therefore, is that even though Libya has eventually filed an admissibility challenge, there is no justification for suspending the surrender request pending the determination of this application. The surrender request should remain effective, and given that it has been deliberately disregarded by Libya since Libya participated unlawfully in Mr. Al-Senussi's transfer from Mauritania in September 2012 and for over seven months thereafter, the Chamber is urged to report Libya's non-compliance to the Security Council. The Chamber should request that the Security Council take all necessary steps to enforce the ICC's surrender request.

⁹ Defence Response of 24 April 2013, paras. 42-44.

¹⁰ Defence Response of 24 April 2013, paras. 45-47.

¹¹ Defence Response of 24 April 2013, paras. 48-50.

¹² Defence Response of 24 April 2013, paras. 51, 52.

8. The Court has stated that “the Court has to inform the Security Council of any lack of cooperation ... in relation to the enforcement of warrants of arrest issued by the Chamber ... thereby providing the Security Council with the information which is necessary for it to take any action as deemed appropriate.”¹³ The Court has acted immediately - within days - following a breach or potential breach to refer States to the Security Council for failing to implement the Chamber’s request for arrest and surrender.¹⁴ The Defence submits that there is no reason why similar action should not be taken against Libya in the present case for its failure to implement the Court’s orders. Reporting would guarantee that the Security Council is provided with all necessary information enabling it to take appropriate action including to ensure that similar breaches are not perpetrated in the future.

9. Even if the Chamber were minded to postpone the surrender request at this stage, Libya’s admissibility application and invocation of Article 95 do not provide a legal basis also to bar or suspend any referral of Libya to the Security Council for Libya’s repeated violations of the ICC’s orders and requests. Neither the admissibility provisions - Articles 17, 18 and 19 of the Statute - nor Article 95 itself, provide that States can avoid being reported to the Security Council for non-compliance merely because of the filing of an admissibility challenge. The Defence submits that in Libya’s case, when the violations have been perpetrated unremittingly for a lengthy period of time, the Chamber should report Libya to the Security Council *irrespective* of whether the surrender order is now postponed. The referral of Mauritania for its violations is, of course, not affected in any way by Libya’s admissibility application, and Mauritania should be reported immediately to the Security Council.

10. The Defence submits that there could be no justification to ignore Libya’s multiple and systematic violations, without providing any remedy, merely because Libya has at

¹³ Prosecutor v. Harun and Kushayb, Decision informing the United Nations Security Council about the lack of cooperation by the Republic of the Sudan, ICC-02/05-01/07-57, 25 May 2010, p. 6, 7. (emphasis added).

¹⁴ Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-139, 12 December 2011, para. 47; Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-140, 13 Decembre 2011, para. 14. See also, Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya, ICC-02/05-01/09-107, 27 August 2010; Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad, ICC-02/05-01/09-109, 27 August 2010; Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to Djibouti, ICC-02/05-01/09-129, 12 May 2011.

the ‘eleventh hour’ filed an admissibility application in Mr. Al-Senussi’s case. It is a last ditch attempt by Libya to avoid the inevitable and entirely justifiable consequence of serial non-compliance, that of being referred to the Security Council for appropriate sanction. Such a referral is important to record all past and present violations, to take remedial steps, and to seek to ensure that these violations will cease and not re-occur in the future. The ICC has held that all violations of its orders should be reported to the Security Council in cases that have been referred by the Council.¹⁵

11. In the present case, reporting Libya to the Security Council would rightly signal that the ICC will not countenance persistent breaches of its orders, particularly when founded on the authority of a Security Council Resolution. It would serve as a precedent for all States that the ICC’s orders must be implemented by States for the Court to be effective in achieving its mandate. It is for this reason that Article 87(5) and (7) empower the Court to refer violations of its orders and requests to the Security Council. In the Defence’s submission the Chamber should invoke these powers to report Libya, as the ICC has done in other cases in which States have ignored the orders of the Court pursuant to a Security Council Resolution.¹⁶ Any other finding would leave several very serious breaches unaddressed, without providing the Security Council with the opportunity to consider and seek to remedy the position when it had entrusted the Court with the responsibility of prosecuting the most serious international crimes in the Libya Situation. The violations that should be reported despite Libya’s admissibility application are the following.

The unlawful transfer of Mr. Al-Senussi from Mauritania to Libya

12. As set out in the Renewed Application of 19 March 2013, Libya and Mauritania acted in violation of Security Council Resolution 1970 and the ICC’s orders and requests by transferring Mr. Al-Senussi from Mauritania to Libya in September 2012. These violations are at the core of the present proceedings before the ICC. But for these violations Mr. Al-Senussi would not be in custody in Libya. There would be no dispute over the application of Article 95 and whether Libya and Mauritania should be reported to the Security Council. In accordance with Resolution 1970 and the orders

¹⁵ See para. 8 above.

¹⁶ See para. 8 above.

of the ICC, Mr. Al-Senussi should have been transferred to the ICC and should be in the custody of the Court.

13. The Defence submits that there is no reason to refuse to report Libya to the Security Council for this unlawful conduct. The fact that Libya has now filed an admissibility application seven months later does not absolve Libya of being responsible for flagrantly violating the provisions of Resolution 1970 and the ICC's orders when it took custody of Mr. Al-Senussi. These violations have plainly undermined the ability of the ICC efficiently to execute its mandate. The Court has not been able to proceed expeditiously with Mr. Al-Senussi's prosecution, having had repeatedly to order Libya to surrender Mr. Al-Senussi without any compliance. The proceedings have been seriously delayed while Mr. Al-Senussi remains in custody in Libya without any protections for his human rights, including having no access to any lawyer of his choosing.¹⁷

14. Contrary to Libya's assertions, the Defence has not in any way resiled from its submission that Libya has acted in violation of international law in transferring Mr. Al-Senussi from Mauritania to Libya. The evidence in support of this submission is not a "distracting, fishing exercise."¹⁸ It establishes that Mauritania and Libya have unlawfully rendered Mr. Al-Senussi to Libya in violation of Security Council Resolution 1970 and the ICC's orders and requests. Irrespective of whether the Chamber makes any findings about the evidence concerning the unlawful rendition, there can be no doubt that Libya and Mauritania have failed to comply with the ICC's orders and requests for surrender when they transferred Mr. Al-Senussi from Mauritania to Libya. This provides a clear basis under the Statute to report Libya and Mauritania to the Security Council.

Failure to surrender Mr. Al-Senussi to the ICC

15. Libya has persistently failed to implement the Chamber's orders of 4 July 2011,¹⁹ 10 December 2012,²⁰ and 6 February 2013²¹ to surrender Mr. Al-Senussi to the Court.

¹⁷ See paras. 17-20, 28, 31 below.

¹⁸ Libya Response of 10 April 2013, para. 19.

¹⁹ Request to the Libyan Arab Jamahiriya for the arrest and surrender of Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI, ICC-01/11-01/11-5, 4 July 2011.

²⁰ Order in relation to the request for arrest and surrender of Abdullah Al-Senussi, ICC-01/11-01/11-241, 10 December 2012.

Even assuming for argument that the surrender request may now be postponed as result of Libya filing its admissibility application, that is no excuse for Libya having disregarded the Chamber's orders for over seven months. Libya's admissibility application was only filed after numerous orders and requests from the Court and with the Defence having filed two applications to refer Libya to the Security Council. The Defence submits that Libya's application cannot justify nor rectify the violations it has committed.

16. As noted above, the Court "has to" inform the Security Council of any lack of cooperation by States in relation to the enforcement of warrants of arrest issued by the Chamber.²² The Defence submits that the Court should thus report Libya so that the Security Council is provided with all necessary information to take the requisite action.

17. It is for the Security Council to determine what are the appropriate sanctions to be imposed in light of the violations that have been committed taking into account as well that Libya has filed an admissibility application. However, the fact that an admissibility application has been filed should not bar the Court from referring the violations to the Security Council for consideration.

Failure to arrange a privileged legal visit

18. Libya has not facilitated a privileged legal visit to Mr. Al-Senussi in compliance with the Chamber's orders.²³ It makes no difference that an admissibility application has been filed. Libya should have by now allowed Defence Counsel to have access to Mr. Al-Senussi. There is no excuse for failing to do so and for acting in breach of Mr. Al-Senussi's basic human rights. This behaviour should be reported to the Security Council. It is obviously hampering the work of the ICC for Defence Counsel not to have any contact whatsoever with the accused in the proceedings before the ICC.

²¹ 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 (hereinafter "Decision of 6 February 2013").

²² Prosecutor v. Harun and Kushayb, Decision informing the United Nations Security Council about the lack of cooperation by the Republic of the Sudan, ICC-02/05-01/07-57, 25 May 2010, p. 6, 7. (emphasis added).

²³ Decision of 6 February 2013, p. 15.

19. Although Libya has very recently indicated that a legal visit can be arranged²⁴, there is no guarantee at all that it will materialise. As explained in the Defence's Response of 24 April 2013²⁵, Libya has previously undertaken to arrange a legal visit without any concrete result. Despite Libya's recent assurance that a visit will be organised, it has imposed new obstacles to any privileged visit in fact taking place, including that Defence Counsel will be subject to local Libyan law and that a Libyan lawyer will have to be in attendance, thus making it impossible to arrange a privileged and confidential meeting with Mr. Al-Senussi. Whatever the present position, nothing that Libya now says can cure its complete failure over many months to allow Mr. Al-Senussi to be visited by his lawyers.

20. As submitted in the Defence Response of 24 April 2013,²⁶ the only effective way of having confidential, privileged, secure and immediate access to Mr. Al-Senussi is for him to be in custody in The Hague. Moreover, Mr. Al-Senussi's presence is required at the Court in order to allow him to exercise his rights under the Statute and Rules.²⁷ Without access to Mr. Al-Senussi it is impossible for Counsel to consult with him and be able to report to the Court on the circumstances of his detention, his health condition, the manner in which he is being treated by the Libyan authorities and the extent to which his fair trial and due process rights are being denied. It is thus imperative that Libya's failure to surrender Mr. Al-Senussi and to arrange a privileged and secure visit is reported to the Security Council so that the Security Council is in a position to take all necessary steps to compel Libya's compliance.

21. The recent report of Human Rights Watch confirms that Mr. Al-Senussi "has not had access to a lawyer or been informed of the formal charges against him during almost eight months in Libyan detention."²⁸ Furthermore, Libya has admitted that Mr. Al-Senussi has been repeatedly interrogated without the presence of any lawyer, and has been confronted by witness statements against him.²⁹

²⁴ Response to "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", ICC-01/11-01/11-314, 23 April 2013, para. 6.

²⁵ Defence Response of 24 April 2013, para. 51-55.

²⁶ Defence Response of 24 April 2013, paras. 51-58.

²⁷ Defence Response of 24 April 2013, para. 58.

²⁸ Libya: Ensure Abdallah Sanussi Access to Lawyer, HRW, 17 April 2013 (<http://www.hrw.org/news/2013/04/17/libya-ensure-abdallah-sanussi-access-lawyer>).

²⁹ Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11-130-Red, 1 May 2012, para. 50; Application on behalf of the Government of Libya relating to Abdullah Al-

Additional evidence of Libya's continuing violations

22. Pursuant to the Chamber's Decision of 26 April 2013, the Defence submits "evidence of Libya's continuing violations"³⁰ which has become available since the filing of the Renewed Application of 19 March 2013 and which is provided to the Chamber so that it has the most up to date and relevant information.

Failure to respect and implement surrender request

23. Libya asserts that "even if Libya could be shown to be responsible for a violation of international law as a result of the extradition of Mr. Al-Senussi ... there is no basis upon which the Pre-Trial Chamber can make a finding of a lack of cooperation by Libya."³¹ Libya has never intended to surrender Mr. Al-Senussi to the ICC. It actively arranged for his transfer from Mauritania, paying no heed at all to the ICC's surrender request.³² Its true position has been confirmed in recent statements:

- On 3 April 2013, Libya's Foreign Minister stated that Libya had no intention of cooperating with the Court's surrender requests: *"Saif Al-Islam will be tried in Libya, so will Abdullah Al-Senussi, Gaddafi's family member and former intelligence chief, as well as other members of the former regime; there shall not be any surrender to any person."*³³
- On 1 May 2013, Libya's Prime Minister Ali Zeidan said in response to the question of whether the ICC should try Mr. Al-Senussi, and other former Gaddafi officials, that: *"they will be tried in Libya and will receive a fair trial in accordance with international justice standards, and this will happen. We*

Senussi pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11-307-Conf-Anx3-Red, 2 April 2013; 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, para. 166. See also, Libya Denies Execution Plans for Abdullah al-Senussi, NY Times, 28 January 2013 (http://www.nytimes.com/2013/01/29/world/africa/libyadenies-execution-plans-for-abdullah-al-senussi.html?_r=0).

³⁰ Decision of 26 April 2013, para. 11.

³¹ Libya Response of 10 April 2013, para. 18.

³² Renewed Application of 19 March 2013, paras. 18-34.

³³ <http://www.dw.de/a-16716499/a-16716499>; <http://aawsat.com/details.asp?section=1&issueno=12545&article=723195&feature=#.UV1eK6JHJqw>.

*are not in need to try them in the ICC because the Libyan people want it to be a Libyan justice, justice under a Libyan will, for the citizens.”*³⁴

24. These statements re-iterate the point made in prior statements from the Prosecutor General’s office to the effect that Libya was not bound by the ICC’s orders.³⁵ Libya has dismissed these prior statements as “inaccurate” reporting³⁶, yet the recent statements of the Prime Minister and the Foreign Minister again make it clear that Libya has no intention of complying at any stage with the orders of the ICC. In addition, Libya has boldly stated that *it* has postponed the surrender request in Mr. Al-Senussi’s case under Article 95 without in any way acknowledging that this is a matter to be considered and determined by the Chamber.³⁷

25. Furthermore, additional evidence has come to light that supports the allegation that Libya paid Mauritania to take custody of Mr. Al-Senussi when he should have been handed over to the ICC.³⁸ Libya has used the same unlawful methods to transfer suspects from Tunisia to Libya³⁹ and now from Egypt to Libya. Reports following the arrest of senior former Gaddafi officials in Cairo and information from a Libyan official, Mohamed Fayez Jibril, confirm that these persons were transferred from Egypt to Libya as a “quid pro quo” in exchange for Libya paying \$2 billion into the Egyptian central bank.⁴⁰ Additional reports state that the transfer followed an agreement “to provide Egypt with a million barrels of oil a month.”⁴¹

³⁴ BBC’s “Bila Quayood” Programme, Interview with Prime Minister Ali Zeidan (<http://www.youtube.com/watch?v=fmBRzyRbaYg>).

³⁵ ICC-01/11-01/11-248-Anx1; 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.

³⁶ 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.

³⁷ Libyan Government’s Response to OPCD Request to dismiss the “Notification by Libyan Government supplemental to its 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” in limine, ICC-01/11-01/11-318-Red, 24 April 2013, para. 13.

³⁸ Renewed Application of 19 March 2013, para. 30.

³⁹ Renewed Application of 19 March 2013, para. 33.

⁴⁰ Libya Putting \$2 Billion Into Egypt’s Central Bank, NY Times, 24 March 2013 (http://www.nytimes.com/2013/03/25/world/middleeast/libya-putting-2-billion-into-egypts-central-bank.html?ref=world&_r=2&utm_source=Africa+Center+for+Strategic+Studies+-+Media+Review+for+March+25%2C+2013&utm_campaign=3%2F25%2F2013&utm_medium=email&utm_term=.0); Gaddafi cousin Ahmed Gaddaf al-Dam arrested in Egypt, BBC, 19 March 2013 (<http://www.bbc.co.uk/news/world-africa-21848712>);

⁴¹ Is Libya transferring \$2 billion to help Egypt?, Libya Herald, 26 April 2013 (<http://www.libyaherald.com/2013/03/26/is-libya-transferring-2-billion-to-help-egypt/>).

26. As occurred when Mr. Al-Senussi was transferred to Libya⁴², these former Gaddafi officials were sent to Libya despite the calls for them to remain in Egypt as they could not receive a fair trial in Libya. Human Rights Watch (HRW) and the Egyptian Organisation for Human Rights (EOHR) voiced serious concerns that “given the current level of abuse of detainees in Libya, no one facing trial should be sent back there unless the government can prove that they won’t be abused or denied a fair trial”⁴³ and “handing them over to the Libyan officials will pose a severe threat to their lives.”⁴⁴ Deputy Director of EOHR, Tarek Zaghloul, asserted that Gaddafi Al-Dam, the cousin of Muammar Gaddafi, should not be extradited to Libya because “He will not receive a fair trial ... They will violate his personal and human rights.”⁴⁵

27. When a member of Human Rights Watch visited Mr. Al-Senussi on 15 April 2013, she was reportedly told by Mr. Al-Senussi that the “Moroccan authorities had arrested [Mr. Al-Senussi] in March 2012 and then detained him for about 12 days before putting him on a plane to Mauritania, where he was handed over to Mauritanian authorities upon arrival, on March 17.”⁴⁶ The HRW’s report states that Mr. Al-Senussi said that the Mauritanian authorities “allowed officials from Saudi Arabia, Lebanon and the United States to question him,”⁴⁷ The FBI was given access to him on two occasions.⁴⁸ He also describes how he was sent to Libya without any judicial proceedings on 5 September 2012.⁴⁹

28. The Defence has been notified of a public statement made by the lawyers who formerly represented Mr. Al-Senussi in Mauritania which explains that no judicial process in accordance with the laws of Mauritania and Libya was followed when Mr.

⁴² Fair trial urged as spy boss Senussi deported to Libya, BCC, 5 September 2013 (<http://www.bbc.co.uk/news/world-africa-19496096>); Gadhafi’s spy chief in Libyan hands, CNSnews, 5 September 2013 (<http://cnsnews.com/news/article/gadhafis-spy-chief-libyan-hands>).

⁴³ Libya: Ensure Due Process for Extradited Libyans, HRW, 30 March 2013 (<http://www.hrw.org/news/2013/03/30/libya-ensure-due-process-extradited-libyans>); Ensure rights of extradited officials, HRW urges Libya, Saudi Gazette, 1 April 2013 (<http://www.saudigazette.com.sa/index.cfm?method=home.regcon&contentid=20130401159392>).

⁴⁴ To extradite or not to extradite, Daily News Egypt, 20 March 2013 (<http://www.dailynewsegypt.com/2013/03/20/to-extradite-or-not-to-extradite/>).

⁴⁵ *Id.*

⁴⁶ Libya: Ensure Abdallah Sanussi Access to Lawyer, HRW, 17 April 2013 (<http://www.hrw.org/news/2013/04/17/libya-ensure-abdallah-sanussi-access-lawyer>). See also; <http://www.jeuneafrique.com/Article/JA2728p019.xml1/libye-arrestation-visite-abdallah-senoussilibye-abdallah-senoussi-se-confie.html>; <http://www.yabiladi.com/articles/details/16772/affaire-senoussi-l-ancien-numero-deux.html>; <http://www.maghrebemergent.com/actualite/breves/fil-maghreb/item/23077-libye-avant-la-mauritanie-abdallah-al-senoussi-dit-avoir-ete-arrete-au-maroc.html>.

⁴⁷ Libya: Ensure Abdallah Sanussi Access to Lawyer, HRW, 17 April 2013 (<http://www.hrw.org/news/2013/04/17/libya-ensure-abdallah-sanussi-access-lawyer>).

⁴⁸ *Id.*

⁴⁹ *Id.*

Al-Senussi was transferred to Libya. A copy of this statement in Arabic with an English translation is attached as Annex 1. This evidence, together with all the evidence submitted by the Defence, directly refutes Libya's assertion in its Response that the transfer of Mr. Al-Senussi was a "lawful extradition".⁵⁰

29. Defence Counsel should be permitted to have access to Mr. Al-Senussi to obtain his full account of these events. These are all matters which it is essential are properly investigated and submitted before the Chamber for its consideration in the present proceedings. Libya's failure to facilitate any contact between Mr. Al-Senussi and his lawyers in violation of the ICC's orders must be reported to the Security Council. This evidence provides further justification for maintaining the surrender request and reporting Libya to the Security Council with a request that the Council take immediate action to enforce the ICC's orders.

Failure to protect Mr. Al-Senussi's human rights

30. In Libya's Response of 10 April 2013, Libya "strenuously denies any wrongdoing or non-compliance with its international law obligations, including any violation of Mr. Al-Senussi's human rights" and seeks to dismiss these allegations as "regrettable hyperbole ... without a cogent evidential basis."⁵¹

31. These bare denials are without any merit. The Defence has substantiated all of its claims in the Renewed Application with credible and reliable evidence. The Defence submits further evidence of Libya's violations with this Reply.

32. Not only is Libya failing to uphold Mr. Al-Senussi's fundamental right to legal representation, there is additional evidence which supports the Defence's submission that Libya is not protecting the human rights of Mr. Al-Senussi and in particular is not able to guarantee his right to a fair trial.⁵²

33. The security situation in Libya is rapidly deteriorating,⁵³ making it impossible to try Mr. Al-Senussi in Libya in accordance with basic international standards and without

⁵⁰ Libya Response of 10 April 2013, para. 10.

⁵¹ Libya Response of 10 April 2013, para. 4.

⁵² Renewed Application of 19 March 2013, para. 46.

⁵³ Public redacted version of Prosecution's Response to "Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute", ICC-01/11-01/11-321-Red, 24 April

putting his life in imminent danger. The Defence refers to the reports of recent incidents of non-governmental militia groups attacking and surrounding the Ministry of Justice,⁵⁴ the Foreign Ministry⁵⁵ and kidnapping personnel of the Prime Minister's office⁵⁶. The recent bombing of the French embassy in Tripoli and other similar incidents indicate that growing violence and instability threaten to engulf the whole of Libya and its political and judicial institutions.⁵⁷

34. Mr. Al-Senussi's safety and security while in detention in Libya are not guaranteed as is evident from reports on 5 April 2013 that protestors outside Al-Habda prison (where Mr. Al-Senussi is being detained) sought to pressure the government to execute him and threatened to storm the prison to take him by force.⁵⁸ The African Court on Human and Peoples' Rights has recognised that, in Mr. Gaddafi's case, "there exists a situation of extreme gravity and urgency, as well as a risk of irreparable harm to the Detainee".⁵⁹ The African Court ordered Libya to comply with provisional measures to prevent "irreparable damage to the Detainee" or "any action that may affect the Detainee's physical and mental integrity as well as his health."⁶⁰ Libya has failed to respond to the African Court's order.

35. This evidence, together with all of the materials referred to in the Renewed Application of 19 March 2013, underscore the importance of reporting Libya to the Security Council. Libya's failure to abide by the orders of the ICC while not respecting Mr. Al-Senussi's rights in detention should be brought to the attention of the Security Council so that appropriate action can be taken. As long as Libya ignores

2013, para. 82. See also, Libya gunmen press siege of ministries, Al-Arabiya, 1 May 2013 (<http://english.alarabiya.net/en/News/africa/2013/05/01/Libya-gunmen-press-siege-of-ministries-.htm>); Storming Ministries, Libya's Militias Put Pressure, ABC, News, 30 April 2013 (<http://abcnews.go.com/International/wireStory/militiamen-besiege-libyas-justice-ministry-19072547#.UYEv3aJHJqw>); Gunmen stormed the Ministry of Justice in Libya, Aljazeera (<http://www.aljazeera.net/news/pages/11ae9c91-836c-4efc-8918-650759d2cf71>).

⁵⁴ Libya: Gunmen Storm Libya Justice Ministry, allAfrica, 1 April 2013 (<http://allafrica.com/stories/201304020027.htm>); See also, http://www.bbc.co.uk/arabic/middleeast/2013/04/130430_libya_siege_justice_ministry.shtml.

⁵⁵ Libya gunmen surround Tripoli Foreign Ministry, BBC, 28 April 2013 (<http://www.bbc.co.uk/news/world-africa-22331562>).

⁵⁶ Libya PM's aid Mohamed al-Ghattous 'kidnapped', BBC, 1 April 2013 (<http://www.bbc.co.uk/news/world-africa-21995485>).

⁵⁷ Libya faces growing Islamist threat, The Guardian, 28 April 2013 (<http://www.guardian.co.uk/world/2013/apr/28/libya-mali-islamist-violence-tripoli>).

⁵⁸ <https://www.facebook.com/newsLy>.

⁵⁹ In the Matter of the African Commission on Human and Peoples' Rights v. Libya, Application No. 002/2013, Order for Provisional Measures, 15 March 2013, para. 17.

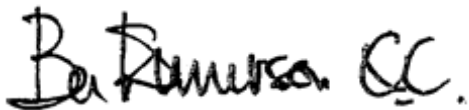
⁶⁰ In the Matter of the African Commission on Human and Peoples' Rights v. Libya, Application No. 002/2013, Order for Provisional Measures, 15 March 2013, p. 6.

the ICC's requests, the ICC is unable to guarantee the fundamental rights that are accorded Mr. Al-Senussi under the Statute.

Conclusion

36. Accordingly, for the reasons set out in the Renewed Application of 19 March 2013 and in this Reply, Counsel for Mr. Al-Senussi respectfully request that the Chamber grant the Renewed Application of 19 March 2013 and immediately refer Libya and Mauritania to the Security Council for the violations identified above, and request the Security Council to take all necessary steps to enforce the orders of the ICC.

Counsel on behalf of Mr. Abdullah Al-Senussi,



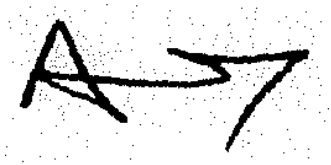
Ben Emmerson QC



Rodney Dixon



Amal Alamuddin

A handwritten signature in black ink, appearing to be 'AK', on a dotted background.

Anthony Kelly

A handwritten signature in black ink, appearing to be 'W Schabas', on a white background.

Professor William Schabas

Dated 3rd May 2013

London, United Kingdom