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

Date: **9 September 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**

**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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## **REGISTRY**

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**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 document in support of its appeal pursuant to the Pre-Trial Chamber's "Decision on an application for leave to appeal submitted by the Defence of Abdullah Al-Senussi" dated 28 August 2013,<sup>1</sup> and notified to the parties on 29 August 2013.<sup>2</sup> This appeal is filed pursuant to Regulations 65(4) and 33 of the Regulations of the Court.
2. The impugned decision is 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" of 14 June 2013 in which the Pre-Trial Chamber decided to postpone the surrender order for Mr. Al-Senussi to the ICC pending its determination of Libya's Admissibility Application.<sup>3</sup>
3. The Defence submits in this appeal that the Pre-Trial Chamber committed discernable errors of law and fact in postponing the surrender order for Mr. Al-Senussi to the ICC pursuant to Article 95 while the admissibility application is being determined by the Pre-Trial Chamber. The Defence therefore respectfully requests the Appeals Chamber to reverse the Pre-Trial Chamber's Decision of 14 June 2013 and to order Libya to surrender Mr. Al-Senussi to the ICC immediately.

## **Standard of review**

4. It is well-established by the ICC's jurisprudence that "the Appeals Chamber will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision."<sup>4</sup>

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<sup>1</sup> Decision on an application for leave to appeal submitted by the Defence of Abdullah Al-Senussi, ICC-01/11-01/11-419, 28 August 2013 (hereinafter "Decision of 28 August 2013").

<sup>2</sup> For the purpose of Regulation 33, the Defence notes that on 29 August 2013 at 10:41 the Defence received an email from Court Management notifying the parties of the Pre-Trial Chamber's decision.

<sup>3</sup> 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 "the Impugned Decision").

<sup>4</sup> *Prosecutor v. Banda and Jerbo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled 'Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation', ICC-02/05-03/09-295, 17 February 2012, para. 20;

5. The Appeals Chamber has held that its functions “extend to reviewing the exercise of discretion by the Pre-Trial Chamber to ensure that the Chamber properly exercised its discretion”.<sup>5</sup>
6. With regard to alleged errors of fact, the Appeals Chamber has stated that it will determine whether the Trial Chamber or Pre-Trial Chamber “committed an error of fact by misappreciating facts, disregarding relevant facts, or taking into account facts extraneous to the *sub judice* issues.”<sup>6</sup>

### **The Issue in the appeal**

7. On 28 August 2013, the Pre-Trial Chamber granted the Defence “leave to appeal the Decision in relation to the Second Issue proposed for appeal;”<sup>7</sup> namely the Chamber’s decision to consider “*irrelevant, for the limited purposes of the Decision, the Defence submissions regarding the alleged violations on the part of Libya of its obligations vis-à-vis the Court, and the need to ensure Mr Al-Senussi's presence at the seat of the Court in order to advance the admissibility proceedings and to give effect to his statutory rights.*”<sup>8</sup> The Defence incorporates, and does not repeat in full, the submissions made in its filing of 24 April 2013 which were considered “irrelevant” by the Pre-Trial Chamber in the Impugned Decision.
8. The Pre-Trial Chamber’s Decision of 28 August 2013 states that “once the Defence arguments were rejected, the Chamber confirmed Libya's entitlement to postpone the execution of the Surrender Request pursuant to article 95 of the Statute”<sup>9</sup> and this “postponement, in turn, arguably involves the legitimisation of a considerable delay in the commencement of the criminal proceedings against Mr Al-Senussi leading to the confirmation of charges hearing, with significant repercussions on the fair and

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*Prosecutor v. Calliste Mbarushimana* Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled “Decision on the confirmation of charges”, ICC-01/04-01/10-514, 30 May 2012, para. 15.

<sup>5</sup> *Prosecutor v. Joseph Kony et al.*, Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009", ICC-02/04-01/05-408, 16 September 2009, para. 80.

<sup>6</sup> *Prosecutor v. Bemba*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled "Decision on the Admissibility and Abuse of Process Challenges", ICC-01/05-01/08-962, 19 October 2010, para. 64.

<sup>7</sup> Decision of 28 August 2013, p. 25.

<sup>8</sup> Decision of 28 August 2013, para. 42.

<sup>9</sup> Decision of 28 August 2013, para. 44.

expeditious conduct of the proceedings.”<sup>10</sup> The Chamber granted leave to appeal on the basis that “the delay resulting from the Decision is such that the Second Issue would have a significant impact on the fairness of the criminal proceedings against Mr Al-Senussi.”<sup>11</sup> The Chamber therefore considered that an “immediate resolution of the Second Issue” by the Appeals Chamber may materially advance the proceedings in order to “cure, at this stage, any possible error of the Decision which would affect the legitimacy of Libya's postponement of the execution of the Surrender Request.”<sup>12</sup>

### **The Errors in the Impugned Decision**

9. The Pre-Trial Chamber found that “the only consideration that the Chamber is called upon to make in the present decision [is] whether the Admissibility Challenge has been duly made within the terms of the relevant statutory provisions” while “shar[ing] the view expressed by Libya to the effect that ‘[t]he Court does not have any discretion in the matter, once a challenge is properly made and remains unresolved.’”<sup>13</sup>
  
10. The Chamber accordingly held that the surrender request for Mr. Al-Senussi could be postponed under Article 95 pending the determination of Libya’s admissibility application on the basis “that the Admissibility Challenge has been properly made within the terms of article 19(2) and (5)”<sup>14</sup>. In particular, the Chamber held that there was nothing in the information before the Court to indicate that Libya had unduly failed to file the admissibility challenge at the “earliest opportunity” as required by Article 19(5).<sup>15</sup> In addition, the “Chamber consider[ed] immaterial, for the limited purposes of article 95 of the Statute,” the Defence arguments that the Chamber must also take into account (1) “whether the State obtained and/or maintained custody of the suspect in non-compliance with the Court's request for his arrest and surrender”<sup>16</sup>; (2) whether the “domestic criminal proceedings against Mr Al-Senussi have not been terminated pending the Court's determination of the Admissibility Challenge, and that a number of political statements demonstrate Libya's intent to carry out the trial

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<sup>10</sup> Decision of 28 August 2013, para. 44.

<sup>11</sup> Decision of 28 August 2013, para. 42.

<sup>12</sup> Decision of 28 August 2013, para. 46.

<sup>13</sup> Impugned Decision, para. 25.

<sup>14</sup> Impugned Decision, para. 33.

<sup>15</sup> Impugned Decision, para. 32.

<sup>16</sup> Impugned Decision, para. 35.

against Mr Al-Senussi at the national level”<sup>17</sup>; and, (3) whether “the transfer of Mr Al-Senussi to the seat of the Court is necessary in order for him to exercise his rights under the Statute and the Rules.”<sup>18</sup>

11. The Defence submits that the Pre-Trial Chamber erred in making these findings, and respectfully requests the Appeals Chamber in the circumstances of the present case, and for the reasons set out below, to reverse the Impugned Decision and to re-instate the surrender order requiring Libya immediately to surrender Mr. Al-Senussi to the ICC while the admissibility application is being determined.

***Admissibility Challenge not filed at earliest opportunity***

12. The Pre-Trial Chamber did consider whether the Admissibility Challenge had been filed “at the earliest opportunity” as required by Article 19(5) for the purposes of determining whether the Admissibility Challenge was properly filed to enable the Chamber to postpone the surrender request under Article 95. The Chamber specifically considered whether the admissibility challenge “was filed in violation of article 19(5)” due to its submission “seven months after Mr Al-Senussi’s transfer to Libya from Mauritania” on 2 April 2013.<sup>19</sup> The Chamber found that “despite being in a position to properly and timely challenge the admissibility of the case against Mr Al-Senussi” the information “before the Chamber does not appear to indicate that Libya ... unduly failed to do so, in violation of article 19(5) of the Statute.”<sup>20</sup>
13. The Defence submission is that given the history of the case, and the submissions made by the Defence in their filing of 24 April 2013, the Pre-Trial Chamber committed a discernable error in making this finding. Libya had not established on the information before the Court that it filed its admissibility application at the earliest opportunity, and the Pre-Trial Chamber should not therefore have found that the admissibility application had been properly filed for the purposes of Article 95. The Chamber should have held that the Libya was not entitled to postpone the surrender request under Article 95 in these circumstances. The Chamber would have been entitled to consider the consequence of not filing the Admissibility Application at the

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<sup>17</sup> Impugned Decision, para. 36.

<sup>18</sup> Impugned Decision, para. 37.

<sup>19</sup> Impugned Decision, para. 30.

<sup>20</sup> Impugned Decision, para. 32.

earliest opportunity on the Application itself when it determined the merits of the Application thereafter.

14. The Defence submits that the Chamber failed to take into account that Libya had stated that it was in a position to challenge the admissibility of Mr. Al-Senussi's case on 1 May 2012 - nearly a year before it filed its Admissibility Challenge of 2 April 2013. The Defence argument was therefore not just that 7 months had elapsed (at that time) since Mr Al-Senussi had been detained in Libya, but that more than 11 months had elapsed since Libya was – *by its own admission* – in a position to file an admissibility challenge. The Pre-Trial Chamber held that the requirement that a State file a case “at the earliest opportunity” meant that the challenge must be filed “*as soon as there are grounds on the basis of which the case would be inadmissible before the Court*”.<sup>21</sup> And yet there is no reasoning whatsoever in the Pre-Trial Chamber decision that explains how a State claiming to be ready to file a challenge – and even claiming that it was filing a challenge – in May 2012, could be allowed to wait another 11 months before filing one and yet be deemed to do so “at the earliest opportunity”.

15. In its Application of 1 May 2012, Libya stated that at that time its “national judicial system is actively investigating Mr Gaddafi and Mr Al-Senussi for their alleged criminal responsibility for multiple acts of murder persecution, committed pursuant to or in furtherance of State police, amounting to crimes against humanity.”<sup>22</sup> Libya explained in its filing of 1 May 2012 that the investigation had been going on for many months, that the two men were to be tried together and it was in a position to challenge the admissibility of Mr. Al-Senussi's case as well as Mr Gaddafi's. It even went on to argue that “if, ... the Chamber considers that the term ‘case’ ... does refer to the proceedings against both Mr Gaddafi and Mr Al-Senussi as a whole, the Government of Libya has provided sufficient evidence concerning the investigation and prosecution of both individuals and **hereby challenges the admissibility of the case against each and both of these two persons**”.<sup>23</sup> Three days later, the Pre-Trial Chamber clarified that Libya's 2 May 2012 application did *not* constitute a formal admissibility challenge in respect of Mr Al-Senussi.<sup>24</sup> So from 4 May 2012 Libya was

<sup>21</sup> Impugned Decision, para. 31 (emphasis added).

<sup>22</sup> 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. 1 (“Admissibility Challenge of 1 May 2012”).

<sup>23</sup> Admissibility Challenge of 1 May 2012, para. 74.

<sup>24</sup> Decision on the Conduct of the Proceedings Following the “Application on behalf of the Government of Libya pursuant to Article 19 of the Statute”, para 8 (“As a preliminary matter, the Chamber has considered Libya's

on notice that it had not actually filed a challenge. However, notwithstanding Libya's own assertion that it could have filed one at that time, Libya decided to wait until April 2013 before it did file one.

16. Even after Mr. Al-Senussi was transferred to Libya in early September 2012, Libya never sought to make its admissibility challenge at that point. In fact, Libya did nothing until it was ordered by the Pre-Trial Chamber on 18 January 2013 to inform the Chamber how it intended to comply with the outstanding surrender order.<sup>25</sup> Libya has provided no explanation for its delay.
17. The Appeals Chamber has held that "Article 19 (5) of the Statute requires a State to challenge admissibility as soon as possible once it is in a position to actually assert a conflict of jurisdictions."<sup>26</sup> A leading commentary on the Rome Statute states that the Chamber has the power under Article 19(5) and "under its inherent power to control its proceedings, to determine whether a challenge was made 'at the earliest opportunity' and to reject untimely challenges, since a challenge not made at the earliest opportunity would simply not be authorised by the Statute."<sup>27</sup> It is explained that "the longer the delay between notification of an investigation and the challenge, the less likely that it would be considered timely."<sup>28</sup>
18. Libya notified the Court on 1 May 2012 that it was perfectly able to and sought to challenge the admissibility of Mr. Al-Senussi's case before the ICC, but only submitted an admissibility challenge in Mr. Al-Senussi's case on 2 April 2013. The Defence submits that the Pre-Trial Chamber failed to explain how Libya has complied with the requirements of Article 19(5), and provided no reasons for its conclusion that "the information before the Chamber does not appear to indicate that Libya" has acted in violation of Article 19(5).<sup>29</sup> The Pre-Trial Chamber therefore erred in finding that

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submissions as to the scope of the Article 19 Application and considers that it must be understood to only concern the case against Mr Gaddafi. Accordingly, the Chamber will not consider the admissibility of the case against Mr Al-Senussi in resolving the Article 19 Application").

<sup>25</sup> Decision requesting Libya to provide observations concerning the Court's request for arrest and surrender of Abdullah Al-Senussi, ICC-01/11-01/11-254, 18 January 2013, p. 6.

<sup>26</sup> Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", ICC-01/09-02/11-274, 30 August 2011, para. 45, 98.

<sup>27</sup> Otto Triffterer, Commentary on the Rome Statute of the International Criminal Court, Second Edition, 2008, Article 19, p. 657, 658.

<sup>28</sup> Otto Triffterer, Commentary on the Rome Statute of the International Criminal Court, Second Edition, 2008, Article 19, p. 657, 658.

<sup>29</sup> Impugned Decision, para. 32.

Libya has not violated Article 19(5) by submitting its Admissibility Application almost a year after it notified the Court that it could challenge the admissibility of his case and seven months after Mr. Al-Senussi was transferred to Libya. The Defence submits that this error materially affected the Impugned Decision as it led to the Chamber finding that the Admissibility Application had been properly filed to justify a postponement of the surrender request under Article 95.

***Failure to take all relevant and necessary circumstances into account***

19. As noted above, the Defence submitted that the Pre-Trial Chamber should take all relevant and necessary circumstances in the case into account when determining whether Libya could postpone the surrender order as a result of filing an Admissibility Application, including Libya's track record of non-compliance with the orders of the Court and whether it has demonstrated that it intends to surrender Mr. Al-Senussi if so ordered at the conclusion of the admissibility proceedings, as well as whether any postponement of the surrender order would undermine the protection of Mr. Al-Senussi's rights under the Statute.
20. The Chamber, however, held that these "other arguments advanced by the Defence relating to the inapplicability of article 95 of the Statute in the present case ... do not bear on the only consideration that the Chamber is called upon to make in the present decision, i.e. whether the Admissibility Challenge has been duly made within the terms of the relevant statutory provisions."<sup>30</sup>
21. The Defence submits that the Chamber erred in excluding from its consideration the circumstances relied on by the Defence in favour of refusing to postpone the surrender request. The provisions of Article 95 should not be viewed in isolation from other applicable provisions in the Statute. Nothing in the wording of Article 95 prevents the Court from taking into consideration all relevant factors to determine whether the surrender order can reasonably and justifiably be suspended for any period of time.
22. An order for arrest and surrender is one of the most significant procedures affecting the ability of the Court to function and carry out its mandate, including guaranteeing the rights of the accused. The Defence submits that Article 95 should not be interpreted to provide States with the ability to postpone a surrender request without

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<sup>30</sup> Impugned Decision, para. 34.

consideration of the effect that any such postponement could have on the Court's ability to carry out its essential functions and to protect the rights of the accused.

23. The Pre-Trial Chamber accepted that the admissibility application must be made in accordance with all of the applicable statutory provisions, and that its determination of whether an application has been properly made must cover an assessment of all necessary requirements.<sup>31</sup> However, the Chamber never gave any reasons for proceeding to exclude from its consideration the "necessary" requirements relied on by the Defence under the statutory provisions which are applicable. The Chamber only considered one of the Defence's arguments – that the Admissibility Application had not been made at the earliest opportunity under Article 19(5) – in its Decision.<sup>32</sup> In other words, the Chamber was prepared to consider whether any delay in the filing of the Admissibility Application could serve as a basis to refuse to accept Libya's postponement of the surrender request. Yet, the Chamber provided no coherent legal basis for deciding that it could not consider any other factors in assessing the propriety of the postponement.

24. The Defence submits that each of the factors relied on by the Defence, as explained below, should have been considered by the Pre-Trial Chamber as providing compelling grounds to continue to require Libya to surrender Mr. Al-Senussi to the ICC while the admissibility proceedings are being determined. Given the very serious risks to Mr. Al-Senussi's safety and well-being in detention in Libya and Libya's persistent failure to protect his fundamental human rights, coupled with Libya's complete lack of cooperation with the Court and consistently stated intention to try Mr. Al-Senussi in Libya regardless of the outcome of the admissibility proceedings, the Defence submits that the Appeals Chamber should insist on Libya surrendering Mr. Al-Senussi to the ICC immediately. In particular, as Mr. Al-Senussi has had no access to his Counsel at any stage of his detention, it is evident that ordering his transfer to The Hague will be the only way to guarantee that he can consult with his Counsel in a privileged and confidential environment. There is accordingly no proper basis to permit Libya to postpone the surrender order even though the admissibility proceedings are yet to be concluded. Although at the appellate stage of the proceedings, the Appeals Chamber has insisted on Mr. Saif Gaddafi being transferred

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<sup>31</sup> Impugned Decision, para. 25.

<sup>32</sup> 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, para. 35.

to the ICC even though the admissibility proceedings have not concluded, noting that his transfer to The Hague would not undermine or hamper Libya's national investigation.<sup>33</sup> In the same way, Libya has not established that transferring Mr. Al-Senussi to the ICC at this stage would impede its national investigation.

(1) The relevance of Libya taking custody of Mr. Al-Senussi in violation of the ICC's orders

25. The Defence submits that the Pre-Trial Chamber erred in failing to identify any proper legal basis for excluding from its consideration of whether it should postpone the surrender order, that Mr. Al-Senussi was only transferred to Libya in violation of the ICC's orders and requests.

26. In the Impugned Decision the Pre-Trial Chamber found that "Libya's alleged violations of its international obligations" are "immaterial for the limited purposes of article 95."<sup>34</sup> The Chamber decided that the "purpose of the Chamber's evaluation of the applicability of article 95 of the Statute in the instant case is not to determine whether or not the State has previously fulfilled its obligation to cooperate with the Court."<sup>35</sup>

27. The Defence has submitted that Libya acted unlawfully in violation of the ICC's orders and requests in rendering Mr. Al-Senussi from Mauritania to Libya in September 2012.<sup>36</sup> Libya was under a clear obligation to comply with the ICC's orders and requests, as required by Security Council Resolution 1970, to surrender Mr. Al-Senussi to the ICC, and thus acted unlawfully in arranging for his rendition from Mauritania to Libya for a substantial payment and in the absence of any judicial proceedings.<sup>37</sup> As submitted by the Defence, Mr. Al-Senussi's illegal transfer to

<sup>33</sup> Decision on the request for suspensive effect and related issues, ICC-01/11-01/11-387, 18 July 2013, para. 27.

<sup>34</sup> Impugned Decision, para. 35.

<sup>35</sup> Impugned Decision, para. 35.

<sup>36</sup> Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah ALSENUSSI", ICC-01/11-01/11-1, 27 June 2011, p. 42; Public Redacted Version with a confidential annex of the "Report of the Registry regarding the arrest of Abdullah Al-Senussi" (ICC-01/11-01/11-80-Conf-Exp), ICC-01/11-01/11-80-Red, 21 March 2012, para. 2.

<sup>37</sup> 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, paras. 6, 15-24, 37, 38; 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, paras. 1, 15, 16, 19-23, 26-30.

Libya constitutes a very serious violation of the ICC's orders and the obligations that arise under Resolution 1970.

28. As highlighted by the Defence, Libya continued thereafter to flout the orders of the ICC to surrender Mr. Al-Senussi. It eventually filed an admissibility challenge on 2 April 2013, having been prompted by the Pre-Trial Chamber that such an application was required if any postponement of the surrender order under Article 95 was to be considered.<sup>38</sup>
29. The Defence does not seek to have these violations taken into account in the present proceedings in order to "punish" Libya<sup>39</sup>. The Defence submits that they are relevant to determining whether a postponement of the surrender request is reasonable and permissible in the circumstances of this case. Libya only has custody of Mr. Al-Senussi in violation of the ICC's orders and requests, and should thus be required to surrender him immediately the ICC irrespective of the stage reached in the admissibility proceedings.
30. The Defence also asks the Appeals Chamber to take into account that the Defence has sought leave to appeal the Pre-Trial Chamber's Decision of 28 August 2013 (the same day the Chamber granted leave to appeal the Impugned Decision) that "the extradition of Mr Al-Senussi to Libya did not constitute a violation on the part of Mauritania of any obligation *vis-à-vis* the Court, and no finding of 'non-cooperation' by Mauritania can be made by the Chamber."<sup>40</sup> The Defence has sought leave to appeal stating that the Chamber erred "in finding that it could not report Mauritania's failure to comply with the ICC's requests to the Security Council"<sup>41</sup> and "in failing to take into account

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<sup>38</sup> 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, paras. 29-33.

<sup>39</sup> Impugned Decision, para. 17. See also, Libyan Government's reply to '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-01/11-01/11-339, 20 May 2013, para. 24.

<sup>40</sup> Decision on the request of the Defence of Abdullah Al-Senussi to make a finding of non-cooperation by the Islamic Republic of Mauritania and refer the matter to the Security Council, ICC-01/11-01/11-420, 28 August 2013, para. 15.

<sup>41</sup> Defence Application on behalf of Mr. Abdullah Al-Senussi for Leave to Appeal against "Decision on the request of the Defence of Abdullah Al-Senussi to make a finding of non-cooperation by the Islamic Republic of Mauritania and refer the matter to the Security Council", ICC-01/11-01/11-431, 4 September 2013, para. 11.

and apply the relevant provisions of the UN Charter” when finding that Mauritania did not have a duty vis-à-vis the Court.<sup>42</sup>

(2) Evidence of Libya’s intention not to cooperate with the Court

31. The Defence submits that the Chamber erred in finding that Libya’s stated intention that it will proceed with Mr. Al-Senussi’s trial in Libya and will not surrender him to the ICC does not amount to non-cooperation that should be taken into account when determining whether the surrender order should be postponed at this time.

32. In the Impugned Decision, the Chamber held that it is “not persuaded by the Defence argument that ... a number of political statements demonstrate Libya’s intent to carry out the trial against Mr Al-Senussi at the national level.”<sup>43</sup> The Chamber stated that “these mere facts do not, per se, amount to a violation of Libya’s obligation to cooperate with the Court, insofar as 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.”<sup>44</sup>

33. The Defence has put before the Pre-Trial Chamber Libya’s previous announcements about Mr. Al-Senussi’s trial which demonstrate that Libya has no intention of cooperating with the Court:

- On 1 January 2013, Taha Bara (a named Prosecutor in Mr. Al-Senussi’s case)<sup>45</sup> gave a press conference announcing that Mr. Al-Senussi and Mr. Gaddafi “will be put on trial in a month’s time.” In response to the Court’s order to surrender Mr. Al-Senussi to the Court, Prosecutor Bara said Libya is not a party to the ICC Statute and is therefore not bound to comply with its request.<sup>46</sup>

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<sup>42</sup> Defence Application on behalf of Mr. Abdullah Al-Senussi for Leave to Appeal against “Decision on the request of the Defence of Abdullah Al-Senussi to make a finding of non-cooperation by the Islamic Republic of Mauritania and refer the matter to the Security Council”, ICC-01/11-01/11-431, 4 September 2013, para. 12.

<sup>43</sup> Impugned Decision, para. 36.

<sup>44</sup> Impugned Decision, para. 36.

<sup>45</sup> ICC-01/11-01/11-307-Conf-Anx5.

<sup>46</sup> ICC-01/11-01/11-248-Anx1. See also, 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, para. 49.

- On 3 April 2013, Libya's Foreign Minister stated that "Saif Al-Islam will be tried in Libya, so will Abdallah 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."<sup>47</sup>
- 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 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."<sup>48</sup>
- On 17 June 2013, Mr. Al-Seddik Al-Sur, a prosecutor assigned to Mr. Al-Senussi's case<sup>49</sup> gave a press conference for the prosecutor's office in which he announced that "the 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." Mr. Al-Sur announced 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." He also incorrectly stated that the Pre-Trial Chamber's decision to postpone the surrender order "gave the green light for Libya to try Al-Senussi and keep him on its territories in order to try him."<sup>50</sup>

34. Libya has not once qualified any of its statements to explain that the continuation of any national trial depends on the outcome of ICC's admissibility proceedings. Libya has also never offered an undertaking that it will surrender Mr. Al-Senussi if so ordered by the ICC irrespective of the stage reached in its national proceedings.

35. The Appeals Chamber should also be informed of Libya's most recent announcements that it will proceed rapidly with the domestic proceedings in Mr. Al-Senussi's case

<sup>47</sup> <http://www.dw.de/a-16716499/ناطع-في-اللجاء-على-تحصل-وعاء-ل-تم-ي-ب-يا-في-ب-اق-الإسلام-في-س>; <http://aawsat.com/details.asp?section=1&issueno=12545&article=723195&feature=#.UV1eK6JHJqw>. See also, 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, para. 48.

<sup>48</sup> BBC's "Bila Quood" Programme, Interview with Prime Minister Ali Zeidan (<http://www.youtube.com/watch?v=fmBRzyRbaYg>).

<sup>49</sup> ICC-01/11-01/11-307-Conf-Anx5.

regardless of the ongoing admissibility proceedings before the ICC. On 27 August 2013 the Libyan Prosecutor-General announced that “[t]he prosecutor’s office has decided to try 30 people linked to the former regime, including Seif al-Islam Gadhafi (and former spy chief) Abdullah al-Senussi,”<sup>51</sup> and that “[t]his affair will be presented on September 19 before the court of first instance in Tripoli.”<sup>52</sup> Professor El-Ghani (named Counsel on behalf of Libya before the ICC and Libya’s ICC focal point) stated in a television interview that followed this announcement that Mr. Al-Senussi would be tried in Libya.<sup>53</sup> Libya had only the day before stated in a filing before the ICC that there is “no imminent prospect of trial”.<sup>54</sup> Prof El-Ghani again made similar statements in a television interview on 4 September 2012.<sup>55</sup>

36. In the Defence’s submission, these statements cannot rightly be characterised as mere “political” statements – they are the announcements of the prosecutors in Mr. Al-Senussi’s case and of Counsel for Libya before the ICC. They echo Libya’s conduct in respect of Mr. Gaddafi’s case. Even though Libya has been ordered by the Pre-Trial Chamber<sup>56</sup> and Appeals Chamber<sup>57</sup> immediately to surrender Mr. Gaddafi to the Court, Libya has failed to take any steps to effect his transfer and has instead made repeated announcements of its intention to try Mr. Gaddafi in Libya and never to surrender him to the Court.

37. The Defence submits that the evidence of Libya’s clear intentions not to cooperate with the Court should have been taken into account by the Pre-Trial Chamber when

<sup>51</sup> Pre-Trial of Gadhafi’s Son Next Month in Tripoli, Naharnet, 27 August 2013 (<http://www.naharnet.com/stories/en/95781-pre-trial-of-gadhafi-s-son-next-month-in-tripoli>); Libya to Try Gadhafi’s Son Next Month, AP, 27 August 2013 ([http://hosted.ap.org/dynamic/stories/M/ML\\_LIBYA?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT](http://hosted.ap.org/dynamic/stories/M/ML_LIBYA?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT)).

<sup>52</sup> Pre-Trial of Gadhafi’s Son Next Month in Tripoli, Naharnet, 27 August 2013 (<http://www.naharnet.com/stories/en/95781-pre-trial-of-gadhafi-s-son-next-month-in-tripoli>); Libya to Try Gadhafi’s Son Next Month, AP, 27 August 2013 ([http://hosted.ap.org/dynamic/stories/M/ML\\_LIBYA?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT](http://hosted.ap.org/dynamic/stories/M/ML_LIBYA?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT)).

<sup>53</sup> ICC-01/11-01/11-424-AnxA.

<sup>54</sup> 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, para. 19.

<sup>55</sup> Video of Prof. El-Ghani’s statement, [http://www.youtube.com/watch?feature=youtu.be&v=ti1BEX-DQGQ&desktop\\_uri=%2Fwatch%3Fv%3Dt1BEX-DQGQ%26feature%3Dyoutu.be&nomobile=1](http://www.youtube.com/watch?feature=youtu.be&v=ti1BEX-DQGQ&desktop_uri=%2Fwatch%3Fv%3Dt1BEX-DQGQ%26feature%3Dyoutu.be&nomobile=1). See also, Addendum to “Filing on behalf of Mr. Abdullah Al-Senussi pursuant to ‘Decision on additional submissions in the proceedings related to Libya’s challenge to the admissibility of the case against Abdullah Al-Senussi’ of 19 August 2013,” and Urgent Application pursuant to Regulation 35, ICC-01/11-01/11-432, 5 September 2013, paras. 21-23.

<sup>56</sup> Decision on the admissibility of the case against Saif Al-Islam Gaddafi, ICC-01/11-01/11-344-Red, 31 May 2013, p. 91.

<sup>57</sup> Decision on the request for suspensive effect and related issues, ICC-01/11-01/11-387, 18 July 2013, para. 27.

considering whether to permit the postponement of the surrender order in Mr. Al-Senussi's case.

(3) Guaranteeing Mr. Al-Senussi's rights

38. The Defence submits that the Pre-Trial Chamber erred in finding that the ability of Mr. Al-Senussi to exercise his rights under the Statute are immaterial when considering whether to postpone the surrender order.

39. The Chamber held that even if Mr. Al-Senussi's transfer to the ICC was necessary in order for him to exercise his rights under the Statute, it would not negate Libya's entitlement to postpone the execution of the surrender order.<sup>58</sup> With regard to whether Mr. Al-Senussi's rights would be affected by the postponement decision, the Chamber only stated that the postponement of the surrender order would in no way affect Libya's continuing obligation to cooperate with the Court.

40. However, Mr. Al-Senussi's rights under the Statute have been consistently violated by Libya's "fail[ure] to comply with the Chamber's order to make the necessary arrangements ... for a privileged visit to Mr Al-Senussi by his Defence,"<sup>59</sup> and despite Libya's continuing obligation to cooperate with the Court. The Defence submits that this was "an additional reason for refusing to postpone the surrender request"<sup>60</sup> but that the Chamber failed to consider or address this argument in its Decision.

41. Libya has failed to provide access to Mr. Al-Senussi and it is evident that his basic right to counsel can only be guaranteed if he is surrendered to the ICC. The Defence has now applied<sup>61</sup> to refer Libya to the Security Council on account of its failure to implement the Pre-Trial Chamber's order on 6 February 2013 to arrange "a visit of the appointed counsel for Mr Al-Senussi to his client on a privileged basis as soon as practicable."<sup>62</sup> Mr. Al-Senussi has been detained in Libya for nearly 12 months

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<sup>58</sup> Impugned Decision, para. 37.

<sup>59</sup> 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, para. 51.

<sup>60</sup> 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, para. 51-58.

<sup>61</sup> 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-01/11-01/11-399, 9 August 2013.

<sup>62</sup> 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. 40.

without any access to a lawyer during the entire period of his detention. It has been over six months since the Chamber ordered Libya to arrange a privileged visit for Counsel. Yet, in Libya's Response to this application, it submitted that it should not be found in non-compliance and referred to the Security Council because its Minister of Justice and Prosecutor-General would meet with the Registrar on 29 August 2013 to sign the Memorandum of Understanding required to facilitate a privileged and confidential legal visit.<sup>63</sup> Despite this meeting, no such memorandum was signed by Libya and no visit has been organised.<sup>64</sup>

42. Moreover, as explained to the Pre-Trial Chamber, Libya is unable to guarantee Mr. Al-Senussi's safety and well-being in detention.<sup>65</sup> Mr. Al-Senussi faces a precarious situation in a prison which is controlled by militia amidst allegations of widespread torture and mistreatment in this facility and others.<sup>66</sup> His guards allege that he committed crimes against them and their families.<sup>67</sup> Only a few days ago his daughter, Anoud Al-Senussi, was kidnapped when she was supposed to be released from prison and reunited with her family.<sup>68</sup> There are several reports of attacks by

<sup>63</sup> 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, para. 13.

<sup>64</sup> 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,'" filed on 26 August 2013, ICC-01/11-01/11-429, 3 September 2013, para. 3, 5, 6.

<sup>65</sup> 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, para. 46; 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, para. 48, 49; Defence Response on behalf of Mr. Abdullah Al-Senussi to "Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute", ICC-01/11-01/11-356, 14 June 2013, paras. 72, 74-98; Filing on behalf of Mr. Abdullah Al-Senussi pursuant to "Decision on additional submissions in the proceedings related to Libya's challenge to the admissibility of the case against Abdullah Al-Senussi" of 19 August 2013, ICC-01/11-01/11-418, 26 August 2013, paras. 6-14, 23-29, 32-38; Addendum to "Filing on behalf of Mr. Abdullah Al-Senussi pursuant to 'Decision on additional submissions in the proceedings related to Libya's challenge to the admissibility of the case against Abdullah Al-Senussi' of 19 August 2013," and Urgent Application pursuant to Regulation 35, ICC-01/11-01/11-432, 5 September 2013, paras. 2, 5-23, 25.

<sup>66</sup> Defence Response on behalf of Mr. Abdullah Al-Senussi to "Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute", ICC-01/11-01/11-356, 14 June 2013, para. 74-93.

<sup>67</sup> 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, para. 46.

<sup>68</sup> Video of 2 September 2013 press conference by Justice Minister Marghani and Ministry of Justice representative, Mr. Wael Najm ([http://m.youtube.com/watch?feature=youtu.be&v=uxb3NuoNdz0&desktop\\_uri=%2Fwatch%3Fv%3Duxb3NuoNdz0%26feature%3Dyoutu.be](http://m.youtube.com/watch?feature=youtu.be&v=uxb3NuoNdz0&desktop_uri=%2Fwatch%3Fv%3Duxb3NuoNdz0%26feature%3Dyoutu.be)). See also, Daughter of Libya's Ex-Spy Chief Abducted, AP, 2 September 2013 ([http://hosted.ap.org/dynamic/stories/M/ML\\_LIBYA?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT](http://hosted.ap.org/dynamic/stories/M/ML_LIBYA?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT)); Abdullah Senussi's freed daughter Anoud kidnapped outside prison gates, Libya Herald, 2 September 2013 (<http://www.libyaherald.com/2013/09/02/abdullah-senussis-freed-daughter-anoud-kidnapped-outside-prison-gates/>); Daughter of Libya's former spy chief Senussi kidnapped, BBC, 2 September 2013 (<http://www.bbc.co.uk/news/world-africa-23938549>). See also, Libya: Latest abduction highlights

militia groups on Judicial Police transporting prisoners which has caused “growing discontent” amongst the police and a “reluctan[ce] to accompany inmates to the public prosecution offices or courts for fear of being attacked.”<sup>69</sup>

43. In addition to the evidence before the Pre-Trial Chamber when it rendered the Impugned Decision<sup>70</sup>, there is more recent information of a similar nature which supports the Defence’s submission that the surrender order should not have been postponed:

- A report on the increased risk of “assassinations of persons in police and security structures and the killing of judges,” and Libya’s “failure to hold anyone accountable”<sup>71</sup>
- A report that “[s]tate institutions, including courts, have been attacked. Lawyers, judges and prosecutors continue to be threatened regularly. In some cases, those representing individuals accused of being Gaddafi supporters have been abducted or subjected to physical harm.”<sup>72</sup>
- Further medical information received by the Defence that Mr. Al-Senussi is suffering from diabetes in prison. His treatment has been limited to receiving insulin injections but it is reported that Mr. Al-Senussi has lost a substantial amount of weight which indicates that advanced treatment is urgently required.<sup>73</sup>

44. Mr. Al-Senussi’s rights under the Statute, and his basic entitlement to safety and security while in detention, can only be afforded if he is immediately transferred to

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‘dysfunctional’ justice system, Amnesty International, 3 September 2013 (<http://www.amnesty.org/en/news/libya-latest-abduction-highlights-dysfunctional-justice-system-2013-09-03>); Libya: Violent Response to Tripoli Prison Mutiny, Human Rights Watch, 3 September 2013 (<http://www.hrw.org/news/2013/09/03/libya-violent-response-tripoli-prison-mutiny>).

<sup>69</sup> Gunmen kill prisoner in jail transfer ambush, Libya Herald, 18 April 2013

(<http://www.libyaherald.com/2013/04/18/gunmen-kill-prisoner-in-jail-transfer-ambush/>); Prisoners escape in Tripoli, Libyan Herald, 3 August 2013 (<http://www.libyaherald.com/2013/08/03/prisoners-escape-in-tripoli/>).

<sup>70</sup> Defence Response on behalf of Mr. Abdullah Al-Senussi to “Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute”, ICC-01/11-01/11-356, 14 June 2013, paras. 72, 74-98.

<sup>71</sup> Libya: Wave of Political Assassinations, HRW, 8 August 2013 (<http://www.hrw.org/news/2013/08/08/libyawave-political-assassinations>).

<sup>72</sup> Libya: al-Gaddafi loyalists at risk of ‘revenge’ death sentences, Amnesty International, 2 August 2013 (<http://www.amnesty.org/en/news/libya-al-gaddafi-loyalists-risk-revenge-death-sentences-2013-08-02>).

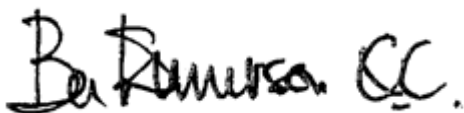
<sup>73</sup> Filing on behalf of Mr. Abdullah Al-Senussi pursuant to “Decision on additional submissions in the proceedings related to Libya’s challenge to the admissibility of the case against Abdullah Al-Senussi” of 19 August 2013, ICC-01/11-01/11-418, 26 August 2013, paras. 26-29.

The Hague. Indeed, it is hard to imagine on what basis a court order should be suspended when its implementation could protect the rights of the accused as required by the ICC Statute. As noted above, the Appeals Chamber has found in Mr. Gaddafi's case that it was "not convinced" that surrendering Mr. Gaddafi to the Court would create an "irreversible situation" and there is no "information as to why Mr Gaddafi's transfer to the Court would prevent Libya from continuing with its investigations concerning him, in addition to any other investigations or prosecutions."<sup>74</sup> The Defence submits that the same considerations apply in Mr. Al-Senussi's case, there being no proper reason to suspend the surrender request at this stage of the proceedings.

### **Conclusion**

45. For all the reasons above, the Defence submits that the Pre-Trial Chamber erred in rejecting the Defence's arguments that: (i) Libya has failed to file a timely challenge;<sup>75</sup> (ii) Libya obtained custody of Mr. Al-Senussi from Mauritania in violation of the ICC's orders and the mere filing of an admissibility challenge should not permit any postponement of the surrender order;<sup>76</sup> (iii) the ICC should insist on Mr. Al-Senussi's immediate transfer in light of Libya's stated intention to try Mr. Al-Senussi in Libya regardless of the ICC's decision; and (iv) Mr. Al-Senussi's rights, in particular to have privileged access to counsel, would be guaranteed through his immediate transfer to The Hague. Given that these errors all materially affect the outcome of the Impugned Decision, the Defence respectfully requests the Appeals Chamber to overturn the Impugned Decision and to order Libya to surrender Mr. Al-Senussi to the ICC immediately.

Counsel on behalf of Mr. Abdullah Al-Senussi,



**Ben Emmerson QC**

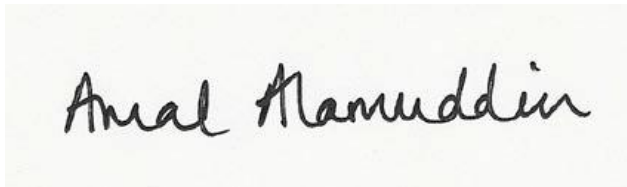
<sup>74</sup> Decision on the request for suspensive effect and related issues, ICC-01/11-01/11-387, 18 July 2013, paras. 23-26.

<sup>75</sup> Impugned Decision, para. 32, 33.

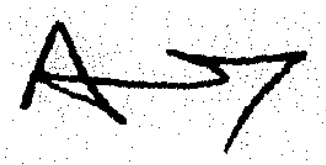
<sup>76</sup> Impugned Decision, para. 34.

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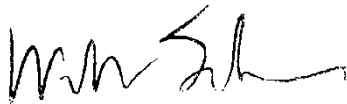
**Rodney Dixon**

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**Amal Alamuddin**

A stylized handwritten signature in black ink, consisting of a large 'A' followed by a horizontal line and a downward stroke.

**Anthony Kelly**

A handwritten signature in black ink, appearing to be 'Wm Schabas'.

**Professor William Schabas**

Dated 9<sup>th</sup> September 2013  
London, United Kingdom