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Date: **26 September 2013**

PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernandez 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 with Confidential Annexes A and B

Government's Submissions and Response to Defence "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 September 2013" and "Addendum" filed on 5 September 2013"

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I. INTRODUCTION

1. The Government of Libya files these submissions [“the Submissions”] in response to the “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 September 2013 [“the Defence Additional Submissions”]¹ and “Addendum” to the aforementioned filing with “Urgent Application pursuant to Regulation 35” filed on 5 September 2013 [“the Addendum”].²
2. The Submissions do not address the “Urgent Application pursuant to Regulation 35 attached to the Addendum. Libya responded to this associated Application on 9 September 2013.³
3. The Defence Additional Submissions and the Addendum were filed in response to the Pre-Trial Chamber’s “Decision on additional submissions in the proceedings related to Libya’s challenge to the admissibility of the case against Abdullah Al-Senussi”.⁴ In this Decision, the Chamber granted the Defence an additional opportunity to complement its submissions with regard to “findings about the inability of the Libyan judicial system to function in the face of regular threats to lawyers, judges and prosecutors, and the attacks on state institutions including prisons”.⁵ The Decision also granted Libya until 16 September 2013: (i) to “provide the Chamber with relevant information in relation to the domestic proceedings against Mr Al-Senussi, including the timetable and nature of such proceedings... [and]... to explain the nature of the proceedings (trial or pre-trial) that are scheduled for the first half of August”;⁶ and (ii) an opportunity to “complement its reply to the responses to the Admissibility Challenge” and respond to the Defence’s additional submissions.⁷

¹ ICC-01/11-01/11-418, 26 August 2013.

² Al-Senussi Defence “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 (“Addendum”).

³ Response to Mr. Al-Senussi’s “Urgent Application pursuant to Regulation 35”, ICC-01/11-01/11-438, 9 September 2013.

⁴ ICC-01/11-01/11-409, 19 August 2013.

⁵ *Ibid.*, para. 15.

⁶ *Ibid.*, paras 13-14.

⁷ *Ibid.*, paras 16, 17.

4. On 11 September 2013, the Chamber extended the time for Libya to provide the aforementioned information and responses to “no later than 26 September 2013”.⁸ In that Decision, the Chamber ruled that this would be the final opportunity for a party to provide information in support of their arguments in relation to the merits of Libya’s admissibility challenge. The Government hereby provides the requested information, responds to the Defence, supplements its submissions where relevant information has become available, and seeks permission to file, by 6 December 2013, essential evidential material that became available on the 19 September 2013 as a result of the case being transferred from the investigation phase to the Accusation Chamber.

II. SUBMISSIONS

A. Information Requested by the Chamber: the Domestic Proceedings

5. The domestic proceedings have progressed and the case against Mr. Gaddafi, Mr. Al-Senussi and 36 others was transferred to the Accusation Chamber (South Tripoli Court of First Instance) on 19 September 2013. The case number assigned to the case is 525/2013 and Accusation Chamber proceedings are estimated to take approximately two months. If the case is substantiated by the Accusation Chamber then it will be sent to the judicial court where the accused will be charged and “offered all the guarantees including a lawyer”.⁹ A principal focus of the Accusation Chamber will be identifying and appointing defence counsel for those defendants who are not yet represented, including Mr. Al-Senussi. The accusation phase is a review of the evidence by an independent and impartial judge, who, pursuant to Article 145 Criminal Procedure Code, is appointed by the Supreme Council of Judicial Authority. The investigation concerning Mr. Al-Senussi and associated former Gaddafi regime officials lasted for 22 months and involved the recording of the evidence of more than 200 witnesses (amounting to several thousand pages) and the collation of associated

⁸ Decision varying the time limit for Libya’s final submissions on the admissibility of the case against Mr. Al-Senussi, ICC-01/11-01/11-441, 11 September 2013.

⁹ Gaddafi, “Request for an immediate finding of non-compliance and referral to United Nations Security Council”, ICC-01/11-01/11-434, 9 September 2013, Annex C, ICC-01/11-01/11-434-AnxC, p. 7.

evidence in the form of tens of thousands of documents.¹⁰

6. On 20 September 2013, Counsel for the Libyan Government obtained a copy (in Arabic) of the dossier that was handed to the Accusation Chamber by the Prosecutor-General's office the previous day. The filing of this material with the Accusation Chamber signified the transfer of the case from the Investigation phase to the Accusation phase of the proceedings. This means that the material was no longer confidential to the investigative team, under the requirements of Libyan law, in particular Article 59 of the Libyan Criminal Procedure Code.¹¹ The dossier remains, of course, confidential from the public in order both to protect witnesses and to ensure the integrity of the upcoming trial. The Accusation Dossier (which, in itself, is approximately 1000 pages) is based upon the aforementioned witness statements and interviews. It is in the process of being analysed by Counsel and the relevant portions of the dossier are being identified and translated with a view to submission of these materials to the Pre-Trial Chamber (if granted leave to do so).
7. This material, together with the minutes of the Accusation Chamber (translated as "Indictment Chamber") hearing held on 19 September 2013, and the note of a decision to allow defence teams to view the accusation file (submitted herewith as Confidential Annex A), reflects the contours and scope of the case as it developed during the investigation. As the Libyan Government has argued, under Libyan law this material could not have been provided to the Court, or indeed to Counsel for the Libyan Government until the actual commencement of the Accusation phase.¹² Two working days after the commencement of that phase, the translated hearing minutes were submitted to the Appeals Chamber in the Gaddafi proceedings and are now submitted to the Pre-Trial Chamber in the Al-Senussi proceedings.¹³ Following the requisite translation, the Libyan

¹⁰ Gaddafi Urgent Notification, ICC-01/11-01/11-424, 29 August 2013, Annex A, ICC-01/11-01/11-424-AnxA, p. 3.

¹¹ This has been consistently noted by the Libyan Government: see, for example, Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, 1 May 2012, ICC-01/11-01/11-130, paragraph 40.

¹² "Application on behalf of the Government of Libya relating to Abdullah Al-Senussi. pursuant to Article 19 of the ICC Statute" (2 April 2013) (ICC-01/11-01/11-307-Conf-Exp)("Admissibility Challenge"), para. 126.

¹³ The Libyan Government's further submissions in reply to the Prosecution and Gaddafi Responses to "Document in Support of Libya's Appeal against the "Decision on the admissibility of the case against Saif Al-Islam Gaddafi" (23 September 2013) (ICC-01/11-01/11-454-Red).

Government will be in a position in the near future to submit the relevant extracts of the Accusation Chamber dossier (as well as further witness statements and evidential materials) relating to the case of Mr. Al-Senussi and to make focused submissions concerning their significance to the admissibility proceedings. However, even the materials submitted herewith, as well as the fact of the dossier's existence, provide context and further credibility to the materials already before the court and provide further support for a determination that the case against Mr. Al-Senussi is inadmissible.

8. Following the first hearing on 19 September 2013, the next hearing of the case before the Accusation Chamber is currently scheduled for 3 October 2013 (see Confidential Annex B for the Chamber's orders to prison authorities to produce Mr Al-Senussi at these hearings). As clarified in earlier submissions, it is now the task of the Accusation/Indictment Judge to review the investigation conducted by the Prosecutor-General. Pursuant to Article 151 of the Criminal Procedure Code, the case will be dismissed if the evidence is found to be insufficient or has been illegally obtained. The case will proceed if there is deemed to be sufficient lawfully obtained evidence to found a criminal case, or if after supplementary investigations the evidence meets this threshold. Although the precise charges will only be decided at the time this assessment is made (in an adjudicated process similar to the ICC's confirmation procedure), it is anticipated that the charges in Mr. Al-Senussi's case will likely include unlawful killing, looting, the distribution of narcotics, incitement to commit rape, kidnapping, and other crimes associated with fomenting sedition and civil war.¹⁴
9. Pursuant to Article 106 of the Criminal Procedure Code, before the case is remitted to trial, the defendant will then be given the opportunity to select a lawyer. As has been explained by Professor El-Ghani, this is a key element of procedure following the transfer to the Accusation Chamber.¹⁵ It is the Accusation/Indictment Judge's role to ensure that any cases referred to trial are adequately and neutrally investigated, that the investigation has remained confidential, that a lawyer has been appointed for the suspect, and that the investigation has been properly recorded. At the time of filing, most of Mr Al-

¹⁴ *Ibid.*, 01/11-01/11-424- AnxB, p.3

¹⁵ Gaddafi, "Request for an immediate finding of non-compliance and referral to United Nations Security Council", ICC-01/11-01/11-434, 9 September 2013, Annex C, ICC-01/11-01/11-434-AnxC, p. 7.

Senussi's co-accused have retained lawyers in preparation for any prospective trial. Several lawyers from Mr. Al-Senussi's tribe have offered their services to Mr. Al-Senussi but have not yet had the opportunity to sign a power of attorney to represent him. It is anticipated that this final step in securing legal representation for Mr Al-Senussi will be completed in the very near future.

B. Response to the Defence Additional Submissions and Addendum and other information in Support of Libya's Admissibility Challenge

10. This section will respond to the Defence Additional Submissions and provide additional information to supplement the arguments demonstrating Libya's ability and willingness to conduct a trial of Mr. Al-Senussi with regard to the case being pursued by the ICC.
11. The Defence argues that there have been "recent developments" in the security situation in Libya that "lend further support to its submission that the Libyan judicial system is unable and unwilling to try Mr. Al-Senussi in Libya and that he should be immediately surrendered to the ICC for trial".¹⁶ The Defence rely upon the following purported developments: (a) attacks on Judges, prosecutors, lawyers, the police, and prison officials/deteriorating security situation;¹⁷ (b) an enhanced risk of the death penalty within Libya;¹⁸ (c) lack of legal representation;¹⁹ (d) lack of control of prisons;²⁰ (e) lack of provision of health care for Mr. Al-Senussi in Al-Hadba prison;²¹ (f) "overly expeditious" trials against former Gaddafi officials;²² and (g) the "kidnapping of Mr. Al-Senussi's daughter, Ms. Anoud Al-Senussi, on 2 September 2013 as she was being released from serving her prison sentence in Libya".²³

¹⁶ Defence Additional Submissions, para. 2; Addendum, para. 1.

¹⁷ *Ibid.*, paras 6 – 14, 32-38.

¹⁸ *Ibid.*, paras 15-18.

¹⁹ *Ibid.*, paras 19-22.

²⁰ *Ibid.*, paras 23-25.

²¹ *Ibid.*, paras 26-29.

²² *Ibid.*, paras 30-31.

²³ Addendum, para. 1.

12. As outlined in the Defence Additional Submissions,²⁴ in summer 2013, Benghazi suffered an increase in violent attacks on law officials and a decrease in the overall level of security. There is no doubt that these have challenged the government of Libya and created difficulties that have impeded the judicial system, including the conduct of domestic proceedings against ordinary suspected criminals and also those from the former Gaddafi regime, including Mr. Al-Senussi. However, as illustrated by the scale of the investigation concerning the former Gaddafi regime officials which was transferred to the Accusation Chamber on 19 September 2013 (as outlined above), this has not *prevented or derailed* the progress of the domestic proceedings against Mr. Al-Senussi and others, despite the fact that they remain amongst the most politically sensitive of cases in Libya. Despite the security issues, the Defence rhetoric, and the campaigning reports from Human Rights Watch, Amnesty, and other human rights organisations, more than 200 witnesses have safely provided statements (totalling thousands of pages of witness testimony) and tens of thousands of pages of other associated evidence has additionally been collated to form a complex investigation of the acts of a brutal past regime.²⁵ The completion of this impressive investigation and its transfer to the Accusation Chamber stands in stark and eloquent contrast to the alarmist submissions from the Defence concerning recent developments in Libya.

13. That is not to underestimate the security problems that beset Benghazi in summer 2013, to dismiss the tragedy of the injury and deaths of committed law enforcement and judicial officials, or to otherwise ignore the challenges that remain. Libya accepts that human rights campaigning groups, such as Amnesty International and Human Rights Watch, raise legitimate points when expressing concern about the fairness of trials in the midst of such violence.²⁶ As correctly pointed out by the Defence, Libyan law enforcement officials have themselves also expressed concern about the challenges ahead: admitting that they face “many obstacles [in the pursuit of genuine accountability] due to the prevailing security situation”.²⁷ Indeed, Prof. El-Ghani, the Government’s liaison with the

²⁴ Defence Additional Submissions, paras. 6–14.

²⁵ Gaddafi Urgent Notification, ICC-01/11-01/11-424, 29 August 2013, Annex A, ICC- 01/11-01/11-424- Anx A, p.3.

²⁶ *Ibid.*, paras 10 and 11.

²⁷ Defence Additional Submissions, para. 8.

ICC, has candidly conceded the potential deleterious consequences (and the potential resulting impact on Libya's admissibility challenge) in public interviews in Libya, including during an interview for the Libya Al-Ahrar TV Station News Station on the 3 September 2013.²⁸ As noted, *inter alia*, by Dr. El-Gehani:

*"It is right to say on the other side, it is obvious that there is a security problem. The security situation overshadows the path of the litigation in admissibility challenge at the ICC. This does not help the Libyan side."*²⁹

14. However, the rhetoric concerning fairness, or the Government's realism and candour on these issues, should not be permitted to supplant the Chamber's assessments pursuant to Article 17. As noted in Libya's Article 19 Challenge, Article 17(3) provides for two cumulative considerations: first, "collapse" or "unavailability" of the national judicial system and secondly, whether as a result of that "collapse" or "unavailability" the State is "unable to obtain the accused, or the necessary evidence and testimony, or otherwise unable to carry out proceedings". The principal consideration under article 17(3) is whether there is a "total or substantial collapse" or unavailability of the national judicial system which has affected the ability of the national jurisdiction to carry out its proceedings genuinely.³⁰
15. The fact is that the complementarity regime cannot work unless careful analysis of the circumstances is undertaken, and where other parties' submissions are not on the basis of direct knowledge, such analysis must be undertaken on the basis primarily of the evidence provided by the state itself – particularly in view of the evident candour and realism that characterises the state's submissions.
16. Article 17(3) and the threshold considerations concerning Libya's ongoing ability to progress its domestic proceedings are not fixated upon a unitary or narrow consideration of international standards, or, even, whether the investigation and/or future trial was viable in the midst of the temporary upsurge of violence in Benghazi in summer 2013 nor otherwise focused upon a mere "snapshot" of the transitional justice environment.

²⁸ Gaddafi, "Request for an immediate finding of non-compliance and referral to United Nations Security Council", ICC-01/11-01/11-434, 9 September 2013, Annex C, ICC-01/11-01/11-434-AnxC, p. 7.9.09.13.

²⁹ Gaddafi Urgent Notification, ICC-01/11-01/11-424, 29 August 2013, Annex C, ICC- 01/11-01/11-424- AnxC, pp. 5-6.

³⁰ Admissibility Challenge, para. 115.

17. Naturally, a proper assessment views overall progress within a fluctuating transitional justice environment and an examination of the sufficiency of the judicial system, rather than the Defence's speculative allegations concerning worst-case scenarios. Even if violence disrupts aspects of the domestic system, admissibility proceedings concern, *inter alia*, an examination of the remaining system, *in the light of the stage that the domestic case has reached*, to ascertain whether it is sufficient to progress the investigation or trial of "the case". Any other approach fails to respect the underlying object and purpose of the admissibility provisions and the Statute. It also hands a victory to the criminal few perpetrating violence in Libya, in the hope that the Government's attempts to end impunity through domestic trials of officials from a tyrannical regime are derailed.

18. Despite the decrease in security in Benghazi in summer 2013 and the regrettable violence against some judicial officials, it cannot seriously be contended that a judicial system that is able to complete an investigation of the breadth and depth discussed above, is in a state of "substantial" collapse, as is required before "collapse" might be reasonably concluded, or "unavailable" within the meaning of the Statute.³¹ Plainly, significant and sufficient portions of the judicial system have remained functional, efficient and robust, throughout the 22 months to enable this investigation to proceed to completion and for "the case" to be transferred to the Accusation Chamber. Although in summer 2013, the system in Benghazi was severely tested, it neither substantially, nor even, partially, collapsed nor was it "unavailable" in relation to the case against Mr. Al-Senussi.

19. Even if there was such a collapse or unavailability *during* summer 2013, there is no evidence to rebut the reasonable inference to the contrary raised by the completion of the investigation and its transfer to the Accusation Chamber. In sum, viewing the 22 months of investigation and its sheer scale, rather than selectively focusing on the two most difficult months (July and August), provides cogent demonstration that the Libyan government's judicial system is capable of continuing to safely detain the accused, obtain or preserve the necessary evidence and testimony, and otherwise advance the case against Mr Al-Senussi to the Accusation Chamber and to trial.

³¹ *Ibid.*, para, 116.

20. As noted at paragraph 118 of the Admissibility Challenge, Abdullah Al-Senussi is in safe custody at a detention centre controlled by the Libyan government. Witnesses have been secured and protected and the necessary evidence and testimony has been obtained and is now before the Accusation Chamber. In sum, the domestic proceedings continue despite the concerted criminal attempts by the violent few to disrupt the judicial system and the implementation of the rule of law. The Defence arguments cannot be reconciled with the achievements manifest in such an investigation and now, in such pre-trial proceedings.

C. Ongoing Measures to Secure Benghazi

21. Moreover, Libya has not remained passive in the face of violence by those seeking to disrupt Libya's transitional justice endeavours. On the contrary, Benghazi is the focus of increasingly successful attempts to apprehend those responsible for the violence and to provide enhanced security. Consistent with Government policy, Benghazi has a "Joint Security Room" that works under the direct supervision of the Cabinet. It works alongside local police, helping them to develop security plans and coordinate with the relevant authorities. The room is chaired by the commander of the Central Military Zone and includes senior local security personnel.³²
22. Those perpetrating the violence have little if any real support in the wider community. As a result of information provided by the public, the Joint Security Room has been responsible for supervising arrests, seizing weapons, and otherwise detaining and investigating those attempting to ensure impunity for the former Gaddafi regime officials. In an approach that was successful in Tripoli early in the year, these efforts have involved seeking assistance from foreign specialists who are able to provide targeted assistance to complement and support the relevant Libyan infrastructure and expertise.³³ As a result of work by the Joint Security Room in Benghazi, suspects have been sent to Tripoli where

³² See for example: <http://www.libyaherald.com/2013/08/13/new-misrata-joint-security-room-set-up/#ixzz2eYxQE7FY>.

³³ See for example, <http://www.libyaherald.com/2013/08/21/explosives-found-in-benghazi-raid/#ixzz2eYwt2RHN>.

they will be further investigated and may be tried.³⁴

23. In September, as part of this concerted approach, hundreds of former revolutionaries who had been trained as police were deployed to Benghazi. Of the 1,800 officers to have graduated from two Benghazi police training facilities, 1,450 were seconded to the Benghazi Security Directorate, to be deployed, *inter alia*, to police stations across Benghazi. A further group of 150 police graduates was designated to be stationed at the Benina Airport; another 150 at the Benghazi Port; and the remainder have been distributed around other vital institutions such as hospitals.³⁵ This type of mobilisation has been mirrored in Tripoli as the Government extends its control of the country and ensures complete demobilization and security is achieved in the shortest possible time.³⁶ As Prime Minister Ali Zeidan has announced publically, his government “will prosecute criminals and bring them to justice”. “There will be no escape whatever happens. We will insist upon pursuing them”.³⁷

D. *The death penalty*

24. The Government reiterates its submissions previously made regarding the irrelevance of the death penalty to the Chamber’s admissibility determination.³⁸ The Chamber is invited to ignore the alarmist and speculative submission of the Defence that Mr Al-Senussi is “at an increased risk of receiving the death penalty in sham trials motivated by revenge.”³⁹ The death penalty *per se* is not (and nor can it be) an indicator of sham proceedings.
25. The Defence submissions also ignore the factual and legal reality that the sentences imposed in the cases to which they refer have not been implemented

³⁴ <http://www.libyaherald.com/2013/08/25/breakthrough-arrests-in-benghazi-murder-campaign;>
<http://www.libyaherald.com/2013/08/26/three-more-terrorist-suspects-arrested-in-benghazi/#ixzz2eP23EpRb;> <http://www.libyaherald.com/2013/07/29/french-forensic-squad-to-help-with-benghazi-investigation/#ixzz2eYwEMNWd>

³⁵ <http://www.libyaherald.com/2013/09/01/hundreds-of-new-police-for-benghazi/>

³⁶ <http://www.libyaherald.com/2013/08/11/thousand-militia-vehicles-in-tripoli-as-revolutionaries-announce-support-for-new-chief-of-staff/#ixzz2dpIvHLwG>

³⁷ <http://www.libyaherald.com/2013/07/28/we-will-prosecute-criminals-even-if-we-use-international-bodies-zeidan/#ixzz2eOz7dZzY>; See also: <http://www.libyaherald.com/2013/08/21/explosives-found-in-benghazi-raid/#ixzz2eYwt2RHN>

³⁸ Libya’s Consolidated Reply, paras 119-121.

³⁹ Defence Additional Submissions, para. 19.

and, indeed, cannot be implemented until the Supreme Court has considered the case. Even if the defendant does not appeal the sentence, the Prosecutor is obliged to do so before the sentence can be implemented (Articles 385bis and 429 Criminal Procedure Code). In appeals involving the death penalty, the Supreme Court is not limited to considering errors of law, but will instead review all factual, legal and procedural arguments.⁴⁰

26. Furthermore, with specific regard to Mr. Al-Senussi, the Government's commitment to applying its domestic processes in full and not rushing to judgment are apparent from, *inter alia*, the progression of his case to the accusation stage, and its joinder with the cases against other accused with alleged involvement in the same crimes. The suggestion that Mr. Al-Senussi is at imminent risk of execution following a sham trial is completely without merit.

E. Legal representation

27. As previously submitted by the Government, and as noted by the Prosecutor, the case against Mr. Al-Senussi cannot proceed to trial without counsel being appointed to represent Mr. Al-Senussi. If Mr. Al-Senussi does not appoint counsel himself then the Court will appoint one for him.⁴¹
28. Libya is fully aware of the need to procure lawyers for Mr. Al-Senussi and remains committed to this issue.⁴² Indeed, this is one of the principal tasks of the Accusation Chamber now that the case has been transferred to it. The security situation is such that there has been some delay in achieving this. However, the requirements of due process in Libyan law do not demand legal representation during the investigation. Moreover, and in any event, many local lawyers from Mr Al-Senussi's tribe have indicated their willingness to represent Mr. Al-Senussi but have not yet been given a formal power of attorney. It is expected that this final hurdle to securing legal representation will be overcome at the order of the Accusation Chamber in the very near future. The Government submits that the delays in relation to the appointment of defence

⁴⁰ Admissibility Challenge, para. 134.

⁴¹ OTP's May Response, para. 81.

⁴² The Addendum, para. 22, citing to purported speech by Professor El-Ghani [at 34.20].

counsel are an understandable consequence of the challenging transnational context and security difficulties. The challenges, however, are not insurmountable and do not amount to inability or unwillingness on the part of the Government to carry out genuine proceedings.

29. The Defence repeat their previous submissions regarding their purported inability to visit Mr. Al-Senussi in Tripoli.⁴³ In doing so, the Defence alleges that “there have been continued and excessive delays, without proper justification, in Libya reaching any agreement on a memorandum of privileges and immunities for a confidential and privileged legal visit and on a date for such a visit.” This statement ignores the good faith efforts that have been made by the Libyan Government to conclude an agreement that is not at all straightforward.
30. As set out by the Government in its Consolidated Reply, on 19 April 2013, very soon after the appointment of the new Prosecutor-General, Mr. Radwan, the Libyan authorities transmitted the Memorandum of Understanding (“MOU”) with some comments and suggested amendments to the Registry. On the same day, the Registry asked the ICC-Libya focal point whether or not the visit of the defence team could then take place shortly. The Libyan authorities indicated that, “the Libyan Government invite[s] the defense team for Mr. Al-Senussi to visit Libya forthwith at any time convenient for them. They will of course need to apply for the requisite visas for entry to Libya and, upon entry, they will be subject to Libya’s domestic laws. They will also need to provide the Government with formal confirmation of their retention by Mr. Al Senussi or his family”.⁴⁴
31. On 18 June 2013, some two months after the Government sent the draft MOU to the Registry, it responded to the Government’s suggestions. Discussions continue between the parties and it is believed that the Memorandum will be concluded imminently.⁴⁵ A further meeting between the Registry and Libyan Government representatives is presently scheduled for October 2013 and it is expected that the Memorandum will be signed at that meeting.

⁴³ Defence Additional Submissions, para. 19; Defence Response, para. 128.

⁴⁴ Consolidated Reply, paras 148-9.

⁴⁵ Libya’s Consolidated Reply, paras 145 – 150.

F. Government control of prisons

32. The Defence submissions regarding the alleged lack of government control over prisons are generalised and repetitive and fail to specify how such alleged lack of control has any bearing upon the investigation and prosecution of Mr. Al-Senussi. Rather, the Defence uses its additional submissions as a platform to make inflammatory allegations of torture and mistreatment in prisons in general.⁴⁶
33. The Government reiterates its previous submissions regarding its control of Al-Habda, the prison in which Mr. Al-Senussi is detained. It also notes that the fact of the hearing on 19 September 2013 being held in the court room in Tripoli, which is itself part of the same purpose-built complex as Al-Habda prison exemplifies the Government's firm control over this prison. It is also reflective of the Government being alive to the issue of security and adapting accordingly in order to ensure Mr. Al-Senussi's security, as well as that of his co-defendants appearing alongside him. Security both inside and around the prison/court complex was tight and effective, with local shops being asked to close for the duration of the hearing. The hearing was held in front of members of the local and international press and occurred without incident. This was despite the fact that the rule of law is such in Libya that some protestors exercised their lawful right to protest outside the prison (objecting to the fact that the charges did not appear to address the alleged massacre at Abu-Salim in 1996).⁴⁷

G. Health care for Mr. Al-Senussi in Al-Hadba prison

34. The concerns regarding the provision of health care for Mr. Al-Senussi's are purely speculative. As set out in the Admissibility Challenge and the Consolidated Reply, Mr. Al-Senussi has been visited by representatives from human rights organisations and members of his family and no concerns have

⁴⁶ Defence Additional Submissions, paras 23-25.

⁴⁷ <http://www.libyaherald.com/2013/09/19/43193/#axzz2fu8YPFeI>;
<http://www.tripolipost.com/articledetail.asp?c=1&i=10652>;
<http://uk.reuters.com/video/2013/09/19/a-day-of-reckoning-for-gaddafis-son-and?videoId=273820786&feedType=VideoRSS&feedName=MOSTPOPULAR&videoChannel=2603>;
<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/10321188/Saif-Gaddafi-asks-for-trial-to-be-heard-in-Zintan-rather-than-Tripoli.html>

been raised about the provision of health care for him.⁴⁸

35. As recently as 12 September 2013, a representative from Amnesty International met privately with Mr. Al-Senussi at Al-Haba prison. Notwithstanding the representative's generalised, unsubstantiated criticisms about the domestic proceedings relating to Mr. Al-Senussi as a whole, there was no suggestion that Mr. Al-Senussi was suffering physically and/or not receiving appropriate medical treatment.⁴⁹ This is because there is no basis to the defence assertion and the Chamber is invited to disregard it.

H. Trials against former Gaddafi officials

36. The Defence asserts that "recent developments in the domestic trials of other former Gaddafi officials continue to show Libya's judicial system is unable to try Mr. Al-Senussi."⁵⁰ The Defence rely upon a report from the lawyers of former Prime Minister, Baghdadi Al-Mahmoudi that his trial is being conducted in an unnecessarily "expeditious" manner and extrapolate from that statement that the hearing is being conducted in such a way as to "arrive at a verdict and sentence as rapidly as possible making it unfair."⁵¹ The Defence provide no support at all for that assertion, which is without foundation.
37. In any event, the Defence allegation of unduly expeditious proceedings is refuted by the reality as indicated by the joinder process and the timeline for the Accusation stage of proceedings. The case against Mr. Al-Baghdadi Al-Mahmoudi has now been joined with the case against Mr Al-Senussi and Mr. Gaddafi as well as 35 other Gaddafi-era officials, and the joint case has been laid before the Accusation Chamber.
38. Other accused persons in the case include Gaddafi's External Security Agency head Abu Zaid Omar Dorda, former Foreign Minister Abdul Ati El-Obaidi, the General People's Conference head Mohamed Al-Zway, and Tripoli Internal Security Agency head Mansour Dhou. Proceedings against Mansour Dhou, who

⁴⁸ Admissibility Challenge, para 178; Consolidated Reply, para. 129.

⁴⁹ <http://www.tripolipost.com/articledetail.asp?c=1&i=10661>;

⁵⁰ Defence Additional Submissions, para. 30.

⁵¹ Defence Additional Submissions, para 31.

was captured in Sirte by Misrata forces on 20 October 2011, deal with employing foreign mercenaries to set up rocket launchers to attack NATO aircraft. He was transferred to Tripoli on 19 September 2013, in compliance with the Attorney-General's request. Messrs. Dorda, Obaidi and Zway have previously been brought before the court in Tripoli. Mr Dorda's case was adjourned on several occasions while Messrs. Obeidi and Zway, who were arrested in July 2011, were found not guilty in June of this year on charges of maladministration while in office and wasting public funds. This shows the impartiality and independence of the Libyan courts⁵² and refutes the general allegation that there is a rush to find guilt in cases involving Gaddafi-era officials.⁵³

I. Security situation in Libya

39. The Government's response to the defence submissions relating to the general security situation and the efforts being made by the Government to deal with the security are set out above. The Government reiterates that the fact of the transfer of the case against Mr Al-Senussi and his 37 co-defendants to the Accusation Chamber shows that the Libyan judicial system has been able to not only function but to carry out a complex investigation of numerous suspects, notwithstanding the security challenges the country faces. This establishes categorically that the Libyan judicial system is available and able to carry out genuine proceedings in relation to Mr. Al-Senussi.

40. With regard to the specific submissions regarding the "kidnapping" of Mr. Al-Senussi's daughter, Ms. Anoud Al-Senussi, on 2 September 2013,⁵⁴ the Defence asserts that her:

abduction has been widely reported and confirmed by the Libyan authorities. It is clearly a matter of the gravest concern. It highlights the precarious situation Mr. Al-Senussi himself faces in Libya in which his security and well-being are in peril. It is yet further evidence of Libya's complete inability to guarantee Mr.

⁵² <http://www.libyaherald.com/2013/06/17/court-finds-obeidi-and-zway-not-guilty-attorney-general-to-appeal/#ixzz2fN0ox6Ov> ; Consolidated Reply, para 169.

⁵³ <http://www.libyaherald.com/2013/09/19/43193/#axzz2fu8YPFel>

⁵⁴ Addendum, para. 1.

*Al-Senussi's safety and fundamental rights and to prosecute him in Libya in accordance with Libyan law and recognised international standards.*⁵⁵

41. Libya accepts that Ms. Al-Senussi's abduction was a "matter of the gravest concern" and accordingly, the police and other Government apparatus spared no effort to discover her whereabouts to ensure her safety. As a consequence of these investigations, Ms. Al-Senussi was located and returned to her family within a matter of days.⁵⁶
42. However, Libya does not accept that these regrettable events illustrated a "level of insecurity in prisons in Libya", as argued by the Defence in the Addendum.⁵⁷ As found by the Chamber, they did not provide a basis for a variation of the time limit for these Additional Submissions being "entirely predicated upon a hypothetical risk faced by Mr. Al-Senussi".⁵⁸ As conceded by the Defence they "do not know the full extent of the abuses or dangers facing Mr. Al-Senussi".⁵⁹ Accordingly, this "risk" was hypothetical at best. In these circumstances, it is not probative of any issue in the present admissibility proceedings and ought to be disregarded by the Chamber. Libya is fully aware of the security issues that will arise at the time of any trial of Mr. Al-Senussi, including those that may arise in the context of transportation to and from the court in Tripoli. As with any judicial system around the world, prisoners are more likely to be the focus of attacks or attempt to escape at this time. Libya's security services are more than capable of securing Mr. Al-Senussi or any of the other 37 accused.

⁵⁵ Addendum, para. 2

⁵⁶ <http://www.bbc.co.uk/news/world-middle-east-24008607>

⁵⁷ Addendum, Para. 25.

⁵⁸ Decision varying the time limit for Libya's final submissions on the admissibility of the case against Mr. Al-Senussi, ICC-01/11-01/11-441, 11 September 2013, Para. 10.

⁵⁹ Addendum, para. 6.

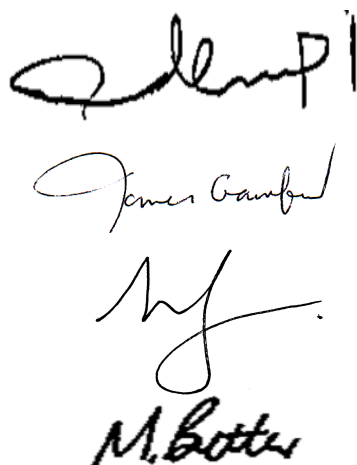
III. RELIEF REQUESTED

43. The Government invites the Chamber to:

(a) take into account the additional material and submissions contained herein, which provide further support for a determination that the case against Mr. Al-Senussi is inadmissible;

(b) further, and without prejudice to the relief requested above, grant Libya until 6 December 2013 to submit additional material arising from the transfer of the case to the Accusation Chamber (namely, a selection of the evidential materials both from the Accusation Chamber dossier and the underlying witness testimonies and documentary evidence which constitute the case at the point of transfer to the Accusation Chamber).

Respectfully submitted:



The image shows four handwritten signatures stacked vertically. The first signature is in black ink and appears to be 'Ahmed El-Ghani'. The second signature is in black ink and appears to be 'James Crawford'. The third signature is in black ink and appears to be 'Wayne Jordash'. The fourth signature is in black ink and appears to be 'Michelle Butler'.

Professor Ahmed El-Ghani

Professor James Crawford SC

Mr Wayne Jordash

Ms Michelle Butler

*Libyan ICC Coordinator and
Counsel on behalf of the Government of Libya
in the case of Abdullah Al-Senussi*

Dated this 26th day of September 2013

At London, United Kingdom