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

Date: 7 November 2013

THE APPEALS CHAMBER

Before: Judge Akua Kuenyehia, Presiding Judge
Judge Sang-Hyun Song
Judge Erkki Kourula
Judge Anita Ušacka
Judge Sanji Mmasenono Monageng

SITUATION IN LIBYA

IN THE CASE OF

THE PROSECUTOR

v.

SAIF AL-ISLAM GADDAFI and ABDULLAH AL-SENUSSI

Public Document

Request on behalf of the Defence for Abdullah Al-Senussi to File a Consolidated Reply to Libya's 'Response to the Al-Senussi Defence's "Request for Suspensive Effect"' and the 'Prosecution's Response to the Request of the Defence for Mr Abdullah Al-Senussi for Suspensive Effect (ICC-01/11-01/11-468-Red OA6)'

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

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

Counsel for Saif Gaddafi:
Mr. John Jones QC
Ms. Sarah Bafadhel

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

I. Introduction

1. The Defence for Mr. Al-Senussi files this request for leave to file a consolidated reply to Libya's "Response to the Al-Senussi Defence's 'Request for Suspensive Effect'" filed on 28 October 2013,¹ and to the "Prosecution's Response to the Request of the Defence for Mr Abdullah Al-Senussi for Suspensive Effect (ICC-01/11-01/11-468-Red OA6)" filed on 31 October 2013.² The Defence filed its request for suspension within its "Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I's 'Decision on the admissibility of the case against Abdullah Al-Senussi', and Request for Suspensive Effect" on 17 October 2013.³
2. This application for leave to reply is filed pursuant to Regulation 24(5) of the Regulations of the Court, and in accordance with the jurisprudence of the Court.
3. The Defence seeks leave to reply in order to correct certain factual and legal assertions made by Libya and the Prosecution in their Responses, as set out below.
4. The Defence also requests that the Appeals Chamber take into account the new evidence that has come to light since the filing of the request for the suspension, which directly supports the need for an immediate suspension of the Pre-Trial Chambers' Decision. This new evidence was filed with the Document in Support of Appeal which the Defence submitted on 4 November 2013.

II. Applicable Legal Provisions

5. Regulation 24(5) of the Regulations of the Court states that "Participants may only reply to a response with the leave of the Chamber."⁴

¹ Response to the Al-Senussi Defence's 'Request for Suspensive Effect', ICC-01/11-01/11-471, 28 October 2013 (hereinafter "Libya Response of 28 October 2013").

² Prosecution's Response to the Request of the Defence for Mr Abdullah Al-Senussi for Suspensive Effect (ICC-01/11-01/11-468-Red OA6), ICC-01/11-01/11-473, 31 October 2013 (hereinafter "Prosecution Response of 31 October 2013").

³ Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I's 'Decision on the admissibility of the case against Abdullah Al-Senussi', and Request for Suspensive Effect, ICC-01/11-01/11-468-Conf, 17 October 2013 (hereinafter "Request for Suspensive Effect").

⁴ Regulation 28, Regulations of the Court.

6. The Appeals Chamber has previously found that “there is no specific provision dealing with replies in the case of requests for suspensive effect pursuant to article 82(3) of the Statute. Rule 156(5) of the Rules of Procedure and Evidence simply regulates the filing of the request itself. However, regulation 24 (5) of the Regulations of the Court provides that ‘[p]articipants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations.’ *It is, therefore, possible for the Appeals Chamber to grant leave to a participant to file a reply.*”⁵
7. Regulation 34(c) provides that “[s]ubject to leave being granted by a Chamber in accordance with regulation 24, sub-regulation 5, a reply shall be filed within ten days ... of the response.”⁶ Regulation 29 and Rule 101 provide that the Chamber has discretion to make orders in relation to time limits having “regard to the need to facilitate fair and expeditious proceedings”⁷ and as “necessary in the interests of justice.”⁸

III. New evidence submitted with the Document in Support of Appeal

8. The Defence submitted in its request for suspension that “the conduct alone of Mr. Al-Senussi’s trial in Libya - whether it is completed or not by the time of the Appeals Chamber’s judgment - will adversely affect Mr. Al-Senussi’s rights and the overall fairness and integrity of the proceedings, which cannot be corrected after the event.”⁹ The Defence noted that it “will rely in the appeal on compelling evidence which establishes that Mr. Al-Senussi’s rights are being systematically violated by the Libyan authorities.”¹⁰ The Defence had submitted such evidence before the Pre-Trial Chamber in the admissibility proceedings.¹¹ Since then and after the request for

⁵ Decision on the request for suspensive effect and related issues, ICC-01/11-01/11-387, 18 July 2013, para. 15 (emphasis added).

⁶ Regulation 34(c), Regulations of the Court.

⁷ Rule 101, Rules of Procedure and Evidence,

⁸ Regulation 29, Regulations of the Court.

⁹ Request for Suspensive Effect, para. 28.

¹⁰ Request for Suspensive Effect, para. 28.

¹¹ 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. 69-143, 155-172; ICC-01/11-01/11-356-AnxA; ICC-01/11-01/11-356-AnxB; ICC-01/11-01/11-356-Conf-Exp-AnxC; 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. 4, 5, 14, 16, 19-22, 26-29, 30, 31, 39; 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. 1, 2, 5, 6, 8, 10, 14-16, 18-23; Defence Application on behalf of Mr. Abdullah Al-Senussi to refer Libya to

suspension was filed, the Defence has “received new evidence that was not previously available concerning Mr. Al-Senussi’s treatment in detention in Libya before and during the accusation stage of the case and pertaining to the circumstances of the national proceedings before and during the accusation stage.”¹² This evidence was submitted with the Appellant’s Document in Support of Appeal.¹³

9. As the Defence explained in its Appeal brief, the new evidence relates specifically to the following issues that are the subject of the appeal:

- *“Mr. Al-Senussi’s physical and psychological mistreatment in detention, particularly after the hearing on 19 September 2013 in order to induce confessions from him to shorten the proceedings;*
- *The substantial influence and unlawful activities of armed militia groups, in particular the control they exert over the running of the Al-Hadba prison, and the lack of security and protection for Mr. Al-Senussi;*
- *The unfair and unjust manner in which the hearings in the accusation stage of the case have taken place in Al-Hadba prison in an intimidatory and insecure environment;*
- *The complete lack of respect for Mr. Al-Senussi’s due process and human rights in detention and in the proceedings; and,*
- *The unavailability of witnesses for the defence due to their concerns for their safety and physical well-being.”¹⁴*

10. The Defence requests that the Appeals Chamber take into consideration this new evidence submitted within the Document in Support of Appeal,¹⁵ and the arguments supporting and explaining the evidence,¹⁶ when determining the Defence’s Request for Suspensive Effect.

11. The Prosecution claims that the Defence “has failed to demonstrate that the conduct of Al-Senussi’s trial in Libya adversely affects his rights and the overall fairness and

the Security Council with Confidential *Ex Parte* (Chamber only) Annex 1, ICC-01/11-01/11-399, 9 August 2013.

¹² Document in Support of Appeal, para. 137.

¹³ Document in Support of Appeal, paras. 137-160; ICC-01/11-01/11-474-Conf-Exp-Anx1; ICC-01/11-01/11-474-Conf-Exp-Anx2; ICC-01/11-01/11-474-Anx3; ICC-01/11-01/11-469-Conf-Exp-AnxA.

¹⁴ Document in Support of Appeal, para. 153.

¹⁵ ICC-01/11-01/11-474-Conf-Exp-Anx1; ICC-01/11-01/11-474-Conf-Exp-Anx2; ICC-01/11-01/11-474-Anx3; ICC-01/11-01/11-469-Conf-Exp-AnxA.

¹⁶ Document in Support of Appeal, paras. 137-160.

integrity of the proceedings to such an extent that it cannot be corrected.”¹⁷ The Prosecution asserts that even though the Defence has stated that it will submit compelling evidence,¹⁸ the request should be dismissed because “the Defence has the burden of substantiating its request for suspensive effect as prescribed by Rule 156(5).”¹⁹

12. The Defence submits that while previous jurisprudence had required that the request for suspensive effect must be made in the first document filed in the appeal – the notice of appeal²⁰, the Appeals Chamber has recently clarified (in the case of Libya’s Request for Suspensive Effect) that the “reasons” for suspensive effect are not required to be submitted in the notice of appeal. The Appeals Chamber held that while it is “preferable for Libya to have included its reasons for suspensive effect in the same document [the notice of appeal] ... this reason alone would not lead the Appeals Chamber to reject the request.”²¹

13. In order to comply with the requirements of Rule 156(5) and the jurisprudence of the Court,²² the Defence lodged its Request for Suspensive Effect within the Appeal - including its “reasons” for the request within this same document. As the Defence explained in its Document in Support of Appeal, the new evidence only became available to the Defence after the Admissibility Decision was handed down, and after the filing of the Request for Suspensive Effect.²³ The Defence clarified that “it has been extremely difficult to obtain certain of the new evidence due to the fears expressed by persons in Libya for their safety if it were known that they were providing information to the Defence. There are also other practical impediments to obtaining evidence, especially from within Libya, due to communication problems and the need to find secure methods to provide information about Mr. Al-Senussi’s circumstances.”²⁴

¹⁷ Prosecution Response of 31 October 2013, para. 16.

¹⁸ Prosecution Response of 31 October 2013, para. 18.

¹⁹ Prosecution Response of 31 October 2013, para. 18.

²⁰ *Prosecutor v. Bemba*, Decision on the Request of Mr Bemba to Give Suspensive Effect to the Appeal Against the "Decision on the Admissibility and Abuse of Process Challenges", ICC-01/05-01/08-817, 9 July 2010, para. 8.

²¹ Decision on the request for suspensive effect and related issues, ICC-01/11-01/11-387, 18 July 2013, para. 14.

²² Decision on the request for suspensive effect and related issues, ICC-01/11-01/11-387, 18 July 2013, para. 14; *Prosecutor v. Bemba*, Decision on the Request of Mr Bemba to Give Suspensive Effect to the Appeal Against the "Decision on the Admissibility and Abuse of Process Challenges", ICC-01/05-01/08-817, 9 July 2010, para. 8.

²³ Document in Support of Appeal, para. 154.

²⁴ Document in Support of Appeal, para. 155.

14. The Defence emphasises the critical importance of taking this new evidence into consideration when deciding whether to suspend the implementation of the Admissibility Decision. Libya concedes that while the “mere progress in the domestic case does not” warrant suspensive effect, “arguments concerning the death penalty, *the quality of due process in Libya*, and the appeal against the postponement of the surrender order ... might potentially meet this test.”²⁵ The evidence plainly shows that the conduct of the Libyan proceedings is adversely affecting not only Mr. Al-Senussi’s rights, but his health and safety, as well as the fairness and integrity of the proceedings. In particular, the Defence submits that the new evidence of Mr. Al-Senussi’s mistreatment clearly indicates that Mr. Al-Senussi’s rights and well-being are being irreversibly harmed while in detention in Libya.

IV. Good cause to reply to inaccurate assertions made by Libya and Prosecution

15. The Defence submits that there is good cause to grant leave to reply to the following submissions and assertions made by Libya and the Prosecution, which the Defence could not have dealt with in its request and which are false and should be corrected so that the Defence’s submissions in reply can be considered before the Appeals Chamber decides on the Appellant’s request for suspension:

- Libya’s claim that proceedings before the Accusation Chamber have not concluded.²⁶
- Libya’s submissions concerning the proportionality of granting suspensive effect, and that the prejudice to Mr. Al-Senussi’s rights must be weighed against the prejudice that might be caused to Libya if the Admissibility Decision is suspended.²⁷

²⁵ Libya Response of 28 October 2013, para. 17 (emphasis added).

²⁶ Libya Response of 28 October 2013, para. 16.

²⁷ Libya Response of 28 October 2013, paras. 14, 23, 26.

- Libya's assertion that the status quo before the Admissibility Decision was issued must be interpreted to mean that Libya had jurisdiction at the national level once the "existence of a domestic process" was established.²⁸
- Libya's argument that the Court must preserve the integrity of the domestic proceedings as well as the proceedings before the Court.²⁹
- The Prosecution's assertion that the Appeals Chamber does not have the necessary relationship with Libya's national court to order suspension of the domestic trials until the appeals proceedings before the Court have been completed.³⁰
- The Prosecution's submissions that the Defence has failed to show why the implementation of the Admissibility Decision causes irreparable prejudice to the postponement appeal, and that granting suspension would not bring the "result desired by the Defence" to "re-enact" Libya's obligation to surrender Mr. Al-Senussi.³¹

1. Completion of the Accusation phase

16. The Defence seeks leave to reply to Libya's claim that the proceedings before the Accusation Chamber have not completed.³² Libya stated in response to the Defence's concern that "the accusation phase would be completed on 24 October 2013 ... before the Appellant will have even submitted his document in support of the appeal,"³³ that it was "baseless" and "unsupported by credible evidence."³⁴ Libya denies in the vaguest possible terms that the Accusation phase has been completed by simply stating that "[w]e are now, of course, beyond that date, without the consequence that Mr. Al-Senussi predicted."³⁵

²⁸ Libya Response of 28 October 2013, para. 7.

²⁹ Libya Response of 28 October 2013, para. 15.

³⁰ Prosecution Response of 31 October 2013, para. 10.

³¹ Prosecution Response of 31 October 2013, paras. 19, 20.

³² Libya Response of 28 October 2013, para. 16.

³³ Request for Suspensive Effect, para. 22.

³⁴ Libya Response of 28 October 2013, para. 16.

³⁵ Libya Response of 28 October 2013, para. 16.

17. Libya makes no effort to clarify the reports submitted by the Defence which state that on 24 October 2013 the Accusation Chamber will “decide whether to drop the charges or to refer the accused to a jurisdiction of its choice.”³⁶ Libya failed to provide the Appeals Chamber with any sources or evidence to support its unsubstantiated assertion that the proceedings before the Accusation Chamber have not concluded, and gave the Appeals Chamber no indication of what is the current status of the proceedings now that the charges have been confirmed.
18. The Defence for Mr. Al-Senussi therefore requests leave to reply in order to provide the Chamber with the most up to date information on the status of the Libyan proceedings; particularly that the Accusation phase has concluded³⁷ and that Mr. Al-Senussi still does not have a lawyer³⁸ – all compelling reasons to grant the suspension requested. The Defence submits that the Appeals Chamber should not rely on Libya’s mere assertion that the accusation proceedings have not concluded without requiring Libya to provide clear evidence to support its vague statement.³⁹
19. Given that the Request for Suspensive Effect was filed on 17 October 2013, before the date the proceedings before the Accusation Chamber concluded at the hearing held on 24 October 2013 hearing, it was impossible for the Defence to present any information about the outcome of the hearing in the its Request. Libya was however able to file its response after the hearing on 24 October 2013. The Defence should be permitted an opportunity to reply to Libya’s claims about the hearing that were filed after the hearing. These issues are central to the determination of the request for suspension.

³⁶ Libya court to rule on top Qaddafi figures October 24, Al Arabiya, 3 October 2013 (<http://english.alarabiya.net/en/News/africa/2013/10/03/Libya-court-to-rule-on-top-Qaddafi-figures-October-24-.html>); Libya court to rule on top Gadhafi figures Oct. 24, The Daily Star, 3 October 2013 (<http://www.dailystar.com.lb/News/Middle-East/2013/Oct-03/233449-libya-court-to-rule-on-top-gadhafi-figures-oct-24.ashx#axzz2gvImdY5n>). See Request for Suspensive Effect, note 18.

³⁷ Libya court indicts Kadhafi aides over 2011 uprising, Global Post, 24 October 2013 (<http://www.globalpost.com/dispatch/news/afp/131024/libya-court-indicts-kadhafi-aides-over-2011-uprising>); Libyan court charges 30 Gaddafi aides with murder, embezzlement and other crimes, global post, 24 October (<http://www.globalpost.com/dispatch/news/regions/africa/131024/libyan-court-charges-30-gaddafi-aides-murder-embezzlement-and-ot>); Libyan Court charges Gaddafi-era figures, BBC, 24 October 2013 (<http://www.bbc.co.uk/news/world-africa-24659181>).

³⁸ Interview with Omar Al-Haddad on 24 October 2013 (<https://www.facebook.com/photo.php?v=542053822536678>). See, minute 4:51 in which Omar Al-Haddad says “... and there is another important fact, as we heard from one of the lawyers, Abdullah al-Senussi and Saif al-Islam Gaddafi have not yet had lawyers appointed for them and in the coming hearing if no lawyer is appointed to them the Criminal Court will appoint them a lawyer for their defence.” See also, Document in Support of Appeal, para. 80.

³⁹ 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. 61.

2. Proportionality of granting suspension

20. The Defence seeks leave to reply to Libya's assertions concerning the proportionality of granting suspensive effect and the alleged prejudice to Libya. Libya argues that the Defence "fails to demonstrate that it would be proportionate to prevent Libya making progress with its domestic criminal justice process,"⁴⁰ and that "[a]ny prejudice that might conceivably be caused to Mr. Al-Senussi by the denial of suspensive relief must be drastically diminished by [the] fact" that "[a]t the point of transfer of Mr. Al-Senussi from Libya to the ICC, there would be no possibility of conviction or sentencing in Libya unless a subsequent admissibility challenge were successful."⁴¹

21. In light of the new evidence submitted within the Document in Support of Appeal, as set out above, the Defence should be granted the opportunity to reply to show that the prejudice caused to Mr. Al-Senussi by denying suspensive effect would greatly outweigh any inconvenience Libya might be caused.

22. The Defence will further submit jurisprudence from the Court emphasising that when considering Libya's submission as to possible prejudice to the national proceedings, the human rights and the fair trial implications for the Accused must override any prejudice Libya might face.⁴² Libya did not bring this case law to the attention of the Appeals Chamber, and it is vital that the Appeals Chamber takes account of this jurisprudence.

3. Status Quo before the Admissibility Decision

23. The Defence seeks leave to reply to Libya's assertion that "the Admissibility Decision did not change the legal *status quo*"⁴³ because the "Appeals Chamber's finding that 'states have the primary responsibility to exercise criminal jurisdiction' can only mean

⁴⁰ Libya Response of 28 October 2013, para. 11.

⁴¹ Libya Response of 28 October 2013, para. 23.

⁴² Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, ICC-01/04-01/06-772, 14 December 2006, paras. 36, 37.

⁴³ Libya Response of 28 October 2013, para. 5.

that, once a state has established the existence of a domestic process (in respect of the same case) exercise of criminal jurisdiction at the national level is the *status quo*.⁴⁴

24. The Defence needs to address in its reply that UN Security Council Resolution 1970 entrusted jurisdiction to the ICC to investigate and prosecute the situation in Libya.⁴⁵ Libya's assertion seeks to pre-empt the very decision the Pre-Trial Chamber is tasked to make - whether Libya is investigating and prosecuting the 'same case' before the Court. Libya cannot unilaterally decide that it is conducting domestic proceedings concerning the same case and thereby usurp the ICC's jurisdiction.

4. The Need to Preserve the Integrity of the Proceedings

25. The Defence seeks leave to reply to Libya's argument that "the need to preserve the integrity of the proceedings overrides any other consideration"⁴⁶ means that the ICC must preserve the "integrity of the domestic proceedings."⁴⁷

26. The Defence is required to reply to this argument which fundamentally misinterprets that duty of the Court. On a proper interpretation of the Statute and the Court's jurisprudence, the Appeals Chamber is not obliged ensure that the national proceedings are viable and should be able to proceed during admissibility proceedings before the ICC.

5. The Appeals Chamber's Relationship with the National Courts

27. The Defence seeks leave to reply to the Prosecution's submission that there is no "relationship between the Appeals Chamber and national courts" which would allow the Appeals Chamber to order Libya to suspend its domestic proceedings until the appeals proceedings are completed.⁴⁸

⁴⁴ Libya Response of 28 October 2013, para. 7.

⁴⁵ Security Council, Resolution 1970 (2011), S/RES/1970 (2011), 26 February 2011.

⁴⁶ Request for Suspensive Effect, para. 25 citing *Prosecutor v. Germain Katanga*, "Decision on the request for suspensive effect of the appeal against Trial Chamber II's decision on the implementation of regulation 55 of the Regulations of the Court", ICC-01/04-01/07-3344 (OA 13), 16 January 2013, para. 9.

⁴⁷ Libya Response of 28 October 2013, para. 15.

⁴⁸ Prosecution Response of 31 October 2013, para. 10.

28. The Defence should be entitled to reply to this misconceived argument. The Prosecution has failed to take into account Libya's obligation to "cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant" Security Council Resolution 1970.⁴⁹ If granted leave, the Defence will address the provisions of Resolution 1970 and the jurisprudence the Court which demonstrate that the Appeals Chamber does have the power to order the suspension of the domestic proceedings against Mr. Al-Senussi in Libya.

6. The Effect of Granting the Suspension on the Postponement Appeal

29. The Defence seeks leave to reply the Prosecution's submissions concerning the Defence's outstanding appeal⁵⁰ against the postponement of the surrender order against Mr. Al-Senussi.⁵¹

30. The Defence is required to reply to the Prosecution's assertion that the "suspension of the Admissibility Decision does not bring the result desired by the Defence" because it "would not 're-enact' a pre-existing obligation of Libya to surrender Al-Senussi."⁵² The Prosecution has completely misunderstood and misinterpreted the Defence's submissions, which should be corrected. The Defence has requested that the national proceedings are suspended and the Admissibility Decision is not implemented to ensure that irreversible prejudice and harm is not caused to Mr. Al-Senussi, and has submitted that such a suspension would also permit the Appeals Chamber in the related appeal on the postponement of the surrender order, to consider whether that order should be reinstated.

31. The Defence submits that it is most important for the Appeals Chamber to receive all of these submissions in reply from the Defence to ensure that the Chamber's determination is not based on the erroneous assertions by Libya and the Prosecution.

V. Conclusion

⁴⁹ Security Council, Resolution 1970 (2011), S/RES/1970 (2011), 26 February 2011, para. 5.

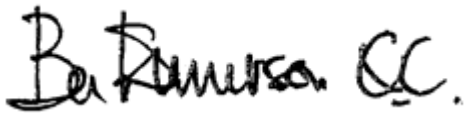
⁵⁰ Appeal on behalf of Mr. Abdullah Al-Senussi against the "Decision on Libya's postponement of the execution of the request for arrest and surrender of Abdullah Al-Senussi pursuant to article 95 of the Rome Statute and related Defence request to refer Libya to the UN Security Council", ICC-01/11-01/11-439, 9 September 2013.

⁵¹ Prosecution Response of 31 October 2013, paras. 19, 20.

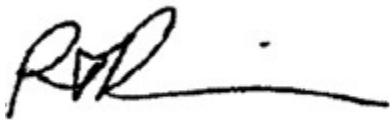
⁵² Prosecution Response of 31 October 2013, para. 20.

32. The Defence submits that it has shown good cause to reply in respect of each of the legal and factual issues identified above. The Defence thus requests leave to reply to Libya's Response of 28 October 2013 and the Prosecution Response of 31 October 2013 pursuant to Regulation 24(5).

Counsel on behalf of Mr. Abdullah Al-Senussi,



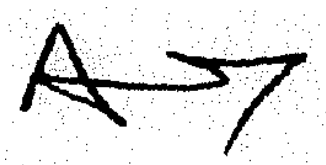
Ben Emmerson QC



Rodney Dixon



Amal Alamuddin



Anthony Kelly

Dated 7th November 2013
London, United Kingdom