



Original: **English**

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

Date: **19 December 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 Abdullah Al-Senussi to File Further Submissions
Pursuant to Regulation 28**

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:

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Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

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Registrar
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Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I. Introduction

1. The Defence for Mr. Abdullah Al-Senussi files this request to file further submissions pursuant to Regulation 28 of the Regulations of the Court in respect of (i) the most up to date position concerning the visit of the Defence team to Mr. Al-Senussi in Tripoli; (ii) the recent developments in relation to further evidence concerning the mistreatment of Mr. Al-Senussi in detention in Al-Hadba prison; and (iii) matters raised in Libya's "Response to the 'Document in Support of Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I's 'Decision on the admissibility of the case against Abdullah Al-Senussi'"¹; and the "Prosecution's Response to the 'Document in Support of Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I's 'Decision on the admissibility of the case against Abdullah Al-Senussi.'"²
2. The Defence requests leave to file further submissions in order to provide additional information concerning all of these important issues which must be addressed for the proper and fair disposal of the Appeal. The Defence submits that in these circumstances, and for all of the reasons set out below, there is good cause for the Appeals Chamber to exercise its discretion to permit further submissions to be filed by the Defence. Libya was permitted to file further submissions pursuant to Regulation 28 on similar grounds in its appeal in the related case concerning Mr. Al-Senussi's co-accused, Mr. Saif Gaddafi.³
3. The Defence seeks leave to file these further submissions by the same date that the Chamber has ordered the Defence to respond to the Victims' observations⁴, namely by 13 January 2014, or within a time limit specified by the Appeals Chamber.

¹ Response to the 'Document in Support of Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I's 'Decision on the admissibility of the case against Abdullah Al-Senussi'', ICC-01/11-01/11-482, 26 November 2013 (hereinafter "Libya's Response of 26 November 2013").

² Prosecution's Response to the 'Document in Support of Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I's 'Decision on the admissibility of the case against Abdullah Al-Senussi', ICC-01/11-01/11-483, 26 November 2013 (hereinafter "Prosecution's Response of 26 November 2013").

³ Decision on the Libyan Government's request to file further submissions, ICC-01/11-01/11-442, 12 September 2013; 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", ICC-01/11-01/11-454-Red, 23 September 2013.

⁴ Order in relation to the filing of victims' observations, ICC-01/11-01/11-481, 22 November 2013, p. 3.

II. Applicable legal provisions and case law

4. Regulation 28 of the Regulations of the Court provides that:

1. *“A Chamber may order the participants to clarify or to provide additional details on any document within a time limit specified by the Chamber.*
2. *A Chamber may order the participants to address specific issues in their written or oral submissions within a time limit specified by the Chamber.*
3. *These provisions are without prejudice to the inherent powers of the Chamber.”*

5. The Appeals Chamber has previously ruled that leave to reply may not be sought to reply to responses to a document in support of appeal pursuant Regulation 24(5), Rule 154 and Rule 155.⁵ Instead, the Appeals Chamber has held that it has the discretion to order further submissions by the parties pursuant to Regulation 28 on Appeals Chamber’s “own motion” or “on request” of the parties.⁶
6. The Appeals Chamber has stated that further submissions under Regulation 28 “are not intended to reiterate a position or demonstrate mere disagreements with the position of another party.”⁷ The Appeals Chamber has explained that it will issue an order for further submissions “should the arguments that are raised in a response to a document in support of the appeal make further submissions by the appellant necessary for the proper disposal of the appeal ... bearing in mind the principle of equality of arms and the need for expeditious proceedings.”⁸
7. The Appeals Chamber has granted requests under Regulation 28 “because there is a need for clarification” on issues within the appeal proceedings.⁹ In addition, requests

⁵ Regulations of the Court, Regulation 24(5); Rules of Procedure and Evidence, Rule 154 and 155.

⁶ *Prosecutor v. Lubanga*, Decision on the "Prosecution's Application under Regulation 28 to provide Clarification or Additional Details which Impact on the Appeals against the Decisions to Stay the Proceedings and Release the Accused", ICC-01/04-01/06-1476, 13 October 2008, para. 3.

⁷ Decision on the Libyan Government's request to file further submissions, ICC-01/11-01/11-442, 12 September 2013, para. 13.

⁸ *Prosecutor v. Lubanga*, Decision on the Prosecutor's "Application for Leave to Reply to 'Conclusions de la defense en reponse au memoire d'appel du Procureur'", ICC-01/04-01/06-424, 12 September 2006, para. 7.

⁹ Decision on the Libyan Government's request to file further submissions, ICC-01/11-01/11-442, 12 September 2013, para. 13.

to file further submissions have been granted to “provide additional details” or to submit “any additional authorities” on which the parties wish to rely.¹⁰ The Appeals Chamber has permitted the submission of additional information on the basis that the circumstances of the case made the information “necessary for the proper determination of the appeal,” and that “it would not have been in the interests of justice to deprive the appellant of the opportunity to make informed submissions.”¹¹

8. The Appeals Chamber permitted Libya to file further submissions pursuant to Regulation 28 in its appeal in Mr. Gaddafi’s case on the basis of this jurisprudence.¹²

III. Update on Libya’s failure to arrange a legal visit

9. Since the filing of the Appeal and the Responses, Libya has still not arranged a secure, privileged and confidential visit to Mr. Al-Senussi by his Defence team. The Defence requests permission to provide the Chamber with information about the recent developments over the past few weeks in seeking to gain access to Mr. Al-Senussi and to respond to any further reports which the Registrar may submit on this matter which should be provided to the Appeals Chamber.
10. The lack of any visit or contact with Mr. Al-Senussi is a key ground of appeal¹³, and it is thus vital that the Appeals Chamber is informed of the very latest position before determining the appeal. This matter has been outstanding for almost a year now, and Libya has completely failed to comply with the Court’s orders to arrange a secure, privileged and confidential legal visit as soon as possible.¹⁴ In its Notice of Appeal and Document in Support of Appeal the Defence highlighted that Libya’s continuing failure to allow the Defence to consult with Mr. Al-Senussi constituted an

¹⁰ *Prosecutor v. Katanga*, Order in relation to the Defence Application to Request Leave to Provide Additional Details and Authorities, ICC-01/04-01/07-164, 24 January 2008, p. 2.

¹¹ *Prosecutor v. Katanga*, Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, ICC-01/04-01/07-476, 13 May 2008, para. 20.

¹² Decision on the Libyan Government’s request to file further submissions, ICC-01/11-01/11-442, 12 September 2013; 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”, ICC-01/11-01/11-454-Red, 23 September 2013.

¹³ Document in Support of Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I’s ‘Decision on the admissibility of the case against Abdullah Al-Senussi’, ICC-01/11-01/11-474, 4 November 2013, paras. 33-49 (hereinafter “Document in Support of Appeal”).

¹⁴ 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. 37-40, and p. 15. And see, Decision concerning a privileged visit to Abdullah Al-Senussi by his Defence, ICC-01/11-01/11-456, 26 September 2013.

unquestionable violation of his basic rights, which should not be countenanced by the ICC, and which provided a clear basis for the Appeals Chamber to overturn the Admissibility Decision of the Pre-Trial Chamber. The Defence stressed that the Appeals Chamber should not decide this Appeal without Counsel being able to consult with Mr. Al-Senussi, and given that Libya was still refusing such contact in the appellate proceedings, the Appeals Chamber should in the absence of any confidential and privileged access to Mr. Al-Senussi by his Defence team, grant Mr. Al-Senussi's appeal.¹⁵

11. It should also be taken into account that Libya has in its Response addressed the issue of the legal visit by emphasising "the reasonableness of the efforts of the Libyan Government to finalise arrangements for a visit by counsel for Mr. Al-Senussi in the ICC proceedings."¹⁶ And yet, arrangements have still not been made by Libya to ensure that a legal visit takes place before the appeal proceedings are completed, as has been ordered by the Court as far back as February 2013.¹⁷ It is thus essential for the Appeals Chamber to be informed of the most up to date position, and what impact this has on the appeal, for the proper determination of the appeal.

IV. Update on evidence of mistreatment of Mr. Al-Senussi in detention

12. In the Document in Support of Appeal, the Defence submitted new evidence which included new information about the mistreatment of Mr. Al-Senussi in detention, the violations of Mr. Al-Senussi's due process and fair trial rights, and the unavailability of defence witnesses due to security concerns.¹⁸ The Defence has requested the Appeals Chamber to admit this evidence in the appeal and to provide Libya with an opportunity to file any response, or to permit the Pre-Trial Chamber to reconsider its findings in light of the evidence.¹⁹ The Appeals Chamber has made no ruling on this application as yet. The Defence also made clear that as a result of obtaining this new

¹⁵ Document in Support of Appeal, para. 4. See also, 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, para. 28; Decision concerning a privileged visit to Abdullah Al-Senussi by his Defence, ICC-01/11-01/11-456, 26 September 2013.

¹⁶ Libya's Response of 26 November 2013, para. 12.

¹⁷ 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. 37-40, and p. 15.

¹⁸ Document in Support of Appeal, paras. 137-160. See also, Confidential Exparte Annex 1, ICC-01/11-01/11-Conf-Exp-Anx1; Confidential Exparte Annex 2, ICC-01/11-01/11-Conf-Exp-Anx2; and Public Annex 3, ICC-01/11-01/11-Anx3.

¹⁹ Document in Support of Appeal, paras. 137, 138, 152-160.

evidence for the first time, it gave rise to certain further inquiries which were still on-going, and that the Defence reserved “the right to seek to file any further evidence that it is able to acquire which has a decisive impact on the outcome of the appeal.”²⁰

13. Since filing the Document in Support of Appeal, as a result of these inquiries, the Defence has received further information which was not previously available concerning Mr. Al-Senussi’s treatment in detention. The Defence is in the process of obtaining witness statement/s for submission to the Appeals Chamber at the earliest opportunity. Given the very serious difficulties of collecting this evidence from within Libya and the grave risks for the security and safety of the persons concerned, the Defence has had to exercise the utmost caution and it has not been possible to obtain the evidence any sooner, as will become apparent from the new evidence itself. The Defence is taking all possible steps to be able to submit the new evidence to the Appeals Chamber as soon as possible.

14. The Defence submits that it is essential that this new evidence is considered by the Appeals Chamber as it directly concerns Mr. Al-Senussi’s treatment and well-being in detention. This issue is plainly fundamental to whether Libya is able and willing genuinely to try Mr. Al-Senussi in accordance with Libyan law and established international standards, as required by Article 17 of the Rome Statute. It is anticipated that the new evidence can thus be filed confidentially with the Defence’s further submissions pursuant Regulation 28.

15. The Defence will also file a public redacted version of the evidence. The Defence notes that Libya has in its Response stated that it will not file any response to the new evidence filed with the Document in Support of Appeal given that it was filed *ex parte*.²¹ The Defence did indicate in the Document in Support of the Appeal the nature of the allegations contained in the new evidence, without naming the witnesses concerned due to the severe risks to their safety. There is nothing preventing Libya from filing submissions and evidence in response if it wishes to refute the allegations of mistreatment and the violations of Mr. Al-Senussi’s fundamental rights in detention. The Defence will in any event file public redacted versions of all of the new evidence with its further submissions pursuant to Regulation 28.

²⁰ Document in Support of Appeal, para. 156.

²¹ Libya’s Response of 26 November 2013, para. 112.

16. It should also be taken into account that although Libya objects to the filing of new evidence in the appellate proceedings in the present case, Libya has itself filed new evidence in its appeal against the Admissibility Decision in Mr. Gaddafi's case and has requested the Appeals Chamber to take it into consideration.²²

V. New and inaccurate submissions by Libya and the Prosecutor

17. Libya and the Prosecution have made submissions in their Responses which are inaccurate and which have in many instances been raised for the first time, as listed below. The Defence submits that it should therefore be permitted to file further submissions to address these inaccuracies and new issues so that the Appeals Chamber can take these informed submissions into account and have all relevant information before it when making its determination. Libya was granted leave to file further submissions under Regulation 28 for this same reason.²³

18. The Defence will not use the further submissions merely to disagree with the arguments of the Prosecution and Libya, or to development the arguments already submitted in the Defence's Document in Support of Appeal.

19. The Chamber has already ordered the Defence to respond to the Victims' observations by 13 January 2014²⁴, and could order the Defence to file any further submissions under Regulation 28 by the same date, or by a date to be fixed by the Appeals Chamber.

20. The issues in the Responses which the Defence submits require further submissions from the Defence are the following.

²² 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", ICC-01/11-01/11-454-Red, 23 September 2013, paras. 8-11. See, ICC-01/11-01/11-454-Conf-AnxA.

²³ Decision on the Libyan Government's request to file further submissions, ICC-01/11-01/11-442, 12 September 2013, paras. 10-14.

²⁴ Order in relation to the filing of victims' observations, ICC-01/11-01/11-481, 22 November 2013, p. 3.

Legal visit

21. As noted above, Libya responded to the Defence submissions concerning the lack of any legal visit by emphasising “the reasonableness of the efforts of the Libyan Government to finalise arrangements for a visit by counsel for Mr. Al-Senussi in the ICC proceedings.”²⁵ The Chamber should be informed of Libya’s latest “efforts” which have again amounted to nothing. No arrangements at all have been made for any visit, let alone “finalised”.
22. Furthermore, Libya now submits on the issue of the lack of any visit that “[t]he right to representation, as a matter of due process, does not require that an accused be represented by counsel in relation to decisions such as the location of the trial” and any “barriers to such representation cannot evince, or even suggest, inability or unwillingness to conduct genuine domestic proceedings.”²⁶ This is a new argument advanced by Libya, having previously repeatedly assured the Pre-Trial Chamber that it could and would arrange a visit so that Mr. Al-Senussi could consult with his Counsel.²⁷ Libya is now submitted before the Appeals Chamber that Mr. Al-Senussi has no right to legal representation in the admissibility proceedings, let alone to be consulted by his Counsel. The Defence should be permitted to address the Appeals Chamber on this change in Libya’s position.

New ‘interpretation’ of Article 106 of the Libyan Code of Criminal Procedure

23. In its Response, Libya asserts for the first time that under Article 106 “the accused may be interrogated without counsel being present”.²⁸ The Prosecution acknowledged

²⁵ Libya’s Response of 26 November 2013, para. 12.

²⁶ Libya’s Response of 26 November 2013, para. 19.

²⁷ 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. 17. See also, Response of the Libyan Government to the “Renewed Application on behalf of Mr. Abdullah Al-Senussi to Refer Libya and Mauritania to the UN Security Council with Public Annex 1 and Confidential and Ex Parte (Registry only) Annexes 2 and 3”, ICC-01/11-01/11-310, 10 April 2013, para. 21; Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11-307-Red2, 2 April 2013, para. 179 (hereinafter “Admissibility Challenge of 2 April 2013”); Response of the Libyan Government to the “Urgent Application on behalf of Abdullah Al-Senussi for Pre-Trial Chamber to order the Libyan Authorities to comply with their obligations and the orders of the ICC”, ICC-01/11-01/11-264, 1 February 2013, para. 31.

²⁸ Libya’s Response of 26 November 2013, para. 66; See paras. 62-69.

that this is a new interpretation by stating that “Libya did not indicate whether interrogation is still possible when the suspect has expressly asked for a lawyer.”²⁹

24. Libya had relied on Article 106 when it sought to re-assure the Pre-Trial Chamber in its Admissibility Challenge that Mr. Al-Senussi’s rights would be guaranteed by claiming that “during the investigation phase of the case, a suspect has the right to appoint a lawyer to attend interviews with the Prosecutor-General and the Military Prosecutor and during confrontation of the defendant with witnesses by the Prosecutor-General.”³⁰ Yet, before the Appeals Chamber, Libya has shifted its position to argue that it is not a violation of Libyan law for Mr. Al-Senussi to be interrogated without a lawyer even though he has repeatedly requested legal representation.

25. This is a clear change of position on Libya’s part that has been raised for the first time, which the Defence should be permitted to reply to by way of further submissions.

Lack of legal representation: the purported distinction between Mr. Al-Senussi’s and Mr. Gaddafi’s cases

26. In its Response, Libya asserts that Mr. Al-Senussi’s and Mr. Gaddafi’s cases can be distinguished on the crucial issue of legal representation. Libya states that the Pre-Trial Chamber found that the lack of legal representation for Mr. Al-Senussi “did not present any insuperable difficulty to the progress of the proceedings or the fairness of the overall process”³¹ because Libya assured the Chamber that the “execution of a formal power of attorney will be carried out”,³² and the assignment of “legal representation for Mr. Al-Senussi will be completed in the very near future.”³³ Libya argues that Mr. Gaddafi’s situation is different because Libya was “only in the ‘process of approaching the Bar Associations of Tunisia and Egypt in order to obtain

²⁹ Prosecution’s Response of 26 November 2013, para. 55.

³⁰ Admissibility Challenge of 2 April 2013, para. 146.

³¹ Libya’s Response of 26 November 2013, para. 46.

³² Decision on the admissibility of the case against Abdullah Al-Senussi, ICC-01/11-01/11-466-Red, 11 October 2013, para. 232 (hereinafter “Admissibility Decision of 11 October 2013”).

³³ 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’, ICC-01/11-01/11-455, 26 September 2013, paras. 9, 28. See also, Admissibility Decision of 11 October 2013, para. 232.

suitably qualified and experienced counsel”” at the time of the Admissibility Decision.³⁴

27. This is a distinction that Libya has never previously sought to make between the two cases. In any event, the Defence submits that this is a ‘distinction’ without any difference at all. The Prosecution has recognised as much in stating that the Chamber relied “on Libya’s assertions that it would overcome the impediment of legal representation”³⁵ in Mr. Al-Senussi’s case, and that Libya’s assurances about the possibility of appointing counsel for both Mr. Al-Senussi and Mr. Gaddafi amount to “similar undertaking[s].”³⁶ The Defence should be permitted to file further submissions to respond to the ‘distinction’ which Libya now seeks to draw, and which is now central to its submission that the two cases can be treated differently by the ICC.

28. The Defence makes this request in light of the fact that despite Libya’s ‘undertaking’ in September 2013 that the assignment of counsel for Mr. Al-Senussi would be “completed in the very near future”, it is now December and no counsel has been appointed. Similarly no counsel has been appointed for Mr. Gaddafi. These are matters of great significance to the present appeal that should be clarified before the Appeals Chamber in further submissions.

Lack of legal representation: the position under International Human Rights Law

29. Libya submits that for the purpose of determining whether Mr. Al-Senussi’s rights have been prejudiced, “international human rights law does not dictate that a trial is irretrievably prejudiced by the absence of a lawyer at the early pre-trial stage.”³⁷

30. The Defence submits that Libya’s argument is plainly wrong as a matter of law. The Defence submits that it should be given an opportunity to correct this erroneous submission and interpretation of international human rights law, and submit any additional authorities, so that the Appeals Chamber can consider this matter with the proper arguments and authorities.

³⁴ Libya’s Response of 26 November 2013, para. 28.

³⁵ Prosecution’s Response of 26 November 2013, para. 62.

³⁶ Prosecution’s Response of 26 November 2013, para. 63.

³⁷ Libya’s Response of 26 November 2013, para. 55.

Lack of adequate witness protection

31. Libya submits in its Response that “the Appellant has failed to show any error in the Pre-Trial Chamber’s consideration of the impact of security concerns on Libya’s ability ... with regard to adequacy of witness protection measures.”³⁸ The Prosecution submitted that the Pre-Trial Chamber’s finding concerning witness protection was justified considering that it was “difficult to predict the impact” of the lack of witness protection programs, and “there was no list of prospective Defence witnesses” at the time of the Admissibility Decision.³⁹

32. Libya has overlooked the key finding in Mr. Gaddafi’s case that the lack of adequate witness protection programs shows that Libya is unable to try him⁴⁰, and that no distinction can be drawn between this case and the situation faced by Mr. Al-Senussi. The lack of a list of potential defence witnesses is completely irrelevant – it in no way establishes that adequate witness protection programs exist. It is also a farcical submission to make when Mr. Al-Senussi has been denied any legal representation and denied access to his Defence team. These are all matters that the Defence should be permitted to address in further submissions. It is the first time that ‘a lack of a list of Defence witnesses’ has been relied on.

The violations of Mr. Al-Senussi’s due process rights

33. Libya asserts that “even if Mr. Al-Senussi had been deliberately deprived of legal assistance during the investigative and accusation stage, this alone does not demonstrate the prejudice required to demonstrate a violation of any international human rights standards.”⁴¹ Libya states that any prejudice to Mr. Al-Senussi’s rights “must be judged *in situ*, not asserted in the abstract.”⁴² Libya also argues that due process violations do not show that the State is unwilling to try the accused.⁴³

³⁸ Libya’s Response of 26 November 2013, para. 105.

³⁹ Prosecution’s Response of 26 November 2013, para. 109.

⁴⁰ Decision on the admissibility of the case against Saif Al-Islam Gaddafi, ICC-01/11-01/11-344-Red, 31 May 2013, paras. 209-211.

⁴¹ Libya’s Response of 26 November 2013, para. 54.

⁴² Libya’s Response of 26 November 2013, para. 55.

⁴³ Libya’s Response of 26 November 2013, paras 74-83.

34. Libya has again shifted its position and presented a new argument. Libya previously assured the Pre-Trial Chamber that all of the rights of a defendant which are guaranteed under Libya law would be available to Mr. Al-Senussi, and stated that the “Libyan Government is committed to meeting all the fair trial requirements set out in” international and regional human rights instruments “including the International Covenant on Civil and Political Rights, the United Nations Convention against Torture, the International Convention on the Elimination of Racial Discrimination, the African Charter on Human and Peoples’ Rights, the Arab Charter on Human Rights and resolutions such as the Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa adopted by the African Union in 2003.”⁴⁴ Libya emphasised that “[i]t is committed to applying international human rights standards both for the conduct of its investigation and any eventual trials.”⁴⁵ Yet, Libya is now arguing before the Appeals Chamber that even if Mr. Al-Senussi’s rights are being violated, it is not relevant to the admissibility determination.

35. The Defence submits that it should be permitted to reply to the new argument relied on by Libya, and to demonstrate how it contradicts Libya’s previous submissions.

Article 304 of the Libyan Code of Criminal Procedure

36. Libya submits that even if the denial of Mr. Al-Senussi’s right to a lawyer and his due process rights has resulted in him making “incriminatory statements in the absence of a lawyer,” there is no prejudice caused to Mr. Al-Senussi because “these may be excluded at any future trial pursuant to Article 304 of the Libyan Code of Criminal Procedure.”⁴⁶

37. Libya has not relied on this argument before. In its Admissibility Challenge, Libya did not submit that Article 304 could remedy violations committed during the investigative and accusation phases. Libya only explained that any violation committed at trial could be remedied by Article 304 before the Appellate Court.⁴⁷

⁴⁴ Admissibility Challenge of 2 April 2013, para. 144.

⁴⁵ Admissibility Challenge of 2 April 2013, para. 14.

⁴⁶ Libya’s Response of 26 November 2013, para. 55.

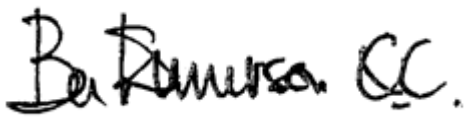
⁴⁷ Admissibility Challenge of 2 April 2013, para. 149.

38. The Defence thus seeks leave to make further submissions to clarify the application of this and related provisions and the fact that Article 304 does not provide any protection against the systematic violations of Mr. Al-Senussi's rights that are currently being committed in detention and in his trial proceedings. These are matters that the Pre-Trial Chamber failed to take into account, which are the subject of the Appellant's grounds of appeal.⁴⁸

VI. Conclusion

39. For all of the reasons above, the Defence respectfully requests that the Appeals Chamber exercise its discretion under Regulation 28 and in the interests of justice to grant the Defence leave to file further submissions on the issues listed above by 13 January 2014, or within a time limit specified by the Appeals Chamber.

Counsel on behalf of Mr. Abdullah Al-Senussi,



Ben Emmerson QC

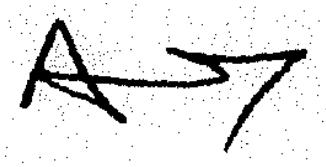


Rodney Dixon



Amal Alamuddin

⁴⁸ Document in Support of Appeal, paras. 11-136.

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

Anthony Kelly

Dated 19th December 2013
London, United Kingdom