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THE APPEALS CHAMBER

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

SITUATION IN LIBYA

IN THE CASE OF

THE PROSECUTOR

v.

SAIF AL-ISLAM GADDAFI and ABDULLAH AL-SENUSSI

Public Document with Confidential *Ex Parte* Annex 2 (to Chambers and Al-Senussi Defence only) and Public Annexes 1 and 3

Response on behalf of Abdullah Al-Senussi to the “Observations on 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’”

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

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Introduction

1. The Defence for Mr. Abdullah Al-Senussi hereby files its Response to the “Observations on 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’” filed on 20 December 2013 by the Principal Counsel of the OPCV.¹
2. This Response is filed pursuant to the Appeals Chamber’s “Order in relation to the filing of victims’ observations” of 22 November 2013 which directed the Defence for Mr. Al-Senussi, the Prosecution and Libya to “respond to the victims’ observations” by 13 January 2014.²
3. The Defence for Mr. Al-Senussi notes that the Victims have submitted observations on all three grounds of the Defence Document in Support of Appeal, and a response in respect of each ground is therefore required. The Defence has set out below its submissions in response in relation to each of its grounds of appeal.
4. The Victims’ Observations highlight that Mr. Al-Senussi’s due process and fair trial rights have been grossly violated in detention in Libya, including that he still has no legal representation after being in custody for nearly a year and a half. The Victims rightly submit that these very serious violations were not taken into account by the Pre-Trial Chamber, and given any weight, in rendering the Admissibility Decision. The Victims stress that this fundamental error has been compounded by the fact that Mr. Al-Senussi has been prevented from consulting his ICC Defence Counsel and has no ability to participate effectively in the ICC proceedings. The Defence submits that these facts – coupled with the new evidence submitted with the Document in Support

¹ Observations on 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-01/11-01/11-494, 20 December 2013 (hereinafter “Victims’ Observations”).

² Order in relation to the filing of victims’ observations, ICC-01/11-01/11-481, 22 November 2013, p. 3. The Appeals Chamber directed that the page limit for the responses should be 20 pages. The content of the Appellant’s Response is 20 pages but exceeds the limit by a few pages due to the cover and signature pages, and the annexes to the Response. The Defence thus requests the Appeals Chamber to permit the Appellant to exceed the page limit for the purpose of including the annexes pursuant to Regulation 37 of the Regulations of the Court given that annexes include vital information for the appeal including a public summary of the *ex parte* evidence. The Appellant has had to address many legal and factual arguments raised by the Victims in each of the grounds of appeal which have also been addressed by Libya. Given the absolute importance of the appeal to where the Appellant will be tried and the conditions he will face, the Appellant submits that each of these issues had to be addressed in this Response to ensure that Appeals Chamber has all relevant arguments and information for its determination.

of Appeal and with this Response (see below) of Mr. Al-Senussi's physical and mental abuse in detention – can only lead to the conclusion that no reasonable Chamber could find that Libya is presently able and willing to bring Mr. Al-Senussi to justice in Libya, as is required by Article 17 to find the case inadmissible before the ICC. As the Victims have urged in their Observations, the Appeals Chamber should therefore declare Mr. Al-Senussi's case admissible before the ICC and order Libya to surrender him immediately to the ICC for trial.

Submissions in response

Ground One: The Pre-Trial Chamber erred in law and fact, and abused its discretion, in finding that Libya is not unwilling and unable genuinely to carry out the proceedings against Mr Al-Senussi in Libya, within the meaning of Article 17(1)(a), (2)(c) and (3), respectively.

5. The Victims addressed various errors under this ground, and concluded that the Appeals Chamber should find that the Pre-Trial Chamber's Decision should be reversed.

Failure to consider the lack of intent to bring Mr. Al-Senussi to justice

6. The Defence submits that the Principal Counsel for the Victims was correct in emphasising that the Chamber committed a fundamental error when it “only considered the incidence of the violation of the suspect's procedural rights on the ‘*independence and impartiality of the national proceedings*’, but did not address whether these violations impacted on the Libya's intent to bring the person concerned to justice.”³ Both the Prosecution and Libya assert in their Responses of 26 November 2013 that “the two requirements set out in Article 17(2)(c) are cumulative, meaning that both requirements must be satisfied for a case to be admissible”⁴; however, as the Victims' Observations rightly show, the Pre-Trial Chamber “completely overlooked a core argument put forward by the Defence”⁵ regarding Libya's intent to bring Mr. Al-

³ Victims' Observations, para. 9.

⁴ 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, para. 25 (hereinafter “Prosecution Response of 26 November 2013”). See also, 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, para. 75 (hereinafter “Libya Response of 26 November 2013”).

⁵ Victims' Observations, para. 9.

Senussi to justice given the serious allegations of due process and fair trial violations. The Defence re-iterates that the Chamber also erred in its findings about the whether the proceedings are being conducted independently and impartially.⁶

7. The Victims correctly submit that the Pre-Trial Chamber committed a “material error of law” by “not conduct[ing] a proper analysis of the requirements of article 17(2)(c) of the Rome Statute and, in particular, ... not consider[ing] at all whether the various allegations concerning breaches of Mr Al-Senussi’s rights reached the level required for declaring the domestic proceedings inconsistent with the intent to bring the person concerned to justice.”⁷ The Victims properly identified that “[s]hould the Chamber have considered international standards applicable to article 17(2)(c) of the Rome Statute, it would have found, at the very least, that proceedings conducted in breach of the defendant’s basic procedural rights are inconsistent with the intent to ‘*bring the person concerned to justice*’”.⁸
8. The Victims’ Observations accord with the Defence’s submission that “[a]t no stage did the Pre-Trial Chamber consider which principles of due process recognised by international law had to be taken into account pursuant to Article 17(2), and at no stage is any reference made in the Pre-Trial Chamber’s decision to any of these principles being considered and applied by the Chamber to assess the proceedings taking place in Libya against Mr. Al-Senussi, and whether they are being conducted independently and impartially and in a manner consistent with bringing him fairly to justice.”⁹
9. The Victims have highlighted precisely the point that the Pre-Trial Chamber overlooked, and which Libya has failed to recognise in its submissions when stating that “a determination of admissibility by the Court [should] not become a judgment on the fairness of the national system *per se*” and “[t]he Court was not designed to be a human rights court with responsibility for harmonising standards or enforcing an agreed ideal that is confined to certain parts of the world.”¹⁰ The Victims’ Observations show that Libya’s assertion is misguided when it claims that “the

⁶ 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. 32, 92-135 (hereinafter “Document in Support of Appeal”).

⁷ Victims’ Observations, para. 10.

⁸ Victims’ Observations, para. 10.

⁹ Document in Support of Appeal, para. 24

¹⁰ Libya Response of 26 November 2013, para. 78.

Chamber was correct not to engage in speculation concerning the overall impact of the lack of legal representation and correct not to draw adverse inferences concerning Libya's willingness or ability to try Mr. Al-Senussi.”¹¹

10. The provisions of Article 17(2) expressly require the Court to “hav[e] regard to the principles of due process recognized by international law”¹² and to determine whether Libya is conducting the national proceedings in Mr. Al-Senussi's case in a manner “inconsistent with an intent to bring the person concerned [Mr. Al-Senussi] to justice”.¹³ The Pre-Trial Chamber erred in disregarding the several violations of Mr. Al-Senussi's due process rights under Libyan law and international law which are directly relevant to any analysis under Article 17(2)(c) and 17(3). Indeed, any determination about whether Libya's conduct is consistent with an intent to bring Mr. Al-Senussi to justice must by definition consider whether he is being treated justly in accordance with the principles of due process. The Defence submits that had the Pre-Trial Chamber considered and taken into account the allegations of violations of Mr. Al-Senussi's rights under national and international law, and thus whether Mr. Al-Senussi was being treated in a manner that is independent and impartial, and consistent with an intent to bring him to justice, the only reasonable conclusion would have been that Libya had not fulfilled the requirements of Article 17.

11. It should be noted that as recently as November 2013, the UN Human Rights Council's Working Group on Arbitrary Detention found that “[i]n grave violation of his fundamental rights, Mr. Gaddafi has been deprived of liberty for two years incommunicado, without having been able to appear before the judicial authorities to challenge the legitimacy of the detention, without access to a lawyer, without having any facilities for the preparation of his defence.”¹⁴ The Working Group concluded that “[t]he gravity of the violations, their nature in this case, and the Government's inability to rectify the violations, has made it impossible to guarantee Mr. Gaddafi's right to fair trial in Libya”¹⁵ and “the adequate remedy would be to discontinue both

¹¹ Libya Response of 26 November 2013, para. 60.

¹² Rome Statute, Article 17(2).

¹³ Rome Statute, Article 17(2)(c).

¹⁴ See ICC-01/11-01/11-491-AnxA, Human Rights Council Working Group on Arbitrary Detention Opinions adopted by the Working Group on Arbitrary Detention at its sixty-eight session, 13–22 November 2013, No. 41/2013 (Libya), para. 42 (hereinafter “UNHRC Working Group on Arbitrary Detention opinion”).

¹⁵ UNHRC Working Group on Arbitrary Detention opinion, para. 43.

the domestic proceedings against Mr. Gaddafi and his detention under those proceedings.”¹⁶

12. Mr. Al-Senussi is in exactly the same situation as Mr. Gaddafi. He has been held without access to any lawyer for a year and four months, denied access to his ICC counsel for over a year, and has had no ability effectively to challenge his detention and to prepare for his defence during the entire period of his detention in Libya. The Working Group’s finding, and the sources of international human rights law relied on by the Working Group,¹⁷ demonstrate that Libya is wrong as a matter of law to argue that “international human rights law does not dictate that a trial is irretrievably prejudiced by the absence of a lawyer at the early pre-trial stages”¹⁸, and also wrong in arguing that no violations have occurred on the specific facts of Mr. Al-Senussi’s case.

Failure to take into account relevant facts – including the lack of any legal representation

13. The Victims rightly submit that the Chamber erred “by misappreciating facts that were crucial to the determination of Libya’s willingness and by disregarding several material facts and evidence.”¹⁹ The Defence agrees with the Victims’ Observations that “the Chamber failed to take into account the defendant’s lack of legal representation in the context of the on-going proceedings in Libya.”²⁰ Libya has now gone so far as to assert that it is not a violation of Libyan law, particularly Article 106 of the Libyan Code of Criminal Procedure, to interrogate Mr. Al-Senussi without a lawyer being present even though he has repeatedly requested legal representation.²¹ This u-turn will be apparent to the Appeals Chamber as Libya has previously sought to reassure the Pre-Trial Chamber that Mr. Al-Senussi would not be interrogated without his lawyer being present²² and that he would be provided with legal representation

¹⁶ UNHRC Working Group on Arbitrary Detention opinion, para. 48.

¹⁷ See Working Group on Arbitrary Detention opinion, note 8-11 citing *Pavlenko v. Russia*, no. 42371/02, Judgement, 1 April 2010, para. 101; *Aliboeva v. Tajikistan*, no. 985/2001, para. 6.4; *Saidova v. Tajikistan*, no. 964/2001, para. 6.8; *Aliev v. Ukraine*, no. 781/1997, para. 7.3; *LaVende v. Trinidad and Tobago*, no. 554/1993, para. 58; HRC General Comment No. 32, CCPR/C/GC/32, 21 August 2007, para. 31; Prosecutor v. *Bagosora et al.*, Decision on the Prosecutor’s Motion for the Admission of Certain Materials under Rule 89(C), ICTR-98-41-T, 14 October 2004, para 16.

¹⁸ Libya Response of 26 November 2013, para. 55.

¹⁹ Victims’ Observations, para 12.

²⁰ Victims’ Observations, para. 13.

²¹ Libya Response of 26 November 2013, paras. 62-69.

²² 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. 146 (hereinafter “Admissibility Challenge of 2 April 2013”). Libya’s Admissibility Challenge ensure the Pre-Trial Chamber that under Article 106 of the

before the Accusation Chamber, neither of which occurred. Libya has completely overlooked²³ that Article 55 of the ICC Statute guarantees the right of persons “during an investigation” and when they are questioned as suspects by national authorities.²⁴

14. The Victims point out that “the non-appointment of a lawyer for Mr Al-Senussi violates Libyan and international law ... [and] constitutes a relevant indication that Libya lacks the requisite willingness to bring the person concerned to justice.”²⁵ These observations highlight that the Pre-Trial Chamber and Libya are incorrect to rely on Libya’s mere assertions that the “execution of a formal power of attorney will be carried out”²⁶, and that the assignment of “legal representation for Mr. Al-Senussi will be completed in the very near future”²⁷, in order to conclude that the lack of legal representation “did not present any insuperable difficulty to the progress of the proceedings or the fairness of the overall process.”²⁸

15. The Chamber’s error in relying on Libya’s mere assertions is highlighted by the fact that Libya’s promise of the appointment of counsel in “the very near future” was made in September 2013. It has now been nearly four months since Libya gave these assurances and Mr. Al-Senussi still has no lawyer. Even before September, Libya had sought to assure the Chamber that the appointment of a lawyer was imminent. The Pre-Trial Chamber erroneously still found that there was “no reason to put into question the information provided by Libya”²⁹ despite that the record in this case discloses that Libya has on so many occasions failed to meet its undertakings, failed to comply with the orders of the ICC, broken its promises and changed its position.³⁰

Libyan Code of Criminal Procedure “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.”

²³ Libya Response of 26 November 2013, paras. 15-20.

²⁴ Rome Statute, Article 55.

²⁵ Victims’ Observations, para. 13.

²⁶ Decision on the admissibility of the case against Abdullah Al-Senussi, ICC-01/11-01/11-466-Red, 11 October 2013, para. 232.

²⁷ 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, 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”).

²⁸ Libya Response of 26 November 2013, para. 46.

²⁹ Admissibility Decision of 11 October 2013, para. 308.

³⁰ Decision on the ‘Urgent Application on behalf of Abdullah Al-Senussi for Pre-Trial Chamber to order the Libyan Authorities to comply with their obligations and the orders of the ICC’, ICC-01/11-01/11-269, 6 February 2013, para. 40 and p. 15; Second report of the Registry on the visit of the defence team to Libya, ICC-01/11-01/11-328, 3 May 2013, para. 3; Notification by Libyan Government supplemental to its consolidated

The Appeals Chamber has indeed held that a State must provide the Court “with evidence of a sufficient degree of specificity and probative value” and that it is “not sufficient merely” to make assertions.³¹

16. The Victims also submit that the Pre-Trial Chamber failed to take into consideration the “very important limitation” that Mr. Al-Senussi has had no communication at all with his ICC Defence Counsel. The Defence agrees that the Chamber “erred in disregarding the significance and relevance of said submissions in the context of admissibility proceedings, and particularly, when assessing the willingness of a State under article 17(2)(c) of the Rome Statute.”³²

17. The Victims rightly argue that the violations of Mr. Al-Senussi’s right to consult with his ICC Defence Counsel “relate to article 17(2)(c) of the Rome Statute and the conditions under which the suspect is brought to trial.”³³ Libya is incorrect to contend that due process violations do not show that Libya is unwilling to try Mr. Al-Senussi.³⁴ As the Victims submit, Rule 51 (as well as the language of Article 17 itself) “mandates the Chamber ...to consider the international standards applicable to article 17(2)”³⁵, which demonstrates the shortcomings of Libya’s claim that even if Mr. Al-Senussi’s rights are being violated, this is not relevant to the admissibility determination.

reply to the responses of the Prosecution, OPCD, and OPCV to its further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi, ICC-01/11-01/11-306, 28 March 2013, para. 4; 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; Report of the Registry on the execution of requests pending before the Libyan authorities with three confidential annexes, Confidential and ex parte Annex 2, ICC-01/11-01/11-444-Conf-Exp-Anx2, paras. 2-5; Sixth Report of the Registry on the visit of the defence team to Libya, ICC-01/11-01/11-467-Conf, 14 October 2013, para. 4-6; 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. 22; 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, paras. 11-13; Defence Application on behalf of Mr. Abdullah Al-Senussi to refer Libya to the Security Council with Confidential *Ex Parte* (Chamber only) Annex 1, ICC-01/11-01/11-399, 9 August 2013, paras. 12-18. See also, Decision on the request for suspensive effect and related issues, ICC-01/11-01/11-387, 18 July 2013, para. 27, in which Libya was ordered to surrender Mr. Gaddafi to the ICC during the appeal, but with which Libya has failed to comply.

³¹ 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.

³² Victims’ Observations, para. 14.

³³ Victims’ Observations, para. 14.

³⁴ Libya Response of 26 November 2013, paras 74-83.

³⁵ Victims’ Observations, para. 10.

18. As the Defence has stressed, Mr. Al-Senussi is being held in virtual incommunicado detention. Not only have his ICC lawyers been prevented from contacting him; his family members have repeatedly been denied visits to him. They have reported that even a very elderly relative was recently turned away from Al-Habda prison. When reports circulated a few days ago on 9 January 2014 that Mr. Al-Senussi had died in detention,³⁶ it was impossible for his family members to verify the accuracy of these reports without having had access to him for many months and with no prospect of being able to contact him, even by phone. Mr. Al-Senussi's ICC lawyers were in the same position. No reasonable Chamber could find that these circumstances were consistent with an intent to bring Mr. Al-Senussi to justice or that they demonstrated that Libya is able to carry out the proceedings.

19. Libya's attempt for the first time to seek to rely on Article 304 of the Libyan Code of Criminal Procedure – that any violations of due process guarantees are not determinative of its intent to bring the accused to justice because any evidence gathered as a result of these violations can be excluded at a later stage of the proceedings – should be firmly rejected.³⁷ Libya is asking the Court to turn a blind eye to the egregious violations of Mr. Al-Senussi's rights on the promise that Libya will not take advantage of these violations in the future proceedings in which Mr. Al-Senussi will face the death penalty. The provisions of Article 17(2) explicitly require the Court to consider whether the proceedings *were* or *are being* conducted independently and impartially and in manner inconsistent with bringing the person to justice. As the Victims point out, the Chamber's assessment must be based on the concrete circumstances as they pertain at the time of the admissibility proceedings. The ICC's case law adopts the same position³⁸, including in the Pre-Trial Chamber's Decision in the present case³⁹. The Chamber's determination under Article 17 cannot properly be based on what may or may not occur and be corrected in the national proceedings in the future, especially when the Appeals Chamber will be unable to determine after the conclusion of the appeal whether Libya's claims have materialised or not.

³⁶ <http://inagist.com/all/421070258167111680/>.

³⁷ Libyas Response of 26 November 2013, para. 55.

³⁸ *Prosecutor v. Katanga*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, 25 September 2009, paras. 56, 80; *Prosecutor v. Ruto, et al.*, 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-01/09-01/11-101, 30 May 2011.

³⁹ Admissibility Decision of 11 October 2013, para. 307.

Reversal of the burden of proof

20. The Victims' Observations support the Defence's submission that Pre-Trial Chamber erred in reversing the burden of proof in the admissibility proceedings by finding "that Libya had no duty to disproof [sic] or even clarify uncertainties regarding the circumstances of Mr. Al-Senussi detention and trial."⁴⁰ As the Victims rightly highlight, "[i]t was obvious that the Defence would not be able to substantiate these allegations in the absence of any direct contact with the defendant and without having the opportunity to assess the situation on the ground ... [and] it was entirely unreasonable for the Chamber to expect and require the Defence to provide specific and conclusive evidence regarding Libya's willingness to genuinely prosecute the person concerned"⁴¹ ... when the State itself prevents contacts with the defendant."⁴²

21. This position is correct as a matter of international law, as argued by the Defence in its appeal. The UN Human Rights Council's Working Group on Arbitrary Detention in the case concerning Mr. Gaddafi's detention in Libya relied on the jurisprudence of the International Court of Justice (ICJ) finding that: "where it is alleged that a person has not been afforded, by a public authority, certain procedural guarantees to which he was entitled, the burden to prove the negative fact asserted by the applicant is on the public authority, because the latter is 'generally able to demonstrate that it has followed the appropriate procedures and applied the guarantees required by law ... by producing documentary evidence of the actions that were carried out.'"⁴³ In addition, the UN Human Rights Committee has held that "the burden of proof cannot rest on the author of the communication alone [i.e. the individual complainant], especially considering that the author and the State party do not always have equal access to the evidence and frequently the State party alone has the relevant information."⁴⁴

22. For all of these reasons Libya's blanket assertion that "parties wishing to raise issues relevant to the Admissibility Challenge bore an evidential burden to raise sufficiently

⁴⁰ Victims' Observation, para. 17.

⁴¹ Victims' Observations, para. 18.

⁴² Victims' Observations, para. 18.

⁴³ UNHRC Working Group on Arbitrary Detention opinion, para. 27 citing *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, International Court of Justice, Judgment, 30 November 2010, para. 55.

⁴⁴ UNHRC Working Group on Arbitrary Detention opinion, para. 28 citing *Butovenko v. Ukraine*, HRC, no. 1412/2005, para. 7.3; *Medjnoune v. Algeria*, no. 1297/2004, para. 8.3; *Conteris v. Uruguay*, no. 139/1983, para. 7.2; *Bleier v. Uruguay*, no. 30/1978, para. 13.3.

relevant and probative allegations before Libya had an obligation to disprove them”⁴⁵ should be rejected as an incorrect statement of the legal position. The Pre-Trial Chamber’s mis-application of this principle led to a material error in its reasoning which formed the basis of its central findings.

Denial of legal visit and effective participation in admissibility proceedings

23. The Defence concurs with the Victims’ Observations that the “Chamber committed an error by failing to take into account the lack of contact between Counsel and Mr Al-Senussi”, and that the Chamber’s findings “not only violate the suspect’s right to counsel as enshrined in articles 55(2) and 67(1)(b) and (d) of the Rome Statute, but also had a wider impact on the manner in which the representation of Mr Al-Senussi had been carried out.”⁴⁶

24. The Defence re-iterates its position that “it was wrong for the Chamber to rely on the fact that the Defence had not asserted that a legal visit was a necessary pre-condition for the Defence to make its submissions, and that the determination of the admissibility challenge should be suspended until such a visit has taken place”.⁴⁷ It was of course absolutely essential for the Defence to obtain Mr. Al-Senussi’s instructions, as the Defence had stressed throughout the proceedings and in all of its efforts that sought to get Libya to comply with the Chamber’s orders to organise a legal visit⁴⁸, or alternatively that the ICC should order Mr. Al-Senussi’s transfer to the ICC so that instructions could be taken in The Hague in a secure and privileged environment. As the Victims point out, the Defence was entitled to assume that the Chamber would ensure that its own orders for a visit would be complied with before it issued any ruling on Libya’s admissibility challenge that was prejudicial to the Defence. The Defence therefore supports the Victims’ submission that “[n]o reasonable Chamber could ever have found that direct instructions or statements from the defendant were unnecessary, especially when considering the State’s intent ‘to bring the person concerned to justice.’”⁴⁹

⁴⁵ Libya Response of 26 November 2013, para. 41.

⁴⁶ Victims’ Observations, para. 22.

⁴⁷ Document in Support of Appeal, para. 34.

⁴⁸ Document in Support of Appeal, para. 34.

⁴⁹ Victims’ Observations, para. 34.

25. Libya is patently incorrect to assert in its Response 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”⁵⁰, and that the Defence arguments on the right to Counsel are limited to representation before the ICC. They clearly relate both to representation before the ICC and in the ongoing national proceedings. In relation to Mr. Al-Senussi’s right to counsel before the ICC, Libya has again changed its position in its submissions on appeal. Libya has consistently maintained before the Pre-Trial Chamber that it is “actively engaged” in trying to ensure a visit by Counsel to Mr. Al-Senussi⁵¹. On the basis of the fact that “Libya has not at any time opposed such a visit by the Defence”, the Pre-Trial Chamber has held that Libya could not be found to be in non-compliance with its orders.⁵²

26. However, since the matter has come before the Appeals Chamber, Libya has changed its position now to assert that there is no right to counsel during the admissibility proceedings. Libya has gone as far as contending that Mr. Al-Senussi’s ICC Defence Counsel can no longer represent him following the Admissibility Decision.⁵³ The Defence submits that Libya’s prolonged denial of access to Mr. Al-Senussi in any form is clear evidence that the Pre-Trial Chamber should have taken into account in assessing whether Libya is bringing Mr. Al-Senussi to justice and is able to try him in Libya.

27. The Victims correctly point out that the “Chamber was under an obligation to ensure that a legal visit would take place”⁵⁴. The Chamber’s error was both one of law and procedure. As the Victims submit, the Chamber committed a procedural error given that it had ordered the visit to take place precisely so that Mr. Al-Senussi could participate in the admissibility proceedings through his appointed counsel, but then proceeded to render its Admissibility Decision before the orders that it had made had been implemented.⁵⁵

⁵⁰ Libya Response of 26 November 2013, para. 19. See paras. 13-20.

⁵¹ 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.

⁵² Decision concerning a privileged visit to Abdullah Al-Senussi by his Defence, ICC-01/11-01/11-456, 26 September 2013, para. 12.

⁵³ Sixth Report of the Registry on the visit of the defence team to Libya, ICC-01/11-01/11-467-Conf, 14 October 2013, para. 6.

⁵⁴ Victims’ Observations, para. 34.

⁵⁵ Victims’ Observations, paras. 36, 37.

28. This state of affairs “directly contributed to hindering the Defence[‘s] ability to substantiate its claim.”⁵⁶ The Prosecution took no account of Libya’s failure to allow the Defence to have contact with their client, and simply asserted that “the Appellant had not successfully rebutted Libya’s submissions as to Al-Senussi’s conditions of detention”.⁵⁷ The Prosecution has indeed been consistently silent on the effect and consequences of denying Mr. Al-Senussi any contact with his lawyers.

29. The Defence agrees with the Victims’ Observations that “it was entirely unreasonable for the Chamber to conclude that, despite the lack of contact between Mr Al-Senussi and the Defence, the violations alleged were ‘generic’ and ‘without any tangible proof.’”⁵⁸ The Chamber instead “relied on a report from Human Rights Watch about its single visit to Mr. Al-Senussi, and failed to give any weight, when assessing the probative value of this evidence, to the fact that Mr. Al-Senussi had not been able to speak to his own Defence Counsel about his treatment.”⁵⁹ Libya argued that the Human Rights Watch (HRW) report could be relied upon, and there was no reason to imply that Mr. Al-Senussi was being mistreated or did not tell the truth about his condition because the interview was permitted “with no prison staff or other officials in the room.”⁶⁰ However, HRW have since written to the parties, noting that their report was relied on in the Admissibility Decision, to make the following points clear:

- The HRW press report was based on a 35 minute interview with Mr. Al-Senussi;
- Even though HRW quoted Mr. Al-Senussi’s words that he had no complaints about his treatment and conditions, HRW “*were in no position to assess his treatment*”.
- HRW “were not able to assess if he felt able on that occasion to speak candidly” to HRW and thus HRW “can not represent whether or not his conditions of detention were in accord with the requirements of international law”. HRW explain that “Mr. Al-Senussi was aware that we would make public information he provided to us, and that the Libyan

⁵⁶ Victims’ Observations, para. 35.

⁵⁷ Prosecution Response of 26 November 2013, para. 47.

⁵⁸ Victims’ Observations, para. 35.

⁵⁹ Document in Support of Appeal, para. 36.

⁶⁰ Libya Response of 26 November 2013, para. 91.

authorities would thus know that he had provided us that information. As a result, as with any detainee who speaks to Human Rights Watch, he may have chosen to limit the information he provided to us about his conditions in detention.”⁶¹

- HRW re-iterate that Mr. Al-Senussi complained about the lack of access to a lawyer, and that despite HRW’s calls to the Libyan Government to ensure that he had immediate access to a lawyer, Mr. Al-Senussi still does not have access to a lawyer.
- HRW has made repeated requests to the Libyan Prosecutor-General since this visit to visit Mr. Al-Senussi, to which HRW has received no reply.

The Defence has attached HRW’s letter to this Response as Annex 3. The Defence has pointed out in its Grounds of Appeal that the Pre-Trial Chamber erred in relying on the HRW report precisely because it was a very short, single visit in which HRW were not in a position to assess his treatment and in which Mr. Al-Senussi was unable to speak freely and openly.⁶²

30. The Defence has made it clear in the appellate proceedings that it is essential that it is able to have privileged and confidential access to Mr. Al-Senussi.⁶³ No final determination that is adverse to the interests of the Appellant can be made by the Appeals Chamber without such contact, and should it continue to be denied by Libya, the Appeals Chamber would have clear grounds to grant the Appellant’s appeal. Since the Pre-Trial Chamber’s Decision, the Registry has continued to seek to get Libya to arrange a legal visit. Despite further recent efforts by the Registry to request Libya to sign a Memorandum of Understanding to facilitate such a visit, Libya has not agreed to do so. It is plainly essential that the Defence has contact without delay with Mr. Al-Senussi in the present proceedings especially given the evidence of his physical and mental abuse in detention.

⁶¹ Annex 3. Human Rights Watch, letter dated 10 January 2013.

⁶² Document in Support of Appeal, paras. 36, 96, 109, 110, 125.

⁶³ 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; Document in Support of Appeal, paras. 35, 48.

Ground Two: There is compelling new evidence that was not previously available which demonstrates that Libya is unwilling and unable genuinely to carry out the proceedings against Mr. Al-Senussi, within the meaning of Article 17(1)(a), (2) and (3)

31. The Defence submit that the Victims' arguments opposing the admission of new evidence before the Appeals Chamber are unconvincing and should not be adopted. The Victims submit that "[i]ntroducing and litigating new factual allegations on appeal must only be allowed in very exceptional circumstances"⁶⁴ due to the corrective nature of the appellate proceedings. The Prosecution has also submitted that a request to admit new evidence "contravenes the corrective nature of the appellate process",⁶⁵ but concedes that new evidence concerning matters that occurred *before* the date of the Admissibility Decision can be admitted if "(a) it was not available at trial to duly diligent counsel; (b) it is relevant and credible; and (c) it could have been a decisive factor in the decision."⁶⁶

Prosecution test is satisfied

32. The Defence submits that the new evidence of the physical mistreatment and mental abuse of Mr. Al-Senussi in detention which the Defence has submitted, clearly qualifies to be admitted under the test relied on by the Prosecution. All of the new evidence (including the new evidence submitted with this Response – see below) concerns incidents of ill-treatment of Mr. Al-Senussi which occurred in custody in Libya before the Admissibility Decision was rendered. This was clear from the Defence's public submissions on the nature and scope of the new evidence in its Document in Support of Appeal.⁶⁷ It is also evident from the public, de-redacted summary of the new evidence that is submitted with this Response at Public Annex 1 (see below). Given the public nature of this evidence, as submitted below, there is no proper basis to refuse to admit the new evidence.

33. The other conditions set out by the Prosecution are all satisfied:

- a. The evidence of the beatings and mental abuse of Mr. Al-Senussi in custody in order to obtain a confession, which are plainly cruel and unlawful acts, would

⁶⁴ Victims' Observations, para. 40.

⁶⁵ Prosecution Response of 26 November 2013, para. 115.

⁶⁶ Prosecution Response of 26 November 2013, para. 121.

⁶⁷ Document in Support of Appeal, paras. 152-160.

undoubtedly have had a decisive impact on the Pre-Trial Chamber's Decision. In light of this evidence, no reasonable Chamber could find that Libya was capable and willing, taking into account Libyan Law and international standards, to bring Mr. Al-Senussi to justice and to carry out genuine judicial proceedings in Libya.

- b. As explained in the new evidence itself, this evidence only came to light after the Admissibility Decision – although it relates to events that occurred before the Decision – and it was not available to duly diligent counsel. Given the source of the evidence and the circumstances in which it arose, there was simply no way that Defence Counsel could have obtained this evidence at any earlier stage, and it must be taken into account that Defence Counsel had no access at all to Mr. Al-Senussi. The Defence submits that it would result in a miscarriage of justice for this evidence of ill-treatment to be excluded⁶⁸, and thus even if it could have been submitted at an earlier stage, it should be admitted and taken into account in the present proceedings.
- c. The evidence is directly relevant to the ability and willingness of Libya to try Mr. Al-Senussi, and is *prima facie* credible. There is no basis to exclude the evidence on credibility grounds. All of the witnesses are prepared to come before the Appeals Chamber to testify about the incidents. Given the very serious allegations of mistreatment, it would be grossly unfair for their evidence to be dismissed without giving them an opportunity to be heard and questioned by the Court. To the extent that the Prosecution objects to the admission of the photograph of Mr. Al-Senussi⁶⁹, the Defence submits that it is authenticated from the new evidence submitted with the photograph. Although this evidence is filed *ex parte* for security reasons, the public de-redacted summary at Annex 1 explains in sufficient detail the circumstances in which the photograph was obtained for the parties to respond and for the Appeals Chamber to admit it.

⁶⁸ *Prosecutor v Barayagwiza*, "Decision on Prosecutor's Request for Review or Reconsideration", ICTR-97-19-AR 72, 31 March 2000, para. 65, *Prosecutor v. Tadić*, Decision on Motion for Review, IT-94-1-R, 30 July 2002, para. 26.

⁶⁹ Prosecution Response of 26 November 2013, paras. 127, 128.

34. For all of these reasons the new evidence should be admitted with Libya and the parties being granted an opportunity to respond. The new evidence should in any event be admitted for the additional reasons set out below.

Exceptional circumstances

35. It cannot be overlooked that the new evidence concerns multiple incidents of violent beatings and mental ill-treatment of Mr. Al-Senussi, in order to extract a confession from him. Such evidence must qualify as evidence to be admitted in “exceptional circumstances”, as highlighted by the Victims.

36. These circumstances must be regarded as exceptional when Mr. Al-Senussi has been denied any due process guarantees in custody, has no legal representation at all, and has been prevented from having any contact with his ICC Defence Counsel. It is hard to imagine a graver situation, and it is plainly one which should be regarded as sufficiently exceptional for the Appeals Chamber to permit the admission of relevant evidence to take into account when making its final determination over the admissibility of Mr. Al-Senussi’s case. The Court is urged to draw on the Victims’ argument regarding the legal visit which is equally applicable to the allegations of mistreatment - the Defence should not be penalised because it was not able to provide evidence about the treatment of the accused when the Defence was prevented from having any access to the accused or the situation on the ground.⁷⁰

Further evidence of beatings and mistreatment

37. Since filing its Document in Support of Appeal, as forecast, the Defence has obtained further evidence of serious ill-treatment of Mr. Al-Senussi at the hands of his captors while in detention. This new evidence is attached to this Response as confidential and *ex parte* Annex 2. The nature and scope of this evidence is set out in the public Annex 1. It consists of evidence from an individual who testifies that Mr. Al-Senussi has been beaten to the point of unconsciousness while in detention, and that he has been intimidated and mentally abused during the course of his detention. The evidence further shows that Libyan officials have attempted to cover up any trace of Mr. Al-Senussi’s ill-treatment. This evidence has been extremely difficult to collect

⁷⁰ Victims’ Observations, para. 18.

considering the very real fear of witnesses for their lives and those of their families. The Defence has needed to take extraordinary steps in order to obtain this information in a manner that can ensure the safety of the individuals and their families.

38. The Defence requests the Appeals Chamber to admit this evidence with the new evidence filed with the Document in Support of Appeal. It corroborates the evidence already filed and together with this evidence clearly establishes that Mr. Al-Senussi cannot be brought to justice in Libya and that Libya is incapable of trying him. The Appeals Chamber has not ruled on the application to admit the new evidence. The new evidence in Annex 2 can thus be considered with the new evidence already before the Appeals Chamber, and Libya and the parties can be given an opportunity to respond to all of the new evidence.

De-redacted public status of the new evidence

39. To the extent that the Libya and the parties complain that they are not in a position to respond due to the *ex parte* status of the evidence, the Defence submits that this argument is misplaced and provides no justification for refusing to admit the new evidence. Libya has submitted that the *ex parte* status of the new evidence “prevent[s] the Libyan Government from making any submissions on its substance, it also – of course – precludes any chance of addressing the issue of whether the material should be admitted before the Appeals Chamber in the first place.”⁷¹ The Defence has provided the parties with sufficient details in the Document in Support of Appeal about the contents of the evidence for the parties to be able to respond and submit their own evidence in rebuttal.⁷² The Defence has set out the issues that the evidence addresses and the essential details of the evidence.⁷³

40. The Defence has also submitted with this Response at Annex 1 a de-redacted public summary of all of the *ex parte* evidence in which the Defence has set out the contents of the evidence in as much detail as possible without jeopardising the safety and security of the witnesses. Summaries of witness statements are often provided and regarded as adequate disclosure in particular circumstances in which witness

⁷¹ Libya Response of 26 November 2013, para. 112.

⁷² Document in Support of Appeal, para. 152-159.

⁷³ Document in Support of Appeal, para. 153.

protection is paramount.⁷⁴ This evidence would simply not be available to the Appeals Chamber in the absence of these protective measures. It should also be taken into account that the witnesses are prepared to travel to The Hague to testify before the Judges of the Appeals Chamber.

41. The Defence submits that Libya and the parties are thus in a position to be able to respond to the new evidence. Libya bears the onus of establishing that it is able and willing to try Mr. Al-Senussi and bring him to justice. The Defence has clearly raised a sufficient evidentiary showing of mistreatment and abuse which Libya has the ability to seek to rebut. As noted above, it has been confirmed that as a matter of international law “where it is alleged that a person has not been afforded, by a public authority, certain procedural guarantees to which he was entitled, the burden to prove the negative fact asserted by the applicant is on the public authority, because the latter is ‘generally able to demonstrate that it has followed the appropriate procedures and applied the guarantees required by law ... by producing documentary evidence of the actions that were carried out.’”⁷⁵

42. The Victims and the parties did not address at all the alternative argument of the Defence. Even if the Appeals Chamber refuses to admit the new evidence, the Defence submits that the Appeals Chamber can suspend the appeal proceedings and direct the Pre-Trial Chamber to consider the new evidence and review its Decision in light of this evidence. As the Defence has submitted,⁷⁶ the ICC’s jurisprudence permits the reconsideration of a prior decision when it is rendered without having all relevant information available to the Chamber.⁷⁷

⁷⁴ For example see, *Prosecutor v. Lubanga*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’, ICC-01/04-01/06-773, 14 December 2006, para. 40; *Prosecutor v. Gbagbo*, Decision on the ‘Prosecution’s Request for redactions pursuant to Rule 81(2) and for disclosure of an anonymous witness summary pursuant to Articles 68(1) and 61(5)’, ICC-02/11-01/11-349-Red, 10 January 2013, paras. 6, 7, 19.

⁷⁵ UNHRC Working Group on Arbitrary Detention opinion, para. 27 citing *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, International Court of Justice, Judgment, 30 November 2010, para. 55.

⁷⁶ Document in Support of Appeal, paras. 147-151.

⁷⁷ On 26 November 2013, Trial Chamber V(B) found that though the Statute does not provide guidance on reconsideration, “the powers of a chamber allow it to reconsider its own decisions, prompted by (one of) the parties or proprio motu.” The Chamber found that a decision can be reconsidered in exceptional circumstances where the decision is “manifestly unsound and [its] consequences are manifestly unsatisfactory” or in circumstances where there are “new facts or new arguments.” See, *Prosecutor v. Kenyatta*, Decision on the Prosecution’s motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial, ICC-01/09-02/11-863, 26 November 2013, para. 11.

Ground Three: The Pre-Trial Chamber erred in law and fact in concluding that Libya was investigating and prosecuting the same case as before the ICC

43. The Defence supports the Victims’ argument that the approach taken by the Pre-Trial Chamber for the purpose of defining the words ‘conduct’ and ‘case’ is “wrong in relation to both cases”⁷⁸ and agrees with the Victims’ submissions that “in the present proceedings, the finding impacted on how the Chamber assessed the evidence submitted by Libya.”⁷⁹ In addition, the Defence endorses the Victims’ additional arguments submitted in respect of Ground 3 of the Defence’s Appeal.⁸⁰
44. The Victims rightly support “the Prosecution’s argument that the conduct must always be understood as ‘incident-specific’ and be limited to the facts that are expressly mentioned in the request for arrest warrant or in the Article 58 Decision.”⁸¹ The Prosecution’s Response of 26 November 2013 acknowledges that the Chamber “departed from prior and consistent jurisprudence of other Pre-Trial Chambers which have defined a case as being incident-specific.”⁸²
45. The Victims’ have correctly submitted that by “holding that a conduct before the ICC may include other unspecified acts, some of which may not be even known to the Prosecution, the Chamber unduly expanded the scope of the case that was initially defined by the Prosecution without specifying its precise contours”⁸³ and “led the Chamber to take into account materials which are clearly unrelated and irrelevant to the allegations brought by the Prosecutor before the Court.”⁸⁴
46. In accordance with both the Prosecution’s and the Victims’ submissions, the Defence submits that when assessing whether Libya’s domestic proceeding cover the same ‘case’ and ‘conduct’ as the ICC case against Mr. Al-Senussi, the Chamber must assess whether Libya has provided evidence that it is investigating the same specific incidents as enumerated in the ICC’s warrant of arrest and the Article 58 decision. The Defence reiterates its position that the Pre-Trial Chamber erred by taking in account “specific incidents which occurred in Benghazi and elsewhere in February 2011” but overlooking the fact that “several incidents, both in Benghazi and in other

⁷⁸ Victims’ Observations, para. 42.

⁷⁹ Victims’ Observations, para. 42.

⁸⁰ Victims’ Observations, para. 41.

⁸¹ Victims’ Observations, para. 41.

⁸² Prosecution Response of 26 November 2013, para. 144.

⁸³ Victims’ Observations, para. 41.

⁸⁴ Victims’ Observations, para. 42.

locations in Libya, which are identified and relied on in the Article 58 decision are not covered in the evidence collected by Libya.”⁸⁵

47. The Defence has submitted that “[t]he case before the ICC clearly involves conduct and incidents that are spread across the whole country, and thus the Libyan domestic proceedings cannot be said to cover the ‘same case’ if Libya’s evidence is limited to certain locations, mainly in Benghazi.”⁸⁶ It cannot be correct that Libya can be considered to be investigating and prosecuting the ‘same case’ when it has only provided the Court with a very generalised and vague pattern of conduct that it claims overlaps with the ICC case. In particular, the Chamber’s finding is unsustainable in light of the fact that the conduct underlying the crime of persecution could not form the basis of any charges against Mr. Al- Senussi under national law⁸⁷, and for this reason it must be overturned.

Conclusion

48. For all of the reasons above, the Defence respectfully requests the Appeals Chamber (i) to adopt the arguments and reasoning set out in the Victims’ Observation in respect of Grounds 1 and 3 of the Defence’s Appeal and to grant the Defence’s Appeal on these grounds; and, (ii) for Ground 2, to admit all of the new evidence in the Appeal, while providing Libya and the parties with an opportunity to respond, alternatively, to direct the Pre-Trial Chamber to reconsider its Decision in light of the new evidence.

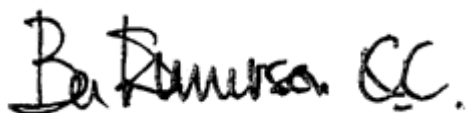
49. For all of the reasons set out in its Grounds of Appeal, Document in Support of Appeal, Application to file further submissions and these submissions if granted permission, and this Response, the Defence for Mr. Al-Senussi requests the Appeals Chamber to reverse the finding of the Pre-Trial Chamber that Mr. Al-Senussi’s case is inadmissible before the ICC, to declare his case admissible at the ICC, and to order his immediate surrender into the custody of the ICC.

⁸⁵ Document in Support of Appeal, para. 176.

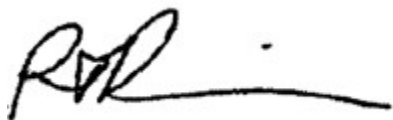
⁸⁶ Document in Support of Appeal, para. 176.

⁸⁷ Document in Support of Appeal, paras. 162, 170, 177-185.

Counsel on behalf of Mr. Abdullah Al-Senussi,



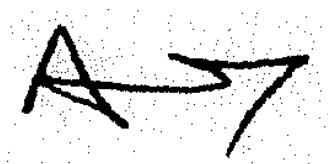
Ben Emmerson QC



Rodney Dixon



Amal Alamuddin



Anthony Kelly

Dated 13th January 2014
London, United Kingdom