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

Date: **20 January 2014**

THE APPEALS CHAMBER

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

**SITUATION IN LIBYA
IN THE CASE OF**

***THE PROSECUTOR v.
SAIF AL-ISLAM GADDAFI and ABDULLAH AL-SENUSSI***

Public

Libyan Government's Request for the Appeals Chamber to dismiss *in limine* the new evidence submitted as part of the Al-Senussi Defence Response to the OPCV's Observations on its Document in support of its Appeal

Source: The Government of Libya, represented by:
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Professor James Crawford SC
Mr. Wayne Jordash
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Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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REGISTRY

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I. INTRODUCTION

1. The Libyan Government hereby requests the Appeals Chamber to disregard the new evidence submitted as part of the Al-Senussi Defence Response to the Observations of the OPCV on its Document in support of its appeal ("Defence Response to the OPCV").¹ This new evidence was included in the Defence Response without the permission of the Appeals Chamber and appears to have been adduced in this filing with the intention of rendering otiose an anticipated ruling by the Appeals Chamber on this very issue. To the extent that the Defence Response to the OPCV makes submissions based on such new evidence it should be rejected *in limine*.

II. SUBMISSIONS

2. It will be recalled that the Defence sought permission to adduce new evidence pertaining to "the most up to date position concerning the visit of the Defence to Mr. Al-Senussi in Tripoli" as well as "informing the Appeals Chamber of recent developments in relation to further evidence concerning the mistreatment of Mr. Al-Senussi in detention in Al-Hadba prison" in its "Defence Request to file further submissions" filed on 19 December 2013.² In separate Responses filed on 9 and 10 January 2014, this request was objected to by both the Libyan Government³ and the Office of the Prosecutor.⁴
3. Rather than awaiting a Decision by the Appeals Chamber on this issue, the Defence simply included, without authorisation, updated materials relating to the legal visit and documentation purporting to relate to Mr Al-Senussi's treatment while in Al-Hadba prison in its Defence Response to the OPCV. Much of that evidence is filed on a Confidential *Ex Parte* basis and is accordingly not available to the Libyan Government at all. In respect of the materials as to Mr Al-Senussi's treatment, the

¹ ICC-01/11-01/11-500.

² ICC-01/11-01/11-493.

³ ICC-01/11-01/11-497.

⁴ ICC-01/11-01/11-498.

Defence has include a very short public Annex purporting to summarise the main allegations contained in the secret new materials. This summary relates principally to events prior to the Libyan Government's filing of its Admissibility Challenge. To the extent that it deals with subsequent events, the alleged perpetrators are not identified and the "mistreatment" is not particularised at all. By adducing the evidence in this manner, the Defence has improperly circumvented the Court's procedures. It has placed, without authorisation, documents before the Appeals Chamber the contents of which are unknown to the Libyan Government and the summary purporting to relate thereto does not give sufficient particulars to enable the Libyan Government to refute in any meaningful way. The Defence's reliance on these documentary materials together with its irresponsible and entirely unsubstantiated allegations as to the rumoured death of Mr Al-Senussi⁵ appear to be designed to be purely prejudicial to a fair adjudication on the merits of the appeal.

4. As outlined in Libya's objection to the new evidence, consideration of this new *ex parte* material would be both unfair and improper as it would deny the Libyan Government due process and undermine equality of arms between the parties to the Appeal. If new evidence in appellate proceedings is to be accorded any consideration at all, the only way in which this could properly be done would be for that evidence to be provided in full form to the Libyan Government (albeit with identifying details of the witnesses redacted) and for the Government to then be accorded a proper period of time in which to make inquiries and to file submissions responding to that evidence. At that stage, it may even be appropriate to hold an oral hearing in order to allow the Government to cross-examine these witnesses in order for the Appeals Chamber to be able to make a proper assessment of their credibility. Seeking to rely upon new and secret evidence at the eleventh hour of these appellate proceedings, in a manner where the Government is not provided with the necessary details of the allegations or the opportunity to file submissions

⁵ See for example, para 18 of the Defence Response to the OPCV.

and additional evidence refuting those allegations is highly improper and ought not to be countenanced by the Appeals Chamber.

5. Moreover, even if the evidence had been provided in full to the Government, it plainly falls outside the scope of the appellate proceedings in any event as it concerns facts that postdate the Decision. The Defence will no doubt be well aware that the Appeals Chamber's review of interlocutory decisions is "corrective in nature and not de novo".⁶ Indeed, the Appeals Chamber has specifically ruled in the Kenya admissibility proceedings that "facts which postdate the Impugned [Admissibility] Decision fall beyond the possible scope of the proceedings before the Pre-trial Chamber and therefore beyond the scope of the proceedings on appeal" and "should be rejected *in limine*".⁷

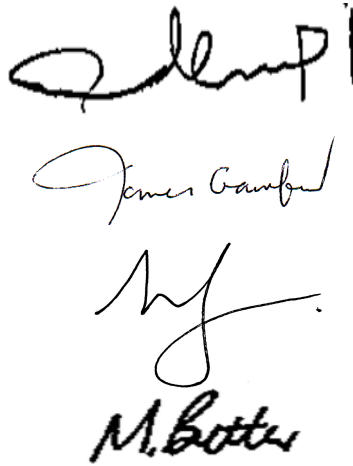
III. RELIEF REQUESTED

6. For the reasons set out above, the Libyan Government respectfully submits that the Appeals Chamber should reject *in limine* the legal submissions based on new evidence which are contained in the Defence Response to the OPCV.

⁶ ICC-02/05-03/09-295OA2, para 20; ICC-01/04-01/10-283OA, para 15, ICC-01/05-01/08-631-RedOA2, para 62.

⁷ ICC-01/09-02/11-202OA, paras 9, 12; ICC-01/09-01/11-234OA, paras. 10, 13.

Respectfully submitted:



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Counsel on behalf of the Government of Libya
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Dated this 20th day of January 2014

At London, United Kingdom