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

Date: 12 February 2014

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

Response on behalf of Abdullah Al-Senussi to the “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” filed on 20 January 2014 and the “Addendum to Libyan Government’s Request for the Appeals Chamber to disregard 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” filed on 27 January 2014

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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Detention Section

Victims Participation and Reparations Section

Other

Introduction

1. The Defence for Mr. Abdullah Al-Senussi hereby files its Response to the “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” filed on 20 January 2014¹ and the “Addendum to Libyan Government’s Request for the Appeals Chamber to disregard 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” filed on 27 January 2014.²
2. Given that Libya has filed this specific Application to dismiss the new evidence with an Addendum, the Defence is entitled to file the present response pursuant to Regulation 24(1) and Regulation 34(b) of the Regulations of the Court.
3. The Defence opposes Libya’s Request and submits that it should be denied by the Appeals Chamber. Libya overlooks the applicable law on the admission of new evidence in appeals, relies on wholly inaccurate assertions about the nature and scope of the Defence’s new evidence and wrongly claims that the summary of the new evidence, as provided by the Defence, is inadequate for it to file any response to the new evidence. The fact that Libya has filed an Addendum with evidence in response to the Defence’s new evidence plainly shows that Libya is capable of responding to the new evidence. This is new evidence that must be assessed in light of all of the new evidence submitted before the Appeals Chamber, taking into account the submissions of the parties. For this reason, the Defence has set out in this Response its submissions in response to the evidence filed in Libya’s Addendum. The Defence submits that Libya’s objections to the consideration of all of the new evidence by the Appeals Chamber completely ignores the obvious relevance and importance of this evidence to the admissibility proceedings in highlighting the gross violations of Mr. Al-Senussi’s well-being, physical integrity, health, and due process and fair trial rights.

¹ 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, ICC-01/11-01/11-502, 20 January 2014 (hereinafter “Libya’s Request of 20 January 2014”).

² Addendum to Libyan Government’s Request for the Appeals Chamber to disregard 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, ICC-01/11-01/11-503, 27 January 2014 (hereinafter “Libya’s Addendum to Request”).

4. The Defence notes that the Appeals Chamber has indicated that it will consider all of these issues and all of the new evidence filed by the parties in its deliberations in respect of Ground 2 of the Appeal.³ As the Defence has indicated, Libya can file evidence in response to the Defence's new evidence before any determination by the Appeals Chamber (as is envisaged in the law and jurisprudence on the admission of new evidence on appeal⁴, and as Libya has already done in its Addendum).

Libya's Request of 20 January 2014

5. For all of the reasons set out below, the Defence for Mr. Al-Senussi opposes Libya's Request and submits that it should be rejected by the Appeals Chamber.
6. Libya asserts without justification that new evidence can never be admitted on appeal. It has completely overlooked the relevant Regulations on the admission of evidence in appellate proceedings, as well as the case law of the ICC and other international criminal tribunals.⁵ As the Prosecution and the Victims have noted, new evidence can be admitted on appeal.⁶ Libya has itself sought to introduce new evidence in the appellate proceedings concerning Mr. Saif Gaddafi⁷, and has filed an Addendum to its Request in which it has sought to introduce new evidence.
7. Given the nature of the new evidence submitted by the Defence in the present proceedings, it would be grossly unfair and prejudicial to the Accused, and contrary to the interests of justice, if evidence of Mr. Al-Senussi's physical and mental mistreatment in detention was excluded altogether from consideration. As the Defence has submitted, this new evidence shows 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 ... [and] ... that Libyan

³ Decision on Mr Al-Senussi's request to file further submissions and related issues, ICC-01/11-01/11-508, 6 February 2014, para. 20.

⁴ 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. 139-143 (hereinafter "Document in Support of Appeal").

⁵ Document in Support of Appeal, paras. 139-143.

⁶ 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. 121; 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, para. 40.

⁷ 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, Paras. 9-11. See also, ICC-01/11-01/11-454-Conf-AnxA.

officials have attempted to cover up any trace of Mr. Al-Senussi's ill-treatment.”⁸ It is plainly relevant to whether Mr. Al-Senussi is being brought to justice in Libya and whether Libya is willing and able to try him. It is obviously not being submitted to prejudice “a fair adjudication on the merits of the appeal”, as Libya claims⁹. This is an astounding statement given that the evidence of abuse is being submitted precisely to seek to guarantee that the Appeal is decided fairly on all of the available evidence. The new evidence directly concerns the merits of the case before the Appeals Chamber.

8. It is incorrect of Libya to try to exclude this evidence by arguing that it “plainly falls outside the scope of the appellate proceedings ... as it concerns facts that postdate the Decision.”¹⁰ As explained in the Defence's Response of 13 January “[a]ll of the new evidence ... concerns incidents of ill-treatment of Mr. Al-Senussi which occurred in custody in Libya before the Admissibility Decision was rendered.”¹¹ This was also made clear in the Defence's Document in Support of Appeal.¹² Libya even acknowledges elsewhere in its Request that the “summary [of evidence] relates principally to events prior to the Libyan Government's filing of its Admissibility Challenge”¹³ (even though most of the incidents referred to in the summary postdate the filing of the Admissibility Challenge).
9. Despite the seriousness of the allegations in the new evidence, Libya asserts that it should be excluded as being “both unfair and improper as it would deny the Libyan Government due process and undermine equality of arms between the parties to the Appeal.”¹⁴ Libya fails to acknowledge the very significant security risks faced by the witnesses concerned. The new evidence concerns the rights and well-being of a person who has been held in virtual incommunicado detention, with no ability to speak to any lawyer for over a year and four months. He has been cut off from the world and been given no ability to inform the Court in a privileged and reliable manner of his treatment. In these circumstances it would be fundamentally unjust if the new

⁸ 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’, ICC-01/11-01/11-500, 13 January 2013, para. 37 (hereinafter “Defence Response of 13 January 2013”).

⁹ Libya's Request of 20 January 2014, para. 3.

¹⁰ Libya's Request of 20 January 2014, para. 5.

¹¹ Defence Response of 13 January 2013, para. 32. See also, para. 33(b).

¹² Document in Support of Appeal, paras. 152-160.

¹³ Libya's Request of 20 January 2014, para. 3.

¹⁴ Libya's Request of 20 January 2014, para. 4.

evidence was excluded without inquiring any further from the witnesses. Libya has simply failed to address the Defence's submission that a miscarriage of justice would be occasioned were the evidence not to be admitted. Libya has also failed to address the Defence's alternative submission that the new evidence is of such importance that the Appeals Chamber should refer it back to the Pre-Trial Chamber for consideration in the event that it could not be admitted in the Appeal.¹⁵

10. Libya's objection to the Defence's summary of the new evidence is without any merit. Libya claims that it "does not give sufficient particulars to enable the Libyan Government to refute in any meaningful way."¹⁶ Yet, Libya has submitted evidence in response to the Defence's evidence in its Addendum. The summary sets out the nature and scope of the allegations and includes details of specific incidents, actions and locations which all provide a more than sufficient basis for Libya to submit rebuttal evidence, as it has sought to do. The Defence reiterates that the ex-parte classification of the new evidence is both necessary and proportionate at this stage of the proceedings. The Defence has detailed the extreme difficulties faced in collecting evidence from witnesses who have genuine fears for their safety and the safety of their families.¹⁷ In the absence of any viable witness protection program in Libya and in light of reports that witnesses in investigations are being intimidated and killed,¹⁸ the Defence submits that the ex-parte filing of the new evidence is fully justified at this stage. As the Defence has submitted, there is jurisprudence which states that "[s]ummaries of witness statements are often provided and regarded as adequate disclosure in particular circumstances in which witness protection is paramount."¹⁹

11. The Defence submits that Libya is in a position to respond to each of the allegations detailed in the summary to assist the Chamber to consider all of the new evidence from the parties. Instead, Libya seeks to have this critical new evidence ignored, and fails to address the substance of the allegations which on any view are directly

¹⁵ Document in Support of Appeal, para. 147-150.

¹⁶ Libya's Request of 20 January 2014, para. 3.

¹⁷ Defence Response of 13 January 2013, para. 37.

¹⁸ 15 Libyans helping US investigation into US Benghazi mission attack murdered: US Senate report, Libyan Herald, 17 January 2014 (<http://www.libyaherald.com/2014/01/17/15-libyans-helping-us-investigation-into-us-benghazi-mission-attack-murdered-us-senate-report/#axzz2r42y6fmq>); Review of the Terrorist Attacks on U.S. Facilities in Benghazi, Libya, September 11-12, 2012 together with Additional Views, U.S. Senate Select Committee on Intelligence, 15 January 2014, p. 40 (<http://s3.documentcloud.org/documents/1005714/senate-intelligence-committee-report-on-benghazi.pdf>).

¹⁹ Defence Response of 13 January 2013, para. 40.

relevant to Libya's willingness and ability genuinely to try Mr. Al-Senussi and bring him to justice.

Libya's Addendum of 27 January 2014

12. In its Addendum to the Request of 27 January 2014, Libya "maintain[s] its position that the new evidence produced by the Defence should be rejected." Nevertheless, Libya itself seeks to submit new evidence – a letter from the Libyan Prosecutor and a medical report purporting to concern Mr. Al-Senussi – before the Appeals Chamber, asserting that this new evidence should be considered "to redress any unfairness in the appellate proceedings."²⁰ As the Appeals Chamber has noted, the Addendum (as with other filings) concerns the admission of new evidence and will be considered by the Appeals Chamber at the same time that it addresses Ground 2 of the Appeal.²¹ There is no proper legal basis for Libya to file this new evidence "simply" to seek "to counter the prejudice that may arise" in the mind of the Court and the public from the Defence's new evidence.²² Libya's Addendum can only be regarded as "new evidence" which itself must be considered by the Appeals Chamber with all new evidence in addressing Ground 2 of the Appeal.

13. As stated above, it is contradictory for Libya to oppose the admission of new evidence when it has itself sought to rely on new evidence in the Addendum, and to argue on the one hand that it cannot fairly respond to the Defence's new evidence as it does not have the witness statements, and then on the other hand, to submit evidence in response to the Defence's evidence. The real issue is whether Libya's evidence should be given any weight by the Appeals Chamber in rebutting the evidence submitted by the Defence. The Defence submits that all of the new evidence in respect of Mr. Al-Senussi's treatment in detention should be admitted and considered by the Appeals Chamber. In its deliberations the Appeals Chamber is urged to find that the recently dated medical report and accompanying letter from the Libyan Prosecutor as relied on by Libya cannot be given any weight and adds nothing of any probative value in the Chamber's assessment of the conditions under which Mr. Al-Senussi has and is being detained and tried.

²⁰ Libya's Addendum to Request, para. 4.

²¹ Decision on Mr Al-Senussi's request to file further submissions and related issues, ICC-01/11-01/11-508, 6 February 2014, para. 20.

²² Libya's Addendum to Request, paras. 4, 6.

14. Both the letter and medical report amount to nothing more than assertions by Libya without any supporting materials. They are not capable of verification in the absence of other independent and reliable evidence. The fact that the Libyan Prosecutor claims in the letter that Mr. Al-Senussi has had “regular” and “recurrent” medical visits, that his “health condition is normal”, that his “conditions of detention are good”, and that he has not submitted any complaints, is of no value at all to the Appeals Chamber. These kinds of assertions have already been made by Libya in its filings before the ICC, and the materials submitted in the Addendum add nothing more.
15. Libya has provided none of the records and files relating to Mr. Al-Senussi’s detention, particularly from the times when it is alleged in the Defence’s evidence that he was beaten and mistreated, nor has Libya provided any independent source to verify its claims. The letter refers to having access to Mr. Al-Senussi’s “health file”, but this file has not even been made available to the Court. There are no records submitted of Mr. Al-Senussi’s daily treatment in custody. As was held in the Kenya case, the State concerned must provide to the Court the detailed information and files which it claims support its assertions, or else no reliance can be placed on mere assertions made by the authorities.²³
16. The Defence has repeatedly made submissions concerning the condition and health of Mr. Al-Senussi and the lack of medical attention he is receiving, with no response from Libya.²⁴ The Defence has also called for the ICRC to be allowed to visit Mr. Al-Senussi. It is only after the Defence presented the Chamber with evidence of physical abuse that Libya submitted a very recent medical report, dated 22 January 2014. There is simply no way of verifying this report without having access to Mr. Al-Senussi as his Counsel and without conducting an independent medical examination. It only highlights again that a legal visit as ordered by the Pre-Trial Chamber as long ago as one year is absolutely essential. Libya has still not permitted this visit to take

²³ *Prosecutor v. Ruto et al.*, 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-01/09-01/11-307, 30 August 2011, paras. 50, 62, 84. See also, *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, paras. 64, 68.

²⁴ Document in Support of Appeal, para. 101; Filing on behalf of Mr. Abdullah Al-Senussi pursuant to ‘Decision on additional submissions in the proceedings related to Libya’s challenge to the admissibility of the case against Abdullah Al-Senussi’ of 19 August 2013, ICC-01/11-01/11-418, 26 August 2013, paras. 26-29.

place (as will be addressed further in the Reply to be filed on 14 February 2014²⁵). The Appeals Chamber should not give any weight to Libya's assertions in its Addendum when it has obstructively failed to comply with the Pre-Trial Chamber's Orders to arrange a legal visit for the very purpose of assessing Mr. Al-Senussi's condition and taking his instructions on this matter. The Pre-Trial Chamber noted in ordering Libya to arrange a legal visit that the Chamber has the "power to issue such orders or seek such cooperation as may be necessary to protect Mr [Al-Senussi]." ²⁶

17. The medical report does not in any event address whether there are any indications that Mr. Al-Senussi has been physically abused at any prior time to January 2014. Libya has not shown that the medical report is relevant to the issues in the present proceedings. The Defence has made clear that the new evidence shows that Mr. Al-Senussi was beaten and abused at specific times including on the days after he was first detained in Libya and following the hearing on 19 September 2013 before the accusation chamber and "until the second accusation chamber hearing on 3 October 2013."²⁷ There are no records provided by Libya from these dates and the medical report does not address these periods of time.

18. It must also be taken into account that the letter and medical report have been provided by the Libyan Prosecutor, the same prosecutor who has made public statements that are dismissive and disrespectful of the admissibility proceedings and the Orders of the ICC, for example in stating that "Saif Al-Islam and Abdullah Al-Senussi will definitely be tried in Libya, because it is the primary, the competent and the concerned jurisdiction"²⁸ when the ICC is still to decide this very issue.

19. Accordingly, the Defence submits that no weight can be accorded the documents filed by Libya in its Addendum. This evidence does not undermine in any way the evidence submitted by the Defence about the beating and mistreatment of Mr. Al-Senussi in custody in Libya, which must be taken at its highest by the Appeals

²⁵ Decision on Mr Al-Senussi's request to file further submissions and related issues, ICC-01/11-01/11-508, 6 February 2014, p. 3.

²⁶ 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. 39 (emphasis added).

²⁷ Annex 1: Public Summary of evidence submitted by Defence Counsel for Mr. Al-Senussi on a Confidential and *Ex parte* basis, ICC-01/11-01/11-500-Anx1, 13 January 2013, para. 6.

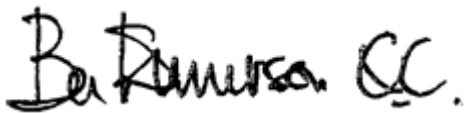
²⁸ Defence Application on behalf of Mr. Abdullah Al-Senussi concerning Libya's Announcement of Trial Date in August 2013, ICC-01/11-01/11-380, 10 July 2013, paras. 4, 16-23. See also, ICC-01/11-01/11-380-Anx1.

Chamber. Libya bears the burden of establishing that Mr. Al-Senussi is being brought to justice, taking international standards into account, and that Libya is willing and able to try him in Libya. The self-serving evidence submitted by Libya is plainly insufficient to discharge Libya's burden, particularly in light of the evidence that has been submitted by the Defence. As is made clear in that evidence, the witnesses concerned are prepared to give this evidence in The Hague before the Judges of the Appeals Chamber.

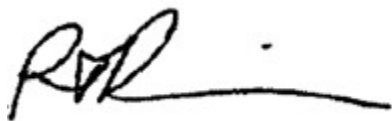
Conclusion

20. For all of the reasons above, the Defence respectfully requests the Appeals Chamber to reject Libya's Request of 20 January 2014 and to admit the new evidence submitted by the Defence as well as any evidence in rebuttal from Libya. The Defence asks the Appeals Chamber to take into account its submissions on the new evidence submitted by Libya in its Addendum when consideration is given to this evidence.

Counsel on behalf of Mr. Abdullah Al-Senussi,



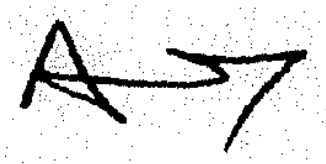
Ben Emmerson QC



Rodney Dixon



Amal Alamuddin

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

Anthony Kelly

Dated 12th February 2014
London, United Kingdom