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

Date: **14 February 2014**

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 Redacted Version with Public Annex 1

Further Submissions on behalf of Abdullah Al-Senussi Pursuant to Regulation 28

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

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4. [REDACTED]
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[REDACTED] It is clear that Libya has no genuine intention of ever permitting Defence Counsel to have access to Mr. Al-Senussi. This shows that Libya is not willing and able to bring Mr. Al-Senussi to justice. If the Libyan authorities are not prepared even to organise a single legal visit to Mr. Al-Senussi, who has been held virtually incommunicado for almost a year and a half, the Defence submits that this is compelling evidence that Libya's conduct is inconsistent with an intention to bring him to justice and that Libya is unwilling and unable to try him.
5. Instead, Libya argues in its Response of 26 November 2013 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."⁷ Libya had repeatedly assured the Pre-Trial Chamber before the admissibility decision was issued that it could and would arrange a visit so that Mr. Al-Senussi could consult with his Counsel.⁸ With the Admissibility Decision having been rendered, Libya has now changed its stance before the Appeals Chamber to submit that Mr. Al-Senussi has no right to legal representation in the admissibility proceedings, let alone to be consulted by his Counsel.

⁶ ICC-01/11-01/11-506-Conf-AnxV.

⁷ 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. 19 (hereinafter "Libya's Response of 26 November 2013").

⁸ 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.

6. This is a deplorable position to adopt, and it confirms Libya's complete disrespect of even the most very basic of fair trial and human rights' standards. It has been roundly criticised by Human Rights Watch (HRW) in its recent report following their brief visit to Mr. Al-Senussi in Al-Hadba prison.⁹ HRW note that Mr. Al-Senussi has been kept in isolation in Al-Hadba since his arrival in Libya, without access to any lawyer. HRW confirm that he has been interrogated on several occasions while in custody without a lawyer being present and has been coerced into signing statements. This evidence corroborates the new evidence which has been filed by Mr. Al-Senussi and is to be considered under Ground 2 of the Appeal.¹⁰ The Defence has attached HRW's report of 13 February 2014 hereto as Annex 1.
7. It is also a matter of great concern that a new law has been passed by the General National Congress in January 2014 which makes it a crime under Libyan law (with a prison term) to "insult" Congress, the government, the judicial institutions or any of their members.¹¹ It would thus be open to the Libyan authorities to charge Mr. Al-Senussi and his Defence team for even raising a defence that was critical of the present authorities. No exception is made in the legislation for the rights of accused persons to present any defence. This new law further underlines that the judicial system is not impartial and independent. It would put the Defence team at risk of arrest during any visit on account of discussions with Mr. Al-Senussi about his defence and makes it impossible for Mr. Al-Senussi effectively to present his defence.

New "interpretation" of Article 106 of the Libyan Code of Criminal Procedure

8. In its Response of 26 November 2013, Libya has completely changed its argument in respect of Article 106 of the Libyan Code of Criminal Procedure. Libya asserts for the first time that under Article 106 "the accused may be interrogated without counsel being present".¹² In its Admissibility Challenge and before the Pre-Trial Chamber,

⁹ Libya: Gaddafi Son, Ex-Officials, Held Without Due Process, HRW, 13 February 2014 (<http://www.hrw.org/news/2014/02/13/libya-gaddafi-son-ex-officials-held-without-due-process>).

¹⁰ 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. 137-160 (hereinafter "Document in Support of Appeal"). See also, ICC-01/11-01/11-474-Conf-Exp-Anx1; ICC-01/11-01/11-474-Conf-Exp-Anx2; ICC-01/11-01/11-474-Anx3; ICC-01/11-01/11-500-Anx1; ICC-01/11-01/11-500-Conf-Exp-Anx2; and ICC-01/11-01/11-500-Anx3.

¹¹ Opposition mounts after Congress makes insulting it a crime, Libya Herald, 11 January 2014 (<http://www.libyaherald.com/2014/02/11/opposition-mounts-after-congress-makes-insulting-it-a-crime/#axzz2tAvGI0kv>).

¹² Libya's Response of 26 November 2013, para. 66; See paras. 62-69.

Libya submitted 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.”¹³ In accordance with this provision, Mr. Al-Senussi has repeatedly requested a lawyer¹⁴ while he has been interrogated¹⁵ but has never been provided access to any lawyer. This is again confirmed in HRW’s recent report following their visit to Al-Hadba prison, which records that Mr. Al-Senussi has been interrogated without any lawyer present on several occasions despite his specific requests to have a lawyer in attendance.

9. Libya previously relied on Article 106 to re-assure the Pre-Trial Chamber that “Suspects and defendants within the Libyan criminal justice system benefit from similar procedural rights and protections to those set out in the Rome Statute.”¹⁶ Article 55 of the Rome Statute guarantees the right of persons “during an investigation” and when they are questioned as suspects by national authorities.¹⁷ However, before the Appeals Chamber, Libya has changed its position - as has been noted by the Prosecution too¹⁸ - 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. In its Response of 26 November 2013, Libya now claims that the language of Article 106 makes “clear that the accused may be interrogated without counsel being present”, asserting for the first time that under the

¹³ Admissibility Challenge of 2 April 2013, para. 146.

¹⁴ Document in Support of Appeal, para. 96. See also, Defence Response on behalf of Mr. Abdullah Al-Senussi to “Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute”, ICC-01/11-01/11-356, 14 June 2013, paras. 124-127 (hereinafter “Defence Response of 14 June 2013”); 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. 19, 20; Addendum to “Filing on behalf of Mr. Abdullah Al-Senussi pursuant to ‘Decision on additional submissions in the proceedings related to Libya’s challenge to the admissibility of the case against Abdullah Al-Senussi’ of 19 August 2013,” and Urgent Application pursuant to Regulation 35, ICC-01/11-01/11-432, 5 September 2013, para. 20 (hereinafter “Addendum of 5 September 2013”). See, Libya: Ensure Abdallah Sanussi Access to Lawyer, HRW, 17 April 2013 (<http://www.hrw.org/news/2013/04/17/libya-ensure-abdallah-sanussi-access-lawyer>); ICC: Libya's Bid to Try Gaddafi, Sanussi, HRW, 13 May 2013, Question 34 (<http://www.hrw.org/news/2013/05/13/qa-libyaand-international-criminal-court#40>); Libya must surrender Saif al-Islam al-Gaddafi to International Criminal Court, Amnesty International, 18 September 2013 (<http://www.amnesty.org/en/for-media/press-releases/libyamust-surrender-saif-al-islam-al-gaddafi-international-criminal-court->).

¹⁵ Document in Support of Appeal, para. 96. See also, Defence Response of 14 June 2013, paras. 43, 125, 126, 132, 138; Addendum of 5 September 2013, para. 20.

¹⁶ Admissibility Challenge of 2 April 2013, para. 143.

¹⁷ Rome Statute, Article 55.

¹⁸ 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, 4 November 2013, para. 55 (hereinafter “Prosecution’s Response of 26 November 2013”).

Libyan Code of Criminal Procedure counsel is only to be provided at trial.¹⁹ Libya has on numerous occasions stated that a lawyer would be available to Mr. Al-Senussi during the pre-trial stage. However, Libya is preventing Mr. Al-Senussi from appointing a lawyer by holding him in incommunicado detention, and then maintaining that it is not prevented from interrogating him, obtaining confessions from him and proceeding with investigating and prosecuting the case against him because he has not appointed a lawyer himself.

The lack of any distinction between Mr. Al-Senussi's and Mr. Gaddafi's cases

10. Libya asserts in its Response that Mr. Al-Senussi's and Mr. Gaddafi's cases can be distinguished on the issue of legal representation. Libya argues that Mr. Gaddafi's situation is different to that of Mr. Al-Senussi because Libya was "only in the 'process of approaching the Bar Associations of Tunisia and Egypt in order to obtain suitably qualified and experienced counsel'" at the time of the Admissibility Decision.²⁰ Libya claims that in Mr. Al-Senussi's case the "execution of a formal power of attorney will be carried out",²¹ and the assignment of "legal representation for Mr. Al-Senussi will be completed in the very near future."²²

11. Libya has never previously sought to make this distinction between the two cases. Indeed, no such distinction exists. The Pre-Trial Chamber was in error for relying "on Libya's assertions that it would overcome the impediment of legal representation"²³ in order to find 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."²⁴ The fact that Libya merely asserted, with no evidence of any kind to support this assertion, that the execution of a power of attorney would be carried out "in the very near future" does not make Mr. Al-Senussi's situation any different to that of Mr. Gaddafi. As the HRW report (Annex 1) confirms, both of them are in the same

¹⁹ Libya's Response of 26 November 2013, paras. 63, 66.

²⁰ Libya's Response of 26 November 2013, para. 28.

²¹ 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").

²² 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.

²³ Prosecution's Response of 26 November 2013, para. 62.

²⁴ Libya's Response of 26 November 2013, para. 46.

position, without access to any lawyer of their choosing. Mr. Al-Senussi has not even spoken to a lawyer at any time during his detention and may not be aware that admissibility proceedings are underway before the ICC. It has now been nearly five months since Libya stated that Mr. Al-Senussi would be appointed a lawyer “in the very near future”²⁵, yet he still has no lawyer and no access to his ICC Defence Counsel.

Lack of adequate witness protection

12. 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.”²⁶ In the Prosecution’s Response of 26 November 2013, the Prosecution argues 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.²⁷

13. The Defence submits that the impact of the lack of any witness protection programs can readily be predicted. The Defence has repeatedly conveyed the difficulty of securing witnesses in the admissibility proceedings due to their very real concerns for their lives and the lives of their families given that there are no witness protection programs in place.²⁸ Many potential witnesses with critical information have refused to provide this evidence to the Court due to the risks to their safety. The evidence that the Defence has been able to submit shows that many potential witnesses for the Defence are not available in the absence of any effective witness protection programs.²⁹ The lack of a specific list of potential defence witnesses is completely irrelevant. It in no way establishes that adequate witness protection programs do

²⁵ 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.

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

²⁷ Prosecution’s Response of 26 November 2013, para. 109.

²⁸ Document in Support of Appeal, paras. 152, 153; 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 2014, paras. 37, 38, 40.

²⁹ ICC-01/11-01/11-500-Conf-Exp-Anx2.

indeed exist in Libya. The simple point is that Libya has not established that such programs are in place to ensure that it is willing and able to conduct Mr. Al-Senussi's trial in Libya.

14. 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 him³⁰, and that no distinction can be drawn between this case and the proceedings against Mr. Al-Senussi. Recent developments in Libya further demonstrate that Libya has no ability to ensure the safety and well-being of witnesses and those involved in the national judicial proceedings. In January 2014, a former Gaddafi official, Al-Hadi Imbaresh – who the Defence believes may be a witness for the Libyan Prosecution³¹ - died in a Zintan prison where it was alleged that he was tortured.³² Furthermore, a US Senate Select Committee on Intelligence report released on 15 January 2014 stated that 15 individuals assisting the investigation into the attacks on 11 September 2012 in Benghazi have been killed.³³ On 8 February 2014 it was reported that the former Prosecutor-General, Abdulaziz Al-Hassadi, who initiated the investigations against Mr. Al-Senussi and Mr. Gaddafi was assassinated.³⁴ In addition, the recent HRW report confirms the attacks on judges, prosecutors and witnesses in Libya.³⁵

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

15. Libya claims in its Response of 26 November 2014 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

³⁰ 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.

³¹ ICC-01/11-01/11-130-Conf-AnxC.

³² Imprisoned senior Qaddafi-era official dies from cancer, Libya Herald, 10 January 2014 (<http://www.libyaherald.com/2014/01/10/imprisoned-senior-qaddafi-era-official-dies-from-cancer/#axzz2t5uq5IXB>).

³³ 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>).

³⁴ Breaking News: Former Attorney General reported murdered in Derna, Libya Herald, 8 February 2014 (<http://www.libyaherald.com/2014/02/08/breaking-news-former-attorney-general-reported-murdered-in-derna/#axzz2tAvGI0kv>).

³⁵ Libya: Gaddafi Son, Ex-Officials, Held Without Due Process, HRW, 13 February 2014 (<http://www.hrw.org/news/2014/02/13/libya-gaddafi-son-ex-officials-held-without-due-process>).

early pre-trial stage.”³⁶ The Defence submits that Libya’s argument is plainly wrong as a matter of law. The Victims have made it clear that “the non-appointment of a lawyer for Mr Al-Senussi violates Libyan and international law.”³⁷ The UN Human Rights Committee has emphasised that “legal assistance should be available at all stages of criminal proceedings”³⁸ and “that legal assistance must be made available to an accused who is charged with a capital crime. This applies not only to the trial and relevant appeals, but also to any preliminary hearings relating to the case.”³⁹ Moreover, the Human Rights Committee has found in relation to cases involving the death penalty that the accused must be effectively assisted by counsel at all stages of the proceedings.⁴⁰

16. The European Court of Human Rights has held that “the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply” with the accused’s fundamental right to counsel.⁴¹ In the case of *Ocalan v. Turkey*, the accused was held in custody for seven days without access to a lawyer and “made several self-incriminating statements that were subsequently to become crucial elements of the indictment and the public prosecutor’s submissions and a major contributing factor in his conviction.”⁴² In these circumstances, the European Court of Human Rights found that the accused’s rights had been violated, stating that “to deny access to a lawyer for such a long period and in a situation where the rights of the defence might well be irretrievably prejudiced is detrimental to the rights of the defence.”⁴³

17. In the *Case of Magee v. The United Kingdom* - where the accused was denied his request to speak with a solicitor and was kept in incommunicado detention during questioning⁴⁴ - the European Court of Human Rights held that “the applicant, as a matter of procedural fairness, should have been given access to a solicitor at the initial

³⁶ Libya’s Response of 26 November 2013, para. 55.

³⁷ Victims’ Observations, para. 13.

³⁸ *Borisenko v. Hungary*, Comm. n. 852/1999, HRC views of 14 October 2002, para. 7.1.

³⁹ *Wright and Harvey v. Jamaica*, Comm. n. 459/1991, HRC views of 27 October 1995, para. 10.1.

⁴⁰ UNHRC Working Group on Arbitrary Detention opinion, para. 32, citing, *Aliboeva v. Tajikistan*, no. 985/2001, para. 6.4; *Saidova v. Tajikistan*, no. 964/2001, para. 6.8; *Aliiev v. Ukraine*, no. 781/1997, para. 7.3; *LaVende v. Trinidad and Tobago*, no. 554/1993, para. 58. See also, HRC General Comment No. 32, CCPR/C/GC/32, 21 August 2007, para. 31.

⁴¹ Case of *Ocalan v. Turkey*, App nl. 46221/99, Judgment, Strasbourg, 12 May 2005, para. 131. See also, Case of *Magee v. The United Kingdom*, App No. 28135/95, Judgment, 6 June 2000, paras. 42-44; *Imbrioscia v. Switzerland*, Judgment, 24 November 1993, Series A no. 275, paras. 36-38; *Artico v. Italy* judgment of 13 May 1980, Series A no. 37, para. 33.

⁴² Case of *Ocalan v. Turkey*, App nl. 46221/99, Judgment, Strasbourg, 12 May 2005, para. 131.

⁴³ Case of *Ocalan v. Turkey*, App nl. 46221/99, Judgment, Strasbourg, 12 May 2005, para. 131.

⁴⁴ Case of *Magee v. The United Kingdom*, App No. 28135/95, Judgment, 6 June 2000, paras. 42, 43.

stages of the interrogation as a counterweight to the intimidating atmosphere specifically devised to sap his will and make him confess to his interrogators.”⁴⁵ The Court found that “to deny access to a lawyer for such a long period and in a situation where the rights of the defence were irretrievably prejudiced is - whatever the justification for such denial - incompatible with the rights of the accused.”⁴⁶

18. The UN Human Rights Council’s Working Group on Arbitrary Detention recently found in relation to Mr. Gaddafi that grave violations of his fundamental rights had been committed in Libya because he “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.”⁴⁷ 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”⁴⁸ and “the adequate remedy would be to discontinue both the domestic proceedings against Mr. Gaddafi and his detention under those proceedings.”⁴⁹ Mr. Al-Senussi is in precisely the same position as Mr. Gaddafi. Contrary to Libya’s claim, the lack of legal representation in the present case for nearly 18 months clearly constitutes a violation of the accused’s rights which is unjust and highly prejudicial, and cannot be rectified.

19. It should be further noted that the UN Human Rights Council’s Working Group on Arbitrary Detention recorded its concern that Mr. Gaddafi has been interrogated without the presence of a lawyer (as has occurred in Mr. Al-Senussi’s case) and cited to jurisprudence from the European Court of Human Rights which states that “an accused often finds himself in a particularly vulnerable position at that stage of the proceedings [the investigation] ... In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer.”⁵⁰

⁴⁵ Case of Magee v. The United Kingdom, App No. 28135/95, Judgment, 6 June 2000, para. 43.

⁴⁶ Case of Magee v. The United Kingdom, App No. 28135/95, Judgment, 6 June 2000, para.44.

⁴⁷ 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”).

⁴⁸ UNHRC Working Group on Arbitrary Detention opinion, para. 43.

⁴⁹ UNHRC Working Group on Arbitrary Detention opinion, para. 48.

⁵⁰ UNHRC Working Group on Arbitrary Detention opinion, para. 31, citing, *Pavlenko v. Russia*, no. 42371/02, Judgement, 1 April 2010, para. 101.

20. The African Court on Human and Peoples' Rights has found⁵¹ that Libya has failed to comply with the African Court's Order immediately to afford Mr. Gaddafi access to a lawyer of his own choosing and to "refrain from all judicial proceedings, investigations or detention, that could cause irreparable damage to the Detainee, in violation of the Charter or any other international instruments to which Libya is a party."⁵² The African Court recognised that under the African Charter the denial of a lawyer would prejudice all future proceedings and thus ordered Libya to refrain from any further proceedings that would cause "irreparable damage" to the accused's rights. The same provisions of the African Charter apply and are being violated in Mr. Al-Senussi's case.

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

21. Libya asserts in its Response 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."⁵³ Libya contends that any prejudice to Mr. Al-Senussi's rights "must be judged *in situ*, not asserted in the abstract."⁵⁴ Libya also claims that due process violations do not show that the State is unwilling to try the accused.⁵⁵

22. Libya has again changed its position and presented a new argument on the protection of Mr. Al-Senussi's rights. Libya previously submitted to the Pre-Trial Chamber that all of the accused's rights 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

⁵¹ Interim Report of the African Court on Human and Peoples' Rights notifying the Executive Council of Non-Compliance by a State, in accordance with Article 31 of the Protocol, 4 June 2013, para. 8.

⁵² In the Matter of African Commission on Human and Peoples' Rights v. Libya, Application No. 002/2013, Order of Provisional Measures, 15 March 2013, para. 20.

⁵³ Libya's Response of 26 November 2013, para. 54.

⁵⁴ Libya's Response of 26 November 2013, para. 55.

⁵⁵ Libya's Response of 26 November 2013, paras 74-83.

Guidelines on the Right to Fair Trial and Legal Assistance in Africa adopted by the African Union in 2003.”⁵⁶ Libya emphasised that “[i]t is committed to applying international human rights standards both for the conduct of its investigation and any eventual trials.”⁵⁷

23. However, 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. The Defence submits that this new position cannot be correct. As provided in Article 17, it is inconsistent with the intent to bring an accused to justice for that accused to be treated unjustly, and within a judicial system that lacks independence and impartiality, taking international standards into account. As noted above, the UN Human Rights Council’s Working Group on Arbitrary Detention and the African Court have found Libya to be acting inconsistent with the requisite standards of justice. As the HRW report stresses, the prosecution of Mr. Al-Senussi “*will be no more credible than a kangaroo court*” if the authorities fail to provide him “with basic due process rights.”⁵⁸

24. Moreover, it is disingenuous for Libya to claim that the Defence is merely asserting prejudice in the “abstract.” There is clear evidence that Mr. Al-Senussi has been interrogated and forced to make incriminating statements in the absence of any lawyer being present (see for example Annex 1). As the recent HRW report notes, he has not had access to the evidence against him even though the charges have now been confirmed, and he has not been able to prepare any defence to the charges against him. When Mr. Al-Senussi asked the judge to review the testimony against him, he was refused access to this material. This report also notes that in many cases the interrogators “did not reveal their identities” and some of them were private citizens “who had somehow obtained access” to the prison to conduct the interrogations.⁵⁹ In addition, the Defence has filed evidence that shows that Mr. Al-Senussi has been beaten and abused in prison in order to obtain confessions.⁶⁰ In the *Case of Magee v. The United Kingdom*, the European Court of Human Rights found that the denial of a

⁵⁶ Admissibility Challenge of 2 April 2013, para. 144.

⁵⁷ Admissibility Challenge of 2 April 2013, para. 14.

⁵⁸ Libya: Gaddafi Son, Ex-Officials, Held Without Due Process, HRW, 13 February 2014 (<http://www.hrw.org/news/2014/02/13/libya-gaddafi-son-ex-officials-held-without-due-process>).

⁵⁹ Libya: Gaddafi Son, Ex-Officials, Held Without Due Process, HRW, 13 February 2014 (<http://www.hrw.org/news/2014/02/13/libya-gaddafi-son-ex-officials-held-without-due-process>).

⁶⁰ 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.

lawyer and incommunicado detention - not to mention physical abuse - constitutes conditions “intended to be psychologically coercive and conducive to breaking down any resolve he [the suspect] may have manifested at the beginning of his detention to remain silent.”⁶¹ For these reasons alone, the Court found that the accused’s rights were “irretrievably prejudiced.”⁶²

Article 304 of the Libyan Code of Criminal Procedure

25. Libya contends in its Response that even if the denial of Mr. Al-Senussi’s rights to a lawyer and due process 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.”⁶³ Libya makes this claim for the first time in the appellate proceedings. In its Admissibility Challenge, Libya never submitted that Article 304 could remedy serious violations committed during the investigative and accusation phases. Libya only asserted that any violation committed at trial could be remedied by Article 304 before the Appellate Court.⁶⁴

26. The Defence submits that this new argument by Libya should be rejected. Libya is asking the Court to turn a blind eye to the grave violations of Mr. Al-Senussi’s rights on the ‘promise’ that Libya will not take advantage of these violations in any 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 a manner inconsistent with bringing the person to justice, and the ICC’s case law clearly states that the Chamber’s assessment must be based on concrete circumstances at the time of the admissibility proceedings.⁶⁵ The Appeals Chamber has no way of knowing whether evidence collected in violation of Mr. Al-Senussi rights will ever be rejected at trial, and therefore cannot rely on Libya’s mere assurances. In any event, the provisions of this

⁶¹ Case of Magee v. The United Kingdom, App No. 28135/95, Judgment, 6 June 2000, para. 43.

⁶² Case of Magee v. The United Kingdom, App No. 28135/95, Judgment, 6 June 2000, para.44.

⁶³ Libya’s Response of 26 November 2013, para. 55.

⁶⁴ Admissibility Challenge of 2 April 2013, para. 149.

⁶⁵ Admissibility Decision of 11 October 2013, para. 307. See also, *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.

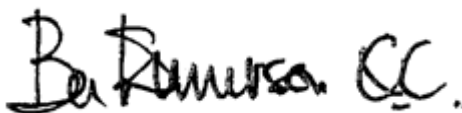
article do not even make clear in what way any evidence gathered in violation of the accused's rights could be excluded.

27. As noted by Libya in the Admissibility Challenge, Article 151 of the Criminal Procedure Code provides that it is “the role of the Accusation/Indictment Judge to review the investigation conducted by the Prosecutor-General’s Office and if they find the evidence to be insufficient or illegally obtained, they must dismiss the case.”⁶⁶ In Mr. Al-Senussi’s case, the Accusation Chamber claims to have reviewed all the evidence him and his co-accused within a few weeks and to have approved the charges. It made no findings that any of the evidence was obtained in violation of Mr. Al-Senussi’s rights under Libyan law and international law. No steps have been taken by the Accusation Chamber to address the blatant violations of Mr. Al-Senussi’s due process rights, and there is no basis to believe that these violations will be addressed in any future proceedings. Furthermore, as noted above, the UN Working Group specifically found that “the Government’s inability to rectify these violations” has made it impossible to guarantee a fair and just trial in Libya.⁶⁷ As the evidence and all of the available independent reports demonstrate, Mr. Al-Senussi cannot be brought to justice in Libya and Libya is unable to try him within its national system with the necessary legal representation, witness protection, and due process guarantees in place.

III. Conclusion

28. For all of the reasons set out in its Appeal and all further filings, including these Submissions, the Defence respectfully requests the Appeals Chamber to reverse the Admissibility Decision of 11 October 2013.

Counsel on behalf of Mr. Abdullah Al-Senussi,⁶⁸



Ben Emmerson QC

⁶⁶ Admissibility Challenge of 2 April 2013, para. 130.

⁶⁷ UNHRC Working Group on Arbitrary Detention opinion, para. 43.

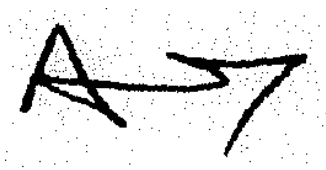
⁶⁸ In order to have the signatures of all counsel on the filing, the signatures of the co-counsel have gone over to page 16. The Defence therefore requests that the 15 page limit is extended purely to accommodate these signatures, the substance of the further submissions having been covered within the 15 pages.

A handwritten signature in black ink, appearing to be 'Rodney' followed by a long horizontal stroke.

Rodney Dixon

A handwritten signature in black ink, clearly legible as 'Amal Alamuddin'.

Amal Alamuddin

A handwritten signature in black ink, appearing to be 'Anthony' followed by a stylized 'K'.

Anthony Kelly

Dated 14th February 2014

London, United Kingdom