



Original: **English**

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

Date: **11 March 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 Document**

**Application on behalf of the Defence for Abdullah Al-Senussi for leave to reply to, or submit further submissions in light of, “Libyan Government’s Response to the Al-Senussi Defence’s ‘Further Submissions on behalf of Abdullah Al-Senussi Pursuant to Regulation 28’” of 24 February 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:**

**The Office of the Prosecutor**  
Ms. Fatou Bensouda, Prosecutor

**Counsel for the Defence**  
Counsel for Abdullah Al-Senussi:  
Mr. Ben Emmerson QC  
Mr. Rodney Dixon  
Ms. Amal Alamuddin  
Mr. Anthony Kelly

Counsel for Saif Gaddafi:  
Mr. John Jones QC  
Ms. Sarah Bafadhel

**Legal Representatives of Victims**  
Ms. Paolina Massida  
Ms. Sarah Pellet  
Mr. Mohamed Abdou

**Legal Representatives of the Applicant**

**Unrepresented Victims**

**Unrepresented Applicants for Participation/Reparation**

**The Office of Public Counsel for Victims**

**The Office of Public Counsel for the Defence**

**States Representatives**  
Professor Ahmed El-Ghani  
Professor James Crawford SC  
Mr. Wayne Jordash  
Ms. Michelle Butler

**Amicus Curiae**

---

**REGISTRY**

---

**Registrar**  
Mr. Herman von Hebel

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section**

**Other**

## **Introduction**

1. The Defence for Mr. Al-Senussi files this request for leave to file a reply to, or to file further submissions in respect of, the “Libyan Government’s Response to the Al-Senussi Defence’s ‘Further Submissions on behalf of Abdullah Al-Senussi Pursuant to Regulation 28’” of 24 February 2014.<sup>1</sup>
2. The Defence seeks leave in order to respond to entirely new information contained in Libya’s submissions that has never been previously submitted before the Appeals Chamber. The Defence requests leave to make further submissions in response to the following three issues:
  - Libya has for the very first time in the appellate proceedings submitted new information about the purported ‘application’ and ‘acceptance’ by the Prosecutor-General’ office of legal representatives for Mr. Al-Senussi<sup>2</sup> – the Defence must be granted a fair opportunity to respond to this new information if any of it is to be taken into account by the Appeals Chamber;
  - Libya has also raised new information in respect of the legal visit ordered by the Pre-Trial Chamber which has not been arranged by Libya<sup>3</sup>; and,
  - Libya has inaccurately quoted Defence Counsel out of context which must be corrected for the record.<sup>4</sup>
3. The Defence submits that the Appeals Chamber should grant the Defence’s request for leave to reply under either Regulation 24(5) of the Regulations of the Court, and in accordance with the jurisprudence of the Court on this Regulation, or pursuant to Regulation 28 as further submissions in order to ensure that the Defence has the opportunity to provide a full response to Libya’s new assertions and the information never submitted previously before the Appeals Chamber. The Defence submits that there is a proper basis under both these Regulations to permit the Defence to respond

---

<sup>1</sup> Libyan Government’s Response to the Al-Senussi Defence’s ‘Further Submissions on behalf of Abdullah Al-Senussi Pursuant to Regulation 28’, ICC-01/11-01/11-519-Conf, 24 February 2014 (hereinafter “Libyan Response of 24 February 2014”).

<sup>2</sup> Libyan Response of 24 February 2014, para. 17. See also Annex 2, ICC-01/11-01/11-519-Anx2.

<sup>3</sup> Libyan Response of 24 February 2014, para. 16. See also Annex 1, ICC-01/11-01/11-519-Anx1.

<sup>4</sup> Libyan Response of 24 February 2014, para. 11.

to the new information put forward by Libya so as to ensure that the Defence is not prejudiced by Libya submitting new information that could be relied on by the Appeals Chamber without the Defence legitimately having the opportunity to respond to it.

### **Applicable legal provisions**

4. As noted above, the Defence files this application pursuant to (i) Regulation 24(5) of the Regulations of the Court, which states that “Participants may only reply to a response with the leave of the Chamber”<sup>5</sup> and (ii) Regulation 28 which permits the Chamber to grant leave for the filing of further submissions.
5. The Appeals Chamber has previously held that “replies to responses to documents in support of appeal may not be filed pursuant to regulation 24(5) of the Regulations of the Court for appeals brought under rule 154 and 155 of the Rules of Procedure and Evidence.”<sup>6</sup> However, the Appeals Chamber has found that it is possible to grant leave to reply in response to other applications and submissions made during the appellate process. The Appeals Chamber held that “there is no specific provision dealing with replies in the case of requests for suspensive effect pursuant to article 82(3) of the Statute. Rule 156(5) of the Rules of Procedure and Evidence simply regulates the filing of the request itself. .... It is, therefore, possible for the Appeals Chamber to grant leave to a participant to file a reply.”<sup>7</sup> The Pre-Trial Chamber in Saif Gaddafi’s case relied on Regulation 24(5) to grant leave to reply to a response to further submissions that had been permitted under Regulation 28.<sup>8</sup>
6. Regulation 34(c) provides that “[s]ubject to leave being granted by a Chamber in accordance with regulation 24, sub-regulation 5, a reply shall be filed within ten days ... of the response.”<sup>9</sup> Regulation 29 and Rule 101 provide that the Chamber has the discretion to make orders in relation to the time limits for filing submissions having

<sup>5</sup> Regulation 28, Regulations of the Court.

<sup>6</sup> Decision on the Libyan Government's request to file further submissions, ICC-01/11-01/11-442, 12 September 2013, para. 13.; *Prosecutor v. Lubanga*, Decision on the Prosecutor's "Application for Leave to Reply to 'Conclusions de la defense en reponse au memoire d'appel du Procureur'", ICC-01/04-01/06-424, 12 September 2006, para. 7. Kenya admiss challenge – para 8.

<sup>7</sup> Decision on the request for suspensive effect and related issues, ICC-01/11-01/11-387, 18 July 2013, para. 15.

<sup>8</sup> Decision on the ‘Libyan Government's Request for Leave to reply to Responses by OTP, OPCV and OPCD to Libyan Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi’, ICC-01/11-01/11-288, 26 February 2013, para. 9.

<sup>9</sup> Regulation 34(c), Regulations of the Court.

“regard to the need to facilitate fair and expeditious proceedings”<sup>10</sup> and as “necessary in the interests of justice.”<sup>11</sup> The Defence submits that pursuant to all of these provisions, and the case law above, the Appeals Chamber should grant leave to the Defence to file submissions in reply.

7. The Defence submits that the Appeals Chamber can also grant the Defence’s request under Regulation 28, and should the Appeals Chamber for any reason not be minded to grant leave pursuant to Regulation 24(5), the Defence requests the Appeals Chamber to permit the Defence to file further submissions under Regulation 28 in light of the completely new information placed before the Appeals Chamber by Libya. Regulation 28 gives the Appeals Chamber the discretion to order further submissions in regard to “any document submitted by a participant” on the Appeals Chamber’s “own motion” or “on request” of the parties.<sup>12</sup> Libya relied on both this provision and Regulation 24(5) (as the Defence does here) in seeking leave to reply to the response of the accused to Libya’s further submissions (filed pursuant to Regulation 28) in Saif Gaddafi’s case before the Appeals Chamber (which has as yet not been ruled on by the Appeals Chamber).<sup>13</sup>
8. The Appeals Chamber has granted requests under Regulation 28 “because there is a need for clarification” on issues within the appeal proceedings.<sup>14</sup> In addition, requests to file further submissions have been granted to “provide additional details” or to submit “any additional authorities” on which the parties wish to rely.<sup>15</sup> The Appeals Chamber has permitted the submission of additional information on the basis that the circumstances of the case made the information “necessary for the proper determination of the appeal,” and that “it would not have been in the interests of

<sup>10</sup> Rule 101, Rules of Procedure and Evidence.

<sup>11</sup> Regulation 29, Regulations of the Court.

<sup>12</sup> *Prosecutor v. Lubanga*, Decision on the “Prosecution’s Application under Regulation 28 to provide Clarification or Additional Details which Impact on the Appeals against the Decisions to Stay the Proceedings and Release the Accused”, ICC-01/04-01/06-1476, 13 October 2008, para. 3 (emphasis added).

<sup>13</sup> Libyan Government’s Request for leave to file Consolidated Reply to the Observations (on the Libyan Government’s further Submissions) filed by the Defence for Saif Al-Islam Gaddafi, the Office of the Prosecutor and the Office of the Public Counsel for Victims on 30 September 2013, ICC-01/11-01/11-462, 3 October 2013, paras. 2-4.

<sup>14</sup> Decision on the Libyan Government’s request to file further submissions, ICC-01/11-01/11-442, 12 September 2013, para. 13.

<sup>15</sup> *Prosecutor v. Katanga*, Order in relation to the Defence Application to Request Leave to Provide Additional Details and Authorities, ICC-01/04-01/07-164, 24 January 2008, p. 2.

justice to deprive the appellant of the opportunity to make informed submissions.”<sup>16</sup>

The Defence submits that all of these criteria are applicable in the present case as the Appeals Chamber cannot fairly take into account Libya’s new information, especially on the central issue of legal representation, without having provided the Defence with an opportunity to be heard in response.

### **Reasons to permit the Defence to file submissions in reply or further submissions**

#### *Libya’s new assertions about legal representation*

9. In its Response of 24 February 2014, Libya claimed that “[t]hree Libyan lawyers have been presented to the office of the Prosecutor General, and have been accepted as a team of defence counsel, representing both Mr. Al-Senussi and Mr. Gaddafi.”<sup>17</sup> In addition, Libya filed a letter from Mr. Al-Sor from the Office of the Prosecutor-General stating that these local lawyers had applied to his office to represent the accused, but that their names could only be revealed “when the Court reviews the action in implementation of the desire of the defence team” (see Annex 2).
10. This is all entirely new information about Mr. Al-Senussi’s purported legal representation which has never previously been submitted or relied on. The Defence for Mr. Al-Senussi submits that it must be given an opportunity to respond to this new information. It would be wholly unfair for the Appeals Chamber to rely on this new information in any way without affording the Defence the opportunity to be heard on why the information cannot be relied on. The lack of any legal representation is one of the central grounds of the present appeal.
11. The Appeals Chamber has found in the *Bemba* case that the parties must be given an opportunity to submit observations on allegations or assertions which may influence the decision of the Chamber.<sup>18</sup> The Appeals Chamber held that to deny the Defence

---

<sup>16</sup> *Prosecutor v. Katanga*, Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, ICC-01/04-01/07-476 , 13 May 2008, para. 20.

<sup>17</sup> Libyan Response of 24 February 2014, para. 17.

<sup>18</sup> Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 26 September 2011 entitled ‘Decision on the accused’s application for provisional release in light of the Appeals Chamber’s judgment of 19 August 2011’, ICC-01/05-01/08-1937-Red2, 23 November 2011, paras. 64-67.

such an opportunity would deprive the accused “of a genuine possibility to influence the Chamber’s decision.”<sup>19</sup>

12. It is most important that the Defence is granted an opportunity to reply so that the Appeals Chamber can hear from the Defence as to why this new information cannot be relied on *before* the Chamber makes any decision which could take this new material into account. In particular, the Defence seeks leave to make submissions to the Appeals Chamber to show that the new information submitted by Libya can provide no assurance at all that any local lawyers of Mr. Al-Senussi’s choosing might be appointed to act for him. Libya’s claim is vague, unclear and completely unsubstantiated, and it lacks the sufficient details necessary to be relied on in any way in the appellate proceedings. Mr. Al-Sor’s letter amounts to no more than a mere assertion by him that lawyers might be appointed, with no concrete information and detail to substantiate whether it is genuine or not, or will be effectively implemented or not. The letter does not even address whether Mr. Al-Senussi has met with the local lawyers. Libya only states in its Response in the vaguest possible terms that “Mr. Al-Senussi, like other of his co-accused, has received several visits from various persons”.<sup>20</sup> The recent report of Human Rights Watch confirms in clear terms that Mr. Al-Senussi has not been visited by any lawyer.<sup>21</sup> The Defence will submit that the jurisprudence of the Court requires that Libya’s mere assurances cannot be relied on by the Appeals Chamber in the absence of sufficient evidence to support the claims made.<sup>22</sup>

13. As the Appeals Chamber is aware, Libya has repeatedly made claims that legal representation will be imminently available to Mr. Al-Senussi, but with no tangible results.<sup>23</sup> Despite its contention in its Response that the appeals process should be

<sup>19</sup> Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 26 September 2011 entitled ‘Decision on the accused’s application for provisional release in light of the Appeals Chamber’s judgment of 19 August 2011’, ICC-01/05-01/08-1937-Red2, 23 November 2011, para. 66.

<sup>20</sup> Libyan Response of 24 February 2014, para. 17.

<sup>21</sup> 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>).

<sup>22</sup> *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, para. 62.

<sup>23</sup> 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’ and ‘Addendum’ filed on 5 September 2013’, ICC-01/11-01/11-455, 26 September 2013, paras. 9, 28; Libyan Government’s consolidated Reply to the Responses by the

limited to the information before the Pre-Trial Chamber<sup>24</sup>, Libya has submitted new information about legal representation. The Defence must be permitted to show that this is yet another pretence designed to create the impression of concrete action when in fact there is nothing to demonstrate that the situation faced by Mr. Al-Senussi, being without any legal representation of his choosing, has changed at all. Libya's latest claim is moreover inconsistent with its previous (equally unsubstantiated) assertions on the topic of legal representation. Libya previously submitted to the Pre-Trial Chamber that "many local lawyers from Mr Al-Senussi's tribe have indicated their willingness to represent Mr. Al-Senussi but have not yet been given a formal power of attorney" and that it "is expected that this final hurdle to securing legal representation will be overcome at the order of the Accusation Chamber in the very near future."<sup>25</sup> The new information filed by Libya fails to explain what happened to these lawyers from Mr. Al-Senussi's tribe who were apparently on the brink of being appointed some 6 months ago, why they were not appointed, and whether the new lawyers have any 'power of attorney', especially given that Libya has not confirmed that the new lawyers have visited Mr. Al-Senussi, let alone that he has genuinely consented to their appointment. In addition, the new information completely fails to address how this apparent application to the Prosecutor-General's office by a group of lawyers to represent Mr. Al-Senussi complies with his rights under Libyan law for him to appoint a lawyer of his own choosing to represent him.<sup>26</sup> This is a very important matter which the Defence seeks leave to address in its further submissions in response to the new information submitted by Libya.

14. In deciding on whether to grant leave, the Appeals Chamber is also urged to take into account that recent events in Libya have caused the security situation to deteriorate even further which has a direct bearing on whether it is possible for Mr. Al-Senussi to

---

Prosecution, Defence and OPCV to the Libyan Government's Application relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11-403-Red2, 14 August 2013, para. 146.

<sup>24</sup> Libyan Response of 24 February 2014, paras. 2, 3.

<sup>25</sup> 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' and 'Addendum' filed on 5 September 2013', ICC-01/11-01/11-455, 26 September 2013, para. 28.

<sup>26</sup> Libya has on several occasions confirmed that Mr. Al-Senussi has the right under Libyan law to appoint a lawyer of his choosing. See for example, 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; and Article 106 of the Libyan Code of Criminal Procedure, ICC-01/11-01/11-482, para. 65. Furthermore, Mr. Al-Senussi has made repeated requests to appoint his own lawyer. See, 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>); 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-01/11-01/11-500-Anx3.

obtain independent and genuinely effective legal representation in Libya. The Defence will submit that recent reports make it clear that the grave security situation will make it untenable for Mr. Al-Senussi to obtain any effective legal representation of his choosing. For example, a recent US State Department report notes that in respect of legal proceedings in Libya “[i]ntimidated judges and prosecutors and under-resourced courts [have] struggled to deal with sensitive and complex political cases. Additionally, judges and prosecutors cited concerns about the overall lack of security in and around the courts, further hindering the re-establishment of the rule of law. Vigilantes threatened detainees that they would be killed if released, and, conversely, escapees threatened their former jailers. ... When authorities did attempt to conduct trials, threats and acts of violence often influenced and curtailed judicial proceedings.”<sup>27</sup> The UN Secretary-General has stated that in light of the current breakdown in security in Libya, the courts there are unable to function effectively.<sup>28</sup> Accordingly, the Defence submits that it should be granted leave to respond to Libya’s new claims that legal representation is supposedly being arranged for Mr. Al-Senussi.

*Libya’s new assertions concerning the visit of the ICC Defence team*

15. In its Response of 24 February 2014, Libya provided new information to seek to support its claim that it has a genuine intention to permit a legal visit for Mr. Al-Senussi’s ICC Defence team. Libya filed a letter from the Libyan Attorney-General (Annex 1) which “attests to his willingness to allow any lawyer or defendant from the ICC to visit Mr. Al-Senussi, as well as, moreover, a desire to assist with obtaining an entry visa.”<sup>29</sup>

16. The Defence seeks leave to respond to this new material. The Defence submits that it must be given a chance to respond in order to explain why this new information cannot be relied on by the Appeals Chamber. The letter fails to address the real issue

<sup>27</sup> US Department of State, LIBYA 2013 HUMAN RIGHTS REPORT, p. 2, 11 (<http://www.state.gov/documents/organization/220578.pdf>). See also, UN voices ‘deep concern’ about continued violence in Libya, UN News Centre, 25 February 2014 (<http://www.un.org/apps/news/story.asp?NewsID=47219&Cr=libya&Cr1=#.Uxl66PldWSp>); Briefing by Tarek Mitri SRSG for Libya - Meeting of the Security Council 10 March 2014 (<http://unsmil.unmissions.org/Default.aspx?tabid=3543&ctl=Details&mid=6187&ItemID=1822224&language=en-US>).

<sup>28</sup> UN Security Council, Report of the Secretary-General on the United Nations Support Mission in Libya, S/2014/131, 26 February 2014, paras. 40, 41 ([http://www.un.org/ga/search/view\\_doc.asp?symbol=S/2014/131](http://www.un.org/ga/search/view_doc.asp?symbol=S/2014/131)).

<sup>29</sup> Libyan Response of 24 February 2014, para. 16. See also, Annex 1, ICC-01/11-01/11-519-Anx1.

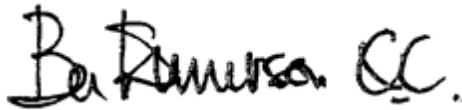


this point (and the authorities referred to) is put before the Appeals Chamber so that it is represented in a fair and balanced way in its proper context.

### **Conclusion**

18. For all of the above reasons the Defence submits that it has shown good cause to reply and/or file further submissions in respect of each of the specific issues identified above. The Defence thus respectfully requests the Appeals Chamber to permit it to file further submissions in reply to Libya's Response of 24 February 2014 pursuant to Regulation 24(5) and/or Regulation 28.

Counsel on behalf of Mr. Abdullah Al-Senussi,



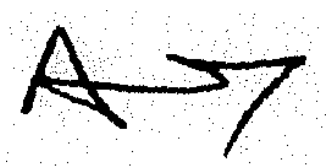
**Ben Emmerson QC**



**Rodney Dixon**



**Amal Alamuddin**



**Anthony Kelly**

Dated 11 March 2014  
London, United Kingdom