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Date: **8 May 2014**

PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernández de Gurmendi, Single Judge

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 “Prosecution Request for an Order to Libya”

Source: Mr. Abdullah Al-Senussi, represented by Ben Emmerson QC, Rodney Dixon QC, 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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Other

Introduction

1. The Defence for Mr. Abdullah Al-Senussi hereby files its Response to the “Prosecution Request for an Order to Libya” filed on 1 May 2014.¹ The Defence submits this Response in accordance with Regulation 24(1) of the Regulations of the Court, and in accordance with the request of the Single Judge that all submissions in response were to “be filed in the record of the case by Thursday, 8 May 2014.”²
2. The Defence submits that in the circumstances of this case, the Prosecutor’s requests are plainly insufficient. Given that Libya has repeatedly failed to comply with the Chamber’s Orders, made it clear that it will not surrender Mr. Al-Senussi to the ICC and that he will be tried in Libya, and then proceeded to try him in violation of all of his basic rights, it serves no useful purpose to ask that Libya report on the present trial proceedings and provide “assurances that the outcome of its domestic proceedings will not ... hinder its potential obligation to surrender Mr Al- Senussi, should the Appeals Chamber reverse the inadmissibility decision against him.”³
3. Mr. Al-Senussi is currently on trial in Libya in proceedings which have been widely condemned as ‘farcical’.⁴ He still has no legal representation, no access to the evidence against him, and no fair trial guarantees. The security situation is perilous with lawyers for defendants being attacked and intimidated. Libya has still not, after nearly a year and a half, permitted the Defence to have any contact with Mr. Al-Senussi. Despite all of Libya’s assurances that Mr. Al-Senussi’s rights would be protected and that the national trial proceedings would be conducted in accordance with the highest international standards, the reality is quite the opposite. In these circumstances, it would be meaningless and cosmetic to ask Libya to provide any further assurances at this stage. Instead, the Defence requests that:

¹ Prosecution Request for an Order to Libya, ICC-01/11-01/11-539, 1 May 2014 (hereinafter “Prosecution Request”).

² Email from Silvestro Stazzone of 1 May 2014.

³ Prosecution Request, para. 8.

⁴ Libya: Trial of former al-Gaddafi officials by video link a farce, Amnesty International, 14 April 2014 (<http://www.amnesty.org/en/news/libya-trial-former-al-gaddafi-officials-video-link-farce-2014-04-14>); Libya: Fair Trial Concerns for Ex-Officials, HRW, 14 April 2014 (<http://www.hrw.org/news/2014/04/14/libya-fair-trial-concerns-ex-officials>); Libya’s Justice Pandemonium, HRW, 14 April 2014 (<http://www.hrw.org/news/2014/04/14/libyas-justice-pandemonium>).

- The Pre-Trial Chamber should order the Libyan authorities to suspend the trial proceedings in Libya until the Appeals Chamber has rendered its final determination (which should be rendered without any further delay). This is the only meaningful way to seek to ensure that any of the ICC's orders, following the Appeals Chamber's final decision, could be implemented.
- The Pre-Trial Chamber should refer Libya to the UN Security Council for its non-compliance with the Orders of the Chamber, including its failure to facilitate any legal visit as ordered by the Chamber. This would make it clear that any failure to comply with the ICC's orders in the future, including after the Appeals Chamber's final decision, would not be countenanced.

The Prosecutor's Request is inadequate

4. Mr. Al-Senussi has been held in virtually incommunicado detention for nearly 20 months. During this extended period the Libyan authorities have interrogated Mr. Al-Senussi on several occasions,⁵ charges have been confirmed against him before the Accusation Chamber⁶, and now the trial proceedings have started.⁷ Throughout, Mr. Al-Senussi's due process and fair trial rights have been systematically and irreparably violated. He has been denied any legal representation despite repeatedly asking for a lawyer.⁸ His ICC Defence team has been denied any access to Mr. Al-Senussi for 16 months, despite two clear Orders from the Pre-Trial Chamber to facilitate a legal visit.⁹ In addition, he has been allowed virtually no contact with his family.

⁵ 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. 43, 125.

⁶ 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-01/11-01/11455, 26 September 2013.

⁷ Libya: Fair Trial Concerns for Ex-Officials, HRW, 14 April 2014 (<http://www.hrw.org/news/2014/04/14/libya-fair-trial-concerns-ex-officials>); Gaddafi's son Saif, former officials face charges in Tripoli court, Reuters, 27 April 2014 (<http://in.reuters.com/article/2014/04/27/us-libya-gaddafi-idINKBN0DD0AV20140427>).

⁸ 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, para. 124.

⁹ 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, IC-01/11-01/11-267, 6 February 2013, paras. 37-40; Decision concerning a privileged visit to Abdullah Al-Senussi by his Defence, ICC-01/11-01/11-456, 26 September 2013.

5. The Libyan authorities have consistently sought to assure the Chamber that “the case against Mr. Al-Senussi cannot proceed to trial without counsel being appointed to represent Mr. Al-Senussi.”¹⁰ Despite these assurances, the trial proceedings against Mr. Al-Senussi began on 14 April 2014 with hearings on 14 April 2014¹¹ and 27 April 2014¹², and future hearings scheduled for 11 May 2014. In both hearings to date, Mr. Al-Senussi complained that he had no legal representation.
6. During the 14 April 2014 trial proceedings, Mr. Al-Senussi stated in the courtroom that “I want to be treated like other prisoners. I want visiting rights. I don't have a lawyer.”¹³ During the 27 April 2014 trial proceedings, Mr. Al-Senussi remained without legal representation. A lawyer appointed to represent Mr. Al-Senussi, withdrew his representation before the 27 April hearing citing “health reasons.”¹⁴ During the hearing Mr. Al-Senussi stated that “I am searching for another lawyer” ... I would like to be given the chance to appoint foreign lawyers, non-Libyans, to represent me.”¹⁵ Mr. Al-Senussi went on to say: “With all due respect, we need to speak in realistic terms. As far as I am concerned, I am not facing Justice but I am facing something else.”¹⁶

¹⁰ 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, para. 27; 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. 19; Libyan Government's consolidated Reply to the Responses by the 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. 144; 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. 129-130; 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. 46; Libyan Government's Response to the Al-Senussi Defence's ‘Further Submissions on behalf of Abdulalah Al-Senussi Pursuant to Regulation 28’, ICC-01/11-01/11-519-Red, 24 February 2014, para. 17.

¹¹ Libya: Fair Trial Concerns for Ex-Officials, HRW, 14 April 2014 (<http://www.hrw.org/news/2014/04/14/libya-fair-trial-concerns-ex-officials>).

¹² Gaddafi's son Saif, former officials face charges in Tripoli court, Reuters, 27 April 2014 (<http://in.reuters.com/article/2014/04/27/us-libya-gaddafi-idINKBN0DD0AV20140427>).

¹³ Libya starts trial of ex-Gaddafi officials, sons absent, Reuters, 14 April 2014 (<http://www.reuters.com/article/2014/04/14/us-libya-trial-gaddafi-idUSBREA3D0DA20140414>). See also, Libya's Justice Pandemonium, HRW, 14 April 2014 (<http://www.hrw.org/news/2014/04/14/libyas-justice-pandemonium>).

¹⁴ Qaddafi Son Appears on Screen at His Trial, NYTimes, 27 April 2014 (<http://www.nytimes.com/2014/04/28/world/africa/qaddafi-son-appears-on-screen-at-his-trial.html>).

¹⁵ ICC-01/11-01/11-537-AnxA.

¹⁶ ICC-01/11-01/11-537-AnxA.

7. With the national trial now underway, the continuing violations of Mr. Al-Senussi's rights are irreversibly prejudicing and harming him. There can be no other conclusion than that Libya is unwilling to try and bring Mr. Al-Senussi to justice and is unable to conduct any national trial. Even though Libya claimed that the trial could never begin without Mr. Al-Senussi being represented, it has started while he has no legal representation. Although it is reported that a lawyer appointed to represent Mr. Al-Senussi resigned for "health reasons",¹⁷ the Defence has received information that this lawyer was shot in the leg outside the court in Tripoli.¹⁸ This demonstrates that the well-documented threats against lawyers in Libya apply directly to Mr. Al-Senussi and make it impossible for him to obtain legal representation.¹⁹ Whatever the reason for the lawyer's withdrawal, the fact remains that Mr. Al-Senussi has no effective representation at trial. It is impossible to be represented genuinely in these circumstances. He has had no opportunity to review the case file and to prepare any defence. Even if some lawyer was now appointed, it would be a last ditch effort by the authorities to seek to claim that the proceedings were somehow fair. This pretence would clearly not provide any genuine and effective representation.

8. The results of Mr. Al-Senussi's interrogations, conducted without a lawyer present, are being used in evidence against him. Most concerning is the evidence showing that Mr. Al-Senussi has been beaten and abused in prison in order to obtain confessions.²⁰ The continuation of the national trial is thus causing him very serious harm that cannot be reversed. Indeed, as a result of these fundamentally flawed proceedings Mr. Al-Senussi imminently faces conviction and the death penalty.

9. It is for these reasons that the Defence submits that the Prosecutor's request is completely insufficient. It is noteworthy that the Prosecutor has not expressed any concern about the way in which the national trial is being conducted and the continuing violations of Mr. Al-Senussi's rights. There is no mention at all of Libya's

¹⁷ Qaddafi Son Appears on Screen at His Trial, NYTimes, 27 April 2014 (<http://www.nytimes.com/2014/04/28/world/africa/qaddafi-son-appears-on-screen-at-his-trial.html>).

¹⁸ The sources of this information can be provided confidentially to the Chamber as they do not wish to be named publicly.

¹⁹ 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, paras. 96, 106; 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. 9.

²⁰ 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.

repeated violations of the ICC's Orders. On all of these crucial matters, the Prosecutor is silent. The Prosecutor has not altered her opposition to Mr. Al-Senussi's appeal and support for Libya's position.

10. The Prosecutor has not established that seeking further assurances from Libya will result in Libya fulfilling any of its obligations to the ICC. Libya has repeatedly stated that it will proceed with the trial in Libya, regardless of the ICC's proceedings, and it has done just that.²¹ It has consistently failed to comply with the ICC's orders, and shown no intent to change its ways. It is a 'repeat offender', and accordingly, the only remedy is to report Libya to the Security Council for non-compliance. The Defence submits that this would be the best way of seeking to ensure that Libya did comply with any future orders that could follow the Appeals Chamber's final decision. Otherwise, Libya will believe, with justification, that it can ignore the ICC's orders without any consequences.

Requested orders

11. The Prosecutor states that she is concerned that "Libya has begun trial proceedings against Mr Al-Senussi while the appeal of the admissibility decision is pending"²² The Defence submits that the only feasible way of addressing this concern is for the Chamber to make the following orders:

(1) Suspend the trial proceedings

12. Given that the national trial has started in order to reach its conclusion, the only effective way of seeking to guarantee that Libya fulfils its obligation of not taking "any action which would frustrate or otherwise hinder or delay the possibility of compliance with its obligations vis-à-vis the Court, including its duty to surrender Mr. Al-Senussi to the Court"²³, is for the Pre-Trial Chamber to order that Libya

²¹ 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-01/11-01/11-248, 9 January 2013, para. 2; 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, 17; 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, para. 96

²² Prosecution Request, para. 4.

²³ 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. 36.

immediately suspend the trial proceedings, pending the final determination by the Appeals Chamber.

13. Before the start of the trial, the Chamber ordered Libya to take “positive measures” to ensure that it did not frustrate or hinder the prompt execution of any surrender order by the ICC and that it would cooperate with the ICC should the case be found admissible.²⁴ Proceeding now with the national trial to its conclusion directly undermines this Order and certainly fails to demonstrate that Libya is taking any “positive measures” to be in a position to comply with any surrender order.
14. The ICC is presently seized of deciding finally whether it will conduct the trial proceedings, and the ICC should therefore prevent any action being taken which would make it impossible to give effect to its final decisions on this matter. In the event that Libya is permitted to conduct and conclude the national trial, it will clearly frustrate the possible implementation of any order made by the ICC to surrender Mr. Al-Senussi. Libya did not commence the trial on the basis that its conduct and conclusion will be dependent on the ICC’s admissibility determination.
15. The previous applications made by the Defence to suspend the national proceedings were decided before the national trial had actually started.²⁵ The circumstances have now changed in that the Libyan authorities have started the trial in order to conclude the trial proceedings. Moreover, given that Mr. Al-Senussi is still without legal representation, despite Libya’s previous assurances to the contrary, and is unable to present any defence, is manifestly causing him irreversible prejudice and harm as a result of the actual trial proceedings.
16. Although this is not a matter for the Pre-Trial Chamber, it is essential that the Appeals Chamber render its final decision on the admissibility of Mr. Al-Senussi’s case without any further delay (as the Defence for Mr. Saif Gaddafi has also submitted to

²⁴ Decision on Libya's postponement of the execution of the request for arrest and surrender of Abdullah Al-Senussi pursuant to article 95 of the Rome Statute and related Defence request to refer Libya to the UN Security Council, ICC-01/11-01/11-354, 14 June 2013, para. 40.

²⁵ Decision on additional submissions in the proceedings related to Libya's challenge to the admissibility of the case against Abdullah Al-Senussi, ICC-01/11-01/11-409, 19 August 2013; Decision on the request for suspensive effect and the request to file a consolidated reply, ICC-01/11-01/11-480, 22 November 2013.

the Appeals Chamber²⁶). The failure to determine the appeals expeditiously has opened the door to Libya to press ahead with the national trial, as it said it would, in defiance of the ICC's admissibility proceedings and in non-compliance with the ICC's Orders.

(2) Report Libya to the Security Council

17. Libya has demonstrated that it will not comply with the Chamber's Orders to facilitate a legal visit to Mr. Al-Senussi. It has been one year and four months since the Pre-Trial Chamber ordered Libya to arrange "a visit of the appointed counsel for Mr Al-Senussi to his client on a privileged basis as soon as practicable."²⁷ In addition, it has been seven months since Pre-Trial Chamber noted the delay in organising the visit²⁸ and ordered Libya to facilitate the visit "on the basis of an *ad hoc* agreement ... in order to expedite the organisation of the visit to Mr Al-Senussi by his Defence."²⁹

18. The Defence has twice requested that Libya be referred to the Security Council for failing to comply with these Orders.³⁰ Both requests were rejected by the Pre-Trial Chamber. The Chamber stated in relation to the Defence's first application that it was:

"unwarranted to resort at the moment to a finding of non-cooperation before the Security Council. The Chamber however notes that to date the privileged legal visit to Mr Al-Senussi is yet to take place. Should the circumstances ultimately evolve into indicating that Libya will fail to cooperate with the Court in the arrangement of the privileged legal visit to Mr Al-Senussi the

²⁶ Urgent Request for the Immediate Issuance of the Judgment on Libya's Appeal against the "Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi", with Public Annex A, ICC-01/11-01/11-537, 30 April 2014, paras. 1-7, 68.

²⁷ 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, IC-01/11-01/11-267, 6 February 2013, paras. 37-40.

²⁸ Decision concerning a privileged visit to Abdullah Al-Senussi by his Defence, ICC-01/11-01/11-456, 26 September 2013, para. 12.

²⁹ Decision concerning a privileged visit to Abdullah Al-Senussi by his Defence, ICC-01/11-01/11-456, 26 September 2013, para. 14.

³⁰ 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-01/11-01/11-304, paras. 35-40; 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.

Chamber will determine what measures would be necessary to ensure compliance on the part of Libya with the Chamber's order to that effect."³¹

19. In respect of the Defence's second application, the Chamber found that even though seven months had passed since its order, "a finding of non-cooperation in relation to the organisation of a privileged visit to Mr Al-Senussi by his Defence is not warranted at this stage."³²

20. Despite various attempts by the Registry and the Defence since then to obtain Libya's co-operation to arrange a legal visit in accordance with the Chamber's Orders, Libya has not arranged the visit.³³ The fact that Libya has not arranged this visit in 16 months can only mean that it will not do so in violation of the Chamber's Orders. The Chamber is thus requested pursuant to Article 87 and the settled jurisprudence of the Court³⁴ to report this violation to the Security Council having already deferred on two previous occasions to make such a ruling without Libya's compliance thereafter. The Defence submits that in these circumstances there can be no doubt that Libya has and will fail to cooperate with the Court in the arrangement of the privileged legal visit.

21. As submitted above, such a report will convey to Libya that there are serious consequences to failing to cooperate with the ICC. It is the proper way to seek to guarantee Libya's compliance with any future orders of the ICC following the final decision of the Appeals Chamber.

³¹ Decision on Libya's postponement of the execution of the request for arrest and surrender of Abdullah Al-Senussi pursuant to article 95 of the Rome Statute and related Defence request to refer Libya to the UN Security Council, ICC-01/11-01/11-354, 14 June 2013, para. 45.

³² Decision concerning a privileged visit to Abdullah Al-Senussi by his Defence, ICC-01/11-01/11-456, 26 September 2013, para. 17.

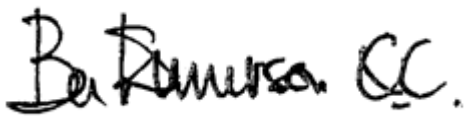
³³ See, Sixth Report of the Registry on the visit of the defence team to Libya, ICC-01/11-01/11-467-Conf, 14 October 2013; Second Report of the Registry on the execution of requests pending before the Libyan authorities, ICC-01/11-01/11-506-Conf-Red, 4 February 2014; Document in Support of Appeal on 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. 42-48; Request on behalf of Abdullah Al-Senussi to File Further Submissions Pursuant to Regulation 28, ICC-01/11-01/11-493, 19 December 2013, paras. 9-11; Further Submissions on behalf of Abdullah Al-Senussi Pursuant to Regulation 28, ICC-01/11-01/11-513-Red, 14 February 2014, paras. 3-7.

³⁴ See, 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-01/11-01/11-304, 19 March 2013, paras. 10-17.

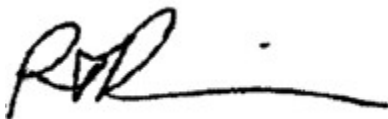
Conclusion

22. For the reasons above, the Defence respectfully requests the Pre-Trial Chamber not to ask Libya for any assurances and instead (i) to order Libya to suspend the trial proceedings pending the outcome of the ICC's appellate proceedings, as the only means of ensuring that no actions are taken to frustrate or hinder compliance with Libya's obligations vis-à-vis the ICC, and (ii) to report Libya to the Security Council for its non-compliance to date.

Counsel on behalf of Mr. Abdullah Al-Senussi,



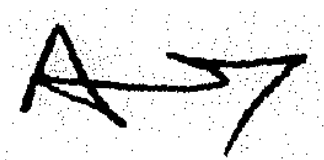
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Dated 8th May 2014

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