

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 17 October 2013

THE APPEALS CHAMBER

Before: Judge Akua Kuenyehia
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

Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I's 'Decision on the admissibility of the case against Abdullah Al-Senussi', and Request for Suspensive Effect

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

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Other

I. Introduction

1. The Defence for Mr. Abdullah Al-Senussi hereby files its appeal against Pre-Trial Chamber I's "Decision on the admissibility of the case against Abdullah Al-Senussi",¹ dated 11 October 2013. This Appeal is filed pursuant to Articles 19(6), 82(1)(a), 82(3), 83(2)(a) of the Rome Statute, Rules 154(1) and 156 of the Rules of Procedure and Evidence, and Regulations 33(1)(d) and 64 of the Regulations of the Court.
2. The Defence requests that this appeal has immediate suspensive effect on the Pre-Trial Chamber's Admissibility Decision of 11 October 2013. This request is made pursuant to Article 82(3) of the Rome Statute and Rule 156(5) of the Rules of Procedure and Evidence.

II. The Decision

3. In the Admissibility Decision of 11 October 2013, the Pre-Trial Chamber:

*DECIDE[D] that the case against Abdullah Al-Senussi is inadmissible before the Court under article 17(1)(a) of the Statute.*²

III. Applicable Law

4. The Defence files this appeal pursuant to Articles 19(6), 82(1)(a), 82(3), 83(2)(a) of the Rome Statute, Rules 154(1) and 156 of the Rules of Procedure and Evidence, and Regulations 33(1)(d) and 64 of the Regulations of the Court.
5. Article 19(6) provides that "[d]ecisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82."³ The Defence, therefore, has an appeal as of right to the Appeals Chamber against the Pre-Trial Chamber's Decision on 11 October 2013.⁴

¹ Decision on the admissibility of the case against Abdullah Al-Senussi, ICC-01/11-01/11-466-Conf, 11 October 2013 (hereinafter "Admissibility Decision of 11 October 2013").

² Admissibility Decision of 11 October 2013, p. 152.

³ Rome Statute, Article 19(6).

⁴ Admissibility Decision of 11 October 2013.

6. Article 82(1)(a) provides that “[e]ither party may appeal” a “decision with respect to jurisdiction and admissibility” in accordance with the Rules of Procedure and Evidence.⁵

7. Article 82(3) provides that:

“An appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence.”⁶

8. Article 83(2)(a) states:

*“If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may:
(a) Reverse or amend the decision or sentence ...”*

9. In accordance with Rule 154(1), such an appeal must be filed “not later than five days from the date upon which the party filing the appeal is notified of the decision.”⁷ Further, in accordance with Regulation 33(1)(d) “[d]ocuments shall be filed with the Registry, at the latest, on the first working day of the Court following expiry of the time limit.”⁸

10. Regulation 64 provides that:

“(1) An appeal filed under rule 154 shall state:

- (a) The name and number of the case or situation;*
- (b) The title and date of the decision being appealed;*
- (c) The specific provision of the Statute pursuant to which the appeal is filed;*
- (d) The relief sought.*

(2) Subject to sub-regulations 5 and 6, the appellant shall file a document in support of the appeal, with reference to the appeal, within 21 days of notification of the relevant decision. The document in support of the appeal shall set out the grounds of appeal and shall contain the legal and/or factual reasons in support of each ground of appeal.”

⁵ Rome Statute, Article 82(1)(a).

⁶ Rome Statute, Article 82(3).

⁷ Rules of Procedure and Evidence, Rule 154(1).

⁸ Regulations of the Court, Reg. 33(1)(d).

IV. The Appeal

11. Pursuant to Articles 19(6), 82(1)(a) and 83(2)(a), the Defence for Mr. Al-Senussi respectfully requests that the Appeals Chamber reverses the Pre-Trial Chamber's Admissibility Decision of 11 October 2013 and determines that the case against Mr. Al-Senussi is admissible before the ICC.
12. Pursuant to Regulation 64(2), the Defence for Mr. Al-Senussi will file the document in support of this appeal in which it shall set out the grounds of the appeal, within 21 days of notification of the impugned decision.

V. Request for Suspensive Effect

13. As part of this appeal, the Defence hereby requests that this appeal⁹ has suspensive effect on the Pre-Trial Chamber's Admissibility Decision of 11 October 2013, and that as a consequence of this suspension Libya is ordered by the Appeals Chamber not to try Mr. Al-Senussi in Libya while the Appeals Chamber is seized of this appeal and until the Appeals Chamber's final judgment on the admissibility of Mr. Al-Senussi's case is rendered.
14. The Defence sets out its request for the suspension of the Pre-Trial Chamber's Decision within this appeal in light of the Appeals Chamber's previous finding that "Any request for suspensive effect must be made in the appeal, which will generally be the first filing of the appellant before the Appeals Chamber."¹⁰ The Appeals Chamber explained that "[t]his requirement is logical because of the urgent nature of requests for suspensive effect, and because of the need for clarity as early as possible as to whether a request for suspensive effect is made."¹¹

⁹ Filed pursuant to Articles 19(6), 82(1) and 83(2), Rules 154(1) and 156 and Regulations 64 as noted above.

¹⁰ *Prosecutor v. Bemba*, Decision on the Request of Mr Bemba to Give Suspensive Effect to the Appeal Against the "Decision on the Admissibility and Abuse of Process Challenges", ICC-01/05-01/08-817, 9 July 2010, para. 8.

¹¹ *Prosecutor v. Bemba*, Decision on the Request of Mr Bemba to Give Suspensive Effect to the Appeal Against the "Decision on the Admissibility and Abuse of Process Challenges", ICC-01/05-01/08-817, 9 July 2010, para. 8.

15. As noted above, Article 82(3) provides that:

*“An appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence.”*¹²

16. Rule 156(5) states that:

“When filing the appeal, the party appealing may request that the appeal have suspensive effect in accordance with article 82, paragraph 3.”

17. The Appeals Chamber has noted that “when faced with a request for suspensive effect, the Appeals Chamber will consider the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under the circumstances.”¹³

18. The Appeals Chamber has held that when assessing whether any suspension should be granted, the Appeals Chamber will consider “whether the implementation of the decision under appeal (i) ‘would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the appellant’, (ii) would lead to consequences that ‘would be very difficult to correct and may be irreversible’, or (iii) ‘could potentially defeat the purpose of the appeal.’”¹⁴

19. The Defence for Mr. Al-Senussi submits that the Appeals Chamber should suspend the implementation of the Admissibility Decision of 11 October 2013 given that the implementation of the Decision - namely that Libya proceeds to try and sentence Mr. Al-Senussi, as opposed to him being transferred and tried at the ICC - would defeat the very purpose of the appeal and render it moot. Mr. Al-Senussi’s trial and sentence - which would inevitably be the death penalty¹⁵ - in Libya would plainly create an irreversible situation with consequences that would be impossible to correct and

¹² Rome Statute, Article 82(3).

¹³ *Prosecutor v. Bemba*, Decision on the Request of the Prosecutor for Suspensive Effect, ICC-01/05-01/08-499, 3 September 2009, para. 11. See also, Decision on the request for suspensive effect and related issues, ICC-01/11-01/11-387, 18 July 2013, para. 22; *Prosecutor v. Thomas Lubanga Dyilo*, “Reasons for the decision on the request of the Prosecutor for suspensive effect of his appeal against the ‘Decision on the release of Thomas Lubanga Dyilo’”, ICC-01/04-01/06-1444 (OA 12), 22 July 2008, para. 8; *Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the Prosecutor’s request to give suspensive effect to the appeal against Trial Chamber I’s oral decision to release Mr Thomas Lubanga Dyilo”, ICC-01/04-01/06-2536 (OA 17), 23 July 2010, para. 7.

¹⁴ *Prosecutor v. Bemba*, Decision on the Request of Mr Bemba to Give Suspensive Effect to the Appeal Against the “Decision on the Admissibility and Abuse of Process Challenges”, ICC-01/05-01/08-817, 9 July 2010, para. 11.

¹⁵ See para 26 and footnotes 21 and 22 below.

reverse if the Appeals Chamber was to find in favour of the Appellant. Even if Libya had not completed Mr. Al-Senussi's trial and sentenced him by the time the Appeals Chamber delivered its judgment, it would still constitute an irreversible situation that could not be corrected even if the Appeals Chamber ruled in favour of the Appellant. As set out below¹⁶, the continuing violations of Mr. Al-Senussi's fundamental due process and fair trial rights in Libya - which are the subject of the present appeal - could not be reversed after the event.

Implementation of the Admissibility Decision would defeat the purpose of the appeal

20. The Defence submits that the purpose of its appeal is for the Appeals Chamber to review the Pre-Trial Chamber's finding that Mr. Al-Senussi's case before the ICC is inadmissible and that he can therefore be tried and sentenced in Libya. In the event that the appeal is granted and the Pre-Trial Chamber's decision is reversed, Libya would not be entitled to try and sentence Mr. Al-Senussi in Libya, but would instead be obliged to surrender him immediately to the ICC for trial at the ICC. The very purpose of the appeal is thus to determine finally *where* Mr. Al-Senussi is to be tried and sentenced.
21. The Admissibility Decision should therefore be suspended so as to guarantee that Libya cannot rely on the Decision to try and sentence Mr. Al-Senussi in Libya as if a final decision on the admissibility of the case has already been made by the ICC. In the absence of an order for suspension, Libya would be able to proceed to conduct and complete the trial proceedings, thus defeating the purpose of the appeal which is to determine whether Mr. Al-Senussi can be tried in Libya at all or should instead be surrendered to the ICC for trial. In these circumstances the present appeal would be rendered moot.
22. The Appeals Chamber should take into account that the national proceedings against Mr. Al-Senussi have reached the accusation stage. Following the hearing in Libya on 19 September 2013, Libya stated in its filing before the ICC that the proceedings before the Accusation Chamber in Libya would "take approximately two months."¹⁷

¹⁶ See paras 24-31 below.

¹⁷ 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

However, after the following hearing in Mr. Al-Senussi's case on 3 October 2013, it was reported that the accusation phase would be completed on 24 October 2013, which would make the accusation phase a month shorter than was submitted by Libya in its filing to the ICC.¹⁸ Given that the trial of the case will follow the accusation phase, which could be completed in as soon as a week from now, and before the Appellant will have even submitted his document in support of the appeal, it is essential that the Admissibility Decision is suspended to prevent Libya from relying on the Decision to try and sentence Mr. Al-Senussi before the Appeals Chamber has finally determined whether Libya can indeed try him or whether the national proceedings should be halted and Mr. Al-Senussi should be transferred to the ICC for trial at the ICC.

23. Furthermore, were Mr. Al-Senussi's trial conducted and completed in Libya before the Appeals Chamber's determination of the present appeal, the very grounds that Libya has relied in the admissibility proceedings before the ICC - that it is genuinely investigating and prosecuting the same case as before the ICC as provided for in Article 17(1)(a) - which is the subject of the present appeal, would no longer be applicable. Mr. Al-Senussi would have been tried, and Libya could then assert that its grounds under Article 17(1)(a) were irrelevant and that the case before the ICC is instead inadmissible under Article 17(1)(c) on the basis that "the person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3".¹⁹ This is a completely different basis for inadmissibility which has not been relied on by Libya in the present admissibility proceedings and which is not the subject of the present appeal. It would defeat the purpose of the appeal that is centred on the application of Article 17(1)(a) if Libya were able to rely on the Admissibility Decision to conduct and complete Mr.

case against Abdullah Al-Senussi' of 19 September 2013' and 'Addendum' filed on 5 September 2013", ICC-01/11-01/11455, 26 September 2013, para. 5.

¹⁸ After the 3 October 2013 hearing, a Defence lawyer, Mussa al-Zentani, stated that in the closed door hearing "The court fixed the date of October 24 to decide whether to drop the charges or to refer the accused to a jurisdiction of its choice." Libya court to rule on top Qaddafi figures October 24, Al Arabiya, 3 October 2013 (<http://english.alarabiya.net/en/News/africa/2013/10/03/Libya-court-to-rule-on-top-Qaddafi-figures-October-24-.html>); Libya court to rule on top Gadhafi figures Oct. 24, The Daily Star, 3 October 2013 (<http://www.dailystar.com.lb/News/Middle-East/2013/Oct-03/233449-libya-court-to-rule-on-top-gadhafi-figures-oct-24.ashx#axzz2gvImdY5n>).

¹⁹ Rome Statute, Article 17(1)(c). Article 20(3) provides that - "No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 bis shall be tried by the Court with respect to the same conduct unless the proceedings in the other court: (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."

Al-Senussi's trial in Libya and thereby (i) to circumvent the need for the Appeals Chamber to determine whether the requirements of Article 17(1)(a) had been met, and (ii) to create a new ground for arguing that the case was inadmissible before the ICC. Mr. Al-Senussi's right to an effective appeal against the Admissibility Decision would be denied and irreversibly lost.

Implementation of the Admissibility Decision would create an irreversible situation and consequences that could not be corrected even if the Appeals Chamber found for the Appellant in the appeal

24. The Defence submits that implementation by Libya of the Admissibility Decision will plainly create an irreversible situation for Mr. Al-Senussi which could not be corrected if the Appeals Chamber reversed the Pre-Trial Chamber's Decision and found Mr. Al-Senussi's case to be admissible before the ICC.
25. In determining whether to suspend a decision under appeal, the Appeals Chamber has previously emphasised that "any adverse effects on the overall fairness of the proceedings and the rights of the accused might be difficult to correct" and that "the need to preserve the integrity of the proceedings overrides any other consideration."²⁰
26. In Mr. Al-Senussi's case, any domestic trial in Libya would inevitably result in the imposition of the death penalty. Libya has made it plain that Mr. Al-Senussi can be sentenced to death for the offences with which he is charged in Libya.²¹ Other former

²⁰ *Prosecutor v. Germain Katanga*, "Decision on the request for suspensive effect of the appeal against Trial Chamber II's decision on the implementation of regulation 55 of the Regulations of the Court", ICC-01/04-01/07-3344 (OA 13), 16 January 2013, para. 9 (emphasis added).

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, paras. 134, 135; 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-Conf-Red, 14 August 2013, paras. 119, 120, 121, 160, 168, 192-199.

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. 67, 157-162; 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 September 2013, paras. 15-18, 30; 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, para. 5; 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. 31, 33, 45, 47; 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, paras. 24, 25. See also, ICC-01/11-01/11-340-Conf-AnxE (statement by Mustafa Abdul Jalil (NTC Chairman, 11 May 2013); The full interview - published on 29 April 2013 - is also found at <http://www.youtube.com/watch?v=WZDTi5GK5kI> at 44:27 minutes.

Gaddafi officials have been sentenced to death in Libya for similar crimes.²² Mr. Al-Senussi's most fundamental right to life will be violated if Libya proceeds to try and sentence him on the basis of the Pre-Trial Chamber's Decision that the case is inadmissible, while the Appeals Chamber is still seized of his appeal to be tried before the ICC. There is, of course, no way to correct this situation after the event if the Appeals Chamber grants Mr. Al-Senussi's appeal and orders that he should be transferred to the ICC for trial.

27. The Defence urges the Appeals Chamber to take all steps to seek to guarantee that Mr. Al-Senussi is not executed while it is still seized of Mr. Al-Senussi's appeal against the very decision which Libya can rely on to proceed with his trial in Libya. Given that there is no certainty about the length of the appeal proceedings before the ICC, and in order to ensure, at a minimum, that there is no risk of Mr. Al-Senussi being tried and sentenced to death, the Appeals Chamber is requested to suspend the implementation of the Admissibility Decision, and accordingly, to order Libya not to try and sentence Mr. Al-Senussi while the Appeals Chamber is seized of the present appeal.

28. Furthermore, the conduct alone of Mr. Al-Senussi's trial in Libya - whether it is completed or not by the time of the Appeals Chamber's judgment - will adversely affect Mr. Al-Senussi's rights and the overall fairness and integrity of the proceedings, which cannot be corrected after the event. This is because, as the Defence will argue on appeal, Libya is unable and unwilling genuinely to conduct fair trial proceedings against Mr. Al-Senussi in Libya, and the Pre-Trial Chamber erred in finding that his case was inadmissible before the ICC. Libya should not be permitted to try Mr. Al-Senussi while the appeal is underway on these matters which concern the very conduct of the national trial, as if Mr. Al-Senussi's appeal is successful, he would then have been wrongly subjected to trial proceedings in Libya in which his fair trial and due process rights would have been violated. Indeed, the Defence will rely in the appeal on compelling evidence which establishes that Mr. Al-Senussi's rights are being

²² Gaddafi minister sentenced to death, BBC, 31 July 2013 (<http://www.bbc.co.uk/news/world-africa-23524134>); Misrata court hands out death sentences, Libya Herald, 6 June 2013 (<http://www.libyaherald.com/2013/06/06/misrata-court-hands-out-death-sentences/>); Libya: al-Gaddafi loyalists at risk of 'revenge' death sentences, Amnesty International, 2 August 2013 (<http://www.amnesty.org/en/news/libya-al-gaddafi-loyalists-risk-revenge-death-sentences-2013-08-02>). See also, 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. 15-18.

systematically violated by the Libyan authorities. He has been detained in Libya for nearly 13 months without access to any lawyer despite his repeated requests to see a lawyer.²³ By any standards this is an appalling and totally unacceptable violation of fundamental due process. He has nevertheless been interrogated in detention in violation of his rights under Libyan law without any lawyer being present.²⁴ He is cut-off from the world and has been denied family visits and telephone calls.²⁵ His ICC Defence team has been prevented by the Libyan authorities from having any contact with him despite the Pre-Trial Chamber's orders to this effect.²⁶ Most recently, in disregard of the Pre-Trial Chamber's order²⁷, [REDACTED]

[REDACTED] In the Admissibility Decision the Chamber noted that it "is mindful that the Defence has not been able to visit Mr Al-Senussi, despite a decision of the Chamber to that effect, and that the Defence ability to properly raise certain issues of fact may have been prejudiced by this absence of direct contacts with Mr Al-Senussi."²⁹ It clearly remains essential for the Defence to consult with Mr. Al-Senussi in a privileged, confidential and secure environment, and particularly in respect of the appellate proceedings - including to obtain his instructions and to ascertain from him how he is being treated - before any final judgment is rendered by the Appeals Chamber. This must be the very least that should be expected of any State conducting proceedings before the ICC.

²³ 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, 125; 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. See also, 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/libya-must-surrender-saif-al-islam-al-gaddafi-international-criminal-court->). See also, ICC: Libya's Bid to Try Gaddafi, Sanussi, HRW, 13 May 2013, Question 34 (<http://www.hrw.org/news/2013/05/13/qa-libya-and-international-criminal-court#40>).

²⁴ 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. 165; See also, ICC-01/11-01/11-307-Conf-Anx3-Red.

²⁵ 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. 132. See also, 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/libya-must-surrender-saif-al-islam-al-gaddafi-international-criminal-court->).

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, paras. 36-40.

²⁷ Decision concerning a privileged visit to Abdullah Al-Senussi by his Defence, ICC-01/11-01/11-456, 26 September 2013, p. 7.

²⁸ Sixth Report of the Registry on the visit of the defence team to Libya, ICC-01/11-01/11-467-Conf, 14 October 2013, paras. 1-10.

²⁹ Admissibility Decision of 11 October 2013, para. 29.

29. [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED] It again demonstrates that Libya has no genuine intention to conclude any agreement in accordance with the Chamber's orders. It is astonishing that Libya simply will not arrange for Mr. Al-Senussi to consult with his Counsel. [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED] In the Defence's submission, this is precisely why the Decision should be suspended during the appeal - so that Libya cannot use the Decision to proceed as if there is no appeal and the admissibility of the case has already been finally determined.

30. Accordingly, Libya should not be permitted to rely on the Admissibility Decision to conduct trial proceedings in Libya that infringe the most basic rights of the Accused - which is itself a matter that is the subject of the present appeal. If Mr. Al-Senussi's appeal is granted, he will not have to endure such treatment and Libya will be obliged to surrender him to the ICC for trial in which he will not face the death penalty. Further, witnesses would not have to testify during the national trial in extremely difficult circumstances in which their lives could be endangered³³, in the absence of adequate witness protection programs³⁴, and without the necessary due process

³⁰ Sixth Report of the Registry on the visit of the defence team to Libya, ICC-01/11-01/11-467-Conf, 14 October 2013, paras. 1-10. See also, Decision concerning a privileged visit to Abdullah Al-Senussi by his Defence, ICC-01/11-01/11-456, 26 September 2013, paras. 14-17.

³¹ Sixth Report of the Registry on the visit of the defence team to Libya, ICC-01/11-01/11-467-Conf, 14 October 2013, para. 6.

³² ICC-01/11-01/11-253-Conf-Exp-Anx1.

³³ As referred to in the following filings: 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 September 2013, paras. 7, 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, paras. 68-72, 101-103. See, Libya: Wave of Political Assassinations, HRW, 8 August 2013 (<http://www.hrw.org/news/2013/08/08/libyawave-political-assassinations>); New Libyan Government Struggles to Restore Order, Al-Monitor (<http://www.almonitor.com/pulse/security/2013/01/new-libyan-government-works-to-restore-order.html#ixzz2VnW3cOUM>). All of these issues are the subject of the present appeal.

³⁴ 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 September 2013, paras. 5, 7, 8; Defence Response on behalf of Mr. Abdullah Al-Senussi to "Application on behalf of the Government of Libya relating to Abdullah Al-Senussi

safeguards, and then be required to testify again before the ICC. The implementation of the Admissibility Decision should therefore be suspended so that Mr. Al-Senussi's rights - and those of witnesses - will not continue to be violated in unfair national trial proceedings, which cannot be reversed after the event.

31. A further reason for granting the suspensive effect would be that it would guarantee that the Appeals Chamber would consider and decide on the merits of the Defence's appeal against the postponement of surrender order against Mr. Al-Senussi.³⁵ The effect of the suspension would be to maintain "the position as it was prior to the issuing of the"³⁶ Admissibility Decision. The Appeals Chamber could then find that the immediate surrender of Mr. Al-Senussi to The Hague during the appellate proceedings is justified in light of the appeal against the postponement of the surrender order and to ensure a secure and privileged setting for communications between Mr. Al-Senussi and his Counsel, given that Libya has not permitted him to have any such contact with his Counsel in Libya. In the Defence's submission such a finding would serve to protect Mr. Al-Senussi's fundamental rights, taking into account that the failure to do so could not be corrected or reversed at any later stage. The Appeals Chamber has previously held that surrendering Mr. Gaddafi to the Court during the appellate proceedings in that case would not prejudice or undermine Libya, or create an irreversible situation to its national proceedings³⁷, and it is submitted that a similar conclusion is warranted in the present case.

pursuant to Article 19 of the ICC Statute", ICC-01/11-01/11-356, 14 June 2013, paras. 68-72, 101-103; Decision on the admissibility of the case against Saif Al-Islam Gaddafi, ICC-01/11-01/11-344-Red, 31 May 2013, para. 209. All of these issues are the subject of the present appeal.

³⁵ Appeal on behalf of Mr. Abdullah Al-Senussi against the "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-01/11-01/11-439, 9 September 2013.

³⁶ *Prosecutor v. Mathieu Ngudjolo Chui*, "Decision on the request of the Prosecutor of 19 December 2012 for suspensive effect", ICC-01/04-02/12-12 (OA), 20 December 2012, para. 17.

³⁷ Decision on the request for suspensive effect and related issues, ICC-01/11-01/11-387, 18 July 2013, paras. 23-26.

VI. Relief Sought

32. For all of the reasons above, the Defence respectfully requests relief in the following terms:

- Pursuant to Articles 19(6), 82(1)(a) and 83(2)(a) of the Statute, the Appeals Chamber:
 - (a) Reverses the “Decision on the admissibility of the case against Abdullah Al-Senussi” of Pre-Trial Chamber I, dated 11 October 2013; and
 - (b) Determines that the case against Abdullah Al-Senussi is admissible before the ICC.
- The Appeals Chamber immediately suspends the Pre-Trial Chamber’s Admissibility Decision of 11 October 2013, pursuant to Article 82(3), and as a consequence of this suspension, orders Libya not to try Mr. Al-Senussi in Libya while the Appeals Chamber is seized of the present appeal and until it delivers its final judgment on the appeal.

Counsel on behalf of Mr. Abdullah Al-Senussi,



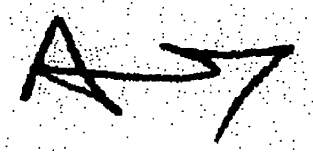
Ben Emmerson QC



Rodney Dixon

Amal Alamuddin

Amal Alamuddin

A handwritten signature consisting of the letters 'A' and 'K' in a stylized, cursive font, with a dotted background behind the ink.

Anthony Kelly

A handwritten signature in a cursive script, appearing to read 'W Schabas'.

Professor William Schabas

Dated 17th October 2013
London, United Kingdom