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Date: **20 June 2013**

PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernández de Gurmendi, Presiding Judge
Judge Hans-Peter Kaul
Judge Christine Van den Wyngaert

SITUATION IN LIBYA

IN THE CASE OF

THE PROSECUTOR

v.

SAIF AL-ISLAM GADDAFI and ABDULLAH AL-SENUSSI

Public with Public Annex 1

**Defence Application on behalf of Mr. Abdullah Al-Senussi for Leave to Appeal against
“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”**

Source: Mr. Abdullah Al-Senussi, represented by Ben Emmerson QC, Rodney
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Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

1. The Defence for Mr. Abdullah Al-Senussi files this application for leave to appeal 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” of 14 June 2013.¹
2. The application for leave to appeal is made pursuant to Article 82(1)(d) of the Statute, Rule 155, and Regulations 33 and 65.

Applicable law and jurisprudence

3. Pursuant to Article 82(1)(d) of the Statute the Applicant is required to demonstrate that the impugned decision concerns an issue that would significantly affect the fair and expeditious conduct of the proceedings, and for which an immediate resolution by the Appeal Chamber may materially advance the proceedings.
4. The Appeals Chamber has stated that “the object of paragraph (d) of article 82(1) of the Statute is to pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial.”² The Appeals Chamber clarified that a “wrong decision on an issue in the context of article 82(1)(d) of the Statute unless soon remedied on appeal will be a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process. In those circumstances the proceedings will not be advanced but on the contrary they will be set back.”³
5. The Appeals Chamber has noted that an issue will affect the fair conduct of the proceedings when it is “associated with the norms of a fair trial, the attributes of which are an inseverable part of the corresponding human right, incorporated in the Statute

¹ 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 (“Decision of 14 June 2013”).

² Appeals Chamber, “Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber's 31 March 2006 Decision Denying Leave to Appeal”, ICC-01/04-168, 13 July 2006 paras 19 (“AC Decision of 13 July 2006”).

³ AC Decision of 13 July 2006, para. 16.

by distinct provisions of it (articles 64 (2) and 67 (I)) and article 21 (3); making its interpretation and application subject to internationally recognized human rights. The expeditious conduct of the proceedings in one form or another constitutes an attribute of a fair trial.”⁴ The issue within the impugned decision need not be “confined to trial proceedings but [may] extend to pre-trial proceedings as well as the investigation of crime.”⁵ The Appeals Chamber has explained the purpose of Article 82(1)(d) saying: “[p]urging the pre-trial process of errors ... is designed as a safeguard for the integrity of the proceedings” as a “[b]reach of or deviation from the rules of a fair trial at the pretrial stage of the proceedings may have implications on the proceedings and may affect the outcome of the trial.”⁶

6. The Appeals Chamber further clarified that granting leave to appeal would “advance” the proceedings by moving the proceedings forward and “remov[ing] doubts about the correctness of a decision.”⁷
7. An ICC Chamber has previously granted leave to appeal on the basis that the issue would significantly affect the fair and expeditious conduct of the proceedings in that “mapping a course of action along the right lines provides a safety net for the integrity of the proceedings.”⁸ The Chamber found that “it is satisfied that the issue ... would significantly affect the fair and expeditious conduct of the proceedings and that it need not determine whether this issue would also affect the outcome of the trial.”⁹

⁴ AC Decision of 13 July 2006, para. 11.

⁵ AC Decision of 13 July 2006, para. 11.

⁶ AC Decision of 13 July 2006, para. 11.

⁷ AC Decision of 13 July 2006, para. 15; *Prosecutor v. Banda and Jerbo*, Decision on the Prosecution's Application for Leave to Appeal the 'Decision on the Prosecution's Request to Invalidate the Appointment of Counsel to the Defence', ICC-02/05-03/09-179, 13 July 2011, para. 22.

⁸ AC Decision of 13 July 2006, para. 15; *Prosecutor v. Banda and Jerbo*, Decision on the Prosecution's Application for Leave to Appeal the 'Decision on the Prosecution's Request to Invalidate the Appointment of Counsel to the Defence', ICC-02/05-03/09-179, 13 July 2011, para. 22.

⁹ *Prosecutor v. Banda and Jerbo*, Decision on the Defence Application for Leave to Appeal the "Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor", ICC-02/05-03/09-457, 21 March 2013, para. 19.

The issues in the present Decision

8. The Defence submits that the Chamber's Decision concerns the following issues, each of which significantly affect the fair and expeditious conduct of proceedings, and in respect of which an immediate resolution by the Appeals Chamber may materially advance the proceedings:
- (i) The finding that prior authorisation by the Chamber is not required to postpone the execution of a surrender order under Article 95;
 - (ii) The postponement of the surrender order on the narrow basis that all the Chamber needed to consider was whether an admissibility challenge had been properly filed before the ICC;
 - (iii) The Chamber's failure to consider or make any decision on the Defence's request to refer Mauritania to the Security Council for its violations of the ICC's orders and requests; and
 - (iv) The Chamber's refusal of the Defence's application to refer Libya to the Security Council for repeated violations of the ICC's orders without providing any reasons for its decision.

(1) The finding that prior authorisation is not required to postpone the execution of a surrender order

9. In the Decision of 14 June 2013, the Chamber found that "the postponement of the execution of a surrender request ... falls within the prerogatives of the requested State"¹⁰ and the State "does not require a prior authorization on the part of the Chamber in order for the State to avail itself of a statutory prerogative."¹¹ The Chamber nevertheless held that it *does* have the power when a "dispute arises" to determine "whether an admissibility challenge has been duly made within the terms of the applicable statutory provisions" before any postponement can take effect.¹²

¹⁰ Decision of 14 June 2013, para. 27.

¹¹ Decision of 14 June 2013, para. 25.

¹² Decision of 14 June 2013, para. 25.

10. The Defence submits that these findings are contradictory. On the one hand, the Chamber states that no “prior authorization” is required from the Chamber to postpone a surrender order, but then states that it does have the power to decide whether an admissibility challenge is properly filed before a surrender order may be postponed. If the Chamber has such a power – which it undoubtedly does – it follows that a State cannot itself decide *without* reference to the Chamber whether the order that the State is under can be postponed. On the Chamber’s own finding the surrender order can only be postponed if an admissibility challenge is duly filed, which is for the Chamber to determine. A State does therefore require the Chamber’s authorisation before any purported postponement can take effect. This reasoning is consistent with the general principle that the Court must have the final say over the implementation of its own orders and requests, including whether they can be temporarily postponed.

11. The Chamber noted that it can exercise a wide discretion in its determination of whether an admissibility challenge is properly filed in accordance with the provisions of the Statute, stating that “the Chamber must take into account the circumstances of the individual case.”¹³ Indeed, in the present case the Chamber has exercised its discretion in considering each of the arguments advanced by the parties to conclude that the surrender order should be postponed in the circumstances of Mr. Al-Senussi’s case.

12. In the Defence’s submission it is essential that the ICC’s jurisprudence makes it clear that States are obliged to seek the Chamber’s authorisation before postponing the Court’s surrender orders. States should not be permitted unilaterally to postpone the implementation of the ICC’s orders. The issue is thus one that should be considered by the Appeals Chamber to ensure that the correct legal position and procedure is adopted.

(2) The reasons relied on by the Chamber to postpone the execution of the surrender order

13. The Chamber decided that the surrender order should be postponed under Article 95 because Libya has properly filed an admissibility challenge. The Chamber

¹³ Decision of 14 June 2013, para. 30.

specifically rejected the arguments that: (i) Libya has failed to file a timely challenge¹⁴; (ii) Libya obtained custody of Mr. Al-Senussi from Mauritania in violation of the ICC's orders and the mere filing of an admissibility challenge should not permit any postponement of the surrender order¹⁵; (iii) the ICC should insist on Mr. Al-Senussi's immediate transfer in light of Libya's stated intention to try Mr. Al-Senussi in Libya regardless of the ICC's decision; and (iv) Mr. Al-Senussi's rights, in particular to have privileged access to counsel, would be guaranteed through his immediate transfer to The Hague.

14. The Defence submits that the Chamber erred in dismissing each of these arguments, each of which concern issues that should be considered and determined by the Appeals Chamber to ensure, as noted above, that the proceedings are not set back by a flawed decision and that the integrity of the proceedings is preserved.

Not filing Admissibility Challenge at earliest opportunity

15. The Chamber considered whether the admissibility challenge "was filed in violation of article 19(5)" due to its submission "seven months after Mr Al-Senussi's transfer to Libya from Mauritania."¹⁶ The Chamber found that "despite being in a position to properly and timely challenge the admissibility of the case against Mr Al-Senussi" the information "before the Chamber does not appear to indicate that Libya ... unduly failed to do so, in violation of article 19(5) of the Statute."¹⁷
16. The Defence submits that the Chamber failed to take into account that Libya had stated that it was in a position to challenge the admissibility of Mr. Al-Senussi's case on 1 May 2012 i.e. nearly a year before it filed its Admissibility Challenge on 2 April 2013. In its Application of 1 May 2012, Libya explained that it was in a position to challenge the admissibility of Mr. Al-Senussi's case if the Chamber so required and Libya submitted that it had "provided sufficient evidence concerning the investigation and prosecution" of his case.¹⁸ Libya submitted, however, that it would be contrary to

¹⁴ Decision of 14 June 2013, para. 32, 33.

¹⁵ Decision of 14 June 2013, para. 34.

¹⁶ Decision of 14 June 2013, para. 30.

¹⁷ Decision of 14 June 2013, para. 32.

¹⁸ Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11-130-Red, 1 May 2013, para. 74 ("Admissibility Challenge of 1 May 2013").

the principle of complementarity to have to make an admissibility challenge in respect of Mr. Al-Senussi when he was at that stage not in Libyan custody.¹⁹

17. Yet, when Mr. Al-Senussi was taken into Libya's custody in September 2012, Libya never sought to make its admissibility challenge at that point. Given that Libya stated on 1 May 2012 that it could make an admissibility challenge in respect of Mr. Al-Senussi's case at that stage, it follows that Libya must have been able to make such application in September 2012, but failed to do so. In fact, Libya did nothing until ordered by the Chamber on 18 January 2013 to inform the Chamber how it intended to comply with the outstanding surrender order.²⁰ Only then did Libya seek to claim that its filing on 1 May 2012 constituted an admissibility challenge.²¹ Libya provided no explanation for this delay.

18. The Defence submits that these are material facts that the Chamber has failed to give any weight, or even refer to in its Decision. Indeed, the Chamber provided no reasons for its conclusion that "the information before the Chamber does not appear to indicate that Libya" has acted in violation of Article 19(5).

19. The Chamber has stated that the Statute's provisions require a State to file any admissibility challenge as soon as there are grounds on the basis of which the case would be inadmissible before the Court. The Chamber has failed to explain how Libya has met this test.

The relevance of Libya taking custody of Mr. Al-Senussi in violation of ICC orders

20. The Chamber found that "Libya's alleged violations of its international obligations" are "immaterial for the limited purposes of article 95."²² The Chamber decided that the "purpose of the Chamber's evaluation of the applicability of article 95 of the Statute in the instant case is not to determine whether or not the State has previously fulfilled its obligation to cooperate with the Court."²³

¹⁹ Admissibility Challenge of 1 May 2013, paras. 70, 71.

²⁰ Decision requesting Libya to provide observations concerning the Court's request for arrest and surrender of Abdullah Al-Senussi, ICC-01/11-01/11-254, 18 January 2013, p. 6.

²¹ Libyan Government's Observations regarding the case of Abdullah Al-Senussi, ICC-01/11-01/11-260, 28 January 2013, para. 2.

²² Decision of 14 June 2013, para. 35.

²³ Decision of 14 June 2013, para. 35.

21. The Defence submits that the Chamber erred in adopting this overly restrictive interpretation, which appears to be contrary to its own reasoning. The Chamber accepted that the admissibility application must be made in accordance with all of the applicable statutory provisions, and that its determination of whether an application has been properly made must cover an assessment of all necessary requirements.²⁴ The Chamber therefore considered, for example, as noted above, whether Libya had acted in violation of Article 19(5). By so doing, the Chamber accepted that if it were to find that an admissibility challenge could have been filed at an earlier stage, it could refuse to postpone the surrender order.
22. The Chamber identified no coherent legal basis for excluding from its consideration of whether it should postpone the surrender order that Libya only obtained custody of Mr. Al-Senussi in breach of the ICC's orders. It is unarguable that Mauritania was required to surrender Mr. Al-Senussi directly to the ICC, and that Libya was not entitled to transfer him to Libya. There can be no doubt that this conduct constitutes a very serious violation. Yet, this is a finding that the Chamber has refrained from making (and, as set out below, has not addressed at all in its Decision). Moreover, the Chamber did not explain why this issue should not be taken into account as part of all of the "necessary pre-requisites"²⁵ for any postponement to be justified. The Defense submits that the Court has the inherent power to supervise and manage the implementation of its orders in accordance with the specific "circumstances of the individual case".²⁶ The Chamber has not identified any reason to limit its powers in any way when determining whether its orders can rightfully be suspended.
23. This is an issue of fundamental importance to the application of Article 95 in the context of the statutory provisions as a whole, which should be decided by the Appeals Chamber to "remove doubts about the correctness" of the decision and to guarantee the integrity of the proceedings. As stated below, it is vital for the legitimacy and integrity of the Court that it considers and decides on the serious violations of the ICC's orders that have been perpetrated by both Libya and Mauritania.

²⁴ Decision of 14 June 2013, para. 25.

²⁵ Decision of 14 June 2013, para. 25.

²⁶ Decision of 14 June 2013, para. 30.

Evidence of Libya's intention not to cooperate with the Court

24. The Chamber stated that a determination on postponement should not be affected by the fact that Libya has not terminated domestic criminal proceedings and that the Chamber is “not persuaded by the Defence argument that ... a number of political statements demonstrate Libya’s intent to carry out the trial against Mr Al-Senussi at the national level.”²⁷ The Chamber states that “these mere facts do not, per se, amount to a violation of Libya’s obligation to cooperate with the Court, insofar as Libya must ensure that its ongoing criminal proceedings do not hinder or delay Mr Al-Senussi’s surrender to the Court should the case eventually be declared admissible.”²⁸
25. The Defence submits that the Chamber erred in finding that Libya’s stated intention that it will proceed with Mr. Al-Senussi’s trial in Libya and will not surrender him to the ICC does not amount to non-cooperation. Libya has not once qualified any of its statements that whether any national trial takes places depends on the outcome of ICC’s admissibility proceedings. Libya has also never given an undertaking that it will surrender Mr. Al-Senussi if so ordered by the ICC irrespective of its national proceedings. On the contrary, Libya has repeatedly failed to comply with the Chamber’s surrender orders. The Chamber did not address any of these matters in its Decision.
26. The Defence submits that leave to appeal should be granted in order that the Appeals Chamber can consider whether Libya’s conduct does amount to non-cooperation that should be taken into account when determining whether the surrender order should be postponed at this time. Unless leave to appeal is granted, the Defence’s submission is that the Chamber’s decision will remain “fraught with error”. This issue directly and significantly affects the fair and expeditious conduct of the proceedings in that any failure by Libya to surrender Mr. Al-Senussi would without question hamper and delay the ICC’s exercise of jurisdiction over Mr. Al-Senussi’s case.
27. The gravity of the Chamber’s error is heightened by the announcement that was made on 17 June 2013 (immediately following the Chamber’s decision to postpone the surrender order) by Al-Seddik Al-Sur, a member of the Libyan prosecutor’s office,

²⁷ Decision of 14 June 2013, para. 36.

²⁸ Decision of 14 June 2013, para. 36.

that Mr. Al-Senussi's trial in Libya would start in the first half of August.²⁹ Mr. Al-Sur insisted that Libya has the right to prosecute Mr. Al-Senussi, without at any stage even acknowledging that Libya's right is conditional on the ICC's decision in respect of admissibility. As with previous announcements³⁰, it cannot correctly be characterised as a mere "political" statement. Mr. Al-Sur is a prosecutor appointed to conduct Mr. Al-Senussi's case.³¹ The reports of the announcement on 17 June 2013 are attached as Annex 1.³²

28. In the Defence's submission, this announcement begs the question whether Libya's Admissibility Application has been genuinely filed with Libya being prepared to respect and abide by the ICC's decision. This issue should therefore be taken into account when considering whether the surrender order should be suspended at this time. It is an issue that the Appeals Chamber should determine to pre-empt the repercussions of any errors in the Decision on the proceedings before the ICC.

Guaranteeing Mr. Al-Senussi's fair trial rights

29. The Chamber held that even if Mr. Al-Senussi's transfer to the ICC was necessary in order for him to exercise his rights under the Statute, it would not negate Libya's entitlement to postpone the execution of the surrender order.³³

30. The Defence submits that the Chamber erred in finding that the ability of Mr. Al-Senussi to exercise his rights under the Statute are immaterial when considering whether to postpone the surrender order. It is hard to imagine on what basis a court order should be suspended when its implementation could guarantee the rights of the accused.

²⁹ Kadhafi's son to stand trial in August: Libya prosecutor, AFP, 17 June 2013; Gaddafi's son to stand trial in August, gulfnews.com, 17 June 2013.

³⁰ See, ICC-01/11-01/11-248-Anx1, Libya: Gaddafi's son and Al-Senussi on trial in a month's time, Al-Masry Al-Youm, 1 January 2013, and Saif Qaddafi and Abdullah Senussi will be put on trial in a month's time and in Libya, Libya Herald, 2 January 2013.

³¹ ICC-01/11-01/11-307-Conf-Anx5.

³² Annex 1: Video of Press Conference of 17 June 2013 (<http://www.youtube.com/watch?v=Y07OCKKqn1c>), for a draft translation of the video press conference please see ICC-01/11-01/11-359-AnxA; Gaddafi officials acquitted but stay behind bars, Times Live, 17 June 2013 (<http://www.timeslive.co.za/africa/2013/06/17/gaddafi-officials-acquitted-but-stay-behind-bars>); Kadhafi's son to stand trial in August: Libya prosecutor, AFP, 17 June 2013 (<http://www.google.com/hostednews/afp/article/ALeqM5hf0VWzFZ0xmEaVROYan6arfqRKYw?docId=CN8.804f72867c9bda4f148b64bf4c290b6e.461>); Libya acquits Gaddafi aides in Lockerbie case, Oman Tribune (<http://www.omantribune.com/index.php?page=news&id=146566&heading=Other%20Top%20Stories>); Gaddafi's son to stand trial in August, BBC, 19 June 2013 (<http://www.bbc.co.uk/news/world-africa-22945159>).

³³ Decision of 14 June 2013, para. 37.

31. The Defence submitted that “an additional reason for refusing to postpone the surrender request is that Libya has failed to comply with the Chamber’s order to make the necessary arrangements ... for a privileged visit to Mr Al-Senussi by his Defence.”³⁴ The Defence detailed its arguments to demonstrate that Libya’s failure to provide Mr. Al-Senussi with legal representation and access to his appointed counsel justified rejecting the postponement request.³⁵ The Chamber has failed to consider or address these arguments in its Decision.

32. The Chamber only states that the postponement of the surrender order in no way affects Libya’s continuing obligation to cooperate with the Court.³⁶ But the Defence’s argument was that Libya’s persistent failure to co-operate with the Court necessitates that the Chamber implement its order for Mr. Al-Senussi’s transfer to The Hague. As noted below, the Chamber has not even determined, one way or the other, whether Libya has acted in breach of the Chamber’s orders.

33. These issues significantly affect the fairness of the proceedings, in particular the rights of the accused, the resolution of which by the Appeals Chamber would materially advance the proceedings. The implementation of the surrender order would provide Mr. Al-Senussi with access to legal representation and the ability to exercise his rights under the Statute.

(3) The Chamber’s failure to consider or make any decision on the Defence’s request to refer Mauritania to the Security Council

34. In the Defence’s Applications of 9 January 2013³⁷ and 19 March 2013³⁸ for referral to the Security Council, the Defence specifically requested that Mauritania’s violations of the ICC’s orders be addressed by the Chamber and that Mauritania should be referred to the Security Council in light of its failure to comply with the ICC’s orders. In both applications, the Defence requested that Chamber “require Mauritania to submit any observations in respect of this matter.”

³⁴ Response on behalf of Abdullah Al-Senussi to the Submission of the Government of Libya for Postponement of the Surrender Request for Mr. Al-Senussi, ICC-01/11-01/11-319, 24 April 2013, para. 51.

³⁵ Response on behalf of Abdullah Al-Senussi to the Submission of the Government of Libya for Postponement of the Surrender Request for Mr. Al-Senussi, ICC-01/11-01/11-319, 24 April 2013, para. 51- 58.

³⁶ Decision of 14 June 2013, para. 40.

³⁷ Urgent Application of 9 January 2013.

³⁸ Renewed Application of 19 March 2013.

35. In rejecting the Defence's Applications of 9 January 2013 and 19 March 2013, the Chamber has failed to address and consider at all the Defence's arguments and requests concerning Mauritania's violations which were the subject of the Defence's Applications. The Chamber provided no indication that the matter would be considered separately or at a later stage. The Defence therefore submits that the Chamber's failure to consider and decide on this matter should be considered by the Appeals Chamber.

36. In the absence of leave to appeal being granted, the Decision will remain defective and the issue will be unresolved.

(4) The Chamber's failure to give any reasons for rejecting the Defence's application to refer Libya to the Security Council

37. The Chamber dismissed the Defence's Applications of 9 January 2013³⁹ and 19 March 2013⁴⁰ to refer Libya to the Security Council by stating that with regard to the "non-compliance with the request for surrender of Mr Al-Senussi" the Chamber "considers it unwarranted and of no benefit to exercise its discretion to refer Libya to the Security Council on the grounds of its failure to surrender Mr Al-Senussi to the Court."⁴¹

38. The Chamber did not provide any reasons for its conclusion that it is "unwarranted and of no benefit to exercise its discretion to refer Libya" to the Security Council. The Chamber failed to explain why it departed from prior findings that "the Chamber has to inform the Security Council of *any* lack of cooperation ... in relation to the enforcement of warrants of arrest issued by the Chamber ... thereby providing the Security Council with the information which is necessary for it to take any action as deemed appropriate."⁴² The Chamber did not even address whether Libya had violated the ICC's orders and did not make any findings on this matter as requested by the Defence in its Applications. It gave no reasons for this omission.

³⁹ 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 (hereinafter "Urgent Application of 9 January 2013").

⁴⁰ 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 (hereinafter "Renewed Application of 19 March 2013").

⁴¹ Decision of 14 June 2013, para. 44.

⁴² *Prosecutor v. Harun and Kashayb*, Decision informing the United Nations Security Council about the lack of cooperation by the Republic of the Sudan, ICC-02/05-01/07-57, 25 May 2010, p. 6, 7 (emphasis added).

39. The ICC's jurisprudence has emphasised the duty of Pre-Trial Chambers to give reasoned decisions: "in making a decision, the Pre-Trial Chamber need not individually recite each and every factor before it, but 'it must identify which facts it found to be relevant in coming to its conclusion.'"⁴³ This principle is affirmed in the case law of the European Court of Human Rights: "according to its established case-law, reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based."⁴⁴ Where a decision did not "adequately state[s] the reasons on which [it is] based",⁴⁵ the European Court of Human Rights held "that the applicant did not have the benefit of fair proceedings" and "the lack of a reasoned decision also hindered the applicant from raising" issues on appeal.⁴⁶

40. The Defence submits that the Chamber's failure to address the arguments relied on by the Defence and to give any reasons for refusing to refer Libya to Security Council has deprived Mr. Al-Senussi of the benefit of fair proceedings. Leave to appeal on this issue should be granted so that the Appeals Chamber can rectify this error and ensure that the proceedings are advanced. It is essential that findings are made about Libya's alleged violations of the ICC's orders so that Libya's continuing breaches are recorded and all steps are taken to seek to prevent further violations and delays in the proceedings and to guarantee the fairness and efficiency of the proceedings.

41. With regard to Libya's failure to facilitate a legal visit to Mr. Al-Senussi, the Chamber noted that although "to date the privileged legal visit to Mr Al-Senussi is yet to take place"⁴⁷ it is "unwarranted to resort at the moment to a finding of non-cooperation before the Security Council."⁴⁸

42. The Chamber has fixed no deadline for this visit despite the delays occasioned by Libya. The Chamber noted that Libya had recently submitted comments on the

⁴³ Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", ICC-01/04-01/06-774, para 30.

⁴⁴ *Kyriakides v. Cyprus*, 39058/05, 18 October 2008, para. 24. See also, *Ruiz Torija v. Spain*, 9 December 1994.

⁴⁵ *Kyriakides v. Cyprus*, 39058/05, 18 October 2008, para. 24.

⁴⁶ *Salov. v. Ukraine*, 65518/01, 6 September 2005, para. 92.

⁴⁷ Decision of 14 June 2013, para. 44.

⁴⁸ Decision of 14 June 2013, para. 44.

proposed Memorandum of Understanding between the Court and Libya.⁴⁹ However, the Chamber failed to highlight that Libya has had this draft since March 2012 – for over a year – and only responded for the first time in April 2013.⁵⁰ The Chamber also did not mention that Libya has insisted on Defence Counsel being subject to local law and on the presence of a local lawyer during any visit.⁵¹ Libya’s “invitation” to the Defence Counsel is meaningless. As the Chamber is aware from the evidence submitted with the Defence’s Applications, Libya did not provide the Defence with visas when requested. None of these facts were given any weight by the Chamber, or even referred to in the Decision.

43. The Defence submits that it is unacceptable that Libya has not arranged a single visit for 6 months. This issue significantly affects the fairness and integrity of the proceedings. The Defence submits that without the Appeals Chamber’s intervention, the resolution of this issue will not be advanced, further delays will result, and the integrity of the proceedings will remain in question.

The requirements of Article 82(1)(d) have been satisfied

44. As noted in respect of each issue, the Defence submits that leave to appeal should be granted as the requirements of Article 82(1)(d) are satisfied. Each of the issues identified significantly affects the fair and expeditious conduct of the proceedings, and an immediate resolution of each issue by the Appeal Chamber may materially advance the proceedings.
45. In particular, the Appeals Chamber should consider whether the surrender order should be postponed at this stage of the proceedings. This issue directly concerns the conduct of the ICC’s proceedings, and whether they are being conducted fairly and without unnecessary delays. In the present circumstances, Mr. Al-Senussi is unable to have access to his Counsel and to be afforded his rights as an accused without being transferred to the ICC. The ICC’s proceedings would have to be halted and at the very least severely delayed in the event that Libya fails to surrender Mr. Al-Senussi to the

⁴⁹ Decision of 14 June 2013, para. 45.

⁵⁰ Second report of the Registry on the visit of the defence team to Libya, ICC_01/11-01/11-328, 3 May 2013, para. 5. See also, First report of the Registry on the visit of the defence team of Abdullah Al-Senussi to Libya, ICC-01/11-01/11-294-Conf-Exp, 6 March 2013.

⁵¹ Second report of the Registry on the visit of the defence team to Libya, ICC_01/11-01/11-328, 3 May 2013, para. 5.

ICC. Libya has consistently stated that it will not hand him over and most recently has announced that it will instead commence his trial in August, which directly impacts on his right to be tried fairly and expeditiously before the ICC.


46. Furthermore, the Chamber has failed to decide whether Libya has violated the ICC's orders and as a consequence should be reported to the Security Council. It has found that Libya has not violated Article 19(5) and that the statements of Libya's prosecutors do not amount to non-cooperation, but it has refrained from considering the Defence's central submission that Libya has acted in breach of the ICC's surrender orders, including in taking custody of Mr. Al-Senussi from Mauritania in disregard of the ICC's order for Mr. Al-Senussi to be directly transferred to The Hague. These are issues which concern the fairness and integrity of the proceedings and which should be resolved by the Appeals Chamber so that the proceedings are not set back.

47. In the Defence's submission, in the absence of any clear findings by the Court on these issues, Libya will continue to conduct itself as though it is not bound to comply with the ICC's orders, which will occasion further delays, as have already occurred since September 2012. In particular, no privileged and confidential visit (with all necessary immunities) could be arranged for Defence Counsel as long as Libya is permitted by the Court to continue to delay making the actual arrangements. The Appeals Chamber should consider and determine these issues to ensure that any errors in the Decision do not cause further delays and undermine the fairness and integrity of the ICC's proceedings.

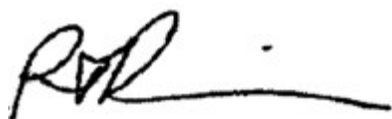
Conclusion

48. For all of these reasons, the Defence for Mr. Al-Senussi requests the Chamber to grant leave to appeal pursuant to Article 82(1)(d). The Chamber's Decision concerns issues, as set out above, which significantly affect the fair and expeditious conduct of the proceedings and which should be immediately determined by the Appeals Chamber to advance the proceedings and preserve their integrity.

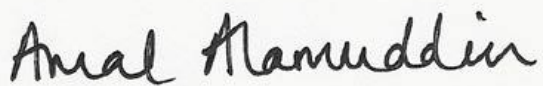
Counsel on behalf of Mr. Abdullah Al-Senussi,



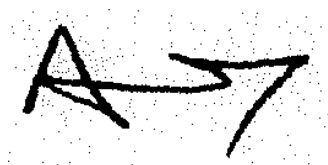
Ben Emmerson QC



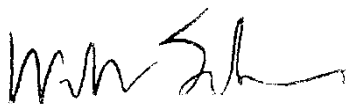
Rodney Dixon



Amal Alamuddin



Anthony Kelly



Professor William Schabas

Dated 20th June 2013

London, United Kingdom