



Original: English

No.: ICC-01/11-01/11
Date: 24 February 2014

THE APPEALS CHAMBER

Before: Judge Akua Kuenyehia, Presiding Judge
Judge Sang-Hyun Song
Judge Sanji Mmasenono Monageng
Judge Erkki Kourula
Judge Anita Usaka

**SITUATION IN LIBYA
IN THE CASE OF**

***THE PROSECUTOR v.
SAIF AL-ISLAM GADDAFI and ABDULLAH AL-SENUSSI***

Public redacted version with public annexes

**Libyan Government's Response to the Al-Senussi Defence's 'Further Submissions
on behalf of Abdullah Al-Senussi Pursuant to Regulation 28'**

Source: The Government of Libya, represented by:
Professor Ahmed El-Gehani
Professor James Crawford SC
Mr. Wayne Jordash
Ms. Michelle Butler

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

The Office of the Prosecutor

Ms. Fatou Bensouda

Counsel for the Defence

Counsel for Saif Al-Islam Gaddafi:

Mr. John R.W.D Jones QC

Ms. Sarah Bafadhel

Counsel for Abdullah Al-Senussi:

Mr. Ben Emmerson QC

Mr. Rodney Dixon

Ms. Amal Alamuddin

Mr. Anthony Kelly

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

Ms. Paolina Massidda

Ms. Sarah Pellet

Mr. Mohamed Abdou

The Office of Public Counsel for the Defence

State's Representatives

Professor Ahmed El-Ghani

Professor James Crawford SC

Mr. Wayne Jordash

Ms. Michelle Butler

REGISTRY

Registrar

Mr. Herman von Hebel

Counsel Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

I. INTRODUCTION

1. The Libyan Government hereby files its Response to the 'Further Submissions on behalf of Abdullah Al-Senussi Pursuant to Regulation 28', filed by the Al-Senussi Defence on 14 February 2014 ('Further Submissions').¹
2. The nature of appellate jurisdiction is to determine whether the Pre Trial Chamber made an error that materially affected the impugned decision.² That is to say, the Appeals Chamber's inquiry is directed *at the Pre Trial Chamber's decision*. This reflects the well-established fact that the Appeals Chamber's jurisdiction is *corrective* in nature,³ restricted to determining whether the Admissibility Decision exhibits any error in its analysis of the law and facts – not to make another decision on the same issue, but at a later date. The Chamber's decision that "further submissions [on a specific list of topics] are justified and necessary in the present circumstances in light of the arguments as a whole that have been made on appeal" does not, of course, indicate a circumvention of appellate jurisdiction.
3. For this reason, the exceptional granting of permission to file further submissions, and accompanying evidence, must not have the effect of converting the Appeals Chamber into the Pre-Trial Chamber. The Appeals Chamber is a jurisdiction of absolutely final instance, in the sense that there is neither a mechanism of judicial review by another chamber nor recourse to another international court – a point to which the theoretical possibility of a further admissibility challenge makes no difference. Thus, the importance of maintaining the corrective nature of its

¹ ICC-01/11-01/11-513.

² Appeal, paras. 7, 8, referring to *Prosecutor v. Katanga*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, 25 September 2009, para. 37; *Prosecutor v. Banda and Jerbo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled 'Reasons for the Order on translation of witness statements (ICC- 02/05-03/09-199) and additional instructions on translation', ICC-02/05-03/09-295, 17 February 2012, para. 20; *Prosecutor v. Calliste Mbarushimana* Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the confirmation of charges", ICC-01/04-01/10-514, 30 May 2012, para. 15.

³ Decision on the "Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber's Decision on Admissibility" ICC-01/09-01/11-234, para. 11.

jurisdiction could not be greater: the very existence of a party's right to appeal before the ICC depends upon it.

II. SUBMISSIONS

4. The submissions of the Al-Senussi Defence exhibit a series of errors of both law and fact, and, it is submitted, the Appeals Chamber must reject them as a result. Where the Al-Senussi Defence's recital of the law is correct, the Libyan Government notes that the Further Submissions contain several attempts to marshal it in favour of arguments that it does not support, sometimes due to factual errors, other times due to *non sequiturs* in the presentation of the law. The rehearsal of principles applied to the facts of *Magee v. The United Kingdom* by the European Court of Human Rights is one example. The general references to 'denial of a lawyer', 'incommunicado detention' and 'physical abuse' masks misunderstandings concerning this case, of law or fact or both. The Libyan Government hereby seeks to rectify those errors.

Legal errors

5. The Further Submissions exhibit a number of errors as to the legal framework in which the admissibility assessment, and the appeal in relation thereto, takes place.
6. Mr. Al-Senussi's Further Submissions assert that 'absence' or 'non-appointment' of a lawyer, regardless of context or circumstances, and regardless of the type, or stage, of legal proceedings entails a violation of international human rights law.⁴ It rejects the Libyan Government's arguments as "plainly wrong as a matter of law",⁵ erroneously ignoring a number of fundamentally important distinctions and principles.
7. The first is the key difference between proceedings which determine criminal responsibility, and those which determine other types of legal issues, such as the jurisdiction or forum in which criminal proceedings will take place, but do not themselves conclude as to whether a person is guilty of a crime. As previously

⁴ Further Submissions, paras. 15-20.

⁵ Further Submissions, para. 15.

noted, it is well established in international human rights law that a criminal trial “determines the civil rights” of the accused, whereas extradition proceedings, for example, in which the jurisdiction or forum in which criminal proceedings will take place is determined, do not.⁶ Further, at the core of the present proceedings, in which the Al-Senussi Defence is acting, lies the delineation of the legal relationship between the state of Libya and the ICC as an international organisation.

8. These distinctions are drawn in order to make clear that the existence of practical difficulties which have caused delays in the occurrence of a privileged visit by the Al-Senussi Defence to date are neither human rights violations nor evidence of inability or unwillingness to conduct a domestic criminal process. In this regard, a second, and related, distinction, which is ignored in the Al-Senussi Further Submissions, is that to be drawn between the issue of Mr. Al-Senussi’s access to lawyers *per se* and access to his ICC legal team in particular. Even if the Chamber were to accept the incorrect and baseless allegations of the Al-Senussi Defence concerning the Libyan Government’s willingness to permit such a visit, this does not indicate unwillingness or inability to conduct a genuine trial.⁷ To be clear, these distinctions are not hereby noted in order to attempt to deny Mr. Al-Senussi representation in the admissibility proceedings before the Court, as has been made clear in previous submissions, and which will be also readily apparent from the factual evidence to the contrary, noted below. The Al-Senussi Defence clearly misrepresents the Libyan Government’s submissions when it asserts that, “Libya is now arguing before the Appeals Chamber that even if Mr. Al-Senussi’s rights *are* being violated, it is not relevant to the admissibility determination”.⁸

9. Another legal error in the Further Submissions arises from the denial of any

⁶ *Mamatkulov and Askarov v. Turkey* (2005) 41 EHRR 494; *Salgado v. Spain*, Application No. 65964/01; *EGM v. Luxembourg*, Application No. 24015/94; *GK and BfF v. The Netherlands*, Application No. 12543/86; *Kirkwood v. UK* (1984) 37 DR 158; *H v. Spain* (1983) 37 DR 93; *X v. Belgium*, Application No. 7256/75. See the Libyan Government’s “Response to the ‘Document in Support of Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I’s ‘Decision on the admissibility of the case against Abdullah Al-Senussi’”, 26 November 2013 (‘Libyan Government’s Response of 26 November 2013’) paras. 13-20.

⁷ Contrary to the assertions of Mr. Al-Senussi. See Further Submissions, para. 4.

⁸ Further Submissions, paras. 21-23.

material difference, in terms of the issue of access to counsel, between the early stages of a criminal process, and the trial stage.⁹ This is wrong for at least two reasons. First, Mr. Al-Senussi argues that the Libyan Government's Response of 26 November 2013 contains a change of argument in respect of Article 106 of the Libyan Code of Criminal Procedure to argue that interrogation without counsel is unproblematic.¹⁰ The submission concerned addresses the legal position, which was made in response to an argument of the appellant. Thus asserting that it was made for the first time – rather than addressing its merits – is irrelevant. It simply clarifies that in Libya – and indeed in other civil law jurisdictions – the Code of Criminal Procedure provides for counsel during the accusation phase and at trial. As the Chamber correctly concluded, the Code permits pre-trial proceedings to be conducted in the absence of legal representation. The fact that previous submissions concentrated upon that fact that the Libyan criminal justice system guarantees provision of counsel in line with international human rights law is a reflection of these different issues.

10. The second reason why the Al-Senussi Defence is wrong to argue that that the stage of proceedings is irrelevant to the requirements of international human rights law is its denial of the relevance of context and the question of whether any prejudice can be remedied. Relatedly, the Al-Senussi Defence takes issue with the Libyan Government's argument that this must be judged *in situ*, asserting that this is in contradiction to the notion of a commitment to fair trial rights.¹¹ Equally erroneous is the denial of the relevance of any means of remedying prejudice caused by the earlier absence of a lawyer.¹²

11. Of course, the right to legal representation does not become relevant only at the point of trial. The position is clear in the jurisprudence of the European Court of Human Rights (in, for example, *Imbroscia v. Switzerland*), and the writings of

⁹ Further Submissions, para. 23.

¹⁰ Further Submissions, paras. 8, 9, referring to Admissibility Challenge, paras. 143, 146.

¹¹ Further Submissions, paras. 21-23.

¹² Further Submissions, para. 25.

eminent publicists:

[...] although the [right to legal representation] forms part of the 'fair trial' requirements, it 'may also be relevant before a case is sent for trial if and in so far as the fairness of the trial is likely to be prejudiced by an initial failure to comply with [fair trial requirements]'. In Imbroscia v. Switzerland, however, the Court held that the failure of the police and public prosecutor to notify the defence lawyers of the interrogations (with the result that the applicant was questioned in their absence) was remedied when the defence lawyer did attend the final interview, and no objection to the record of the previous interviews.¹³

12. This further reveals the misguided nature of the Al-Senussi Defence's assertions that (i) there is no way of knowing if a trial in Libya will be unfair;¹⁴ and (ii) the Court was wrong to rely on the Libyan Government's submissions in relation to future developments in respect of the provision of legal representation to Mr. Al-Senussi.¹⁵ The former is an irrelevant consideration (notwithstanding the evidence to the contrary) and the latter is legally incorrect, as well as factually. Notwithstanding the factual credibility of the Libyan Government's submissions (on which, see below), these arguments evince a desire to subvert or elude any requirement for the Defence to support its arguments with credible evidence.

13. The Al-Senussi Defence refers to the Libyan Government's submission that due process protections are as in the Rome Statute.¹⁶ To be clear, the submission was that "[s]uspects and defendants within the Libyan criminal justice system benefit from similar procedural rights and protections to those set out in the Rome Statute" and it was noted that the "2011 Constitutional Declaration has a specific provision upholding human rights and freedoms (Article 7) and also has an entire Part

¹³ Ben Emmerson QC et al., *Human Rights and Criminal Justice*, (Sweet & Maxwell, 2012) pp. 281-282, citing *Imbroscia v. Switzerland* (1994) 17 EHRR 441; *Brennan v. UK* (2002) 34 EHRR 18; and *Salduz v. Turkey* (2008) 49 EHRR 421.

¹⁴ Further Submissions, para. 26.

¹⁵ Further Submissions, para. 11, referring to the Libyan Government's Response of 26 November 2013, paras. 46, 62.

¹⁶ Further Submissions, para. 9.

dedicated to Judicial Guarantees".¹⁷ It is patently obvious that a domestic civil jurisdiction could not take the same approach to implementing such protections as does the ICC, or indeed international criminal law more generally, which is neither a purely common law nor civil law jurisdiction, and which necessarily has a unique procedural regime. As was noted above, the difference between the investigation and accusation phases in Libya is comparable to the approach taken in numerous other civil law jurisdictions.

Factual errors

14. Notwithstanding the legal errors described above, it is submitted that the Further Submissions of the Al-Senussi Defence rely upon the following factual misconceptions.

1. Intention to allow visit

15. Mr. Al-Senussi asserts that the Libyan Government has no genuine intention of allowing a legal visit from his ICC legal team, and that this indicates that Libya fails the admissibility assessment.¹⁸ It is submitted that this assertion is entirely without proper basis.

16. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Similarly, Annex 1 to this Response is a signed letter from the Libyan Attorney General Mr. Abdel Kader Radwan, dated 22nd February 2014, which attests to his willingness to allow any lawyer or defendant from the ICC to visit Mr. Al-Senussi, as well as, moreover, a desire to assist with obtaining an entry visa.

¹⁷ "Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute", para. 143, referring to "Government of Libya Article 19 Application - Saif Al-Islam Gaddafi", Annex G.

¹⁸ Further Submissions, para. 4.

¹⁹ ICC-01/11-01/11-506-Conf.

2. *Provision of counsel in domestic criminal proceedings*

17. As the Libyan Government has noted on multiple occasions, and as the Pre Trial Chamber correctly recognized, the trial will not commence unless Mr. Al-Senussi has legal representation in Libya.²⁰ Such representation will also take effect within, and for the purposes of, the accusation stage. Three Libyan lawyers have been presented to the office of the Prosecutor General, and have been accepted as a team of defence counsel, representing both Mr. Al-Senussi and Mr. Gaddafi. They have, furthermore, received permission to visit both Mr. Al-Senussi and Mr. Gaddafi at the prisons where they are respectively detained. Annex 2 to this Response is an official statement signed by Mr. Al-Siddik Ahmed Alsor, Head of Investigation Department, Office of the Libyan Prosecutor General. Mr. Al-Senussi, like other of his co-accused, has received several visits from various persons.

18. Although Al-Senussi Defence objects to the notion that there are any material factual differences between the Al-Senussi and Gaddafi cases, particularly with regard to the position as to legal representation,²¹ this dispute has been rendered moot by subsequent developments. In any event, the difference in location and governance of detention between the *Gaddafi* and *Al-Senussi* cases was plainly key to the Pre-Trial Chamber's assessment.²²

19. As noted above, it is legally wrong for the Al-Senussi Defence to criticise the Court for having relied up on the Libyan Government's submissions as to future developments in the provision of legal representation to Mr. Al-Senussi.²³ The facts as they continue to develop, and as outlined above, reaffirm this point.

3. *Other matters of domestic due process*

20. Mr. Al-Senussi contends, further, that the Libyan Government has changed its

²⁰ Admissibility Decision, para. 206.

²¹ Further Submissions, para. 10.

²² Libyan Government's Reesponse of 26th November 2013, paras. 45-47; Declaration of Judge Christine Van den Wyngaert, ICC-01/11-01/11-466-Anx, 11 October 2013, para. 1

²³ Further Submissions, para. 11, referring to the Libyan Government's Response of 26th November 2013, paras. 46, 62.

position in relation to the provision of assurances that it will afford due process to Mr. Al-Senussi in the domestic legal system, and that its arguments constitute “a deplorable position to adopt, [which] confirms Libya’s complete disrespect of even the most very basic of fair trial and human rights standards”.²⁴ The legal error in this contention was addressed above. However, this also entails a factual error as to the intention of the Libyan authorities to afford due process and fair trial protections to Mr. Al-Senussi.

21. The Al-Senussi Defence ignores the two sentences immediately prior to those, in the Libyan Government’s submissions, that it criticises. They are relevant because they were included precisely in order to avoid the misunderstanding that the Further Submissions now exhibit:

The Libyan Government does not seek to argue for any diminution in the participation of the Appellant in the present admissibility proceedings. Rather, it seeks clarity as to the principles applicable to such participation.

22. In any event the situation in Libya does not reflect any such “disrespect” of basic fair trial and human rights standards. The Al-Senussi Defence refers repeatedly to its Annex 1, in order to argue that Mr. Al-Senussi has been kept in isolation, has been coerced into signing statements, and has requested a lawyer while being interrogated, which was never provided, as well as to criticise the above-mentioned “change of position”.²⁵ The Al-Senussi Defence also refers to a series of alleged recent developments, in particular the deaths of Abdulaziz Al-Hassadi and Al-Hadi Imbaresh, and allegations based upon a US Senate Select Committee on Intelligence report (concerning, *inter alia*, deaths of persons assisting an investigation into the attacks on 11 September 2012 in Benghazi).²⁶

23. It must be borne in mind, as regards Annex 1 to the Further Submissions, that the credibility of Human Rights Watch does nothing to change the nature of the

²⁴ Further Submissions, para. 6.

²⁵ Further Submissions, paras. 6, 8, 24.

²⁶ Further Submissions, para. 23.

information upon which its report is based: largely unverifiable hearsay which is recounted by an accused himself. The assertions of the Al-Senussi Defence concerning the death of Al-Hadi Imbairesh must also be rejected as entirely baseless. The Al-Senussi Defence appears to base its assertions entirely upon the mere fact that it was suggested to a council spokesperson that mistreatment had occurred. The report cited in the Further Submissions states, in relevant part, as follows

*Spokesperson for Zintan Local Council Omar Matooq told the Libya Herald that Imbairesh died from pancreatic and liver cancer. He denied rumours that he had been tortured in the Zintan jail where he was held.*²⁷

24. The death of Abdulaziz Al-Hassadi was the result of isolated actions of extremists in eastern Libya. Such occurrences are sadly inevitable in the transitional climate, but are no more than ordinary crimes, to which the proper response is a domestic investigation, which is taking place. Such isolated events do not evince inability or unwillingness to conduct a domestic criminal trial.
25. Mr. Al-Senussi argues that a new Libyan domestic law would allow the Libyan authorities to “charge Mr. Al- Senussi and his Defence team for even raising a defence that was critical of the present authorities”, and that this shows that the judicial system is not impartial or independent, and that it puts the Al-Senussi Defence at risk.²⁸ However, no evidence is offered as to the nature of the offence set out in the new law to which it refers other than the face of the newspaper article cited. This alone means that the Chamber must disregard the argument as the evidence offered cannot be presumed to be a reliable interpretation of the legislation concerned. Moreover, the article *prima facie* makes clear that the nature of the prohibition is “deliberately publish[ing] false news”, and similarly “l[ying] in

²⁷ <http://www.libyaherald.com/2014/01/10/imprisoned-senior-qaddafi-era-official-dies-from-cancer/#axzz2u3Qtt44q>

²⁸ Further Submissions, para. 7.

order to cause chaos”,²⁹ prohibitions which are analogous to those to be found, in the form of public order offences, in the criminal legislation of many countries, including those subject to the jurisdiction of the European Court of Human Rights. Even if the Appeals Chamber were a human rights monitoring body – which it is patently not – there is no indication of a breach of even general freedom of speech, let alone the right to a fair trial.

26. The Al-Senussi Defence asserts that the arguments of the Prosecutor – that the impact of any lack of witness protection mechanisms is not easily predicted, and that a relevant consideration is the lack of a list of witnesses – are irrelevant.³⁰ The Libyan Government submits that these factors are entirely relevant, not least as indicia of the credibility of the Defence’s assertions. The Al-Senussi Defence also makes the leap of logic to assert that adequacy of witness protection was the key finding in the *Gaddafi* case that demonstrated that Libya is unable to try him.³¹ As noted above, this is clearly incorrect. In any event, the Libyan Government has already addressed the issue of witness protection.³²

III. RELIEF REQUESTED

27. For the reasons set out above, the Libyan Government, respectfully requests that the Appeals Chamber

- a. Reject the Further Submissions on behalf of Abdullah Al-Senussi Pursuant to Regulation 28, filed by the Al-Senussi Defence on 14 February; and
- b. Dismiss the appeal.

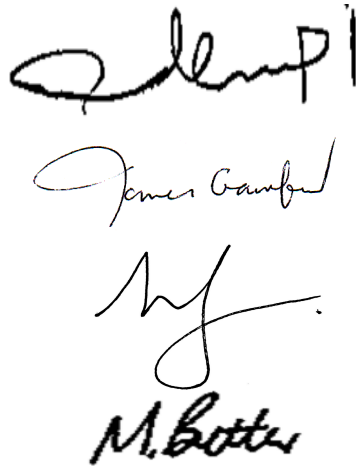
²⁹ See the report to which the Al-Senussi Defence refers in its Further Submissions: <http://www.libyaherald.com/2014/02/11/opposition-mounts-after-congress-makes-insulting-it-a-crime/#axzz2u3Qtt44q> (emphasis added); Further Submissions, para. 7, fn. 11.

³⁰ Further Submissions, paras. 12-14.

³¹ Further Submissions, para. 14, referring to Decision on the admissibility of the case against Saif Al-Islam Gaddafi, ICC-01/11-01/11-344-Red, 31 May 2013, paras. 209-211.

³² Libyan Government’s Response of 26th November 2013, paras. 105-108.

Respectfully submitted:



The block contains four handwritten signatures stacked vertically. The first signature is in dark ink and appears to be 'Ahmed El-Gehani'. The second signature is in cursive and appears to be 'James Crawford'. The third signature is a stylized 'W' followed by a period, likely 'Wayne Jordash'. The fourth signature is 'M. Butler'.

Professor Ahmed El-Gehani
Professor James Crawford SC
Mr Wayne Jordash
Ms Michelle Butler

*Libyan ICC Coordinator and
Counsel on behalf of the Government of Libya
in the case of Abdullah Al-Senussi*

Dated this 24th day of February 2014
At London, United Kingdom