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

Date: **25 April 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 Document

**Defence Request on behalf of Abdullah Al-Senussi for Access to All Confidential Filings,
Decisions and Documents in Case ICC-01/11-01/11 prior to the Appointment of Counsel
for Mr. Al-Senussi**

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:

The Office of the Prosecutor
Ms. Fatou Bensouda, Prosecutor

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

Counsel for Saif Gaddafi:
Mr. John Jones QC

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

Legal Representatives of the Applicant

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

The Office of Public Counsel for Victims

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

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

Amicus Curiae

REGISTRY

Registrar
Mr. Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Defence for Mr. Abdullah Al-Senussi files this Request urgently to request access to all confidential filings, decisions and documents in case ICC-01/11-01/11 prior to the appointment of Defence Counsel for Mr. Al-Senussi.
2. This request is made pursuant to Article 57(3)(b),¹ Article 55 and Article 67 which guarantee Mr. Al-Senussi's rights during the proceedings including to have access to the filings and evidence relied on and relevant to his case.

Procedural background

3. On 9 January 2013, the Registrar provisionally appointed Ben Emmerson QC as counsel for Mr. Al-Senussi to represent him in proceedings before the Court.²
4. On 16 January 2013, the Defence requested access to all confidential filings and decisions in case ICC-01/11-01/11 prior to the appointment of Mr. Emmerson.³
5. On 31 January 2013, the Registry notified the Defence that the Chamber had decided that the Defence would have access to all confidential filings from the date of Mr. Emmerson's appointment but would not have access to any confidential materials prior his appointment save for two confidential annexes from Libya's 1 May 2012 Admissibility Application which the Chamber stated were relevant to Mr. Al-Senussi's case.⁴ The Defence was advised by the Registry that any requests to have access to any other confidential documents should be conveyed to the Registry for consideration by the Chamber.

¹ Decision on OPCD Request, ICC-01/11-01/11-129, 27 April 2012, para. 11.

² ICC-01/11-01/11-253 and the confidential exparte annex, citing 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, footnote 19.

³ Email from the Defence of 16 January 2013.

⁴ Email from the Registry of 31 January 2013.

6. On 20 February 2013, the Defence requested access to certain confidential filings which had been filed before 9 January 2013 on the basis that they were relevant to the preparation of Mr. Al-Senussi's case.⁵ No response has been received to this request.
7. Following the filing by Libya of its admissibility application⁶, on 15 April 2013 the Defence requested access to confidential documents in case ICC-01/11-01/11 prior to the appointment of Mr. Al-Senussi's Counsel, which the Defence submitted were all relevant to Mr. Al-Senussi's case.⁷
8. On 17 April 2013, the Chamber's legal officer notified the Defence that the request of 15 April 2013 should be submitted in a filing to the Chamber.⁸

Request for access to all confidential materials

9. The Defence respectfully requests urgent access to all confidential filings, decisions and documents prior to 9 January 2013 in case ICC-01/11-01/11. The Defence submits that it is necessary for the Defence to review these materials for the preparation of its submissions on behalf of Mr. Al-Senussi in the present proceedings, including so that it can respond to the arguments and allegations relied on by Libya in its admissibility application in Mr. Al-Senussi's case.
10. The Defence submits that the date of Defence Counsel being appointed for Mr. Al-Senussi of 9 January 2013 is an arbitrary delineation for determining whether the Defence should have access to confidential materials. Counsel for Mr. Al-Senussi is entitled to have access to all filings in his case (unless filed *ex parte*), and should be in no different position to Counsel for Mr. Gaddafi, who has received all confidential filings in Mr. Gaddafi's case as well as Mr. Al-Senussi's case. The mere fact that Defence Counsel was only appointed for Mr. Al-Senussi on 9 January 2013 should not be a reason to deny his Defence access to confidential case materials from before that date.

⁵ Email from the Defence, 20 February 2013.

⁶ 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-Conf-Red, 2 April 2013 (hereinafter "Admissibility Challenge of 2 April 2013").

⁷ Email from the Defence of 15 April 2013.

⁸ Email from the Chamber's legal officer of 17 April 2013.

11. Filings made in case ICC-01/11-01/11 in relation to Mr. Gaddafi's admissibility proceedings are directly relevant to the admissibility proceedings now underway in Mr. Al-Senussi's case and it is necessary for the Al-Senussi Defence to review them in order to prepare its submissions and filings. In particular, it is essential in order to analyse the materials relied on by Libya in Mr. Al-Senussi's case, to compare, and assess, this evidence with the materials used by Libya in Mr. Gaddafi's case.
12. The Defence notes that Libya made no objection to the OPCV having access to the confidential version of the 1 May 2013 admissibility application, and its confidential annexes, or to "any other document filed confidentially in the record of the case which the Chamber might identify as relevant to the Admissibility Challenge."⁹ In light of Libya's position, the Chamber found "it appropriate to grant the OPCV access" to all these confidential materials.¹⁰
13. The cases against Mr. Al-Senussi and Mr. Gaddafi are joined before the ICC in one case. The Defence submits that there is no reason to refuse Mr. Al-Senussi access to any confidential materials in the same case. The Chamber has already noted that despite not being a party to the admissibility challenge in respect of Mr. Gaddafi, Mr. Al-Senussi is entitled to have access to confidential materials in those proceedings "considering the repeated references from Libya to a prospective joint trial of Mr. Gaddafi and Mr. Al-Senussi at the national level in view of the close relationship between the allegations against senior Gaddafi regime officials".¹¹ The admissibility proceedings that have since been launched in Mr. Al-Senussi's case are directly related to those against Mr. Gaddafi. Indeed, Libya made clear in its 1 May 2012 admissibility application that evidence in Mr. Gaddafi's case also concerns the case against Mr. Al-Senussi. It stated that "the investigations carried out by the Prosecutor-General in relation to Mr Gaddafi will be referred to the Military-Prosecutor for

⁹ Decision on the OPCV 'Request to access documents in relation to the Challenge to the Jurisdiction of the Court by the Government of Libya', ICC-01/11-01/11147, para. 7; Libyan Government Response to OPCV Request to access documents in relation to the challenge to the jurisdiction of the Court by the Government of Libya, ICC-01/11-01/11-143, para. 3.

¹⁰ Decision on the OPCV 'Request to access documents in relation to the Challenge to the Jurisdiction of the Court by the Government of Libya', ICC-01/11-01/11147, para. 7

¹¹ Decision on the "Libyan Government's proposed redactions to ICC-01/01- 01/11-258-Conf-Exp and Annexes 4,5,6,7,15,16 and 17", ICC-01/11-01/11-271-Red, 7 February 2013, para. 17.

potential use with respect to crimes alleged to have been committed by Mr Al-Senussi.”¹²

14. Libya has consistently stated in submissions before the Court that it will seek to join the cases against Mr. Al-Senussi and Mr. Gaddafi.¹³ The Defence notes that under Article 435 of the Libyan Criminal Procedure Code, Mr. Al-Senussi has the “right to view the investigative materials relating to [his] case.”¹⁴ In its recommendation for joinder, the Attorney General’s Investigative Committee has recognised that the case against Mr. Al-Senussi and Mr. Gaddafi “are inter-related” and that it “would be more appropriate for the preservation of evidence ... for the trials to be heard together before the same court.”¹⁵

15. As noted by the Chamber, Libya’s statements about a prospective joint trial makes the materials relied on in Mr. Gaddafi’s case before the ICC directly relevant for Mr. Al-Senussi’s case before the ICC.¹⁶

Conclusion

16. For these reasons, Counsel for Mr. Al-Senussi submit that the Defence should be urgently granted access to all confidential case materials. Counsel respectfully request access to all confidential filings, decisions and documents prior to 9 January 2013.

Counsel on behalf of Mr. Abdullah Al-Senussi,



Ben Emmerson QC

¹² 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 2012, para. 50.

¹³ Libyan Government’s further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi, ICC-01/11-01/11-258-Red2, 23 January 2013, para. 59 (hereinafter Further Submissions of 23 January 2013”); Admissibility Challenge of 2 April 2013, para. 29, 175

¹⁴ Admissibility Challenge of 2 April 2013, para. 146.

¹⁵ Further Submission of 23 January 2013, para. 59; Admissibility Challenge of 2 April 2013, para. 175.

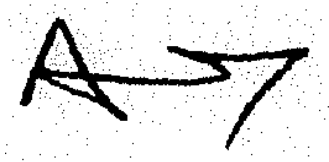
¹⁶ Decision on the "Libyan Government's proposed redactions to ICC-01/01- 01/11-258-Conf-Exp and Annexes 4,5,6,7,15,16 and 17", ICC-01/11-01/11-271-Red, 7 February 2013, para. 17.



Rodney Dixon



Amal Alamuddin



Anthony Kelly



Professor William Schabas

Dated 25th April 2013
London, United Kingdom