

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/11-01/11
Date: 28 August 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

Decision on the request of the Defence of Abdullah Al-Senussi to make a finding of non-cooperation by the Islamic Republic of Mauritania and refer the matter to the Security Council

Decision to be notified, in accordance with Regulation 31 of the Regulations of the Court, to:

The Office of the Prosecutor
Fatou Bensouda, Prosecutor
James Stewart, Deputy Prosecutor

Counsel for Saif Al-Islam Gaddafi
John R.W.D. Jones

Counsel for Abdullah Al-Senussi
Benedict Emmerson

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**
Paolina Massidda

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

States Representatives

REGISTRY

Registrar
Herman von Hebel

Deputy Registrar
Didier Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Pre-Trial Chamber I (the “Chamber”) of the International Criminal Court (the “Court”) issues the present decision addressing the requests by the Defence of Abdullah Al-Senussi (“Mr Al-Senussi”) to make a finding of non-cooperation by the Islamic Republic of Mauritania (“Mauritania”) and refer the matter to the United Nations Security Council (the “Security Council”).

1. On 26 February 2011, the Security Council, acting under Chapter VII of the UN Charter, adopted Resolution 1970, whereby it referred the situation in Libya since 15 February 2011 to the Prosecutor of the Court.¹

2. On 27 June 2011, the Chamber issued a warrant of arrest against Abdullah Al-Senussi (“Mr Al-Senussi”) for his alleged criminal responsibility for crimes against humanity committed in Benghazi, Libya, from 15 February 2011 until at least 20 February 2011.²

3. On 17 September 2012, the Registrar informed the Chamber that it appeared that Mr Al-Senussi, which had been previously arrested in Mauritania, had arrived on Libyan territory on 5 September 2012.³ This fact was later confirmed by Libya.⁴

4. The Defence of Mr Al-Senussi repeatedly sought from the Chamber a finding of non-cooperation by Mauritania and Libya and a referral of the matter to the Security Council for alleged violations of their international obligations in the extradition of Mr Al-Senussi to Libya. More specifically, on 9 January 2013, the Defence for Mr Al-Senussi requested that the Chamber order Mauritania to provide observations in respect of its failure to cooperate with

¹ S/RES/1970 (2011).

² Pre-Trial Chamber I, Warrant of Arrest for Abdullah Al-Senussi, 27 June 2011, ICC-01/11-01/11-4.

³ ICC-01/11-01/11-208. See also ICC-01/11-01/11-80-Conf-Exp.

⁴ ICC-01/11-01/11-252-Anx3-Conf. See also ICC-01/11-01/11-264.

the Court in violation of its alleged binding international obligations.⁵ On 6 February 2013, the Chamber reserved its right to consider the matter “in due course”.⁶ On 19 March 2013, the Defence of Mr Al-Senussi requested the Chamber to make a finding of alleged non-cooperation by Mauritania and refer the matter to the Security Council.⁷

5. On 14 June 2013, the Chamber issued 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” (the “14 June 2013 Decision”) in which it addressed the request of non-cooperation in relation to Libya only.⁸

6. On 20 June 2013, the Defence requested leave to appeal the 14 June 2013 Decision on the ground, *inter alia*, that the Chamber “fail[ed] 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”.⁹

7. On 28 August 2013, the Chamber rejected leave to appeal the 14 June 2013 Decision in relation to this issue and clarified that a decision addressing the Defence submissions concerning the need to make a finding of non-cooperation by Mauritania would be simultaneously issued with a view to ultimately disposing of this matter that had been raised again by the Defence of Mr Al-Senussi.¹⁰

⁵ ICC-01/11-01/11-248, paras 35 and 68(d).

⁶ Pre-Trial Chamber I, 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”, 6 February 2013, ICC-01/11-01/11-269, para. 23.

⁷ ICC-01/11-01/11-304, paras 50, 51(v) and 51(vi).

⁸ Pre-Trial Chamber I, ICC-01/11-01/11-354.

⁹ ICC-01/11-01/11-365, para. 8.

¹⁰ Pre-Trial Chamber I, Decision on an application for leave to appeal submitted by the Defence of Abdullah Al-Senussi, 28 August 2013, ICC-01/11-01/11-419, para. 55.

8. According to the Defence of Mr Al-Senussi, the Chamber should make a finding of non-cooperation by Mauritania and refer the matter to the Security Council on three grounds, namely that Mauritania, by extraditing Mr Al-Senussi to Libya: (i) has violated its obligation to surrender him to the Court;¹¹ (ii) has violated the travel ban imposed, also in respect of Mr Al-Senussi, by Resolution 1970 (2011), without permission of the Security Council;¹² and (iii) has committed an internationally wrongful act in breach of its obligations under article 14 of the International Covenant on Civil and Political Rights (the "ICCPR"), to which it is a party.¹³

9. The Chamber notes articles 13(b), 86 and 87(5) and (7) of the Rome Statute (the "Statute").

10. At the outset, the Chamber observes that its authority to make a finding of non-cooperation is limited to situations in which a State fails to comply with its obligations *vis-à-vis* the Court. No such competence exists in relation to the alleged breaches by Mauritania of its international obligations concerning the sanctions regime and the prohibition of transfer of Mr Al-Senussi across international borders imposed by the Security Council, or in respect of article 14 of the ICCPR. These obligations are not obligations *vis-à-vis* the Court.

11. Accordingly, the only question that remains to be addressed is whether Mauritania was under a duty to surrender Mr Al-Senussi to the Court once he was arrested on its territory.

12. The Statute of this Court is an international treaty. Therefore, it is only with the State's consent that the Statute can impose obligations, or confer rights, on a State that is not party to it.¹⁴ This is also reflected in the Statute

¹¹ ICC-01/11-01/11-248, paras 30 to 38; ICC-01/11-01/11-304, para. 48.

¹² ICC-01/11-01/11-248, paras 39 to 42; ICC-01/11-01/11-304, para. 48.

¹³ ICC-01/11-01/11-248, paras 43 to 46.

¹⁴ Article 34 of the Vienna Convention on the Law of Treaties.

itself. Indeed, while article 86 of the Statute states that “States Parties shall [...] cooperate fully with the Court”, article 87(5)(a) of the Statute provides that “the Court may invite any State not party to th[e] Statute to provide assistance under [Part 9] on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis”. This principle may be altered by the Security Council, which may, in accordance with the Charter of the United Nations, impose an obligation to cooperate with the Court on those United Nations Member States that are not parties to the Statute.

13. Mauritania is not a State Party to the Statute. No *ad hoc* arrangement or agreement has been concluded between the Court and Mauritania and no other appropriate basis under article 87(5)(a) of the Statute imposes an obligation on Mauritania with respect to the arrest and surrender of Mr Al-Senussi to the Court. Accordingly, Mauritania has no obligations *vis-à-vis* the Court directly arising from the Statute.

14. Furthermore, no duty to cooperate with the Court arises from a decision of the Security Council. In this regard, the Chamber observes that, when referring the situation in Libya to the Prosecutor of the Court, the Security Council, acting under Chapter VII of the UN Charter, imposed the obligation to cooperate with the Court exclusively on one State not party to the Statute: Libya.¹⁵ Indeed, in its Resolution 1970, the Security Council explicitly “*decide[d]* that the Libyan authorities *shall* cooperate fully with and provide any necessary assistance to the Court and the Prosecutor”.¹⁶ In relation to all other States, the Security Council “*urge[d]*” them, together with the other concerned regional and other international organizations, to cooperate fully with the

¹⁵ See Pre-Trial Chamber I, Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Statute, 1 June 2012, ICC-01/11-01/11-163, paras 27 to 30; and *id.*, 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”, 6 February 2013, ICC-01/11-01/11-269, para. 21.

¹⁶ UN Resolution 1970 (2011), para. 5 (emphasis added).

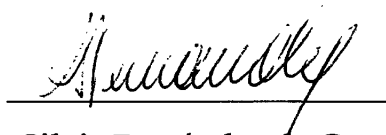
Court and the Prosecutor.¹⁷ In the same paragraph of the resolution, the Security Council also clarified that “States not party to the Rome Statute have no obligation under the Statute”.¹⁸

15. Accordingly, Mauritania is under no obligation *vis-à-vis* the Court, and, therefore, it was not under a duty to surrender Mr Al-Senussi to the Court. Consequently, the extradition of Mr Al-Senussi to Libya did not constitute a violation on the part of Mauritania of any obligation *vis-à-vis* the Court, and no finding of “non-cooperation” by Mauritania can be made by the Chamber.

FOR THESE REASONS, THE CHAMBER

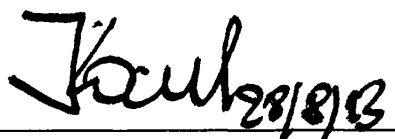
REJECTS the Defence request to make a finding of non-cooperation by Mauritania in relation to Mr Al-Senussi’s extradition to Libya, and to refer the matter to the Security Council.

Done in both English and French, the English version being authoritative.



Judge Silvia Fernández de Gurmendi

Presiding Judge



Judge Hans-Peter Kaul



Judge Christine Van den Wyngaert

Dated this Wednesday, 28 August 2013

At The Hague, The Netherlands

¹⁷ *Id.*

¹⁸ *Id.*