

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/11-01/11
Date: 13 November 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 “Defence Application on behalf of Mr. Abdullah Al Senussi for Leave to Appeal against the ‘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

Other
 Appeals Chamber

REGISTRY

Registrar
 Herman von Hebel

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
 Section**

Pre-Trial Chamber I (the “Chamber”) of the International Criminal Court (the “Court” or the “ICC”) issues the present decision on the “Defence Application on behalf of Mr. Abdullah Al-Senussi for Leave to Appeal against the ‘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’” (the “Application”).¹

1. 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

2. On 17 September 2012, the Registrar informed the Chamber that it appeared that Mr Al-Senussi, who had been previously arrested in the Islamic Republic of Mauritania (“Mauritania”), had arrived on Libyan territory on 5 September 2012.³ This fact was later confirmed by Libya.⁴

3. On 19 March 2013, the Defence of Mr Al-Senussi requested the Chamber to make a finding of non-cooperation by Mauritania and refer the matter to the United Nations Security Council, for alleged violation of its international obligations in the transfer of Mr Al-Senussi to Libya, rather than to the Court.⁵

4. On 28 August 2013, the Chamber issued the “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” (the “Decision”).⁶

¹ ICC-01/11-01/11-431.

² 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.

⁵ ICC-01/11-01/11-304, paras 50, 51(v) and 51(vi).

⁶ ICC-01/11-01/11-420.

5. On 4 September 2013, the Defence filed the Application.
6. On 9 September 2013, the Prosecutor filed her response to the Application (the “Response”).⁷
7. The Chamber notes article 82(1)(d) of the Rome Statute (the “Statute”), rule 155 of the Rules of Procedure and Evidence and regulation 65 of the Regulations of the Court. In particular, pursuant to article 82(1)(d) of the Statute, the party requesting leave to appeal is required to demonstrate that the decision concerned “involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and for which [...] an immediate resolution by the Appeals Chamber may materially advance the proceedings”.
8. According to established jurisprudence, an “issue” is an identifiable subject or topic requiring a decision for its resolution, as opposed to a hypothetical concern or an abstract legal question or a question over which there is a mere disagreement or conflicting opinion. An issue is constituted by a subject, the resolution of which is “essential for the determination of matters arising in the judicial cause under examination”.⁸ Furthermore, for leave to appeal to be granted, article 82(1)(d) of the Statute requires that the “issue” identified by the party would significantly affect either the fair and expeditious conduct of the proceedings or the outcome of the trial. Finally, it is necessary that, in the opinion of the Chamber, an immediate resolution of the issue by the Appeals Chamber may materially advance the proceedings. As held by the Appeals Chamber, “the issue must be such that its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its

⁷ ICC-01/11-01/11-435.

⁸ Appeals Chamber, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 9.

authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial”.⁹ Accordingly, “[p]ut in a nutshell, 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”.¹⁰

9. The Defence submits that, in the Decision, the Chamber erred in determining that it cannot make a finding of non-cooperation by Mauritania for the non-surrender of Mr Al-Senussi to the Court, and, more specifically, erred in concluding that neither the Statute nor the UN Resolution 1970 (2011) imposed on Mauritania any obligation *vis-à-vis* the Court.¹¹ According to the Defence, these findings “concern fundamental questions of international law about the obligations and duties on non-State parties of the ICC when a country situation has been referred by the Security Council to the Court under Chapter VII of the UN Charter”.¹²

10. In the Decision, the Chamber stated:

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.

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. 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’. 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

⁹ *Ibid.*, para. 14.

¹⁰ *Ibid.*, para. 19.

¹¹ Application, paras 8-9.

¹² *Ibid.*, para. 9.

with the Court and the Prosecutor. 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’.¹³

11. The Defence challenges precisely these findings on the basis of which the Chamber concluded that “Mauritania is under no obligation *vis-à-vis* the Court”¹⁴ and, accordingly, rejected the Defence request to make a finding of non-cooperation by Mauritania. The Chamber is therefore satisfied that the Defence has identified an “issue” involved in the Decision which was indeed essential for the Chamber’s determination of the matter that had been raised by the Defence in its request of 19 March 2013.

12. The Chamber is however not persuaded that the issue for which leave to appeal is sought would significantly affect the fair and expeditious conduct of the proceedings against Mr Al-Senussi or the outcome of the trial. In order to assess whether the issue would indeed significantly affect one of the “elements of justice” mentioned in article 82(1)(d) of the Statute, the Chamber “must ponder the implications of a given issue being wrongly decided” on the fairness and expeditiousness of the proceedings or the outcome of the trial.¹⁵

13. In support of its Application the Defence argues that:

Were it not for the Chamber’s errors, the Chamber could have concluded that Mauritania did fail to comply with the Court’s request to surrender Mr. Al-Senussi to the ICC and could have reported this matter to the Security Council for consideration and appropriate action. The determination of the Security Council could assist in ultimately bringing about Mr. Al-Senussi’s transfer to the Court where he could have full and privileged access to his Counsel in the conduct of his trial before the ICC, as opposed to proceedings in Libya in which his due process rights are being violated and he faces the death penalty.¹⁶

¹³ Decision, paras 13 and 14 (footnotes omitted).

¹⁴ *Ibid.*, para. 15.

¹⁵ Appeals Chamber, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, paras 10 and 13.

¹⁶ Application, para. 16.

14. In this regard, the Prosecutor submits that the Defence only “cites a chain of four hypothetical situations, each one requiring the former to be true in order to support the hypothetical conclusion that Mr Senussi’s due process rights are being violated”¹⁷ and that “[t]his series of unsubstantiated and speculative assumptions does not constitute evidence to support the Defence’s claim”.¹⁸

15. The Chamber considers that if indeed it erred in its determination that Mauritania has no obligation *vis-à-vis* the Court, the only direct consequence would be that the Chamber would be in a position to decide whether or not it would be warranted to make a finding of non-cooperation by Mauritania and refer the matter to the Security Council. In the Chamber’s view, this result has no significant and actual repercussions on either the fair and expeditious conduct of the proceedings against Mr Al-Senussi or the outcome of the trial. The fact that Mr Al-Senussi could have been ultimately transferred to the Court “where he could have full and privileged access to his Counsel in the conduct of his trial before the ICC”, as a result of the Chamber finding that Mauritania has obligations *vis-à-vis* the Court, rests indeed on speculations and, as observed by the Prosecutor, on a “chain of four hypothetical situations”.¹⁹ As held by Trial Chamber II, “the impact of the issue on the conduct of the proceedings or the outcome of the trial must be actual and significant [and] [a]ccordingly it does not suffice for an issue to have merely a hypothetical impact on the fairness/expeditiousness of proceedings or the outcome of the trial”.²⁰

¹⁷ Response, para. 11.

¹⁸ *Ibid.*, para. 12.

¹⁹ *Ibid.*, para. 13.

²⁰ Trial Chamber II, Decision on the “Prosecution’s Application for Leave to Appeal Oral Rulings on Clarifying Inconsistencies in Prior Statements and Partial Hostilities”, 11 March 2010, ICC-01/04-01/07-1958, para. 20.

16. Finally, the Chamber notes the Defence additional argument that “the issues will significantly impact on the outcome of the Defence’s outstanding appeal to the Appeal Chamber concerning the postponement of the surrender against Mr Al-Senussi”.²¹ According to the Defence “[t]he Appeals Chamber should [...] be permitted to consider the extent of Mauritania’s duty to cooperate with the Court under Resolution 1970”.²² The Chamber finds it sufficient to observe that the Defence has been able to present before the Appeals Chamber the full extent of its arguments²³ (none of which is, in the Defence submission, ultimately dependant on whether or not Mauritania has any obligation *vis-à-vis* the Court²⁴), and that, in any event, nothing prevents the Appeals Chamber in the context of its disposal of the Defence appeal against the Chamber’s decision under article 95 of the Statute from addressing the issue of the scope of Mauritania’s duty *vis-à-vis* the Court, if any, should the Appeals Chamber deem it necessary or appropriate for the determination of the appeals under its consideration.

FOR THESE REASONS, THE CHAMBER

REJECTS the Application.


²¹ Application, para. 17. The Defence reference is to its appeal against the Chamber’s “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, ICC-01/11-354.

²² Application, para. 17.

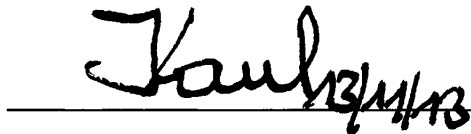
²³ ICC-01/11-01/11-439.

²⁴ The Defence arguments in relation to the transfer of Mr Al-Senussi to Libya from Mauritania revolve around Libya’s alleged violations of the Court’s order, and not on violations of Mauritania’s international obligations *vis-à-vis* the Court (see ICC-01/11-01/11-439, paras 25 to 30).

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, 13 November 2013

At The Hague, The Netherlands