



Original: **English**

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

Date: **4 September 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 Application on behalf of Mr. Abdullah Al-Senussi for Leave to Appeal against
“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”**

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
Sarah Bafadhel

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-Ghani
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 Other
Section**

Introduction

1. The Defence for Mr. Abdullah Al-Senussi files this application 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” dated 28 August 2013,¹ and notified to the parties on 29 August 2013.²
2. This 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 which would significantly affect the fair and expeditious conduct of the proceedings, and for which an immediate resolution by the Appeals 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.”³ 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.”⁴

¹ 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, ICC-01/11-01/11-420, 28 August 2013 (hereinafter “Decision of 28 August 2013”).

² For the purpose of Regulation 33, the Defence notes that on 29 August 2013 at 10:42 the Defence received an email from Court Management notifying the parties of the Pre-Trial Chamber’s decision.

³ 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”).

⁴ AC Decision of 13 July 2006, para. 16.

5. 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

The issues arising from present Decision

8. In its Decision of 28 August 2013, the Chamber reasoned that Mauritania has no obligation *vis-à-vis* the Court because “Mauritania is not a State Party to the Statute. No *ad hoc* arrangement or agreement has been concluded ... 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.”¹⁰ The Chamber further concluded that “no duty to cooperate with the Court arises from a decision of the Security Council,” noting that Resolution 1970 only “urge[d]” all States not party

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.

¹⁰ Decision of 28 August 2013, para. 13.

to the Rome Statute to cooperate fully with the Court.¹¹ The Chamber therefore found that “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.”¹²

9. The Defence submits that the Pre-Trial Chamber erred in making these findings. They concern fundamental questions of international law about the obligations and duties of 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. These important matters have not been considered and ruled on by the Appeals Chamber. The Defence submits that the Pre-Trial Chamber should therefore grant leave for these questions to be taken before the Appeals Chamber for resolution. Moreover, as set out below, the issues raised by the Decision significantly impact on the fair and expeditious conduct of the proceedings in Mr. Al-Senussi’s case and the Appeals Chamber’s determination could materially advance these proceedings.

10. The Defence brought its application for referral to the Security Council under Article 87(5)¹³, which provides that:

(a) The court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.

(b) Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the court, the Security Council.

11. Given that the Security Council “urged” all non-States’ parties to “co-operate fully” with ICC in Resolution 1970 passed under Chapter VII of the UN Charter, the Defence submits that the Chamber and the Registry properly requested Mauritania to

¹¹ Decision of 28 August 2013, para. 14.

¹² Decision of 28 August 2013, para. 15.

¹³ Libya had argued that Article 87(7) was applicable, which was addressed by the Defence, including by submitting that the requirements of this provision had in any event been met in the present case: see 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, para. 14.

surrender Mr. Al-Senussi to the ICC.¹⁴ As submitted before the Chamber,¹⁵ the Security Council Resolution constitutes “an appropriate basis” to invite a State not party to the Statute to provide assistance to the ICC. It follows that the Court may inform the Security Council under Article 87(5)(b) when such requests for assistance are not complied with. The plain wording of this provision envisages that the Security Council can be informed of any failure to assist when it has referred the matter to the Court. The Defence submits that the Chamber erred in finding that it could not report Mauritania’s failure to comply with the ICC’s requests to the Security Council.

12. Furthermore, as a member State of the United Nations,¹⁶ Mauritania is bound to implement the decisions of the Security Council acting under Chapter VII of the UN Charter. Articles 24, 25, 41 and 103 of the UN Charter specifically require Mauritania to “accept and carry out the decisions of the Security Council” irrespective of any other obligation or international agreement.¹⁷ It is well-established that “measures taken by the Council under Chapter VII of the Charter fall into the category of binding

¹⁴ Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah ALSENUSSI", ICC-01/11-01/11-1, 27 June 2011, p. 42; Public Redacted Version with a confidential annex of the “Report of the Registry regarding the arrest of Abdullah Al-Senussi” (ICC-01/11-01/11-80-Conf-Exp), ICC-01/11-01/11-80-Red, 21 March 2012, para. 2.

¹⁵ 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, para. 11.

¹⁶ Mauritania became a member of the United Nations on 27 October 1961. See, 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, para. 31.

¹⁷ See, Articles 24, 25, 41 and 103 of the UN Charter, as set out below. See also, 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, paras. 1, 9-11, 21-24, 31, 35, 67; 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, paras. 16, 17.

Article 24 of the UN Charter provides that: “(1) In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf. (2) In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII. (3) The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.”

Article 25 of the UN Charter provides that: “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”

Article 41 of the UN Charter provides that: “The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”

Article 103 of the UN Charter provides that: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

decisions.”¹⁸ As Resolution 1970 was adopted under Chapter VII of the UN Charter,¹⁹ all UN member States are bound to give full effect to the measures stipulated within the Resolution. The Chamber erred in failing to take into account and apply the relevant provisions of the UN Charter.

13. The Defence submits that the Chamber has deviated, without any reasoned justification, from the Court’s jurisprudence which has held that when a Situation is referred to the ICC by the Security Council acting under Chapter VII of the UN Charter, the Court has the “*inherent power* to inform the Security Council”²⁰ of a non-State party’s failure to cooperate with the Court on the basis that such non-cooperation in itself prevents “the Court from executing the task entrusted to it by the Security Council.”²¹ Irrespective of whether the State itself was “ordered”, “urged”, or “requested” to cooperate with the ICC by the Security Council Resolution, the Court may inform the Security Council of the State’s response to any request for assistance and whether the Court’s request has been complied with or not, so that the Security Council can decide on the appropriate action to be taken.

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

14. The Defence submits that leave to appeal should be granted in respect of the issues identified above as the requirements of Article 82(1)(d) are satisfied. The issues significantly affect the fair and expeditious conduct of the proceedings, and an immediate resolution of these issues by the Appeals Chamber may materially advance the proceedings.

15. As noted above, the issues concern novel and important questions which the Appeals Chamber has not addressed and determined. The Appeals Chamber has previously

¹⁸ For example, see David Schweigman, *The Authority of the Security Council under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice*, Springer, 1 edition (May 30 2001), p. 32. See also, International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, para. 113.

¹⁹ Resolution 1970 (2011), S/RES/1970 (2011), 26 February 2011, p. 2.

²⁰ *Prosecutor v. Harun and Kushayb*, 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 (hereinafter “*Harun Kushayb Decision of 25 May 2010*”). Cf *Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-3, 4 March 2009, p. 6 (emphasis added).

²¹ *Prosecutor v. Harun and Kushayb*, 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 (hereinafter “*Harun Kushayb Decision of 25 May 2010*”). Cf *Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-3, 4 March 2009, p. 6.

held that the purpose of leave to appeal under Article 82(1)(d) is to “[p]urg[e] the pre-trial process of errors ... [and] is designed as a safeguard for the integrity of the proceedings.”²² The issues go to the heart of whether non-State Parties of the ICC may be requested to cooperate with the Court and could be reported to the Security Council if they refuse to cooperate when the Security Council has referred the situation to the ICC under Chapter VII of the UN Charter. The resolution of these crucial legal questions will “remove doubts about the correctness of a decision”²³ for this and future cases.

16. These issues also directly affect Mr. Al-Senussi’s case and the fairness and expeditiousness of his proceedings. 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.

17. In addition, the Defence submits 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 order against Mr. Al-Senussi.²⁴ On 28 August 2013, leave was granted to appeal against the Pre-Trial Chamber’s decision to disregard “discrete arguments in the context of its analysis related to article 95 of the Statute”,²⁵ namely the Defence’s arguments that “Libya obtained custody of Mr. Al-Senussi from Mauritania in violation of the ICC’s order and the mere filing of an admissibility challenge should not permit any postponement of the surrender order.”²⁶ The issues in this appeal are related to the issues that are the subject of the present Application. The

²² AC Decision of 13 July 2006, para. 11.

²³ 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.

²⁴ Decision on an application for leave to appeal submitted by the Defence of Abdullah Al-Senussi, ICC-01/11-01/11-419, 28 August 2013, paras. 43-47.

²⁵ Decision on an application for leave to appeal submitted by the Defence of Abdullah Al-Senussi, ICC-01/11-01/11-419, 28 August 2013, para. 42.

²⁶ 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”, ICC-01/11-01/11-365, 20 June 2013, paras. 13, 14.

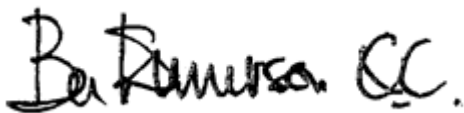
Defence is seeking to overturn the decision to postpone the surrender order – one of the key arguments is that Mauritania’s failure to comply with the ICC’s requests should be given significant weight in deciding whether it is appropriate to suspend the surrender order at this stage of the proceedings. The Appeals Chamber should therefore also be permitted to consider the extent of Mauritania’s duty to cooperate with the Court under Resolution 1970.

18. For this reason, granting leave to appeal would “advance” the proceedings by ensuring that any error by the Pre-Trial Chamber does not “setback”²⁷ and “unravel the judicial process.”²⁸ It would ensure that the Appeals Chamber does not rule on the outstanding appeal based on the erroneous decision of the Pre-Trial Chamber concerning Mauritania’s failure to comply with the requests of the Court, and hence it would “pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial.”²⁹

Conclusion

19. 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 Mr. Al-Senussi’s proceedings, as well as important legal principles before the Court. These issues 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

²⁷ AC Decision of 13 July 2006, para. 16.

²⁸ AC Decision of 13 July 2006, para. 16.

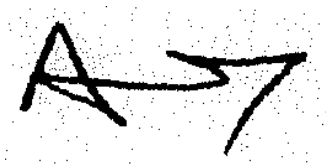
²⁹ Appeals Chamber, "Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber’s 31 March 2006 Decision Denying Leave to Appeal", ICC-01/04-168, 13 July 2006 paras 19 (“AC Decision of 13 July 2006”).

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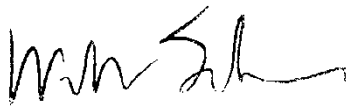
Rodney Dixon

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Amal Alamuddin

A handwritten signature in black ink, appearing to be 'Anthony Kelly'.

Anthony Kelly

A handwritten signature in black ink, appearing to be 'William Schabas'.

Professor William Schabas

Dated 4th September 2013

London, United Kingdom