

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/11-01/11
Date: 26 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

Decision concerning a privileged visit to Abdullah Al-Senussi by his Defence

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**

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

States Representatives
Ahmed El-Gehani
James Crawford
Wayne Jordash
Michelle Butler

Others

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” or “ICC”) issues the present decision concerning the privileged visit to Abdullah Al-Senussi (“Mr Al-Senussi”) by his Defence.

1. On 26 February 2011, the United Nations Security Council adopted Resolution 1970, whereby it referred the situation in Libya since 15 February 2011 to the Prosecutor of the Court and required the Libyan authorities to cooperate fully with and provide any necessary assistance to the Court and the Prosecutor.¹

2. On 27 June 2011, the Chamber issued a warrant of arrest against Abdullah Al-Senussi.²

3. On 10 January 2013, the Registrar provisionally acknowledged the appointment of Benedict Emmerson as counsel for Mr Al-Senussi to represent him in proceedings before the Court.³

4. On 6 February 2013, the Chamber issued the “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’” (the “Decision of 6 February 2013”), whereby it, *inter alia*, ordered the Registrar to “make the necessary arrangements with the Libyan authorities for a privileged visit to Mr Al-Senussi by his Defence”.⁴

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-01/11-01/11-253 and confidential *ex parte* annex.

⁴ ICC-01/11-01/11-269, p. 15.

5. The Registrar reported to the Chamber on the matter on 6 March 2013,⁵ 3 May 2013,⁶ 19 August 2013,⁷ 22 August 2013,⁸ and 13 September 2013.⁹

6. On 9 August 2013, the Defence of Mr Al-Senussi filed the “Defence Application on behalf of Mr. Abdullah Al-Senussi to refer Libya to the Security Council with Confidential *Ex Parte* (Chamber only) Annex 1”,¹⁰ requesting that the Chamber “find, pursuant to Articles 87(5) and 87(7) of the Rome Statute and in accordance [with] the Chamber’s ‘inherent power’ that:

- Libya is in non-compliance with the Chamber’s Order of 6 February 2013 to arrange a ‘visit of the appointed counsel for Mr Al-Senussi to his client on a privileged basis as soon as practicable;’ and
- Libya should be referred to the United Nations’ Security Council for immediate action to be taken to enforce the ICC’s Order” (the “Request for a Finding of Non-Cooperation”).¹¹

7. On 26 August 2013, Libya filed its “Response to ‘Defence Application on behalf of Mr. Abdullah Al-Senussi to refer Libya to the Security Council with Confidential *Ex Parte* (Chamber only) Annex 1’”, opposing the Request for a Finding of Non-Cooperation.¹²

8. On 3 September 2013, the Defence of Mr Al-Senussi filed the “Application for Leave to Reply to the ‘Response to Defence Application on behalf of Mr Abdullah Al-Senussi to refer Libya to the Security Council with Confidential

⁵ ICC-01/11-01/11-294-Conf-Exp (Defence of Mr Al-Senussi only) and confidential annexes, *ex parte*, Registry only.

⁶ ICC-01/11-01/11-328 and confidential annexes, *ex parte*, Defence of Mr Al-Senussi and Registry only.

⁷ ICC-01/11-01/11-408-Conf-Exp (Defence of Mr Al-Senussi and Libya only) and confidential annexes, *ex parte*, Defence of Mr Al-Senussi and Libya only.

⁸ ICC-01/11-01/11-413-Conf-Exp (Defence of Mr Al-Senussi and Libya only).

⁹ ICC-01/11-01/11-444-Conf and confidential annex, *ex parte*, Defence of Mr Al-Senussi and Libya only.

¹⁰ ICC-01/11-01/11-399 and confidential annex, *ex parte*, Defence of Mr Al-Senussi only.

¹¹ ICC-01/11-01/11-399, para. 27.

¹² ICC-01/11-01/11-417, pp. 9-10.

Ex Parte (Chamber only) Annex 1,' filed on 26 August 2013" (the "Request for Leave to Reply").¹³

9. On 9 September 2013, Libya filed its "Response to Defence 'Application for Leave to Reply to the "Response to 'Defence Application on behalf of Mr. Abdullah Al Senussi to refer Libya to the Security Council with Confidential Ex Parte (Chamber only) Annex 1'", submitting that the Request for Leave to Reply should be rejected.¹⁴

10. The Chamber notes articles 48, 57(3)(b), 67(1), 87 and 93 of the Rome Statute (the "Statute"), rule 22(1) of the Rules of Procedure and Evidence (the "Rules") and regulation 24(5) of the Regulations of the Court.

11. In the Decision of 6 February 2013, the Chamber found it "appropriate, acting pursuant to article 57(3)(b) of the Statute, to request the Libyan authorities to arrange, in consultation and cooperation with the Registrar, a visit of the appointed counsel of Mr Al-Senussi to his client on a privileged basis as soon as practicable".¹⁵

12. The Chamber notes that Libya has not at any time opposed such a visit by his Defence,¹⁶ but that today, seven months after the Chamber's decision, the visit has not yet taken place.

13. The reason for the delay appears to be the difficulties encountered by the Registrar and Libya in the process of agreeing on a comprehensive Memorandum of Understanding regulating cooperation between Libya and the Court. Nevertheless, the Chamber does not consider that the conclusion of the comprehensive Memorandum of Understanding is a pre-condition for the

¹³ ICC-01/11-01/11-429.

¹⁴ ICC-01/11-01/11-437.

¹⁵ Decision of 6 February 2013, para. 40.

¹⁶ See ICC-01/11-01/11-264, para. 38; ICC-01/11-01/11-417, para. 5.

visit to Mr Al-Senussi by his Defence, which may also proceed on the basis of *ad hoc* arrangements between the Registrar and Libya. In this respect, the Chamber notes that the Registrar reports that “during the meeting dated 29 August 2013 the Libyan authorities agreed to consider applying an *ad hoc* legal arrangement for the purpose of this visit”.¹⁷

14. In light of the above and in order to expedite the organisation of the visit to Mr Al-Senussi by his Defence, the Chamber considers it appropriate that a visit is organised on the basis of an *ad hoc* arrangement to be concluded by the Registrar and Libya as soon as possible. This *ad hoc* arrangement should address the practical modalities of the visit, and should provide to the members of the Defence of Mr Al Senussi that participate in the visit such treatment as is necessary for the proper functioning of the Court, in accordance with article 48(4) of the Statute.

15. Taking into account the purpose of the visit, the provisions of the *ad hoc* arrangement should be appropriate to ensure, in particular, the right of Mr Al-Senussi to communicate freely with his counsel in confidence, in accordance with article 67(1)(b) of the Statute.

16. Therefore, the arrangement should include all practical arrangements necessary to ensure the unhindered entrance of the Defence team and their belongings to Libya as well as their appropriate treatment and protection during their stay on Libyan territory. This treatment should explicitly include, at a minimum, immunity from arrest and detention and from search of personal baggage for the individuals participating in the visit, the inviolability of the Defence documents, and the non-interference with and guarantee of the privileged nature and communication between Mr Al-Senussi and his Defence during the meeting. The Chamber recalls that, in conformity with international

¹⁷ ICC-01/11-01/11-444-Conf-Exp-Anx2.

law, such privileges and immunities are without prejudice to the obligation of those participating in the visit to respect the national laws of Libya. If Libya has reasonable grounds to believe that the Defence of Mr Al-Senussi has violated Libyan law, Libya shall, however, not take any action that may impact on the necessary treatment that must be accorded to the Defence under the Statute, unless and until the Presidency of the Court has, upon prompt official request by Libya, waived the relevant immunity.

17. In light of the considerations expressed above, the Chamber is of the view that a finding of non-cooperation in relation to the organisation of a privileged visit to Mr Al-Senussi by his Defence is not warranted at this stage. The Request for a Finding of Non-Cooperation, as well as the related Request for Leave to Reply, should therefore be rejected.

FOR THESE REASONS, THE CHAMBER

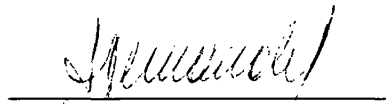
ORDERS the Registrar to make the necessary arrangements with Libya for a privileged visit to Mr Al-Senussi, in line with the present decision;

ORDERS the Registrar to file in the record of the case by Monday, 14 October 2013, a report on the matter;

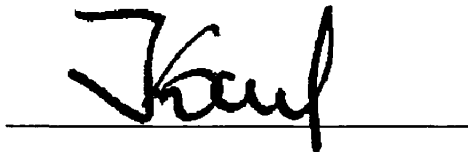
REJECTS the Request for a Finding of Non-Cooperation; and

REJECTS the Request for Leave to Reply.

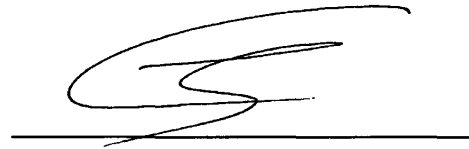
Done in both English and French, the English version being authoritative.



Judge Silvia Fernández de Gurmendi
Presiding Judge



Judge Hans-Peter Kaul



Judge Christine Van den Wyngaert

Dated this Thursday, 26 September 2013

At The Hague, The Netherlands