

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **6 September 2012**

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

**Request to Submit Observations Pursuant to Regulation 77(4) of the Regulations
of the Court**

Source: The Office of Public Counsel for the Defence

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Ms. Fatou Bensouda

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

Mr. Xavier-Jean Keïta, Principal Counsel

Ms. Melinda Taylor, Counsel

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia, Registrar

Deputy Registrar

Mr. Didier Daniel Pereira, Deputy Registrar

Victims and Witnesses Unit

Counsel Support Section

Detention Section

Victims Participation and Reparations Section

Other

1. On 27 June 2011, Pre-Trial Chamber I issued an arrest warrant against Abdullah Al-Senussi,¹ and at the same time, requested the Registrar to transmit a request for cooperation to, *inter alia*, the Libyan authorities pursuant to rule 176(2) of the Rules of Procedure and Evidence.²
2. On 4 July 2011, the Registrar transmitted to the Libyan authorities a request for the arrest and surrender of Mr. Al-Senussi, which explicitly requested “Libya to comply with the procedures provided for in articles 59, 89(2) and 89(4) of the Statute and rule 117 of the Rules” (the Request for Cooperation).³
3. At a time when the Counsel for Libya had avowed to the Pre-Trial Chamber that the Government had effectively been dissolved,⁴ and the current Minister of Justice did not have the competence or authority to instruct Counsel,⁵ the current Minister of Justice and officials from the Prosecutor-General’s office travelled to Mauritania to arrange for the transfer of Mr. Al-Senussi to Libya.⁶
4. It has been reported that Libya obtained Mauritania’s agreement to transfer Mr. Al-Senussi in exchange for financial benefits, allegedly amounting to \$200 million.⁷
5. According to news report, Mr. Al-Senussi arrived in Tripoli on 5 September 2012. Upon his arrival, the current Prime Minister Keib (who was appointed by the National Transitional Council and not the General National Congress), announced that he would be tried in Libya, and not surrendered to the International Criminal Court (ICC).⁸
6. In clear contravention to the presumption of innocence, Prime Minister Keib also informed the Guardian that

¹ ICC-01/11-01/11-4

² Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENSUSSI", ICC-01/11-01/11-1, at p. 42.

³ Request to the Libyan Arab Jamahiriya for the arrest and surrender of Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENSUSSI, ICC-01/11-01/11-5, 4 July 2011.

⁴ Libyan Government’s Application for Leave to Reply and Reply to (i) the Defence’s “Response to the ‘Libyan Government Request for Status Conference and Extension of Time to file a Reply to the Responses to its Article 19 Admissibility Challenge’” and (ii) the “Registrar’s Observations with respect to Libyan Government’s Request”, ICC-01/11-01/11-199, at paras. 4 and 13 *inter alia*.

⁵ Libyan Government Request for Status Conference and Extension of Time to file a Reply to the Responses to its Article 19 Admissibility Challenge, ICC-01/11-01/11-192, at para. 11.

⁶ Mauritania deports Libya spy chief Abdullah al-Senussi BBC 5 September 2012, <http://www.bbc.co.uk/news/world-africa-19487228>; M. Cousins, ‘Kib insists Senussi will receive fair trial in Libya’ Libya Herald 5 September 2012, <http://www.libyaherald.com/?p=13809>

⁷ G. Grant, ‘Government struck financial deal with Mauritania over Senussi handover’ Libya Herald 5 September 2012, <http://www.libyaherald.com/?p=13796>

⁸ M. Cousins, ‘Kib insists Senussi will receive fair trial in Libya’ Libya Herald 5 September 2012.

I guarantee he [Senussi] was almost directly or indirectly involved in most if not all of the crimes [of the former regime].⁹

7. Under the clear terms of Article 59 the ICC Statute, which is binding on Libya *per* the terms of Security Council Resolution 1970,¹⁰ Libya is obliged to bring Mr. Al-Senussi promptly before a judge, and thereafter, to deliver him to the Court “as soon as possible”. These twin obligations equate to a duty to “to act expeditiously in the surrender of persons subject to an arrest warrant issued by the Court”,¹¹ and thereby preclude the possibility that a State may defer the surrender of a person with a view to building or enhancing a future challenge to the admissibility of the case before the ICC.
8. This Pre-Trial Chamber has previously emphasised that the obligation to surrender Mr. Saif Al Islam Gaddafi and Mr. Al-Senussi dates from the day Libyan authorities were notified of the warrant of arrest (that is, 4 July 2011).¹² The Pre-Trial Chamber also put Libya on notice that a failure to comply with a surrender request could trigger a finding of non-compliance, which could be reported to the Security Council.¹³
9. At this point in time, Libya has not been exempted from its obligation to bring Mr. Al-Senussi before a judge or to surrender him to the ICC as soon as possible. The Pre-Trial Chamber has confirmed that the challenge to admissibility filed by Libya “must be understood to only concern the case against Mr Gaddafi. Accordingly, the Chamber will not consider the admissibility of the case against Mr Al-Senussi in resolving the Article 19 Application.”¹⁴ Since the admissibility of the case against Mr. Al-Senussi is not under consideration by the Court, Article 95 is not applicable, and there is no basis for postponing the execution of the ICC arrest warrant. The fact that Libya has secured Mr. Al-Senussi’s transfer from Mauritania does not legitimize their right to try him: a defendant’s rights should not be sold to the highest bidder.

⁹ L. Harding, I. Black, ‘Mauritania extradites Gaddafi spy chief Senussi to Libya’ *Guardian* 5 September 2012, <http://www.guardian.co.uk/world/2012/sep/05/mauritania-gaddafi-senussi-libya?newsfeed=true>

¹⁰ Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Rome Statute, ICC-01/11-01/11-163, 1 June 2012, at para. 27.

¹¹ Decision on the "Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo (ICC02/11-01/11-129)", ICC-02/11-01/11-212, 15 August 2012 at para. 100.

¹² Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi, ICC-01/11-01/11-100, 4 April 2012, at para. 19.

¹³ Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi, ICC-01/11-01/11-100, 4 April 2012, at para. 19.

¹⁴ Decision on the Conduct of the Proceedings Following the "Application on behalf of the Government of Libya pursuant to Article 19 of the Statute", ICC-01/11-01/11-134, 4 May 2012, at para. 8.

10. At this point in time, there is no information as to whether Mr. Al-Senussi has appointed counsel, or whether he has had any opportunity to communicate a wish for counsel to be appointed. The most effective mechanism for his right to legal representation to be satisfied would be for Mr. Al-Senussi to be immediately brought before a judge, so that it can be ascertained in a transparent manner whether his rights have been respected, and he can voice any preferences concerning legal representation.
11. Of further concern is the fact that in their challenge to the admissibility of the case, Counsel for Libya indicated that since the date of Mr. Al-Senussi's arrest in Mauritania,

the severity of Mr Al-Senussi's liver disease has become apparent and his health condition is now such that it is understood that he cannot presently be investigated domestically for breaches of Mauritanian law, let alone transferred back to Libya.¹⁵

12. Although it is evident from Mr. Al-Senussi's transfer to Libya that his health would not act as a bar to his transfer to the ICC, the possibility of such ill-health further underscores the importance of bringing Mr. Al-Senussi promptly before a judge and securing his right to legal representation, so that any relevant medical issues can be addressed in a timely and transparent manner.
13. Regulation 77(4) of the Regulations of the Court provides that the tasks of the Office of Public Counsel for the Defence shall include:

Representing and protecting the rights of the defence during the initial stages of the investigation, in particular for the application of article 56, paragraph 2(d), and rule 47, sub-rule 2. For this purpose the Office of Public Counsel for the defence may, on the instruction or with the leave of the Chamber, make submissions concerning the needs of the defence in ongoing proceedings;

14. In order to ensure that Mr. Al-Senussi's rights are not prejudiced through the dilatory or non-implementation of his rights under Article 59 of the Statute, the OPCD requests

¹⁵ Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11-130, at para. 30.

the leave of the Pre-Trial Chamber to submit the present observations concerning the obligation of the Libyan authorities to immediately comply with the terms of the ICC arrest warrant, and Request for Cooperation.

Relief Sought

15. For the reasons set out above, the OPCD respectfully requests the Honourable Pre-Trial Chamber to:
- i. grant leave to the OPCD to submit the present observations concerning the execution of the arrest warrant and Request for Cooperation concerning Mr. Al-Senussi; and
 - ii. report any failure by the Libyan authorities to comply with these obligations in a timely manner to the Security Council.



Xavier-Jean Keïta, Principal Counsel of the OPCD

Dated this, 6th Day of September 2012

At The Hague, The Netherlands