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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

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

Source: Abdullah Al-Senussi, represented by Ben Emmerson QC and Rodney Dixon

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

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**Victims Participation and Reparations
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Other

Introduction

1. This urgent Application is submitted pursuant to Article 87(5) of the ICC Statute and Articles 24, 25 and 103 of the Charter of the United Nations Charter¹.
2. The Application is filed in light of the official statement of 1 January 2013 from the Libyan Prosecutor General's office which declared that Mr. Abdullah Al-Senussi and Mr. Saif Al-Islam Gaddafi "will be put on trial in a month's time" in Libya². It stated that as Libya was not a party to the Rome Statute, it was not bound to comply with the Pre-Trial Chamber's most recent Order of 10 December 2012 to transfer Mr. Al-Senussi to the ICC³.
3. This statement disregards, and is patently in breach of, the binding obligations of Libya under Security Council Resolution 1970 of 26 February 2011, which referred the Libya Situation to the ICC under Chapter VII of the UN Charter⁴, and under the orders and requests of the ICC that have been issued pursuant to this Resolution, including the Chamber's Order of 10 December 2012.
4. Counsel for Mr. Al-Senussi, therefore, request the Pre-Trial Chamber immediately to refer the conduct of Libya and Mauritania to the Security Council. The stance taken by Libya (of open defiance of the orders of the ICC, and repudiation of its jurisdiction notwithstanding Security Council Resolution 1970) makes it clear that intervention by the Security Council is now the only means of securing compliance by Libya with its international obligations. Whilst the Pre-Trial Chamber is additionally requested to make the orders set out in paragraph 6 as an urgent precautionary measure (and in order to provide Libya with a final opportunity to reconsider its position), it is submitted that the evidence now demonstrates beyond doubt that Libya will not perform its obligations under international law unless it is expressly directed to do so by the Security Council. The position has been reached at which urgent reference to

¹ Due to the urgency of this matter, the number of important issues to address in a single urgent motion, and the necessity of referring to the full background and sources in support of this Application, Counsel for Mr. Al-Senussi wish to request that the Chamber permit an extension of the page limit for this Application by 3 pages pursuant to Regulation 37 of the Regulations of the Court.

² Attached hereto as Annex 1, Libya: Gaddafi's son and Al-Senussi on trial in a month's time, Al-Masry Al-Youm, 1 January 2013, and Saif Qaddafi and Abdullah Senussi will be put on trial in a month's time and in Libya, Libya Herald, 2 January 2013.

³ Order in relation to the request for arrest and surrender of Abdullah Al-Senussi, ICC-01/11-01/11-241, 10 December 2012 (hereinafter "Order of 10 December 2012").

⁴ Resolution 1970 (2011), Adopted by the Security Council at its 6491st meeting, on 26 February 2011, S/RES/1970 (2011).

the Security Council is imperative. Libya's intention to refuse compliance with the orders of the Pre-Trial Chamber, and thereby to rectify its complicity in an internationally wrongful act, is sufficiently established by its conduct and statements, including in particular its statement of 1 January 2013. The Pre-Trial Chamber is therefore requested to refer the situation immediately to the Security Council.

5. For these reasons, and in the exceptional and urgent circumstances of this case, Counsel for Mr. Al-Senussi has informed the President of the Security Council of the developments in a letter of representation asking that the situation be placed on the Security Council's agenda for urgent action to be taken to ensure that Libya complies with Security Resolution 1970 and with the Order of the Chamber to surrender Mr. Al-Senussi to the ICC⁵. In taking this action it was not intended to pre-empt the decisions of the Chamber either as to the appointment of counsel to act for Mr. Al-Senussi, or on the present application. However, given the urgency of the situation, and in the absence of the Judges of the Chamber during the holiday recess period, it was incumbent upon Counsel to take all reasonable steps to ensure that the situation can be rectified before it becomes irretrievable.
6. In addition (and not as an alternative) the Pre-Trial Chamber is requested to order the Libyan authorities to comply with their obligations pursuant to Security Council Resolution 1970 and the ICC's subsequent orders. The Pre-Trial Chamber is requested to make orders in the following terms, and to afford Libya a maximum of five calendar days in which to comply:
 - i. That Libya should immediately implement the Pre-Trial Chamber's Order of 10 December 2012 to transfer Mr. Senussi to the custody of the ICC, on the following grounds;
 - a. That despite its statement on 1 January 2013, Libya is obliged to comply with the ICC's requests and orders to surrender Mr. Al-Senussi to the ICC under the UN Charter and Security Council Resolution 1970 which are the legal basis for the ICC's orders and requests. Indeed, in the Chamber's Order of 10 December 2012 the Libyan authorities were reminded of their obligations under

⁵ Attached hereto as Annex 2. The letter has been forwarded to the President of the ICC as a courtesy.

Security Council Resolution 1970 and to comply with the request for arrest and surrender of Mr. Al-Senussi transmitted by the Registry on 4 July 2011 following the warrant of arrest that was issued by the Pre-Trial Chamber⁶. Libya has failed to comply with any of these orders and now claims without any legal justification that it is not obliged to do so. This constitutes an internationally wrongful act that is continuing to date and entails further international obligations on Libya of (a) performance of the international obligations it has violated (b) cessation and non-repetition and (c) restoration of the situation that existed prior to Libya's violation of its international obligations.

- b. That the Government of Mauritania has acted in breach of its international obligations under Security Council Resolution 1970 as a Member State of the United Nations and under the orders and requests of the ICC pursuant to the Resolution in transferring Mr. Al-Senussi to Libya. It is indisputable that Mauritania was obliged to surrender Mr. Al-Senussi to the ICC upon his capture. It failed to do so and instead handed him to Libya for a substantial reward in breach of its obligations under international law. Libya is responsible in international law for the commission of this internationally wrongful act, through its provision of “aid and assistance” to Mauritania in the commission of that act.
- c. That Mauritania has also violated the mandatory sanctions regime imposed by the Security Council under Resolution 1970 (and in particular the provisions of the sanctions regime imposed by that Resolution that prohibited any act involving the physical transfer of Mr. Al-Senussi across an international border without obtaining the necessary permission from the Security Council). Libya is also responsible in international law for the commission of this internationally wrongful act, through its provision of “aid and assistance” to Mauritania in the commission of that act.

⁶ Request to the Libyan Arab Jamahiriya for the arrest and surrender of Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI, ICC-01/11-01/11-6, 4 July 2011.

- d. That Mr. Al-Senussi was also rendered to Libya in violation of Mauritania's obligations under Article 14 of the International Covenant on Civil and Political Rights ("ICCPR"). Again, Libya is responsible in international law for the commission of this internationally wrongful act, through its provision of "aid and assistance" to Mauritania in the commission of that act.
 - e. That by making and announcing arrangements to put Mr. Al-Senussi on trial in Libya before the end of this month, Libya has committed a yet further internationally wrongful act aimed at frustrating the performance of its international obligations.
 - f. That since these serial violations of international law by Libya and Mauritania constitute internationally wrongful acts entailing the international responsibility of Libya, this gives rise to a binding international obligation on Libya to cease the continuing internationally wrongful act; to provide guarantees of cessation and non-repetition; and restore the *status quo ante* by transferring Mr. Al-Senussi to the ICC immediately. Libya should not be permitted by the ICC or the Security Council to benefit from a series of flagrant violations of international law, and should therefore be required to transfer Mr. Al-Senussi to the ICC immediately.
- ii. That Libya should immediately cease all actions and proceedings in respect of Mr. Al-Senussi's case in the national courts since the steps announced on 1 January 2013 will impede the immediate execution of the Pre-Trial Chamber's order and request for Mr. Al-Senussi's arrest and surrender to the ICC⁷; and in particular that Libya be prohibited from commencing any national trial proceedings as forecast in the statement of 1 January 2013 that could hinder or further delay Mr. Senussi's transfer to the ICC.

⁷ The Pre-Trial Chamber made a similar order in Mr. Gaddafi's case: see 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.

- iii. Libya should urgently facilitate a secure and privileged visit to Mr. Al-Senussi by his Counsel and family with all necessary immunities and protections. Mr. Al-Senussi has now been in custody for over 9 months since his arrest on 17 March 2012 in Mauritania and subsequent transfer to Libya in September 2012. He has had no access to any lawyer or to any of his family in Libya.

- 7. Alternatively, if the Pre-Trial Chamber is not minded to refer the situation to the Security Council immediately, it is requested to make the orders against Libya set out in paragraph 6 above, allowing no more than 5 calendar days for compliance, and to notify Libya that if it fails to comply with each of these orders within the prescribed time period, this will result in Libya being reported to the Security Council for non-compliance in accordance with Article 87(5)(b) of the Statute and the jurisprudence of the ICC.

Applicable legal provisions

- 8. Article 87(5) of the Rome Statute 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.

- 9. Article 24(1) of the UN Charter states:

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.

- 10. Article 25 of the UN Charter provides as follows:

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

11. Article 103 of the UN Charter states:

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.

Libya's statement of 1 January 2013

12. This Application has been precipitated by the official statement of the Libyan Prosecutor General's office on 1 January 2013, which is attached to this Application as Annex 1.

13. It is reported "that Saif Al-Islam, former Libyan President Muammar Gaddafi's son, and Abdullah Al-Senussi, former spy chief, will be put on trial in a month's time."⁸

14. In addition, the Prosecutor General's office responded to the Chamber's Order of 10 December 2012 by claiming that "Libya is not a party to the ICC, therefore it is not bound to comply with this request", and that the "ICC's jurisdiction over Saif Al-Islam's trial is an exceptional jurisdiction, and the Libyan justice system is capable of prosecuting Al-Senussi."⁹

Libya's non-compliance with its binding legal obligations

15. The Libyan authorities' announcement on 1 January 2013 is plainly in breach of their obligation to surrender Mr. Al-Senussi to the ICC. Libya has not filed any admissibility challenge pursuant to Articles 17 and 19 of the Statute in respect of Mr. Al-Senussi. Instead, it has defiantly declared that as a non-party to the ICC Statute, it is not obliged to comply with the ICC's orders and requests, including the most recent Order of 10 December 2012. Libya is (a) responsible for aiding and assisting an internationally wrongful act by Mauritania (namely the rendition of Mr. Al-Senussi by Mauritania to Libya in breach of Security Council Resolution 1970 and relevant orders of the ICC); (b) responsible on its own behalf for its continuing breach of its international legal obligations through its own failure to surrender Mr. Al-Senussi to the ICC since it has had him in its custody and control and to date; (c) responsible for a further internationally wrongful act in taking steps now to frustrate the performance of the relevant international legal obligations by which it is bound through making

⁸ See Annex 1.

⁹ See Annex 1.

arrangements to put Mr. Al-Senussi on trial in proceedings which could result in the imposition of the death penalty.

Applicable provisions of Security Council Resolution 1970 and ICC orders

16. Libya has completely ignored the fact that the Security Council, acting under Chapter VII of the UN Charter, has required Libya to cooperate with the ICC and comply with its orders and requests. Security Council Resolution 1970 of 26 February 2011 referred the situation in Libya to the Prosecutor of the ICC and “*Decide[d] that the Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution.*”¹⁰ This Resolution is attached hereto as Annex 3.

17. Following this Resolution, on 27 June 2011, the Pre-Trial Chamber granted the Prosecutor’s application for arrest warrants for Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi. It ordered the Registry to “prepare and transmit to any State any request for transit which may be necessary for the surrender of Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi to the Court.”¹¹ This Decision is attached hereto as Annex 4.

18. In accordance with this Order, the Registry on 4 July 2011 transmitted a Request for Arrest and Surrender to the Libyan authorities. It stated that “considering that the United Nations Security Council ‘decide[d] that the Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor’” the Court “requests Libya to arrest and surrender” Abdullah Al-Senussi to the Court.¹² This Request is attached to this Application as Annex 5.

19. Furthermore, on 6 September 2012, following reports that Mr. Al-Senussi had been transferred to Libya, the Registry “transmitted a *note verbale* to the Libyan authorities ... request[ing] that the Libyan authorities confirm the extradition of Mr. Abdullah Al-Senussi ... the name of the detention centre in which Mr Al-Senussi is detained ...

¹⁰ Resolution 1970 (2011), Adopted by the Security Council at its 6491st meeting, on 26 February 2011, S/RES/1970 (2011), paras. 4-5.

¹¹ 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-01/11-12, 27 June 2011, p. 42.

¹² Request to the Libyan Arab Jamahiriya for the arrest and surrender of Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI, ICC-01/11-01/11-6, 4 July 2011, p. 3-5.

[and] his state of health.”¹³ As far as it is publicly known, no response has been received from the Libyan authorities to this request. The reference to this request is contained in the Registry’s report of 17 September 2012 which attached as Annex 6.

20. The Chamber’s Order of 10 December 2012 “Reiterate[d] to the Libyan authorities the request for arrest and surrender of Mr Al-Senussi and remind[ed] them of their obligation to comply with the request”.¹⁴ The Chamber repeated its request that the Libyan authorities “(i) confirm the extradition of Mr Al-Senussi from Mauritania to Libya; and (ii) provide the name of the detention centre in which Mr Al-Senussi was being held, if any, as well as information about his state of health, by Tuesday, 15 January 2012.”¹⁵ This Order is attached as Annex 7.

Binding nature of legal obligations

21. It is unquestionable that Libya is bound under Security Council Resolution 1970, which was passed under Chapter VII of the UN Charter, to comply with the orders and requests of the ICC issued pursuant to this Resolution. Article 25 of the UN Charter provides that all Members of the UN are obliged to “*carry out the decisions of the Security Council in accordance with the present Charter*”.

22. Article 103 of the UN Charter states that these obligations under the Charter prevail over obligations under any other international agreement.

23. The ICC’s jurisprudence has confirmed that these provisions of the UN Charter require all States, including non-parties to the ICC Statute, to comply with the ICC’s orders when the situation has been referred to the ICC by the Security Council acting under Chapter VII of the UN Charter. The Pre-Trial Chamber has found that the State concerned “has the obligation to fully cooperate with the Court” because “the obligation ... to cooperate with the Court stems directly from the Charter of the United Nations and [the Security Council] Resolution.”¹⁶

¹³ Second report of the Registry on the status of the execution of the request for arrest and surrender of Abdullah Al-Senussi, 17 September 2012, paras. 1, 3.

¹⁴ Order of 10 December 2012, p. 5.

¹⁵ Ibid.

¹⁶ Document 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, p. 6.

24. In accordance with Article 103 of the UN Charter, the Pre-Trial Chamber has stated that the obligation “to cooperate fully with and provide any necessary assistance to the Court shall prevail over any other obligation that the State ... may have undertaken pursuant to ‘any other international agreement’.”¹⁷

Reporting non-compliance to the Security Council

25. In light of the unequivocal stance taken by Libya in the statement of 1 January 2013, the Chamber is requested to report Libya to the Security Council immediately (and to make the orders sought in paragraph 6 above). Alternatively the Chamber is requested to make the orders sought and to inform Libya that if it has not complied with all of them (including the order to surrender Mr. Al-Senussi to the ICC) within 5 calendar days, then the matter will be reported to the Security Council.

26. The Pre-Trial Chamber has previously notified the Libyan authorities in respect of Mr. Gaddafi that “any failure on the part of the Government of Libya to comply with its obligations to enforce the warrant of arrest against Mr. Gaddafi may warrant that the Court make a finding” of non-compliance which can be reported to the Security Council.¹⁸

27. The Pre-Trial Chamber in another case has reported the non-compliance of a non-State party to the Rome Statute, finding that by virtue of the Security Council Resolution applicable in that case, the State had failed to cooperate with the ICC, “thereby preventing the Court from executing the task entrusted to it by the Security Council”. The Chamber held that the ICC has the inherent power to inform the Security Council of such a failure.¹⁹

¹⁷ 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, paras. 243-249.

¹⁸ Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi, 4 April 2012, para 19.

¹⁹ 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, p. 6.; See also, Public Redacted Version of “Prosecution request for a finding on the non-cooperation of the Government of the Sudan in the case of The Prosecutor v Ahmad Harun and Ali Kushayb, pursuant to Article 87 of the Rome Statute”, filed on 19 April 2010, ICC-02/05-01/07-48-Red, 19 April 2010, para. 53.

Mauritania's non-compliance with its binding international obligations

28. Libya should be ordered immediately to transfer Mr. Al-Senussi to the ICC for the additional reason that Libya only gained custody of Mr. Al-Senussi as a result of Mauritania's own breaches of Security Council Resolution 1970 and the Orders of the ICC in transferring Mr. Al-Senussi to Libya. Libya was complicit in those violations by Mauritania through (a) inciting the violation through the offer and payment of a substantial sum of money in return for the unlawful rendition of Mr. Al-Senussi; and (b) making arrangements with Mauritania to transfer Mr. Al-Senussi across an international boundary and receive him into the custody and control of the Libyan authorities.
29. The Chamber is requested to make findings in respect of Mauritania's non-compliance which are specific to Mr. Al-Senussi's case, and which provide a distinct basis in his case for ordering Libya to transfer him to the ICC.

Violation by Mauritania of its legal obligation to transfer to ICC

30. Mauritania is under a clear obligation to comply with the orders and requests of the ICC on the basis of the provisions of Security Council Resolution 1970. The Resolution "urge[d] all States and concerned regional and other international organizations to cooperate fully with the Court and the Prosecutor" even if non-parties to the Rome Statute.²⁰
31. As a Member of the United Nations since 27 October 1961, Mauritania is bound "to accept and carry out the decisions of the Security Council" in accordance with Articles 24 and 25 of the UN Charter. Moreover, Article 103 requires Mauritania to discharge its obligation to abide by Security Council Resolution 1970 notwithstanding any agreements or arrangements that it may have entered into with Libya (either generally or in the particular case).

²⁰ Resolution 1970 (2011), Adopted by the Security Council at its 6491st meeting, on 26 February 2011, S/RES/1970 (2011), para. 5.

32. In accordance with (and citing) the provisions of Security Council Resolution 1970, the Registry transmitted a confidential request for the arrest and surrender of Mr. Al-Senussi to the Minister of Foreign Affairs of Mauritania shortly after it was reported that he had been arrested in Mauritania on 17 March 2012.²¹
33. The request required Mauritania to surrender Mr. Al-Senussi to the ICC on the basis of Mauritania's obligation to co-operate with the ICC pursuant to Resolution 1970. The filing of 21 March 2012 which includes reference to this request is attached hereto as Annex 8. As the filing is redacted, it is not known whether Mauritania responded to the request and on what basis it refused to comply with it, if any.
34. In any event, Mauritania failed to hand over Mr. Al-Senussi to the ICC in violation of its obligations under the UN Charter. No action has yet been taken against Mauritania.
35. Counsel for Mr. Al-Senussi request that the Chamber order Mauritania to submit observations to the Chamber in respect of this violation (and the further violations set out below). Such observations have been requested by the Pre-Trial Chamber from other States when violations of Security Council Resolutions and orders of the ICC have been alleged, including in respect of Malawi,²² Chad²³ and Kenya.²⁴ While Mauritania is not a party to the Rome Statute, the Pre-Trial Chamber has the power to request a non-State party to submit observations on its failure to cooperate with the Court's request for arrest and surrender when the request "stems directly from the Charter of the United Nations and [the Security Council Resolution]."²⁵ As stated above, Mauritania is obligated under Article 24, 25 and 103 of the UN Charter to cooperate with any request of the Court which derives from a Security Council Resolution.

²¹ See, 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.

²² Decision requesting observations about Omar Al-Bashir's recent visit to Malawi, ICC-02/05-01/09-137, 19 October 2011.

²³ Decision requesting observations about Omar Al-Bashir's recent visit to the Republic of Chad, ICC-02/05-01/09-132, 18 August 2011.

²⁴ Decision requesting observations from the Republic of Kenya, ICC-02/05-01/09-117, 25 October 2010.

²⁵ 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, p. 6.

36. It follows that Libya should be required to surrender Mr. Al-Senussi to the ICC on account of his transfer to Libya being unlawful. The ICC should not permit Libya to retain custody of Mr. Al-Senussi when the basis of his transfer and detention to Libya were in violation of the ICC's orders, premised on the provisions of Security Council Resolution 1970 under Chapter VII of the UN Charter.

37. As far as it is publicly known, no information has been provided to the ICC about Mr. Al-Senussi's transfer from Mauritania. There is no evidence that any proper and legitimate legal and judicial process was followed. On the contrary, there is information that shows that Libya "struck a deal" with Mauritania to invest over \$200 million in Mauritania in exchange for Mr. Senussi. It is reported that the Chairman of Libya's National Public Congress and Finance Minister stated that "an important deal was struck between the Libyan authorities and their Mauritanian counterpart" involving Mr. Senussi²⁶. A Decision of the Libyan Council of Ministers records that an "amount of (250,000,000) two hundred and fifty million Dinars, as a donation to the Mauritanian people ... was approved in the Council of Ministers' 28th ordinary session for 2012, in accordance with the coordination made through the President of the General National Congress,"²⁷. Since then, a Member of the Mauritanian Parliament has raised questions in a publicly broadcast session of the Parliament, alleging misappropriation of the money paid to the Government of Mauritania after "the [Libyan] government sold Al-Senussi to Libya in change of 200 million dollars."

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38. In these circumstances, there are strong grounds to submit that Mr. Al-Senussi was transferred to Libya extra-judicially as a rendition in violation of Security Council Resolution 1970 and the applicable provisions of the UN Charter, in return for the illegal payment by Libya of a bribe or inducement to public officials of Mauritania to violate Mauritania's international obligations. The Chamber should consider, and having heard from Mauritania, rule upon the precise circumstances of Mr. Al-Senussi's transfer to Libya as it has a direct bearing on Libya's failure to surrender

²⁶ Al-Jazeera: *At what price did Libya bring Al-Senussi?*; Khaled Al-Maheer – Tripoli; 10 September 2012 (<http://www.aljazeera.net/news/pages/e1f57da1-8c80-4ce1-a7c4-9bedd62286d7>); Controversy and confusion surrounds \$200m Tunisia deal, 24 November 2012.

²⁷ Council of Ministers Decision No. (454) of 2012 amending a provision in its Decision No. (453) of 2012, 14 November 2012.

²⁸ See, Al-Senussi's price raises controversy in Parliament, Al-Akhbar, 24 December 2012 (draft translation); <http://www.alakhbar.info/27924-0--F505CCC-FF-F-FBF-.html> for the original article in Arabic. It is reported that the deal was arranged at the highest level with the participation of the Libyan Prime Minister, Minister of Justice and Finance Minister.

him to the ICC. The Chamber should not countenance Libya's refusal to surrender Mr. Al-Senussi to the ICC in light of the serious violations committed by Mauritania.

Violation by Mauritania and Libya of UNSC sanctions (viz. a travel ban) by Mauritania

39. Resolution 1970 provides that all Member States of the UN shall prevent "the entry into or transit through their territories of individuals listed in Annex I of this resolution ... provided that nothing in this paragraph shall oblige a State to refuse its own nationals entry into its territory"²⁹. Mr. Al-Senussi is listed in Annex I, yet Mauritania transferred him from their territory to Libya in violation of the provisions of Resolution 1970.
40. Mauritania's actions do not come within any of the exceptions provided in paragraph 16 of Resolution 1970, namely "(a) Where the Committee determines on a case-by-case basis that such travel is justified on the grounds of humanitarian need, including religious obligation; (b) Where entry or transit is necessary for the fulfillment of a judicial process; (c) Where the Committee determines on a case-by-case basis that an exemption would further the objectives of peace and national reconciliation in the Libyan Arab Jamahiriya and stability in the region; or (d) Where a State determines on a case-by-case basis that such entry or transit is required to advance peace and stability in the Libyan Arab Jamahiriya and the State subsequently notifies the Committee within forty-eight hours after making such a determination".
41. Neither Libya nor Mauritania has sought any determination from the Security Council to obtain permission for the transfer of Mr. Al-Senussi between their two countries. Furthermore, there is no basis to invoke para. 16(b) as the transit and entry was not "necessary" for the fulfillment of "a judicial process".
42. There was no extant judicial process, properly so-called, on foot in Libya at the time of Mr. Al-Senussi's rendition to Libya. Moreover, even if there had been, both Libya and Mauritania were subject to an *a priori* binding international legal obligation, pursuant to Security Council Resolution 1970, to transfer Mr. Al-Senussi to the ICC. That obligation takes precedence over any international or bilateral extradition arrangement that may have been applicable as between the two States (though it

²⁹ See para. 15.

appears that there was in fact no judicial process whatsoever involved in the rendition of Mr. Al-Senussi). The process by which he was taken from Mauritania to Libya was not judicial, and should not have occurred, whatever the basis, in light of Mauritania's overriding legal obligation to transfer Mr. Al-Senussi to the ICC.

Violation by Mauritania and Libya of their international obligations under the ICCPR

43. Both Libya and Mauritania were, at all relevant times, State parties to the International Covenant on Civil and Political Rights.³⁰ Article 14(1) of the ICCPR guarantees to any person accused of a criminal charge the right to a fair trial before an independent and impartial tribunal. Article 14(3) (b) provides that an accused person has the right to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.³¹
44. A State which expels a person on its territory to another State in the knowledge that such an expulsion will result in "flagrant denial of justice" acts in violation of its obligations under Article 14 ICCPR (see, *mutatis mutandis*, Grand Chamber of the European Court of Human Rights, *Othman (Abu Qatada) v. The United Kingdom*, Judgment, Case No. 8139/09). By rendering Mr. Al-Senussi to Libya instead of surrendering him to the ICC, Mauritania violated this obligation.
45. In the case of Saif Gaddafi the Pre-Trial Chamber has sought further information from Libya in light of certain significant fair trial deficits identified in the proceedings, and has ordered Libya to provide this information by 23 January 2013. Instead of complying with this Order, Libya has announced its intention to proceed with the trial of Mr. Gaddafi in a time-frame that demonstrates the flagrantly unfair nature of the contemplated proceedings.
46. By rendering Mr. Al-Senussi to Libya, Mauritania exposed him to a similar risk of a flagrantly unfair trial – a risk which is now about to materialise. Mauritania thereby committed an internationally wrongful act. Libya is internationally responsible for

³⁰ Libya ratified on 15 May 1970 and Mauritania on 17 November 2004.

³¹ Similar provisions are contained within the Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights; namely Articles 7, 10 and 11 of the Universal Declaration of Human Rights and Articles 3 and 7 of the African Charter. Both Libya and Mauritania have ratified the Universal Declaration of Human Rights and the African Charter.

that violation, having provided “aid and assistance” to Mauritania for the purposes of the rendition.

47. Further, by announcing a decision to put Mr. Al-Senussi on trial in under one month, when he has been denied access to a lawyer of his own choosing throughout the period of his detention to date, and still has no lawyer of his own choosing, Libya is currently engaged in the commission of a further violation of Article 14(3)(b) of the ICCPR.
48. Libya has demonstrated that it does not intend to ensure that all persons irrespective of affiliation are treated fairly and equally by the law and before its courts. In May 2012, Libya’s National Transitional Council (NTC) passed Laws 35 and 38, which grant amnesty for crimes committed during the uprising by those “promoting or protecting the revolution”. These laws have the effect of excusing those who supported the NTC from prosecution for crimes committed during the uprising and armed conflict. It is noteworthy that while addressing the Security Council in November 2012, the ICC Prosecutor, Ms Fatou Bensouda, called on Libya’s new government “to ensure that there is no amnesty for international crimes and no impunity for crimes, regardless of who the perpetrator is and who is the victim”³².

The legal consequences of the internationally wrongful acts complained of

49. Libya is itself in continuing violation of its international obligations to surrender Mr. Al-Senussi to the ICC, and now proposes to take steps aimed at permanently frustrating the performance of that obligation. Moreover, the inference that Libya incited or was otherwise complicit in an internationally wrongful act committed by Mauritania is irresistible.
50. The International Law Commission’s (ILC) Articles the Responsibility of States for Internationally Wrongful Acts (adopted by the UN General Assembly, and applied by the International Court of Justice) make it clear that where a State has committed an internationally wrongful act (as defined in Articles 2, 3 and 12), or has knowingly given “aid and assistance” to another State in the commission of such an act (as defined in Article 16), the relevant States remain under a continuing international law

³² See statement of ICC Prosecutor to the Security Council, 17 November 2012; reported in <http://www.un.org/apps/news/story.asp?NewsID=43435>.

obligation to comply with the original international obligation they have violated; to cease the internationally wrongful act where it is continuing; to guarantee its non-repetition; and to restore the situation that existed prior to the commission of the internationally wrongful act (by virtue of Articles 30, 31, 34 and 35). In the case of Libya this inevitably requires that Mr. Al-Senussi be immediately surrendered to the ICC.

51. An internationally wrongful act of a State occurs whenever there is an act or omission that constitutes a breach of an international obligation binding on that State (ILC Articles on State Responsibility, Article 2(b)). There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character (Article 12). An order of the ICC for the arrest and surrender of an accused person, made pursuant to a reference by the Security Council, is binding on all States to whom the order is addressed. It follows, by virtue of Article 12 of the ILC Articles, that any failure on the part of a relevant State to comply with such an order, when it is in a position to do so, is an internationally wrongful act of State that incurs State responsibility, and entails duties of cessation, continued performance of the underlying obligation, reparation and restitution. It is immaterial that the act or omission may not be considered wrongful or unlawful under municipal law since the characterisation of an act of State as an internationally wrongful act is governed solely by international law (Articles 3 and 32).
52. As regards the rendition of Mr. Al-Senussi by Mauritania, the internationally wrongful act committed by Mauritania occurred at the moment of his transfer into the custody and control of the Libyan authorities (Article 14(1)). However, Libya also bears international responsibility for the act of Mauritania in rendering Mr. Al-Senussi to Libya (whether or not it procured his rendition through the payment of a substantial sum of money to Mauritania). Article 16 of the ILC Articles expressly provides that a State which “aids or assists” another State in the commission of an internationally wrongful act is internationally responsible for doing so if (a) that State provides aid or assistance with the knowledge of the circumstances of the internationally wrongful act and (b) the act would be internationally wrongful if committed by that State.

53. Both conditions are plainly satisfied in the present case (without the need for further evidence) by the fact that the current Libyan authorities entered into an arrangement with Mauritania whereby Mr. Al-Senussi would be transferred to Libya, instead of being surrendered to the ICC, in defiance of the binding orders of the ICC and of the terms of Security Council Resolution 1970. The mere (and self-evident) fact that the Libyan authorities entered into an arrangement to allow Libyan airspace and/or territory to be used to effect the transfer, and for Mr. Al-Senussi to be received into the custody and control of the Libyan authorities (where he remains in defiance of the orders of the ICC) fixes Libya with international responsibility for the wrongful act of Mauritania.
54. If, as seems to be the inevitable inference, Libya incited the unlawful rendition of Mr. Al-Senussi by Mauritania, through the payment of a substantial “bounty, this compounds Libya's responsibility for the internationally wrongful act of Mauritania, and may entail greater consequences in reparation, but it is not essential for a finding of Libyan State responsibility for the act of rendition.
55. Moreover, the continuing failure of Libya to date to comply with the orders to surrender Mr. Al-Senussi to the ICC represents a separate internationally wrongful act for which Libya bears primary responsibility (as opposed to responsibility for aiding and assisting Mauritania’s internationally wrongful act of rendition). By its continuing failure to surrender Mr. Al-Senussi to the ICC, Libya's breach of its international obligations “extends over the entire period during which the act continues and remains not in conformity with the international obligation [to surrender]” (Article 14(2)). Article 29 of the ILC articles caters for precisely this situation, providing that irrespective of any other legal consequence of Libya's internationally wrongful acts (as to which see paragraphs 56 to 59 below), it remains under a continuing duty to perform the international obligation that it has breached (*viz.* to surrender Mr. Al-Senussi to the ICC).
56. The consequences of the internationally wrongful acts and omissions of Libya and of Mauritania are governed by Articles 30 to 39. In addition to the fact that Libya remains under a continuing duty to comply with its international obligations, Article 30 provides that the State responsible for an internationally wrongful act is under an obligation to cease that act if it is continuing and to offer appropriate assurances and

guarantees of non-repetition if circumstances so require. Article 31 provides that the State responsible for an internationally wrongful act is under an obligation to make full reparation for any injury (including moral injury) caused by the internationally wrongful act. Articles 34 and 35 provide that reparation includes restitution (defined as an obligation to re-establish the situation which existed before the wrongful act was committed, providing this is materially possible and does not involve the imposition of a burden out of all proportion to the benefit to be derived from restitution instead of compensation). It hardly needs pointing out that the present situation is one in which the restoration of the *status quo ante* is materially possible, and that compensation could never provide sufficient reparation.

57. In the instant case the axiomatic obligations imposed by the ILC Articles on State Responsibility necessarily require that Mr. Al-Senussi should be restored to the position that he would have been in if Mauritania (with the complicity of Libya) had not unlawfully rendered him to Libya and had instead complied with its international legal obligation to surrender him to the ICC. Moreover, Libya remains in continuing breach of its international obligations and is required as a matter of international law to comply with them immediately, and to take no further steps to prejudice the performance of its obligations. For this reason also it follows that Libya must now comply with the order of the ICC to effect his immediate surrender.

58. It is immaterial that Libya is a State “in transition” (an argument previously deployed by counsel for Libya in the ongoing case concerning Saif Gaddafi). Article 10 of the ILC Articles on State Responsibility expressly provides that the conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law. This plainly applies to the acts and omissions of the current Libyan authorities.

59. Nor does the suggestion in the statement of 1 January 2013 that the Libyan authorities do not regard themselves as bound to give effect to orders of the ICC provide any answer. Article 32 expressly provides that a State responsible for an internationally wrongful act may not rely on the provisions of its internal law as justification for failure to comply with its obligations to provide full reparation (including (a) the continuing obligation to perform the international obligation it has previously

breached (Article 29); and (b) the obligation to re-establish the situation that existed before the wrongful act or omission was committed (Articles 30 and 35).

Libya must cease all actions that could impede Mr. Al-Senussi's transfer to ICC

60. In light of Libya's statement of 1 January 2013 the Pre-Trial Chamber should immediately order Libya to cease any actions that could in any way impede the transfer of Mr. Al-Senussi to the ICC. In particular, Libya must be ordered to suspend the commencement of any trial proceedings in the national courts, as such proceedings could clearly interfere with Libya's ability to comply with its obligations to transfer Mr. Senussi to the ICC. This is particularly so in view of the fact that the proposed "trial" will inevitably constitute a flagrant denial of justice, and may result in the imposition and carrying into effect of the death penalty. Moreover, in view of Libya's declared commitment to repudiate and ignore orders of the ICC in relation to Mr. Al-Senussi, the Pre-Trial Chamber should simultaneously and immediately refer the situation to the Security Council so that it can take the necessary measures against Libya in order to secure compliance by Libya with Security Council Resolution 1970 and the orders of the Pre-Trial Chamber made pursuant to that Resolution.

61. It is clear from the statement made by Libya on 1 January 2013 that the continuation of the present domestic proceedings is deliberately aimed at frustrating Libya's international obligation to surrender Mr. Al-Senussi to the ICC (and at preventing the restoration of the *status quo ante* as required by Article 16 of the ILC Articles on State Responsibility). As such, the continuation of the present proceedings in Libya at this time is, in itself, a yet further internationally wrongful act within the meaning of Article 29 of the ILC Articles, and engages the obligation of cessation and non-repetition in Article 30.

62. In Mr. Saif Gaddafi's case, when permitting a temporary postponement of the surrender request pending the outcome of Libya's jurisdictional challenge on complementarity grounds, the Pre-Trial Chamber ordered that: "Libya must ensure that all necessary measures are taken during the postponement in order to ensure the possibility of an immediate execution of the Surrender Request should the case be found admissible."³³ It is clear from the statement made on 1 January 2013 that the

³³ 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, 1 June 2012, para. 40.

Libyan authorities are in the process of violating the obligation imposed by the ICC in Mr. Gaddafi's case by announcing their intention to bring Mr. Gaddafi to trial at the end of January.

63. It follows that no useful purpose would be served by the Pre-Trial Chamber issuing an order suspending the surrender request in Mr. Al-Senussi's case on similar (or indeed any) terms. This is because the Libyan authorities have already indicated in the statement made on 1 January 2013 that Libya intends to proceed with the trial of Mr. Al-Senussi in defiance of the extant order of the ICC for his immediate surrender, and without even applying for its suspension.
64. As noted above, Libya has not lodged any admissibility challenge in Mr. Al-Senussi's case. Nor has it filed a motion requesting any postponement of the surrender request. Instead, it has bluntly stated that it will not comply with the ICC's orders and requests. This only heightens the need for the Pre-Trial Chamber to refer the situation to the Security Council immediately, whilst in the meanwhile ordering Libya, as a matter of the utmost urgency, to comply with the ICC's extant orders for the immediate surrender of Mr. Al-Senussi to the ICC, and to halt all steps that could impede the execution of the Security Council resolution and the Pre-Trial Chamber's Order.

Libya must urgently facilitate a legal and family visit

65. Libya should also be ordered, in co-operation and consultation with the Registrar of the ICC, to facilitate a legal and family visit to Mr. Al-Senussi in Tripoli as soon as possible. It is plainly unacceptable that Mr. Senussi has been in custody in Libya since September 2012 without access to any lawyer or to any family members.
66. The Pre-Trial Chamber should order a visit to Mr. Al-Senussi under the same procedure adopted by the Chamber for Mr. Saif Gaddafi's initial visit in its Decision of 3 February 2012. The Chamber ordered that such a "visit be arranged as soon as possible and that measures be taken to ensure a meaningful result from this visit."³⁴ Mr. Al-Senussi is entitled to the same initial visit as occurred for Mr. Gaddafi. Libya must be ordered to ensure that such a visit can take place right away with the necessary immunities, safe passage and security arrangements being in place.

³⁴ Decision on the Registry-OPCD Visit to Libya, ICC-01/11-01/11-52-Conf-Exp, 3 February 2012, p. 4.

Conclusion

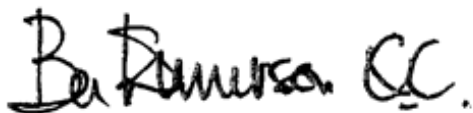
67. For all of these reasons, the Pre-Trial Chamber is requested in accordance with Article 87(5) of the Rome Statute and Articles 24, 25 and 103 of the UN Charter to refer the conduct of Libya to the Security Council forthwith, and without further reference to Libya.

68. In addition, the Pre-Trial Chamber is requested immediately to order Libya:

- a. To implement the Pre-Trial Chamber's Order of 10 December 2012 to transfer Mr. Senussi to the custody of the ICC within 5 calendar days;
- b. To cease all actions and proceedings in respect of Mr. Al-Senussi's case which could in any way impede the immediate execution of the order and request for Mr. Al-Senussi's arrest and surrender to the ICC, including the commencement of any national trial proceedings;
- c. To facilitate a secure and privileged visit to Mr. Al-Senussi by his Counsel and family with all necessary immunities and protections; and,
- d. The Chamber is requested to order Mauritania to respond in the present proceedings and to explain the circumstances surrounding the clear breaches of its obligations under Security Council Resolution 1970 as a Member State of the United Nations, and of the orders and requests of the ICC pursuant to the Resolution.

69. If the Chamber is not minded to refer the situation to the Security Council forthwith, it is nonetheless requested to make the orders sought in paragraph 68 (on the grounds set out in paragraph 6 above and elaborated herein) with a time limit of 5 calendar days for compliance; and to inform Libya that in the event of continued non-compliance for 5 calendar days, the Chamber will refer the matter to the Security Council forthwith and without further notice.

Counsel for Mr. Abdullah Al-Senussi,



Ben Emmerson QC



Rodney Dixon

With the assistance of **Professor William Schabas** (consultant to the defence of Mr. Al-Senussi).

Dated 9th January 2013

London, United Kingdom