

# **ANNEX 2**



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Excellency,

Request for Urgent Action Concerning  
Non-compliance by Libya with Security Council Resolution 1970

I have the honour to address you in your capacity as President of the Security Council for January 2013. I write in my capacity as legal counsel appointed to represent the interests of Abdullah Al-Senussi who currently stands charged by the International Criminal Court, jointly with Saif Al-Islam Gadaffi, for crimes allegedly committed in Libya.

The purpose of this letter is to bring to your immediate attention an alarming development concerning non-compliance by Libya with a binding Resolution of the Security Council and to ask you, as a matter of urgency, to place the situation onto the agenda of the Council, with a view to taking necessary measures to secure the compliance by Libya with the terms of Resolution 1970.

On 26 February 2011 the Council, acting under Chapter VII of the Charter of the United Nations, and taking measures under its Article 41, adopted Resolution 1970. By paragraph 4 of the resolution the Security Council decided to refer the situation in the Libya Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court.

The Resolution also decided that the Libyan authorities should co-operate fully with, and provide any necessary assistance to, the Court and the Prosecutor pursuant to the resolution. Whilst recognising that States not party to the Rome Statute have no obligations deriving from the Statute itself, the Security Council, in Resolution 1970, urged all States to co-operate fully with the Court and the Prosecutor in giving effect to the decision of the Council to refer the situation to the ICC.

The Security Council also decided in Resolution 1970 that all Member States of the United Nations should take the necessary measures to prevent the entry into, or transit through, their territories, of the individuals listed in Annex I to the resolution. Mr. Al-Senussi was one of those listed in Annex I. Exceptions to the travel ban were made subject to prior authorisation by the relevant Sanctions Committee (or notification to

the Committee within 48 hours of any decision by a State to facilitate such travel on the grounds that it was necessary to advance peace and stability in the Libyan Arab Jamahiriya). In the absence of prior authority or subsequent notification of a decision to authorise travel for the purposes of advancing peace and security, the only exception to the travel ban authorised by the Council was that set out in paragraph 16(b), namely where travel was necessary for the fulfilment of a judicial process.

Following the adoption of Resolution 1970, the Pre-Trial Chamber of the ICC that was seized of the case issued an arrest warrant for Mr. Al-Senussi, in which it ordered the Registry of the ICC to prepare and transmit to any State any request for transit necessary for his surrender to the ICC.

Pursuant to this Order, on 4 July 2011 the Registrar transmitted to the Libyan authorities a Request for Mr. Al-Senussi's arrest and surrender to the ICC. The operative passage of the request stated that in light of the fact that “the United Nations Security Council ‘decide[d] that the Libyan authorities shall co-operate 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.”

At the time this order was issued Mr. Al-Senussi was not in Libya. On or about 17 March 2012, however, he was detained by the State authorities in Mauritania. Following reports of his detention in Mauritania, the Registrar of the ICC transmitted a confidential request to the Minister of Foreign Affairs of Mauritania for the arrest of Mr. Al-Senussi and his

surrender to the ICC. The request reminded Mauritania of its obligation to co-operate with the ICC pursuant to Security Council Resolution 1970: *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. It is not known whether Mauritania responded to the request.

Neither Libya nor Mauritania were (or are) States Party to the Rome Statute of the ICC. However, as Member States of the United Nations, both States were bound, by virtue of Articles 25 and 103 of the United Nations Charter, to comply with Security Council Resolution 1970, and the orders of the Pre-Trial Chamber, because the Chamber is exercising jurisdiction by virtue of a Security Council resolution.

The ICC has previously held that where it has issued to a Member State of the United Nations a request for the arrest and surrender of an accused person the request is binding on the State concerned as a matter of international law, whether or not that State is a party to the Rome Statute. This was held to be the position in international law because the obligation to co-operate with the ICC stems directly from the Charter of the United Nations and the relevant Security Council resolution referring the situation to the ICC: *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.

The ICC has also held that the obligation on States that are not party to the Rome Statute to comply with an order for arrest and surrender takes

precedence over any other international agreement, arrangement or obligation since it stems from the exercise of Chapter VII powers by the Security Council: *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.

Libya and Mauritania were thus both obliged, as a matter of international obligation, to co-operate fully with the ICC, and to comply with the Order of the Chamber of 4 July 2011 to arrest Mr. Al-Senussi and surrender him to the ICC.

However, on or about 5 September 2012 Mauritania transferred Mr. Al-Senussi to Libya for trial in clear violation of the international obligations of both States. There is no evidence to suggest that any lawful or judicial process was followed. On the contrary, reports in the media have suggested that Libya agreed to pay a substantial sum of money to Mauritania to secure Mr. Al-Senussi's extraordinary rendition.

Records of a decision of the Libyan Council of Ministers Council of Ministers on 14 November 2012 record approval of the proposal that a sum of 250,000,000 Dinars should be paid “as a donation to the Mauritanian people”: *Decision No. (454) of 2012 amending a provision in its Decision No. (453) of 2012*, 14 November 2012.

The transfer of Mr. Al-Senussi from Mauritania to Libya thus involved internationally unlawful acts by both States. He was transferred in violation of Security Council Resolution 1970 and the obligation on

both States to comply with the Orders of the ICC that flowed from that resolution. The extraordinary rendition of Mr. Al-Senussi was also effected in violation of the international travel ban imposed by Resolution 1970 since there was no extant judicial process in Libya, properly so-called, and both States were under an *a priori* obligation not to transmit Mr. Al-Senussi across any international border, other than for the purposes of effecting his surrender to the ICC.

On 6 September 2012 the ICC Registrar transmitted a *note verbale* to the Libyan authorities requesting them to confirm that Mr. Al-Senussi was now in Libya, and to provide information as to the name of the detention centre at which he was being detained and on his state of health. As far as is known, Libya did not comply with this request.

Since then Libya has not filed any challenge to the admissibility of Mr. Al-Senussi's case before the ICC under Articles 17 and 19 of the Rome Statute (as they did in the case of his co-accused Saif Al-Islam Gaddafi). Accordingly, the Chamber has neither suspended (nor been asked to suspend) its extant and binding order for his immediate surrender. Indeed, as appears below, the ICC reiterated that Order in a fresh request transmitted to Libya by the ICC Registrar on 10 December 2012.

As the State that currently has custody and control of Mr. Al-Senussi, Libya thus remains subject to a binding international legal obligation to surrender him forthwith to the ICC. Libya is in continuing violation of that obligation.

Libya's continuing failure to surrender Mr. Al-Senussi to the ICC in accordance with the Chamber's Request of 4 July 2011 is thus a further and continuing internationally unlawful act (over and above Libya's complicity in his unlawful rendition). Both acts are in violation of Security Council Resolution 1970 and represent a direct challenge to the authority of the Security Council and the ICC.

On 10 December 2012, faced with this continuing situation, the ICC Pre-Trial Chamber issued an order to Libya re-iterating its request for the surrender of Mr. Al-Senussi to The Hague, and reminding Libya of its obligation to comply with the request by virtue of Security Council Resolution 1970. In the same decision the Chamber re-iterated its order to Libya to provide information concerning the circumstances of Mr. Al-Senussi's transfer from Libya to Mauritania, his current place of detention and his state of health. The Chamber set a deadline of 15 January 2013 for the provision of this information.

At the year's end therefore Libya had been party to a deliberate violation of Security Council Resolution 1970 through its complicity in Mr. Al-Senussi's unlawful rendition by Mauritania; Libya was also in continuing violation of its international legal obligations to the ICC and to the Security Council by continuing to fail to surrender Mr. Al-Senussi to The Hague once he was in its custody and control; and the Libyan authorities had 15 days remaining in which to comply with the Order of the ICC issued on 10 December 2012.



It is against this background that I have to report the disturbing developments of 1 January 2013. On that day the Office of the Prosecutor-General of Libya issued a statement announcing that Mr. Al-Senussi is to be put on trial in Libya within one month. The urgency of the situation will be apparent from (a) the fact that Mr. Al-Senussi faces the death penalty if convicted so that the internationally unlawful acts that Libya has committed and is continuing to commit threaten to cause irreparable harm in the very near future; (b) the unseemly rush to put Mr. Al-Senussi on trial within weeks (in circumstances where he has not been provided with independent legal counsel during the four months that he has been detained in Libya); (c) Libya's flagrant disregard of the Orders of the Trial Chamber and of Security Council Resolution 1970 and (d) the openly defiant stance that Libya has adopted to its international obligation to comply with the Order of the ICC.

The statement issued by the Prosecutor-General on 1 January 2013 indicates that since Libya is not a party to the Rome Statute it is not bound to comply with the Chamber's Order of 10 December 2012 to surrender Mr. Al-Senussi to the ICC. It further stated that the extant consideration by the ICC of Libya's objection to jurisdiction in the case of Saif Gadaffi was "exceptional" and that "the Libyan justice system is capable of prosecuting Al-Senussi".

These statements are plainly wrong as a matter of international law. They represent a direct challenge to the authority of the Security Council and of the ICC, and a direct threat to the international rule of law. Moreover, the announcement made by the Office of the Prosecutor-General

reflects a deliberate intention to frustrate the performance of Libya's binding international obligations, and is likely to result in irreparable harm through the imposition and execution of the death penalty.

Through the statement of the Prosecutor-General Libya has indicated its clear intention not to obey orders made by the ICC in the case of Mr. Al-Senussi. The only means now to ensure that Libya complies with Security Council Resolution 1970 and with the Order of the ICC is for the Security Council itself to become seized of the situation and to take appropriate measures against Libya in order to ensure its compliance with a decision of the Council itself.

Please accept, Excellency, the assurance of my highest consideration.



Ben Emmerson QC

Cc (1) The Permanent Representatives to the United Nations of all Members of the Security Council for the time being; (2) The United Nations Assistant Secretary General for Human Rights, His Excellency Mr. Ivan Simonovic; (3) The High Commissioner for Human Rights, Her Excellency Ms Navi Pillay; (4) The President of the International Criminal Court, Judge Sang-Hyun Song.