

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/11-01/11
Date: 6 February 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 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”**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor
Fatou Bensouda

Counsel for Saif Al-Islam Gaddafi
Xavier-Jean Keïta
Melinda Taylor

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**
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States Representatives
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Amicus Curiae

REGISTRY

Registrar
Silvana Arbia

Deputy Registrar
Didier Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Pre-Trial Chamber I (the “Chamber”) of the International Criminal Court (the “Court”) issues the following 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 “Defence Application”).¹

I. Procedural history

1. On 26 February 2011, Resolution 1970 was adopted by the United Nations Security Council, referring the situation in Libya since 15 February 2011 to the Prosecutor of the Court and deciding that the Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor.²

2. On 27 June 2011, the Chamber issued the “Decision on the ‘Prosecutor’s Application Pursuant to Article 58 as to the Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi’”,³ and warrants of arrest for, *inter alia*, Abdullah Al-Senussi (“Mr Al-Senussi”).⁴

3. On 4 July 2011, the Registrar filed the “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”, requesting Libya to arrest and surrender to the Court, *inter alia*, Mr Al-Senussi (the “Surrender Request”).⁵

4. On 21 March 2012, the Registrar filed the “Report of the Registry regarding the arrest of Abdullah Al-Senussi”.

¹ ICC-01/11-01/11-248.

² S/RES/1970 (2011).

³ ICC-01/11-01/11-1.

⁴ ICC-01/11-01/11-4.

⁵ ICC-01/11-01/11-5.

5. On 1 May 2012, the Chamber received the “Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute” (the “Admissibility Challenge”),⁶ challenging the admissibility of the case against Saif Al-Islam Gaddafi (“Mr Gaddafi”) and requesting “postponement and suspension of the Pre-Trial Chamber’s order to surrender Mr Gaddafi pending a final determination of th[e] challenge” in accordance with article 95 of the Rome Statute (the “Statute”).⁷

6. On 4 May 2012, the Chamber issued the “Decision on the Conduct of the Proceedings Following the ‘Application on behalf of the Government of Libya pursuant to Article 19 of the Statute’”, whereby the Chamber, *inter alia*, determined that, upon Libya’s request and in light of Libya’s own submissions as to the scope of the Admissibility Challenge, such challenge had to be “understood to only concern the case against Mr Gaddafi”.⁸

7. On 1 June 2012, the Chamber issued the “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”,⁹ whereby the Chamber, noting that the challenge to the admissibility of the case against Mr Gaddafi had been properly made within the terms of article 19(2) of the Statute and rule 58(1) of the Rules of Procedure and Evidence (the “Rules”),¹⁰ decided that “Libya may postpone the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Statute until such time that the Chamber has ruled on the Admissibility Challenge”.¹¹

⁶ ICC-01/11-01/11-130-Red.

⁷ ICC-01/11-01/11-130-Red, para. 103.

⁸ ICC-01/11-01/11-134, para. 8.

⁹ ICC-01/11-01/11-163.

¹⁰ *Ibid.*, para. 39.

¹¹ *Ibid.*, p. 16.

8. On 17 September 2012, the Registrar filed the “Second Report of the Registry on the status of the execution of the request for arrest and surrender of Abdullah Al-Senussi”, informing the Chamber, *inter alia*, of the fact that, despite the absence of any official information from the Libyan authorities, it appeared that Mr Al-Senussi had arrived on Libyan territory on 5 September 2012.¹²

9. On 10 December 2012, the Chamber issued the “Corrigendum to the Order in relation to the request for arrest and surrender of Abdullah Al-Senussi”, whereby it: (i) instructed the Registrar to “reiterate to the Libyan authorities the request for arrest and surrender of Mr Al-Senussi and remind them of their obligation to comply with the request”; and (ii) requested the Libyan authorities to confirm the extradition of Mr Al-Senussi from Mauritania to Libya, and provide the name of the detention centre in which Mr Al-Senussi is being held, if any, as well as information about his state of health.¹³

10. On 9 January 2013, the Defence of Mr Al-Senussi filed its Application,¹⁴ whereby it requests that the Chamber refer Libya and Mauritania to the Security Council for their non-compliance with the obligations to cooperate with the Court.¹⁵ Alternatively, or in addition, the Defence of Mr Al-Senussi requests that the Chamber order Libya to: (i) transfer Mr Al-Senussi to the custody of the Court within 5 calendar days;¹⁶ (ii) cease immediately all actions and proceedings in respect of Mr Al-Senussi’s case which could in any way impede his arrest and surrender to the Court, including commencement of any national trial proceedings;¹⁷ and (iii) facilitate a secure and privileged

¹² ICC-01/11-01/11-208.

¹³ ICC-01/11-01/11-241-Corr.

¹⁴ ICC-01/11-01/11-248.

¹⁵ Defence Application, paras 6 and 67.

¹⁶ Defence Application, paras 6, 68, 69.

¹⁷ Defence Application, paras 6, 60 to 64, 68 and 69.

visit to Mr Al-Senussi by his counsel and family with all necessary immunities and protections on an urgent basis.¹⁸

11. 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 as of 9 January 2013.¹⁹

12. On 15 January 2013, Libya informed the Chamber, *inter alia*, of the fact that the investigation into the national case against Mr Al-Senussi is approaching completion, and the case will accordingly be transferred in the next month to the Chamber of Accusation for pre-trial proceedings.²⁰

13. On 16 January 2013, the Registrar filed in the record of the case the response received by the Libyan authorities pursuant to the order issued by the Chamber on 10 December 2012.²¹ In particular, the Libyan authorities confirmed that Mr Al-Senussi is at present in their custody and that judicial proceedings are currently ongoing at the domestic level.²² Libya also provided the requested information regarding the detention centre in which Mr Al-Senussi is being held and his state of health.²³

14. On 18 January 2013, the Chamber, noting that Libya had neither surrendered Mr Al-Senussi to the Court nor undertaken any of the proceedings prescribed under the Statute to postpone Mr Al-Senussi's surrender to the Court, requested the Libyan authorities to provide observations on the way Libya intends to fulfil its obligations to cooperate

¹⁸ Defence Application, paras 6, 65, 66, 68 and 69.

¹⁹ ICC-01/11-01/11-253 and confidential *ex parte* annex thereto.

²⁰ ICC-01/11-01/11-251, paras 4 and 5.

²¹ ICC-01/11-01/11-252, and annexes attached thereto.

²² ICC-01/11-01/11-252-Anx3.

²³ *Ibid.*

with the Court in relation to the arrest and surrender of Mr Al-Senussi, and especially its duty to comply with the Surrender Request.²⁴

15. On 28 January, Libya filed the “Libyan Government’s Observations regarding the case of Abdullah Al-Senussi”²⁵ (“Libya’s Observations”).

16. On 1 February 2013, Libya filed its response to the Defence Application (“Libya’s Response”).²⁶

17. On 5 February 2013, the Defence for Mr Al-Senussi filed an application under regulation 24(5) of the Regulations of the Court (the “Regulations”) for leave to reply to Libya’s Response on the ground that “[m]any [...] issues have been raised for the first time by Libya in its Response, which the Defence has not had an opportunity to address in its submissions”.²⁷

18. On the same day, Libya filed the “Libyan Government Response to Mr Al-Senussi’s ‘Application for leave to reply to the “Response of the Libyan Government to the ‘Urgent Application on behalf of Abdullah Al-Senussi for the Pre-Trial Chamber to order the Libyan Authorities to comply with their obligations and the orders of the ICC’”, requesting the Chamber to reject Mr Al-Senussi’s application for leave to reply since, “[g]iven the foreseeability of the issues now sought to be addressed, Mr Al-Senussi’s application for leave to reply fails to demonstrate good cause as to why its additional submissions and fresh evidence on these topics was not included in its original application”.²⁸

²⁴ “Decision requesting Libya to provide observations concerning the Court’s request for arrest and surrender of Abdullah Al-Senussi”, ICC-01/11-01/11-254.

²⁵ ICC-01/11-01/11-260.

²⁶ ICC-01/11-01/11-264.

²⁷ ICC-01/11-01/11-266.

²⁸ ICC-01/11-01/11-268.

II. Analysis and conclusion

19. The Chamber notes articles 1, 13, 17, 19, 21, 57(3), 86, 87, 89 and 95 of the Statute, rule 58 of the Rules and regulation 24(5) of the Regulations.

20. As a preliminary matter, the Chamber addresses the application of the Defence of Mr Al-Senussi for leave to reply to Libya's Response. The Chamber considers that, after receiving Libya's Response, it does not need any further submissions on the issues *sub judice*. Accordingly, the Defence application for leave to reply must be rejected.

21. The Chamber recalls that, although Libya is not a State Party to the Statute, it is under an obligation to cooperate with the Court.²⁹ As previously held, the order to Libya to "cooperate fully" with the Court contained in the Security Council Resolution 1970 (2011) "means that the Statute, and especially its Part IX, is the legal framework within which Libya must comply with the Surrender Request" and that "Libyan authorities [...] are required to work within the cooperation framework provided by the Statute".³⁰ The entire legal framework of the Statute applies equally to situations referred by the Security Council, including its complementarity and cooperation regimes, in line with, *inter alia*, articles 1, 13 and 21 of the Statute.³¹

Referral of non-compliance to the Security Council

22. The Chamber takes note of the request of the Defence of Mr Al-Senussi to refer the conduct of Libya to the Security Council immediately or after giving Libya a time limit to comply with its obligations *vis-à-vis* the Court. Also, the Defence requests the Chamber to order Mauritania to explain the

²⁹ See "Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi", ICC-01/11-01/11-72, paras 12 and 13; and "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, paras 27 to 30.

³⁰ ICC-01/11-01/11-72, para. 12.

³¹ ICC-001/11-01/11-163, paras 28 and 29.

circumstances surrounding the transfer of Mr Al-Senussi to Libya rather than to the Court, with a view to acquiring the necessary information for a possible finding on non-cooperation.³²

23. In relation to these requests, the Chamber will determine in due course what actions may be required to ensure States' compliance with their obligations *vis-à-vis* the Court regarding the arrest and surrender of Mr Al-Senussi.

Order for immediate surrender of Mr Al-Senussi to the Court

24. As recalled above, the Defence of Mr Al-Senussi further requests that the Chamber orders Libya to proceed to the immediate transfer of Mr Al-Senussi to the custody of the Court.³³

25. In both its Observations and its Response to the Defence Application, Libya argues that its obligation to surrender Mr Al-Senussi to the Court is currently suspended in accordance with article 95 of the Statute. More specifically, in its Observations, Libya submits that, "for the purposes of article 95 of the Statute", the Admissibility Challenge filed on 1 May 2012 also constitutes a challenge to the admissibility of the case against Mr Al-Senussi pursuant to Article 19 of the Statute, "notwithstanding the need for further supplemental submissions to be lodged in the near future, and consequently, [...] the order for the surrender of Mr Al-Senussi may be postponed pending a determination by the Court".³⁴

26. Separately, Libya asserts that "even if the [Admissibility Challenge] is not considered an admissibility challenge *stricto sensu* under Article 95 [with respect to the case against Mr Al-Senussi] [...] the order for surrender should

³² Defence Application, para. 68.

³³ *Ibid.*, para. 6

³⁴ Libya's Observations, para. 9.

be postponed nonetheless as an ‘appropriate measure for the conduct of the proceedings’ within the purview of Rule 58(2)”.³⁵

27. Similar arguments are raised by Libya in its Response to the Defence Application. In particular, making reference to its previous Observations, Libya states:

With respect to the request for surrender, Libya confirmed that it was seeking postponement of the surrender request pursuant to article 95 of the Statute on the basis that (a) an intention to challenge admissibility with respect to the case of Abdullah Al-Senussi was notified to the Court on 1 May 2012; and (b) a supplemental Submission containing further information critical to this admissibility challenge will be filed with the Court by 29 March 2013.³⁶

In the same filing, Libya again submits that, in the alternative, the Surrender Request should be postponed by the Chamber acting pursuant to rule 58(2) of the Rules.³⁷

28. For the reasons set out in the following paragraphs, the Chamber is not persuaded by the arguments put forward by Libya and emphasises that, in the present circumstances, Libya’s obligation to surrender Mr Al-Senussi to the Court stands fully and is not subject to any suspension.

29. According to article 95 of the Statute, “[w]here there is an admissibility challenge under consideration by the Court pursuant to article 18 or 19, the requested State may postpone the execution of a request under this Part pending a determination of the Court [...]”. In interpreting the scope of application of this provision, the Chamber has already determined that “a State may postpone the execution of a surrender request to the extent that [an admissibility] challenge has been properly made pursuant to article 19(2) of

³⁵ *Ibid.*, para. 10.

³⁶ Libya’s Response, para. 25.

³⁷ *Ibid.*, para. 26.

the Statute and rule 58(1) of the Rules”.³⁸ In addition, the Chamber held that, under article 95 of the Statute, a State may only temporarily suspend the execution of a request for cooperation until such time that a determination on admissibility is made by the Court and, accordingly, since an arrest warrant remains valid in accordance with article 19(9) of the Statute, it must ensure that all necessary measures are taken during the postponement in order to ensure the possibility of an immediate execution of a surrender request should the case be found admissible.³⁹

30. As made clear in article 95 of the Statute, and as already observed by the Chamber,⁴⁰ the postponement of a surrender request pursuant to this provision can only be made “[w]here there is an admissibility challenge under consideration”. Accordingly, any expression of intention to challenge the admissibility of the case against Mr Al-Senussi – whether made in the Admissibility Challenge, the Observations of 28 January 2013, the Response to the Application, or in any other filing in the record of the case – is of no consequence for the application of article 95 of the Statute. In fact, the Chamber has already held specifically that article 95 of the Statute cannot constitute a legal basis to postpone a request for surrender following a mere announcement that an admissibility challenge is forthcoming and, therefore, in the absence of any such challenge before the Chamber.⁴¹

31. Furthermore, the Chamber cannot accept Libya’s argument that the Admissibility Challenge of 1 May 2012 is to be considered a challenge to the admissibility of the case against Mr Al-Senussi. At the time, it was Libya’s

³⁸ 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, para. 37.

³⁹ *Ibid.*, para. 40.

⁴⁰ See 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, para. 18.

⁴¹ *Id.*

own submission that said challenge only covered Mr Gaddafi.⁴² On this basis, and granting Libya's specific request, the Chamber determined that the challenge should be considered only with respect to the case against Mr Gaddafi.⁴³

32. Moreover, Libya's present contention that the Admissibility Challenge needs to be supplemented by further critical submissions⁴⁴ can only be understood as an acknowledgment that the Admissibility Challenge of 1 May 2012 cannot be considered as a complete challenge to the admissibility of the case against Mr Al-Senussi. However, the Chamber observes that an incomplete challenge which needs to be supplemented in due course cannot be considered as having been "properly made within the terms of article 19 of the Statute and rule 58 of the Rules". In this regard, the Chamber finds of relevance the finding of the Appeals Chamber that a State has the duty to ensure that its admissibility challenge is sufficiently substantiated by evidence, as it has no right to expect to be allowed to present any additional evidence after the initial challenge.⁴⁵

33. On the basis of the above, the Chamber considers that, regardless of whether the Admissibility Challenge can be considered as an expression of Libya's intention to challenge the admissibility of the case against Mr Al-Senussi or instead as a fractional admissibility challenge to be supplemented in due course, Libya's submissions are presently not sufficient to trigger the applicability of article 95 of the Statute and justify a postponement of the execution of the Surrender Request.

⁴² Admissibility Challenge, paras 69 to 73.

⁴³ "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, para. 8.

⁴⁴ Libya's Observations, para. 9; Libya's Response, para. 25.

⁴⁵ Appeals Chamber, "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'", ICC-01/09-02/11-274, para. 95.

34. Furthermore, the Chamber takes note of Libya's argument that the Surrender Request should be postponed on the basis of rule 58(2) of the Rules as an exercise of the Chamber's discretion to take the appropriate measures for the proper conduct of the admissibility proceedings.

35. In this regard, the Chamber has already stated, in response to an identical argument made by Libya with respect to the postponement of the surrender of Mr Gaddafi:

[R]ule 58 of the Rules only details some specific points of procedure which are involved when making an admissibility challenge under article 19 of the Statute. This rule makes no mention of postponing a request for cooperation and cannot therefore be used as a legal basis by the Government of Libya in support of its [request for postponement of the surrender of Mr Gaddafi].⁴⁶

In addition, the determination of the "appropriate measures for the proper conduct of the proceedings" within the meaning of rule 58 of the Rules is dependent on the existence of admissibility proceedings as properly triggered in accordance with the appropriate procedure set out in the Statute. As observed above, no such procedure has been undertaken by Libya with respect to the case against Mr Al-Senussi.

36. Accordingly, the Chamber concludes that Libya remains under obligation to comply with the Surrender Request, and, pending this fulfilment, is also under the corollary obligation not to put in place any action which would frustrate or otherwise hinder or delay the possibility of compliance with its obligations *vis-à-vis* the Court, including with its duty to surrender Mr Al-Senussi to the Court.

⁴⁶ "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, para. 17.

Privileged visit to Mr Al-Senussi

37. The Defence for Mr Al-Senussi further requests the Chamber to order Libya to facilitate a secure and privileged visit to Mr Al-Senussi by his Counsel. The Defence submits that “[i]t 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” and that “Mr. Al-Senussi is entitled to the same initial visit as occurred for Mr Gaddafi”.⁴⁷

38. Libya responds that “[t]he Libyan government does not seek to prevent a secure and privileged visit to Mr. Al-Senussi by his counsel and is actively now considering terms of an ICC protocol devised for this purpose by the Registrar”.⁴⁸

39. The Chamber notes the provision of article 57(3)(b) of the Statute, according to which the Chamber may “[u]pon request of a person who has been arrested or has appeared pursuant to a summons under article 58, issue such orders [...] or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence”. In this regard, and with respect to Mr Gaddafi, the Chamber already held that “its power to issue such orders or seek such cooperation as may be necessary to protect Mr Gaddafi or assist in the preparation of his defence pursuant to articles 57(3)(b) and (c) cannot be made contingent on Libya’s compliance with the request for arrest and surrender issued by the Court”.⁴⁹ The same applies to Mr Al-Senussi.

40. In light of the above, the Chamber finds it appropriate, acting pursuant to article 57(3)(b) of the Statute, to request the Libyan authorities to arrange, in consultation and in cooperation with the Registrar, a visit of the appointed

⁴⁷ Defence Application, para. 65.

⁴⁸ Libya’s Response, para. 31.

⁴⁹ “Decision on OPCD Requests”, ICC-01/11-01/11-129, para. 11.

counsel for Mr Al-Senussi to his client on a privileged basis as soon as practicable.

FOR THESE REASONS, THE CHAMBER

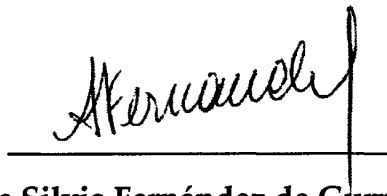
ORDERS the Libyan authorities to proceed to the immediate surrender of Mr Al-Senussi to the Court;

ORDERS the Libyan authorities to refrain from taking any action which would frustrate, hinder or delay Libya's compliance with its obligation to surrender Mr Al-Senussi to the Court;

ORDERS the Registrar to make the necessary arrangement with the Libyan authorities for a privileged visit to Mr Al-Senussi by his Defence; and

REJECTS the application of the Defence of Mr Al-Senussi for leave to reply to Libya's Response.

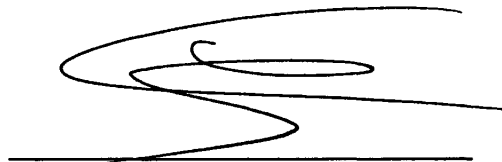
Done in both English and French, the English version being authoritative.



Judge Silvia Fernández de Gurmendi
Presiding Judge



Judge Hans-Peter Kaul



Judge Christine Van den Wyngaert

Dated this 6 February 2013

At The Hague, The Netherlands