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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

Renewed Application on behalf of Mr. Abdullah Al-Senussi to Refer Libya and Mauritania to the UN Security Council with Public Annex 1 and Confidential and Ex Parte (Registry only) Annexes 2 and 3

Source: Mr. Abdullah Al-Senussi, represented by Ben Emmerson QC, Rodney Dixon and Amal Alamuddin

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Introduction

1. The Defence for Mr. Abdullah Al-Senussi files this renewed Application pursuant to Article 87 of the ICC Statute, the ICC's jurisprudence, UN Security Council Resolution 1970, and Chapter VII and Articles 24, 25 and 103 of the UN Charter. The Defence requests that Libya and Mauritania be referred to the Security Council on account of their respective failures to comply with UN Security Council Resolution 1970 and the orders and requests of the ICC.¹
2. The Defence originally applied for Libya and Mauritania to be referred to the Security Council in its urgent Application of 9 January 2013, and incorporates by reference all the arguments made in this Application.² The Chamber ruled on this Application in its Decision of 6 February 2013, ordering Libya "to proceed to the immediate surrender of Mr Al-Senussi to the Court" and noting that it would determine "in due course what actions may be required to ensure States' [Libya and Mauritania's] compliance with their obligations vis-à-vis the Court regarding the arrest and surrender of Mr Al-Senussi."³ The Chamber also ordered Libya 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"⁴ and to arrange a privileged legal visit by counsel to Mr. Al-Senussi's detention facility in Libya.
3. It has been almost six weeks since the Chamber's Order of 6 February, and Libya has failed to comply with every one of these instructions. Libya has failed to make any attempt to transfer Mr. Al-Senussi to the ICC and continues to detain him in Libya in violation of Security Council Resolution 1970 and the orders and requests of the ICC. Libya has ignored a formal request from the Registry to send representatives to The

¹ Due to the important issues and evidence addressed in this application, 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 to this Application and its annexes pursuant to Regulation 37 of the Regulations of the Court.

² 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, ICC-01/11-01/11-248, 9 January 2013 (hereinafter "Urgent Application of 9 January 2013").

³ 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", ICC-01/11-01/11-269, 6 February 2013, para. 23 (hereinafter "Decision of 6 February 2013").

⁴ Decision of 6 February 2013, p. 15.

Hague to make arrangements to facilitate Mr. Al-Senussi's transfer and has not taken any other action to arrange his surrender.⁵

4. Instead, the Libyan authorities continue to detain Mr. Al-Senussi, and are actively preparing to commence his trial in Libya as soon as possible. In so doing Libya has also violated the injunction contained within the Chamber's 6 February Order to the effect that Libya must refrain from any action which could hinder or delay his immediate transfer to the ICC.
5. Libya has also ignored the third order made by the Chamber requiring arrangements to be made for a privileged legal visit by appointed Defence Counsel.⁶ Mr. Al-Senussi has now spent six months in detention in Libya (from September 2012 to date) being questioned about criminal allegations without access to counsel. This in itself makes any claims regarding the fairness of proceedings in Libya untenable.
6. As the Defence submitted in its original Application of 9 January, in addition to its refusal to transfer Mr. Al-Senussi to The Hague, Libya has also acted in breach of its international obligations by assisting in the unlawful rendition of Mr. Al-Senussi from Mauritania to Libya in September 2012.⁷ The Defence submits further evidence with this Application that shows Libya's complicity in the illegal transfer of Mr. Al-Senussi from Mauritania to Libya in violation of international law.⁸ This provides a further basis for informing the Security Council of Libya's non-cooperation, as well as Mauritania's.
7. There cannot now be the slightest doubt that Libya intends to maintain its stance of deliberately violating the Chamber's 6 February Order (and all previous orders and requests⁹) by refusing to transfer Mr. Al-Senussi to the ICC without any legal

⁵ See Confidential and Ex Parte, Annex 2.

⁶ Decision of 6 February 2013, para. 40.

⁷ See paras. 4, 6, 15-24, 28, 36-48, 52-55, 67-69.

⁸ See Annex 1 (public).

⁹ Decision of 6 February 2013, para. 40. Abdullah Al-Senussi, ICC-01/11-01/11-241, 10 December 2012, para. 9 (hereinafter "Decision of 10 December 2012"); 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, 18 January 2013, p. 6. (hereinafter "Decision of 18 January 2013"); Decision on the Defence for Abdullah Al-Senussi's "Urgent Application pursuant to Regulation 35", ICC-01/11-01/11-257, 23 January 2013, para. 12 (hereinafter "Decision of 23 January 2013"); Warrant of Arrest for Abdullah Al-Senussi, ICC-01/11-01/11-4, 27 June 2011 (hereinafter "Al-Senussi Warrant"); 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-01/11-01/11-5, 4 July 2011 (hereinafter "Request for Surrender of 4 July 2011"); Second report of the Registry on the status

justification, and by refusing to allow his lawyers to see him. If Libya truly intended to comply with the Orders of the ICC it would by now have done so, or would be actively engaged in making arrangements to do so.

8. This case has reached a point at which the impasse between Libya and the ICC can only be broken by a referral to the Security Council. If the authority of the Court is to be respected, its orders and requests must be complied with. Further latitude would simply enable Libya to perpetuate its tactics of delay, obfuscation and prevarication and its consistent attempts to mislead the Chamber and the Registry as to its true intentions.¹⁰ Libya's intentions and actions are very clear.
9. It is for the Chamber to decide in the exercise of its discretion to refer a State to the Security Council. This discretion should be exercised with reference to the primary purpose of the Rome Statute, which is to establish an international criminal court with "jurisdiction over the most serious crimes of concern to the international community" in order to "guarantee lasting respect for and the enforcement of international justice".¹¹ If the Court is to carry out its mandate, its orders and requests must be complied with, especially where they involve a State's core obligation to surrender a suspect to the Court. When, as here, the Chamber has taken all possible measures to obtain the cooperation of a State and yet that State has simply disregarded the ICC's orders, the Chamber's discretion should only be exercised in one way. The Defence submits that upholding the authority of the Court, and the international rule of law, must now prevail over the non-compliant and disrespectful conduct of Libya, a State that is, even by its own admission, incapable of administering justice in a manner that complies with international law.¹²

Applicable legal provisions and jurisprudence

10. This Application is submitted pursuant to Article 87 of the Statute and the settled jurisprudence of the ICC. The Defence relies in particular on Article 87(5) of the Rome Statute which provides that:

of the execution of the request for arrest and surrender of Abdullah Al-Senussi, ICC-01/11-01/11-208, 17 September 2012, paras. 1-3 (hereinafter "Second Registry Report on Al-Senussi Surrender").

¹⁰ See paras 19-40..

¹¹ Rome Statute, Preamble, p.1.

¹² See n. 66, *infra*.

- (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.** [Emphasis added]*

11. Article 87(5)(a) clearly applies to States, like Libya and Mauritania, which are not parties to the Rome Statute but which are required to provide assistance to the ICC pursuant to a Security Council Resolution. The term “any other appropriate basis” should be interpreted to include Situations referred to the Court by the Security Council that require non-State parties to provide assistance to the ICC. This is clear from the terms of Article 87(5) itself. The subparagraph explicitly applies “where the Security Council has referred the matter to the Court” and permits the Chamber in such cases to refer non-States parties to the Security Council when the State “fails to cooperate” with requests made by the Chamber. No further showing is required.

12. Libya has not disputed that the Chamber has the “discretionary power to report Libya to the Security Council.”¹³ But it argues that “the correct provision for the Court to consider in ruling upon Mr Al-Senussi’s request [for referral of Libya to the Security Council] is article 87(7), not article 87(5) of the ICC Statute.”¹⁴

13. In contrast to Article 87(5), Article 87(7) applies “where a *State Party* fails to comply with a request to cooperate by the Court”. The Chamber in another case has accordingly relied on Article 87(7) to refer two States (Chad and Malawi) which are parties to the ICC Statute to the Security Council.¹⁵ On the other hand, the Chamber did not specifically rely on Article 87(7) when it referred a non-State party, Sudan, to

¹³ Response of the Libyan Government to 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”, ICC-01/11-01/11-264, 1 February 2013, para. 15 (hereinafter “Libya’s Response of 1 February 2013”).

¹⁴ Libya’s Response of 1 February 2013, para. 14.

¹⁵ Prosecutor v. Bashir, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-139, 12 December 2011, para. 47 Prosecutor v. Bashir, Décision rendue en application de l’article 87-7 du Statut de Rome concernant le refus de la République du Tchad d’accéder aux demandes de coopération délivrées par la Cour concernant l’arrestation et la remise d’Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-140, 13 December 2011, para. 14.

the Security Council for failing to surrender accused persons to the ICC.¹⁶ The Chamber referred to Article 87 in general.

14. If Article 87(7) is regarded as being applicable in the present case, the requirements of this provision have clearly been met. The requirements under the two subparagraphs are very similar: subparagraph 5 requires a finding of non-cooperation by a State as does subparagraph 7 when such non-cooperation “prevent[s] the Court from exercising its functions and powers under this Statute”.¹⁷ The Defence submits that under either of these provisions there is a clear legal basis for the Chamber to refer Libya and Mauritania to the Security Council for non-cooperation with the Court.
15. Furthermore, it has been held that when a Situation is referred to the ICC by the Security Council acting under Chapter VII of the UN Charter, the Court has the “*inherent power* to inform the Security Council”¹⁸ of a non-State party’s failure to cooperate with the Court on the basis that such non-cooperation in itself prevents “the Court from executing the task entrusted to it by the Security Council.”¹⁹ The Chamber can thus rely on its inherent powers to report Libya and Mauritania to the Security Council on the basis of the Security Council’s Resolution that referred the Libya Situation to the ICC.
16. The ICC’s jurisprudence has also held that the applicable provisions of the UN Charter (Articles 24, 25 and 103) are directly relevant and are to be relied on when referring a non-State Party to the Security Council.²⁰ In accordance with Article 25 of the UN Charter, the “Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter”. Libya and Mauritania are members of the UN and their obligations under Security Council Resolution 1970 therefore stem directly from the UN Charter.

¹⁶ Prosecutor v. Harun and Kushayb, 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 (hereinafter “Harun Kushayb Decision of 25 May 2010”). Cf. 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.

¹⁷ In addition, the Relationship Agreement between the UN and the ICC refers in equal terms to the power of the Court to make “a finding, pursuant to article 87, paragraph 5 (b) or paragraph 7, of the Statute, of a failure by a State to cooperate with the Court”. See Negotiated Relationship Agreement between the International Criminal Court and the United Nations, ICC-ASP/3/Res.1, 22 July 2004, article 17(3).

¹⁸ Harun Kushayb Decision of 25 May 2010, p. 6. (emphasis added)

¹⁹ *Id.*.

²⁰ *Id.*

17. These basic propositions are surprisingly denied by Libya, which has asserted that Articles 24, 25, and 103 of the UN Charter are “wholly irrelevant”²¹ to an application for referral to the Security Council. The key provisions of the UN Charter have however been squarely relied on by the ICC in referring States to the Security Council,²² and should be relied on in this case as well.

Grounds for referral of Libya to the Security Council

18. Libya should be reported to the Security Council on account of (i) its failure to surrender Mr. Al-Senussi to the ICC, (ii) its involvement in the unlawful rendition of the Mr. Al-Senussi from Mauritania to Libya, and (iii) its failure to arrange a privileged legal visit for the Defence. Libya has had ample opportunity to explain its position to the Chamber and even remedy any non-compliance, and should therefore be reported without any further delay.

(1) Non-compliance with order for immediate surrender

19. The Chamber has found that Libya has failed to “fulfill its obligations to cooperate with the Court”²³ “within the cooperation framework provided by the Statute.”²⁴ The Chamber emphasised that “although Libya is not a State Party to the Statute, it is under an obligation to cooperate with the Court” and that Libya is “required to work within the cooperation framework provided by the Statute.”²⁵ The Chamber explained that the Statute “is the legal framework within which Libya must comply with the Surrender Request [for Mr. Al-Senussi].”²⁶

20. The Libyan Government itself has informed the Court of its “unequivocal recognition that it is bound by the terms of the surrender request due to the operation of Security Council Resolution 1970”²⁷ and that “[t]he Libyan government does not dispute that it is bound by Security Council Resolution 1970”.²⁸ In fact, the gap between rhetoric and reality could not be wider.

²¹ Libya’s Response of 1 February 2013, para. 10.

²² Harun Kushayb Decision of 25 May 2010, p. 5-6.

²³ Decision of 18 January 2013, p. 6.

²⁴ Decision of 18 January 2013, para. 10.

²⁵ *Id.*

²⁶ *Id.* See also Rome Statute, Articles 86, 87 and 89 and *see, generally*, Part 9.

²⁷ Libya’s Response of 1 February 2013, para. 23.

²⁸ *Id.* at para. 22.

21. Libya is beyond doubt in violation of Security Council Resolution 1970 and all the orders and requests made by the ICC to surrender Mr. Al-Senussi, including most recently the Chamber's Decision of 6 February which ordered the Libyan authorities to "*immediately*" surrender Mr. Al-Senussi to the Court.²⁹ Libya has indeed been in violation of the orders and requests of the ICC to surrender Mr. Al-Senussi for more than six months: the Registry transmitted the original request for arrest and surrender in July 2011, and Mr. Al-Senussi has been in Libyan custody since September 2012.

22. Libya has been afforded more than sufficient time to hand over Mr. Al-Senussi to the ICC:

- The warrant of arrest against Mr. Al-Senussi was issued by the ICC on 27 June 2011 and the Registry's Request for the Arrest and Surrender of Mr. Al-Senussi was transmitted to the Libyan authorities on 4 July 2011.³⁰
- In September 2012 and at various other times, Libya has been reminded of its obligation to surrender Mr. Al-Senussi by way of various communications from the Registry. It has failed to respond to any of these communications.³¹
- Libya has been continuously reminded by the Chamber of its obligation to surrender Mr. Al-Senussi to the ICC, including in the Chamber's decision of 10 December 2012 which "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"³², and the Chamber's Decision of 18 January 2013 which reminded Libya of its "obligations to cooperate with the Court in relation to the arrest and surrender of Mr Al-Senussi, and especially its duty to comply with the Surrender Request."³³
- The Chamber noted in its Decision of 23 January 2013 that Libya has "been reminded by the Court on numerous occasions" of its duty to execute the Request for Surrender of Mr. Al-Senussi to the ICC;³⁴ and
- The Chamber reiterated Libya's obligation to immediately surrender Mr. Al-Senussi's in its Order of 6 February 2013.

23. It is now almost six weeks since Libya was last ordered by the Chamber to surrender Mr. Al-Senussi. Yet Libya has neither surrendered him to the ICC, nor complied with

²⁹ See Decision of 10 December 2012, para. 9; Decision of 18 January 2013, p. 6; Decision of 23 January 2013, para. 12 (emphasis added).

³⁰ Al-Senussi Warrant; Request for Surrender of 4 July 2011.

³¹ See Second Registry Report on Al-Senussi Surrender, paras. 1-3.

³² Decision of 10 December 2012, para. 9.

³³ Decision of 18 January 2013, p. 6.

³⁴ Decision of 23 January 2013, para. 12.

the Registry's request to send officials to The Hague to make arrangements for the transfer to be effected. Libya has plainly failed to appreciate that the Chamber is under a duty to take steps to enforce its own orders and requests.³⁵

24. The Chamber has concluded that Libya has not filed an admissibility application before the ICC in Mr. Al-Senussi's case and that Libya's submissions were "not sufficient to trigger the applicability of article 95 of the Statute and justify a postponement of the execution of the Surrender Request."³⁶ The Chamber found instead that "Libya's obligation to surrender Mr Al-Senussi to the Court stands fully and is not subject to any suspension."³⁷

25. Libya has however still taken no steps to comply with the Chamber's unambiguous directions to surrender Mr. Al-Senussi and its resolute inaction suggests that it has no intention of doing so.

(2) Non-compliance with prohibition on inciting, aiding or assisting unlawful rendition

26. As set out in its Application of 9 January 2013, the Defence submits that Libya has acted in violation of international law by inciting and/or aiding and assisting an internationally wrongful act in unlawfully rendering Mr. Al-Senussi to Libya in breach of Security Council Resolution 1970 and relevant orders and requests of the ICC.³⁸ The Chamber stated that it would address this submission "in due course."³⁹ It is now imperative that this matter be considered since it forms an additional ground for the referral of Libya (and Mauritania) to the Security Council.

27. Mr. Al-Senussi's transfer from Mauritania to Libya clearly violated international law:

³⁵ See eg Washington post article (citing chief of prison facility as saying that Al-Senussi is a war criminal and it will be "impossible" for Libya to send Al-Senussi and Saif Gaddafi abroad). In the new Libya, former prisoners guard their onetime captors, Washington Post, 4 March 2013 (http://www.washingtonpost.com/world/middle_east/in-the-new-libya-former-prisoners-guard-their-captors/2013/03/03/e2f7bf9c-7f47-11e2-b99e-6baf4ebe42df_story_1.html) (hereinafter "WP article of 4 March 2013").

³⁶ Decision of 6 February 2013, para. 33.

³⁷ Decision of 6 February 2013, paras. 28, 36.

³⁸ Urgent Application of 9 January 2013, paras. 4, 6, 15-24, 28, 36-48, 52-55, 67-69.

³⁹ Decision of 6 February 2013, para. 23.

- Acting under Chapter VII of the UN Charter, the Security Council has required Libya to cooperate with the ICC and comply with its order and requests. Security Council Resolution 1970 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.*”⁴⁰
- The Security Council “urge[d] all States”, even those that are not Parties to the ICC Statute, “to cooperate fully with the Court and the Prosecutor”.⁴¹
- At the time of Mr. Al-Senussi’s transfer to Libya, the ICC had requested Libya and Mauritania immediately to surrender Mr. Al-Senussi to the ICC pursuant to Security Council Resolution 1970 and this obligation was confirmed in subsequent orders.
- UN Security Council Resolution 1970 includes a travel ban requiring that all Member States of the UN “shall take the necessary measures to prevent the entry into or transit through their territories of individuals listed in Annex I of this resolution”, including Mr. Al-Senussi.⁴²

Notwithstanding these obligations contained in a binding resolution passed unanimously under Chapter VII of the UN Charter and the orders of the Court, which required Mr. Al-Senussi’s immediate transfer to the ICC, Mr. Al-Senussi was unlawfully transferred to Libya.

28. Libya’s involvement in Mr. Al-Senussi’s illegal transfer is evidenced *inter alia* by the following:

- Libya has confirmed that Mr. Al-Senussi was arrested in Mauritania on 17 March 2012.
- Libya has admitted that three days later, on 20 March 2012, “a Libyan delegation [conducted a] visit to Mauritania” and that as a result of this visit “[t]he Military Prosecutor [was able to] commence his investigation of Mr Al-Senussi in relation to allegations of both financial crimes and crimes against the person”.⁴³

⁴⁰ Resolution 1970 (2011), Adopted by the Security Council at its 6491st meeting, on 26 February 2011, S/RES/1970 (2011), paras. 4-5.

⁴¹ *Id.* at para. 5.

⁴² Mauritania’s actions do not come within any of the exceptions provided in paragraph 16 of Resolution 1970. See Urgent Application of 9 January 2013, paras. 39-42.

⁴³ Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11-130-Red, 1 May 2012, para. 50 (hereinafter “Libya’s Application of 1 May 2013”).

- Libya has also admitted that the discussions on 20 March included negotiations over Mr. Al-Senussi's transfer to Libya. That day, Mustafa Abushagur, at the time the Deputy Prime Minister of Libya,⁴⁴ tweeted on his official Twitter account (still in use today) that "I have met with the President of Mauritania and he agreed to the extradition of Senussi to Libya".⁴⁵
- Libya has stated that the next day, 21 March – i.e. without any time for proper consideration of any legal requirements, such as the apparent requirement under Mauritanian law that a judge approve an extradition⁴⁶ – "the Government of Mauritania gave an assurance to the Libyan Government ... to the effect that Mr Al-Senussi would be returned to Libya to face trial in due course".⁴⁷
- Libya has admitted that on 1 May 2012 "an extradition request to Mauritania for Mr. Al-Senussi [was] pending" and that "[t]he justice ministries of both countries are in regular contact and are monitoring Mr Al-Senussi's condition in order to determine when his transfer will be possible".⁴⁸
- Documentary evidence in the form of a Note Verbale shows that on 24 July 2012, Libya – through its embassy in Nouakchott – made a formal request to Mauritania for permission to land "the Libyan plane" at Nouakchott International Airport on 25 July for the expressed purpose of "transporting the Libyan spy chief" to Maateeka military airport in Tripoli. This 'Note Verbale', in the original Arabic with an informal English translation, is submitted with this Application as Annex 1.
- Documentary evidence in the form of a video-recording reveals that when Mr. Al-Senussi ultimately arrived in Libya in September 2012, Abdelrahim Al-Keib – the Libyan Prime Minister at that time – publicly announced that Mr. Al-Senussi "ha[d] been brought back to Libyan soil" from Mauritania "after big efforts".⁴⁹

29. This direct evidence – most of which comes from Libya's own statements and admissions – establishes that Libya was clearly involved in rendering Mr. Al-Senussi from Mauritania to Libya. This conduct constituted incitement and/or aiding and assisting in the commission of an internationally wrongful act, namely

⁴⁴ See Full List of Official NTC Executive Board, 22 November 2011 (<http://feb17.info/official-documents/full-list-of-official-ntc-executive-board-english-arabic/>).

⁴⁵ See <https://twitter.com/mustafaag>



⁴⁶ Constitution of the Republic Mauritania Islamic, 12 July 1991 with amendments of 25 July 2006, para. 22; Riyadh Arab League Agreement on Extradition and Judicial Cooperation, 6 April 1983.

⁴⁷ Libya's Application of 1 May 2013, para. 30.

⁴⁸ Libya's Application of 1 May 2013, paras. 30, 96.

⁴⁹ See <http://www.youtube.com/watch?v=9NEzYIPx19M>.

the transfer of Mr. Al-Senussi to Libya in violation of Security Council Resolution 1970 and the orders and requests of the ICC.

30. Other evidence shows not only that Libya was involved in negotiating a deal for Mr. Al-Senussi's transfer to Libya, but also that it paid a large amount of money to secure it. As the Defence submitted in its original Application, there is evidence that Libya paid a bribe or inducement to public officials of Mauritania in the sum of \$200 million in exchange for rendering Mr. Al-Senussi to Libya.⁵⁰ As noted in the original Application, 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."⁵¹
31. To this day, Libya has simply denied that it has acted unlawfully in the transfer of Mr. Al-Senussi from Mauritania to Libya.⁵² It has however not explained how its involvement in securing his transfer - which is *prima facie* a violation of the provisions of Security Council Resolution 1970 - is legally justified. This bare denial cannot be relied on by the Chamber and is indeed inconsistent with Libya's own previous admissions before this Court of its role in negotiating Mr. Al-Senussi's transfer. Such an omission should not be countenanced by the Court, much less in a case of this magnitude which carries the death penalty in Libya.
32. Similarly, in relation to the payment made by Libya, its response is that the payment was effected as a "donation to the Mauritanian people".⁵³ This constitutes a denial that the funds were transferred in return for the rendition of Mr. Al-Senussi. But no evidence was submitted to substantiate this claim, nor to demonstrate that Mr. Al-Senussi was lawfully transferred to Libya by any legal and judicial process. There is thus no evidence to displace the obvious inference that the funds were paid for a more sinister purpose. In responding to the Defence Application, Counsel for Libya relied entirely on evidence submitted by the Defence itself and a press statement by

⁵⁰ Urgent Application of 9 January 2013, para. 37.

⁵¹ See 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.

⁵² See Libya's Response of 1 February 2013, para. 19 ("even if Libya could somehow be shown to be responsible for a violation of international law arising from the extradition of Mr. Al-Senussi to Libya from Mauritania (which is denied)...").

⁵³ Libya's Response of 1 February 2013, para. 18.

the Libyan Deputy Prime Minister, without referring to any instructions and evidence provided by their client.⁵⁴ All that is said by Libya in its Response is that:

*“As outlined in Mr Al-Senussi’s Application, Libyan Government records establish that the payment of 250 million dinars to Mauritania which was approved by the Libyan General National Congress and recorded in a GNC Decision of 14 November 2012 (ie. more than 70 days following the extradition of Mr Al-Senussi to Libya from Mauritania), was made by way of bilateral aid ‘as a donation to the Mauritanian people’. Indeed, the former Libyan Deputy Prime Minister, Mostafa Abu Shagur, who was in office at the time of Mr Al-Senussi’s extradition, has confirmed that the payment made was consistent with Libya’s many other investments in Mauritania and was made specifically in order to assist the Mauritanian economy.”*⁵⁵

33. The Defence submits that Libya’s response to this vital issue lacks any credibility. All the more so in the light of reports that an identical (\$200 million) payment was made to secure the return of former Libyan Prime Minister Baghdadi Al-Mahmoudi from Tunisia.⁵⁶ And yet, Libya has provided no evidence or explanation for what occurred. Libya obviously has this evidence and has elected not to disclose it to the Court, conduct which is plainly unacceptable when it has failed to comply with the orders and requests of the ICC and in the context of a case that carries the death penalty.

34. In light of the evidence before it, and the manner in which Libya has dealt with this matter, the Chamber is entitled to infer that Libya has incited and/or aided and assisted in the unlawful rendition of Mr. Al-Senussi from Libya to Mauritania when he should have been transferred directly to the ICC pursuant to Security Council Resolution 1970 and the orders of the ICC. The Defence submits that Libya’s conduct constitutes an overt breach of international law and displays a wholesale disrespect for the decisions of the Security Council and the orders of the ICC.

(3) Non-compliance with order to arrange privileged legal visit

35. In addition to the violations outlined above, Libya has failed to comply with the Chamber’s Order of 6 February 2013 to facilitate a privileged legal visit for the Defence to meet with Mr. Al-Senussi in Libya. The Chamber specifically ordered the

⁵⁴ Libya’s Response of 1 February 2013, para. 18.

⁵⁵ *Id.*

⁵⁶ Defence Submission of Additional Evidence Pursuant to the “Order convening a hearing on Libya’s challenge to the admissibility of the case against Saif Al-Islam Gaddafi” (ICC-01/11-01/11-207, ICC-01/11-01/11-216, 3 October 2013, Annex 3.20).

“Libyan authorities to arrange, in consultation and in cooperation with the Registrar, a visit of the appointed counsel for Mr. Al-Senussi to his client on a privileged basis as soon as practicable.”⁵⁷

36. From the moment that Counsel was appointed by the Chamber to represent Mr. Al-Senussi before the ICC on 9 January 2013, Counsel have taken every step with the assistance of the Registry to seek to arrange a legal visit to Mr. Al-Senussi. As is evident from the materials filed in confidential and *ex parte* Annexes 2 and 3 to this Application, various steps have been undertaken by the Registry and the Defence to seek to get the Libyan authorities to arrange a legal visit as soon as practicable. The Libyan authorities have emphatically failed to take any concrete action to ensure that the legal visit is arranged. They have not shown that they intend to organise the visit in compliance with the Chamber’s Order.
37. In its Response of 1 February 2013, Libya stated that it “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”.⁵⁸ Ten days later, in their filing of 11 February, Libya submitted that it was “*in the process of agreeing a protocol*” on “the scope of future privileged visits by defence counsel” with the ICC Registry.⁵⁹ Then, on 4 March 2013, Libya stressed that the “Government ... has voluntarily *entered into negotiations* with the Registry to *conclude a Memorandum of Understanding* between the Government and the court in order to facilitate cooperation between the parties and provide security measures for all court participants to the fullest extent that it is able.”⁶⁰
38. Libya’s statements attempt to create the impression that Libya was at the material times (over six full weeks) involved in active and on-going discussions with the Registry to make the necessary arrangements for a privileged legal visit. However, as is evident from confidential and *ex parte* Annexes 2 and 3, these pleaded claims are simply untrue. At the time when these submissions were made, the Libyan authorities

⁵⁷ Decision of 6 February 2013, para. 40.

⁵⁸ Libya’s Response of 1 February 2013, para. 31 (emphasis added).

⁵⁹ Libyan Government’s Response to Urgent Defence Request of 21 January 2013, ICC-01/11-01/11-274, 11 February 2013, para. 14 (emphasis added).

⁶⁰ Libyan Government’s consolidated reply to the responses of the Prosecution, OPCD, and OPCV to its further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi, ICC-01/11-01/11-293-Red, 4 March 2013, para. 13 (emphasis added).

had failed to respond to written requests from the Registry, and they had not had discussions or exchanged drafts with the Registry with a view to agreeing such a protocol.⁶¹

39. The matter has now been outstanding for a considerable length of time and no fixed arrangements are in place to ensure that the visit takes place as soon as practicable. It is misleading for Libya to state in their filings that it is in the process of actively reaching an agreement with the Registry on legal visits and making arrangements for such visits when no such steps have in fact been undertaken by Libya.

40. The Defence submits that Libya has clearly failed to comply with the Chamber's order to arrange a legal visit without delay. In its Decision of 6 February, the Chamber referred to "[i]ts power to issue such orders or seek such cooperation as may be necessary to protect [Mr. Al-Senussi] or assist in the preparation of his defence pursuant to articles 57(3)(b) and (c)."⁶² Libya's non-compliance is currently preventing the Court from ensuring that the rights of the suspect under the Statute are fully guaranteed. The Defence therefore requests the Chamber to make a finding of non-compliance with the Chamber's Order of 6 February 2013 concerning a privileged legal visit, and immediately to report Libya to the Security Council.

(4) All requirements are satisfied for Libya to be referred to the Security Council

41. Libya's lack of cooperation with the requests and orders of the Court as described above is undeniable. Libya should now be referred to the Security Council so that the Council can take appropriate action.

42. As explained above, in order to report Libya to the Security Council under Article 87(5), the Chamber must find that the State has "fail[ed] to cooperate with requests" made by the Court. There can be no doubt that Libya has failed to cooperate and comply with the ICC's requests.

⁶¹ See, Confidential and Ex parte Annex 2.

⁶² Decision of 6 February 2013, para. 39.

43. Under Article 87(7) (if applicable) the Chamber must also find that such non-cooperation “prevent[ed] the Court from exercising its functions and powers under this Statute”. This requirement is plainly satisfied in the present case.

44. It is clear that in refusing to transfer Mr. Al Senussi to the Court and in not facilitating a privileged legal visit for his Counsel, Libya is undermining the Court’s powers and preventing the Court from carrying out its functions. The preamble to the ICC Statute emphasises that the Court’s purpose is to exercise “jurisdiction over the most serious crimes of concern to the international community” and to “guarantee lasting respect for and the enforcement of international justice”. The Security Council Resolution referring the Situation in Libya to the ICC does so for the purposes of “investigations or prosecutions”. By refusing to surrender Mr. Al-Senussi to the ICC, Libya is impeding all progress in the proceedings before the Court. Moreover, the manner in which it is doing so - by failing to provide Mr. Al-Senussi with access to his Counsel and to guarantee his fundamental human rights in detention - violates the principles underlying the functioning of the Court as reflected *inter alia* in Articles 21 and 55 of the Statute.⁶³

45. In the Sudan Situation, the Chamber found that “the Security Council has entrusted the Court with the task of investigating and prosecuting crimes within the jurisdiction of the Court”. It reasoned that a failure to cooperate with the Court by not transferring the suspect to the ICC *in itself* amounted to “preventing the Court from executing the task entrusted to it by the Security Council”.⁶⁴ The Defence submits that the same reasoning applies in the present case. In addition, the Chamber in that case found not only that it had the discretion to inform the Security Council of Sudan’s non-cooperation, it had a *duty* to do so. It therefore reasoned that “the Court has the inherent power to inform the Security Council of ... a failure [to cooperate and] indeed that the Court *has to* inform the Security Council of any lack of cooperation by the Republic of the Sudan in relation to the enforcement of warrants of arrest issued by the

⁶³ Rome Statute, Articles 21, 55. Libya’s response to this is simply the self-serving unsupported conclusion that “it is manifestly unarguable that any lack of cooperation on the part of Libya is preventing the court from exercising its functions and powers under the Statute and that Libya should therefore be reported to the Security Council”. Libya’s Response of 1 February 2013, para. 20.

⁶⁴ See, Harun Kushayb Decision of 25 May 2010, p. 6. “CONSIDERING that, by virtue of Security Council Resolution 1593 (2005), when the Republic of the Sudan fails to cooperate with the Court, **thereby preventing** the Court from executing the task entrusted to it by the Security Council, the Court has the inherent power to inform the Security Council of such a failure” (emphasis added).

Chamber ... thereby providing the Security Council with the information which is necessary for it to take any action as deemed appropriate”.⁶⁵

46. The importance of taking immediate action to seek to ensure that Libya does comply with the Security Council Resolution and the orders of the ICC is re-enforced by the fact that Libya has failed to guarantee the basic human rights of suspects, especially Gaddafi-era officials,⁶⁶ and by the very serious allegations of torture in detention in Libya, including in the prison in which Mr. Al-Senussi is being detained:

- There have been recent reports that the former Prime Minister of Libya, Mr. Al-Baghdadi al-Mahmudi, is in critical condition, and “could die”, after being tortured in the same Libyan prison where Mr. Al-Senussi is held.⁶⁷
- The Libyan Justice Minister, Mr. Salah Marghani, has openly confirmed the widespread abuse and torture in Libyan prisons, stating that “unfortunately, the culture of torture has continued after the revolution. [Libya] has a problem ... We have prisons that were spinning out of control”.⁶⁸
- Amnesty International reported that “[w]ith rare exceptions, detainees have no access to lawyers and are interrogated alone”⁶⁹ and there is “a clear pattern that the Government was applying these illegal procedures across the board to all

⁶⁵ Harun Kushayb Decision of 25 May 2010, p. 6, 7 (emphasis added).

⁶⁶ The Libyan government has conceded on several occasions that the Libyan state has continued to commit systemic human rights abuses. See speech by Ali Zeidan, the Head of Government, to the UN, 26 February 2013, reported in <http://pm.gov.ly/news/لمة-س-ال-س-د-ك-لمة>, paragraphs 3 and 4 (English translation of the relevant sections: “We inherited a failed state, a paralysed administration, collapsed institutions and a looted treasury... this is what has hampered us from sticking to many of our pressing commitments, including those related to the fight against human rights abuses”). See also statement by Salah Marghani, the Libyan Justice Minister, regarding the HRW Report 2013, 6 February 2013, reported in http://www.hrw.org/sites/default/files/related_material/2013_Libya_Worldreport.pdf, paragraphs 2 and 3 (The HRW Report 2013 found, amongst other things, that “there continued to be cases of abuse and some deaths in custody [in state-run detention facilities]”, “[t]he judicial system remained weak... Threats and physical attacks on prosecutors and judges further inhibited the rule of law”, and that “[d]etained [Gaddafi-era] officials complained that they did not have access to a lawyer and did not know the charges against them.” In his 6 February statement Mr. Marghani accepted this saying “[t]he Ministry of Justice does not contest the report’s findings.”) Finally, see comments made by Salah Marghani on or around 4 March 2013, and reported in WP Article of 4 March 2013, p. 3. (the article states that “according to Libya’s justice minister... Investigations are slow, prosecutors are scarce and willing defense lawyers are even scarcer”).

⁶⁷ Ex-Gaddafi PM in critical state after torture in Libya: Lawyer, Ahramonline, 27 February 2013 (<http://english.ahram.org.eg/NewsContent/2/8/65721/World/Region/ExGaddafi-PM-critical-after-torture-in-Libya-Lawye.aspx>); Former Gaddafi PM “risks dying” after torture: lawyer, Reuters, 27 February 2013 (<http://www.reuters.com/article/2013/02/27/us-libya-gaddafi-pm-idUSBRE91Q0UP20130227>); Ex-Gadhafi PM Critical after Torture in Libya, Naharnet, 27 February 2013 (<http://www.naharnet.com/stories/en/73568>); Former Gaddafi PM “risks dying” after torture: lawyer, Yahoo News, 27 February 2013 (<http://news.yahoo.com/former-gaddafi-pm-risks-dying-torture-lawyer-162131746.html>). See also, Interview: Libyan National Guard head Khalid al-Sharif, Asharq Al-Aswat, 20 September 2012 (<http://www.aawsat.net/2012/09/article55240539>) and ICC-01/11-01/11-216-Anx3A.3a for evidence that Mr. Al-Senussi is held in the same prison as former Prime Minister Al-Baghdadi al-Mahmudi.

⁶⁸ WP article of 4 March 2013.

⁶⁹ Libya: Rule of Law or Rule of Militia?, Amnesty International, July 2012, p. 7.

persons associated with the former Gaddafi regime, including ... Mr. Al-Senussi”.⁷⁰

- Various reports confirm that Mr. Al-Senussi is being interrogated in custody.⁷¹ A recent article in the Washington Post identifies Mohamed Gweider, a former Islamist insurgent, as the “chief” of the Al-Hadba detention facility in which Mr. Al-Senussi is held. The article carries an interview with Mr. Gweider in which he claims to be a victim and a witness of crimes allegedly committed by Mr. Al-Senussi, and he states that he should be “taking revenge” on Mr. Al-Senussi. The article confirms that other guards at the prison also claim to be victims of alleged crimes committed by Mr. Al-Senussi, and states that it would be “impossible” for Libya to surrender Mr. Al-Senussi to the ICC.⁷² As observed by the OPCD, members of the National Guard have also apparently been allowed to participate in the interrogation of detainees at Al-Hadba, though they are not part of the Ministry of Justice.⁷³
- It is impossible to know the full extent of the danger that Mr. Al-Senussi is facing or what is happening to him in detention since Libya has not arranged for his counsel to visit him.⁷⁴ Libya’s Counsel have stated that it is not known whether he will be tried within the military court system, or the civilian court system, and who he will be tried with.⁷⁵ Nevertheless, Libya is moving forward with proceedings against him on charges that carry the death penalty. According to Libya’s own calculations, the trial could commence in as little as six weeks.⁷⁶

47. For all these of reasons, the Defence submits that the point has now been reached when Libya should be reported to the Security Council in Mr. Al-Senussi’s case. Despite being afforded all possible latitude, Libya has failed to respect the orders and requests of the ICC which it is bound to implement pursuant to Security Council Resolution 1970. As has been held in other cases of non-compliance, the Chamber is duty bound to report Libya to the Security Council to inform the Security Council of Libya’s failure to comply with the Security Council’s Resolution and the ICC’s orders.

⁷⁰ Public Redacted Version of the “Response to the “Libyan Government’s further submissions on issues related to admissibility of the case against Saif Al-Islam Gaddafi””, ICC-01/11-01/11-281-Red2, 18 February 2013 (hereinafter “OPCD Response of 18 February 2013”), para. 204.

⁷¹ <http://www.elaph.com/Web/NewsPapers/2013/3/798399.html>; and <http://gate.ahram.org.eg/News/319054.aspx>. See also, Trial of Gaddafi son likely to be delayed after spy chief arrest, Reuters, 6 September 2012 (<http://in.reuters.com/article/2012/09/06/libya-senussi-arrest-idINL6E8K66V920120906>); Libya court postpones Saif al-Islam Gaddafi trial, BBC, 10 September 2012 (<http://www.bbc.co.uk/news/world-africa-19551566>).

⁷² WP Article of 4 March 2013.

⁷³ OPCD Response of 18 February 2013, para. 280.

⁷⁴ In addition to reported abuse, Libya reported that at one stage “the severity of Mr Al-Senussi’s liver disease has become apparent” and prevented him from being investigated or moved. Libya’s Application of 1 May 2013, para. 30. This contradicts information provided more recently by Libya.

⁷⁵ Libyan Government’s Observations regarding the case of Abdullah Al-Senussi, ICC-01/11-01/11-260, 28 January 2013, para. 14 (hereinafter “Libya’s Observations of 28 January 2013”).

⁷⁶ In its filing of 15 January 2013 Libya stated that the pre-trial phase before the Chambre d’Accusation was likely to begin in February. Observations by Libya in response to the OPCD Notification of 8 January 2013, ICC-01/11-01/11-251, 15 January 2013, para. 4. And in its filing of 28 January 2013 Libya avers that “[t]he best estimate of the Libyan Government is that the Chambre d’Accusation’s examination of the case is likely to take approximately three months”. Libya’s Observations of 28 January 2013, para. 13.

Libya should be reported without any further delay given that Libya has repeatedly failed to comply with the ICC's orders and requests since September 2012 and given the grave violations of Mr. Al-Senussi's human rights that continue while he is in detention in Libya facing the death penalty without access to his lawyers.

Grounds for referral of Mauritania's non-cooperation to the Security Council

48. In the Application of 9 January 2013, the Defence submitted that Mauritania had committed an internationally wrongful act in unlawfully rendering Mr. Al-Senussi to Libya in breach of Security Council Resolution 1970 and the ICC's orders and requests. As noted above, Resolution 1970 urged all States to cooperate with the ICC's requests and required States to enforce a travel ban imposed on Mr. Al-Senussi.⁷⁷ The Defence highlighted in its original Application that there was no evidence that Mr. Al-Senussi was transferred to Libya on the basis of any legal and judicial process, and that there are strong grounds to find that Mauritania accepted an illegal payment from Libya to bribe or induce public officials in Mauritania to violate Mauritania's international obligations and unlawfully render Mr. Al-Senussi to Libya.⁷⁸ The Defence requested the Chamber to require Mauritania to submit any observations in respect of this matter and to find that Mauritania had violated its international legal obligations under Security Council Resolution 1970 by transferring Mr. Al-Senussi from its territory to Libya and by refusing to surrender him to the ICC.⁷⁹

49. The Chamber held in its decision of 6 February 2013 that it would address the Defence submissions on Mauritania's unlawful rendition of Mr. Al-Senussi to Libya "in due course."⁸⁰ Given the current stage of the proceedings, the Defence requests the Chamber to consider its Application of 9 January 2013 concerning Mauritania's conduct in light of the submissions made in this Application and the evidence set out above, including in Annex 1.

50. As with Libya's non-cooperation, Mauritania's illegal actions have frustrated the Court's ability to advance the legal process before the ICC and the Chamber is

⁷⁷ Urgent Application of 9 January 2013, paras. 6, 28-42, 49-57, 67-69.

⁷⁸ Urgent Application of 9 January 2013, paras. 37, 38.

⁷⁹ Urgent Application of 9 January 2013, paras. 35, 68.


⁸⁰ Decision of 6 February 2013, para. 23.

therefore asked to report Mauritania to the Security Council for its non-compliance. To the extent that the Chamber considers it necessary to seek observations from Mauritania, the Defence submits that this should not delay the Chamber immediately reporting Libya to the Security Council.

Relief requested

51. For all of these reasons, the Defence for Mr. Al-Senussi respectfully requests the Chamber,

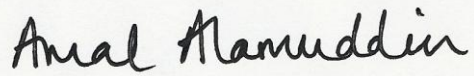
- i. To find that Libya has failed to comply with the Chamber's Order of 6 February 2013 for the "immediate surrender of Mr Al-Senussi to the Court" and to "refrain from taking any action which would frustrate, hinder or delay Libya's compliance with its obligation to surrender Mr Al-Senussi to the Court";
- ii. To find that Libya breached its international obligations by inciting and/or aiding and assisting in the unlawful rendition of Mr. Al-Senussi from Mauritania to Libya;
- iii. To find that Libya has failed to comply with the Chamber's Order of 6 February 2013 by not arranging a privileged legal visit for the Defence to Mr. Al-Senussi;
- iv. To refer and report Libya immediately to the Security Council and request that appropriate action is taken;
- v. To find that Mauritania breached its international obligations by extra-judicially rendering Mr. Al-Senussi to Libya and failing to surrender him to the ICC; and,
- vi. To refer and report Mauritania to the Security Council and request that appropriate action is taken.



Ben Emmerson QC



Rodney Dixon



Amal Alamuddin

Dated 19th March 2013

London, United Kingdom