

**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**



Original: English

No.: ICC-01/11-01/11  
Date: 9 September 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**

**Prosecution's Response to the "Defence Application on behalf of Mr. Abdullah Al-Senussi for Leave to Appeal against 'Decision on the request of the Defence of Abdullah Al-Senussi to make a finding of non-cooperation by the Islamic Republic of Mauritania and refer the matter to the Security Council'" (ICC-01/11-01/11-431)**

**Source:** Office of the Prosecutor

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

**The Office of the Prosecutor**

Ms Fatou Bensouda  
Mr James Stewart

**Counsel for Saif Al-Islam Gaddafi**

Mr John Jones, QC

**Counsel for Abdullah Al-Senussi**

Mr Ben Emmerson, QC  
Mr Rodney Dixon

**Legal Representatives of Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the  
Defence**

**States Representatives**

Professor Ahmed El-Ghani  
Professor James Crawford, SC  
Mr Wayne Jordash  
Ms Michelle Butler

**Amicus Curiae**

**REGISTRY**

---

**Registrar**

Mr Herman von Hebel  
Mr Didier Preira

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Other  
Section**

## Introduction

1. On 4 September 2013 the Defence of Mr Abdullah Al-Senussi (the “Defence”) sought leave to appeal the Pre-Trial Chamber I (“Chamber”)’s decision rejecting the Defence’s request to make a finding of non-cooperation by the Islamic Republic of Mauritania (“Mauritania”) and refer the matter to the Security Council” (“Application”).<sup>1</sup> The Prosecution submits that the Application should be dismissed. The Defence has failed to identify any appealable issue and seeks to re-litigate *ex novo* the Chamber’s conclusions before the Appeals Chamber. The Application therefore constitutes a mere disagreement with the Chamber’s findings.
2. Further, and in the event the Chamber determines that the Defence has identified appealable issues, the Prosecution submits that they do not meet the requirements under Article 82(1)(d).

## Procedural Background

3. On 19 March 2013, the Defence requested the Chamber to make a finding of alleged non-cooperation by Mauritania and refer the matter to the Security Council.<sup>2</sup>
4. On 29 August 2013, the Chamber rejected the Defence request on the grounds that neither the Rome Statute nor Security Council Resolution 1970 imposed an obligation to Mauritania *vis-à-vis* the Court (the “Decision”).<sup>3</sup>
5. On 4 September 2013, the Defence sought leave to appeal the Decision.<sup>4</sup>

---

<sup>1</sup> ICC-01/11-01/11-431.

<sup>2</sup> ICC-01/11-01/11-304.

<sup>3</sup> ICC-01/11-01/11-420.

<sup>4</sup> ICC-01/11-01/11-431.

## Submissions

### I. The Application fails to identify appealable issues arising from the Decision.

6. The Defence fails to clearly identify an appealable issue and, instead, seeks leave to appeal the overall Chamber's Decision. This is evidenced by the terms of the Defence's Application where the Defence re-states the Chamber's findings – namely, that Mauritania has no obligations *vis-à-vis* the Court because it is not a State Party to the Statute and no *ad hoc* arrangement or agreement has been concluded under Article 87(5)(a);<sup>5</sup> that no duty to cooperate with the Court arises from Resolution 1970;<sup>6</sup> and that therefore the Chamber cannot make a finding of non-cooperation – and then concludes that the Chamber “erred in making these findings”.<sup>7</sup>
7. Further, the rest of the section entitled “[t]he issues arising from the present Decision” is devoted to re-arguing the merits of these conclusions.<sup>8</sup> The Defence's arguments are lifted, almost verbatim, from its anterior filings.<sup>9</sup>
8. The Prosecution submits that the Application does not advance any appealable issue. First, the Defence fails to identify clearly the issue or issues that it would like adjudicated on appeal. Leave to appeal has been refused previously in circumstances where the issue is not “identifiable”,<sup>10</sup> and where the Defence fails to “identify clearly the appealable issue”<sup>11</sup> because the

---

<sup>5</sup> Application, para.8 referring to Decision, para.13.

<sup>6</sup> Application, para.8 referring to Decision, para.14.

<sup>7</sup> Application, para.9.

<sup>8</sup> Application, paras.9-13.

<sup>9</sup> See ICC-01/11-01/11-248, paras.6(i)(b), (c) and (d), 28, 30-35, 39-44, 46, 52; ICC-01/11-01/11-304, paras. 11, 14-16, 27, 48-50.

<sup>10</sup> ICC-01/04-168OA3, para. 9.

<sup>11</sup> ICC-02/11-01/11-307, para.70; ICC-02/05-02/09-267, p.6; ICC-01/09-02/11-27, para.7; ICC-02/11-01/11-464, para.26.

Chamber is “[...] unable to carry out an assessment under article 82(1)(d)”.<sup>12</sup> The Application presents such a defect.

9. Second, the Defence presents the overall conclusion of the Chamber as an “issue” and effectively seeks to re-litigate the entire Decision before the Appeals Chamber “*ex novo*”.<sup>13</sup> This does not constitute an issue within the meaning of Article 82(1)(d), but a mere disagreement with the Chamber’s conclusion. In this regard, the Appeals Chamber has stated that “a question over which there is disagreement or conflicting opinion” is not sufficient to form an issue.<sup>14</sup> On these grounds the Defence’s Application should be dismissed without assessing its merits with respect to the other requirements under Article 82(1)(d).
10. Third, the Defence’s submission that the Chamber deviated from this Court’s jurisprudence that the Court has the inherent power to inform the Security Council of a non-State party’s failure to cooperate with the Court is misplaced.<sup>15</sup> The Defence tries to draw a parallel between this case and the case of *Ahmand Harun and Ali Kushayb*, wherein the Chamber informed the UN Security Council about Sudan’s non-compliance.<sup>16</sup> Unlike Mauritania, Sudan’s obligation to cooperate with the Court emanates from UN Security Council Resolution 1593 (2005), which provides that “the Government of Sudan and all other parties to the conflict in Darfur *shall* cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution”.<sup>17</sup> Resolution 1970 only requires such an obligation of Libya, whose authorities “*shall* cooperate fully with and provide

<sup>12</sup> ICC-02/11-01/11-389, para.28; ICC-02/11-01/11-464, para.26.

<sup>13</sup> ICC-02/11-01/11-307, para.70.

<sup>14</sup> ICC-01/04-168 OA3, para.9; *see also* ICC-02/11-01/11-350, para.40 (“a mere reiteration of prior arguments and an expression of disagreement with the analysis and conclusion made by the Chamber are not sufficient to identify an ‘issue’”).

<sup>15</sup> Application, para.13.

<sup>16</sup> ICC-02/05-01/07-57.

<sup>17</sup> ICC-02/05-01/07-57, p.6. Emphasis added.

any necessary assistance to the Court and the Prosecutor”, while all other States *are “urge[d]”* to cooperate fully with the Court and the Prosecutor.<sup>18</sup> As a result, the Chamber did not deviate from its previous jurisprudence.

II. The issues do not affect the fair and expeditious conduct of the proceedings.

11. In the alternative, if the Chamber finds that the Defence has identified appealable issues, the Prosecution submits that they do not affect the requirements under Article 82(1)(d).<sup>19</sup> In support of its argument that the issues affect the fairness and expeditiousness of the proceedings, the Defence cites a chain of four hypothetical situations, each one requiring the former to be true in order to support the hypothetical conclusion that Mr Senussi’s due process rights are being violated:

Were it not for the Chamber’s errors, the Chamber *could* have concluded that Mauritania did fail to comply with the Court’s request to surrender Mr. Al-Senussi to the ICC and *could* have reported this matter to the Security Council for consideration and appropriate action. The determination of the Security Council *could* assist in ultimately bringing about Mr. Al-Senussi’s transfer to the Court where he *could* have full and privileged access to his Counsel in the conduct of his trial before the ICC, as opposed to proceedings in Libya in which his due process rights are being violated and he faces the death penalty.<sup>20</sup>

12. This series of unsubstantiated and speculative assumptions does not constitute evidence to support the Defence’s claim. The Court’s jurisprudence suggests that “it does not suffice for an issue to have merely a hypothetical impact on the fairness/expeditiousness of proceedings or the outcome of the trial”.<sup>21</sup>

<sup>18</sup> See Decision, para.14. Emphasis added.

<sup>19</sup> ICC-01/04-168 OA3, paras.10-11.

<sup>20</sup> Application, para.16. Emphasis added.

<sup>21</sup> ICC-01/04-01/07-1958, para.20; *see also* ICC-01/11-01/11-419, para.12; ICC-02/04-01/05-367, paras.21-22; ICC-01/09-02/11-211, paras.33, 39; ICC-01/04-01/06-2109, para.22; ICC-01/05-01/08-680, para.36.

### III. The issues do not affect the outcome of the proceedings.

13. The Defence fails to establish that the issues affect the outcome of the trial.<sup>22</sup>

Although the Defence attempts to link the Decision to the outstanding appeal concerning Libya's postponement of the surrender order against Mr Al-Senussi,<sup>23</sup> again, its arguments are speculative, abstract and unsubstantiated. The Defence's reasoning relies on the twin assumptions that (i) the Appeals Chamber will find that the Chamber should have considered the merits of Mauritania's actions, and (ii) Libya's suspension of Mr Al-Senussi's surrender pursuant to Article 95 will be rejected on the grounds of Mauritania's purported non-compliance. These are remote possibilities.

14. In any case, the above concerns will not even factor into the Appeals Chamber's decision-making. Contrary to the Defence's claims,<sup>24</sup> the sole issue allowed by the Chamber in its 28 August 2013 grant of leave to appeal is "[t]he postponement of the surrender order on the narrow basis that all the Chamber needed to consider was whether an admissibility challenge had been properly filed before the ICC".<sup>25</sup> In its consideration of this legal question, which concerns solely the scope of Article 95, the Appeals Chamber is unlikely to consider "Mauritania's failure to comply with the ICC's requests".<sup>26</sup> Because the Defence's arguments are based on an erroneous characterisation of the issues on that appeal, even if the Application were to be granted, it would have *no effect* on the outcome of this trial.

<sup>22</sup> ICC-01/04-168OA3, paras.10, 13.

<sup>23</sup> ICC-01/11-01/11-419.

<sup>24</sup> Application, para.17.

<sup>25</sup> ICC-01/11-01/11-419, p.25.

<sup>26</sup> Application, para.17.

IV. Immediate resolution of the issues will not significantly advance the proceedings.

15. As a preliminary matter, the Defence's claim that the issues "concern novel and important questions which the Appeals Chamber has not addressed and determined"<sup>27</sup> is irrelevant to the requirements of Article 82(1)(d).
16. Moreover, the Defence fails to show that the immediate resolution of the issues will materially advance the proceedings.<sup>28</sup> The alleged errors are unrelated to the proceedings in this case because Mr Al-Senussi is already in the custody of the Libyan authorities. Even if the Appeals Chamber reversed the Decision and found that the Chamber was able to report Mauritania to the Security Council, this only tangentially and hypothetically impacts upon Mr Al-Senussi's fair trial rights. Because the alleged errors are so far removed from the proceedings in this case, they are not likely to provide significant guidance or assist the proceedings to "move forward".<sup>29</sup> Indeed, continuing this litigation will only result in unnecessary delay in the proceedings.<sup>30</sup>

---

<sup>27</sup> Application, para.15.

<sup>28</sup> ICC-01/04-168 OA3, paras.14-19.

<sup>29</sup> ICC-01/04-168 OA3, para.15.

<sup>30</sup> As the Prosecution has regularly submitted, the extent of any likely delay is one factor to consider in whether immediate resolution of the issue would materially advance the proceedings, although it is certainly not decisive in its own right. *See, e.g.* ICC-01/04-103, para.37 and authorities cited therein (in particular at fn.22).



## Conclusion

17. For the reasons set out above, the Prosecution requests that the Chamber reject the Defence's Application.



---

Fatou Bensouda, Prosecutor

Dated this 9<sup>th</sup> day of September, 2013  
At The Hague, The Netherlands