

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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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 Redacted Response to the "Notification and Request by the Government of
Libya in response to "Decision on Libya's Submissions Regarding the Arrest of
Saif Al-Islam Gaddafi"**

Source: The Office of Public Counsel for the Defence

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

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1. Introduction

1. The Libyan authorities are obliged to immediately surrender Mr. Saif Al-Islam Gaddafi to the custody of the International Criminal Court.
2. Article 95 cannot be invoked to excuse the stark reality that the Libyan authorities have failed to comply with the order for his arrest and surrender, and the terms of Security Council Resolution 1970 for over four and a half months.
3. In any case, Article 95 does not extend to surrender requests, or other requests predating the admissibility challenge. In line with the fact that the ICC Pre-Trial Chamber retains the exclusive competence for determining the admissibility of the case, the Chamber must also have the competence to make such decisions as are necessary to ensure that the ICC will be in a position to investigate and prosecute the case, should the admissibility challenge be rejected. A broad interpretation of Article 95 would undermine this competence by giving national authorities sufficient time to adjudicate the case, and implement the death penalty, which would render the outcome of the admissibility challenge a *fait accompli*.
4. Article 95 can only be invoked in connection with an admissibility challenge, which is receivable in the sense that it has been filed timeously, and with due diligence. Article 95 should also not be exploited as a stalling tactic for admissibility challenges, which appear to have the sole purpose of thwarting Mr. Saif Al-Islam Gaddafi's transfer to the ICC.
5. The Pre-Trial Chamber has an overarching duty to interpret the Statute in a manner which is consistent with internationally recognised human rights. The Chamber cannot place its imprimatur on a requested postponement, which would maintain Mr. Saif Al-Islam Gaddafi in an unacceptable black hole as concerns the enforcement of fundamental rights under the Statute. The Chamber also has a positive duty to take measures to alleviate such violations. In the present case, this translates to an obligation to ensure that the Libyan authorities transfer Mr. Gaddafi to the custody of the ICC as soon as possible.

2. Procedural History

6. On 23 November 2011, the National Transitional Council (NTC) confirmed by letter the arrest of Saif-Al Islam Gaddafi on 19 November 2011.¹ The NTC further informed

¹ ICC-01/11-01/11-34-Anx.

the Pre-Trial Chamber that the Pre-Trial Chamber's surrender request would be considered and the Pre-Trial Chamber would be informed when a decision was reached.

7. On 6 December 2011, the Honourable Pre-Trial Chamber found that it required more information from the Libyan authorities concerning the status of Mr. Gaddafi, and the issues raised by the letter.² The Pre-Trial Chamber therefore ordered the Libyan authorities, on an urgent basis, to provide the Chamber with information concerning, *inter alia*, the status of the arrest of Mr. Gaddafi, and whether and when the Libyan authorities intended to surrender him to the Court.³
8. The Pre-Trial Chamber granted the request of the NTC for additional time to respond, and set a new deadline of 23 January 2012.⁴
9. On 23 January 2012, the NTC filed its observations, in which it informed the Pre-Trial Chamber that:⁵
 - i. Mr. Gaddafi was arrested as a prisoner of war in Zintan, and that he will be transferred to Tripoli. He was not arrested on account of the ICC arrest warrant;
 - ii. Mr. Gaddafi has received some visits, namely from one uncle, and representatives from local and international organisations;
 - iii. Mr. Gaddafi has apparently refused to receive visits from a local or international lawyer, or from any ICC officials;
 - iv. The NTC is willing to facilitate visits from a representative of the Registry and an expert at an agreed upon time and place;
 - v. Mr. Gaddafi is being investigated by local magistrates for murder, mass murder, torture, rape and financial corruption. A case number has not yet been assigned; and
 - vi. The NTC is not formally challenging the admissibility of the case at this point in time but is seeking to defer Mr. Gaddafi's surrender under article 94 in order to obtain more time to complete its domestic investigations.

10. The OPCD and the Prosecution filed their respective responses on 2 February 2012.⁶

11. On 7 March 2012, the Pre-Trial Chamber issued its 'Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi', in which the Chamber found that Article 94 could not be invoked to postpone the surrender of Mr. Gaddafi in order to

² Prosecutor v. Gaddafi et al, Public Redacted Version of Decision Requesting Libya to file Observations Regarding the Arrest of Saif Al-Islam Gaddafi, ICC-01/11-01/11-39-Red, 6 December 2011 at para. 9.

³ At para. 11.

⁴ Decision on the request of Libya for extension of time limit to submit observations regarding the arrest of Saif Al-Islam Gaddafi, 10 January 2012, ICC-01/11-01/11-42.

⁵ Confidential annex to the "Report of the Registrar on Libya's observations regarding the arrest of Saif Al-Islam Gaddafi", 23 January 2012, ICC-01/11-01/11-44-Conf-Anx1

⁶ ICC-01/11-01/11-51-Conf, and ICC-01/11-01/11-50-Conf-Exp.

allow the domestic authorities to investigate Mr. Gaddafi for other crimes.⁷ The Chamber therefore ordered the Libyan authorities to:

- i. make their decision to grant the surrender request and inform the Chamber within seven days of notification of the Arabic translation of the decision;
- ii. arrange with the Registry for the surrender of Mr. Gaddafi to the ICC; and
- iii. inform the Court within fourteen days of the notification of the Arabic translation of the arrangements for surrender.

12. The Registrar sent the Arabic translation of the decision to the Libyan authorities on 13 March 2012, and the Libyan authorities acknowledged receipt on 15 March 2012.⁸

13. On 22 March 2012, the Libyan authorities notified the Pre-Trial Chamber of their intention to challenge admissibility, on the grounds that they were investigating Mr. Gaddafi for allegations of crimes against humanity falling under the scope of Article 7 of the Statute.⁹ The Libyan authorities indicated that they intended to file such a challenge by 30 April 2012, and further requested the Pre-Trial Chamber to suspend the surrender request pursuant to Article 95 of the Statute.

14. On 26 March 2012, the Pre-Trial Chamber ordered the Prosecution and the OPCD to file any responses to the Notification by 30 March 2012.¹⁰

15. On 27 March 2012, the OPCD requested the Pre-Trial Chamber to make a finding of non-compliance, in light of the fact that the Libyan authorities had failed to notify the Pre-Trial Chamber by 23 March 2012 of their decision, in principle, to surrender Mr. Gaddafi to the ICC.¹¹ The OPCD further requested the Pre-Trial Chamber to order the Libyan authorities to immediately inform the ICC as to whether they will surrender Mr. Gaddafi to the ICC, and to remind the Libyan authorities of their obligation to inform the Court by 30 March 2012 concerning the modalities of the surrender of Mr. Gaddafi to the ICC.

16. The OPCD hereby files its observations. The OPCD has submitted both a confidential *ex parte* (OPCD Registry only) version, and a confidential, redacted, version. The former is justified due to the fact that the OPCD has cited information that is currently subject to a confidential *ex parte* classification. In the event that the Chamber

⁷ ICC-01/11-01/11-72-Conf, 7 March 2012.

⁸ ICC-01/11-01/11-83-Conf-Corr-Anx1.

⁹ 'Notification and Request by the Government of Libya in Response to 'Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi'', ICC-01/11-01/11-82-Conf.

¹⁰ Order on the filing of responses to the "Notification and Request by the Government of Libya in response to 'Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi'", ICC-01/11-01/11-85-Conf.

¹¹ ICC-01/11-01/11-87-Conf.

reclassifies the Chamber's decisions of 3 February 2012 and 7 March 2012 and the Libyan authorities' filing of 22 March 2012, the OPCD will be in a position to file a public redacted version of the present response. The OPCD reiterates its concern that this shroud of confidentiality has given legitimacy to the failure of the Libyan authorities to surrender Mr. Gaddafi in a timely manner.

3. Submissions

Article 95 does not apply to requests for surrender, or requests made prior to the making of the challenge to admissibility

17. It is clear from the context and placement of Article 95 in the Statute that it is confined to forms of cooperation other than surrender. The ICC Appeals Chamber has held that in accordance with the Vienna Convention on the Law of Treaties,

The context of a given legislative provision is defined by the particular subsection of the law read as a whole in conjunction with the section of an enactment in its entirety.¹²

18. Articles 88 to 92 explicitly concern the details of arrest and surrender. In contrast, Articles 94 and 95 follow on from Article 93, which concerns *other* forms of cooperation, and precede Article 96, which addresses the contents of requests for other forms of assistance under Article 93.
19. During the drafting of the Statute, the Working Group on Cooperation placed the draft forms of Article 94 and Article 95 under Article 90, which was titled 'Other forms of Cooperation'. Although footnote 231 to the Working Group Reports stated that the "Working Group draws the attention of the Drafting Committee to the need to consider the question of the placement of this article",¹³ the fact that the final version of the Statute retained the grouping of Article 94 and Article 95 after Article 93 (Other forms of assistance) and before Article 96 (Contents of request for other forms of assistance under Article 96) demonstrates that the drafters considered that this would be the most appropriate location for Article 95, and that its location was not arbitrary but determinative of its content.
20. As found by the Pre-Trial Chamber, the deliberate placement of Article 94 after Article 93 and before Article 96 evidences the intention of the drafters that Article 94

¹² Situation in the Democratic Republic of the Congo "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" 13 July 2006, ICC-01/04-168, at para. 33.

¹³ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 15-17 July 1998, Official Records, Vol. III, at footnote 231.

was restricted to other forms of cooperation.¹⁴ If the drafters ultimately decided that Article 95 should also be placed after the relevant article concerning other forms of cooperation and before the article concerning contents of request for other forms of assistance, then it follows that the drafters also decided that Article 95 should be restricted in a similar manner to other forms of assistance.¹⁵

21. Both Article 94 and Article 95 specifically refer to the collection or preservation of evidence, as an indication of the genus of cooperation, which these articles are intended to encompass.¹⁶ In this regard, the specific reference in Article 95 to “the collection of **such** evidence” qualifies the type of request, which may be postponed, to requests concerning evidentiary issues. The word ‘such’ in this context must be given its plain meaning, which according to the Oxford Dictionary, is “of the type previously mentioned”.¹⁷ If the term evidence is not intended to qualify the type of request, which may be postponed, then the use of the word ‘such’ would be redundant.
22. Article 95 should in any case, be interpreted in a similar manner to article 94. The title of both articles is preceded with phrase ‘Postponement of execution of a request in respect of [...]’; the only difference concerns whether the request relates to an ongoing domestic investigation or prosecution, or an admissibility challenge. Neither the title of the articles nor their content distinguishes between the types of cooperation encompassed therein. Accordingly, if, as the Pre-Trial Chamber recently ruled, Article 94 does not extend to requests for surrender, then it also follows that neither does Article 95.¹⁸
23. It is also notable that Article 89, which is the governing provision on surrender, contains within it an express exception to the obligation to surrender. Article 89(2) provides that:

¹⁴ ICC-01/11-01/11-72-Conf at footnote 28, citing Report of the Working Group on International Cooperation and Judicial Assistance A/Conf.183/C.1/WGIC/L.11/Add. 2, 13 July 1998, at footnote 6.

¹⁵ W. Schabas, ‘Article 95, Postponement of execution of a request, admissibility challenge’, The International Criminal Court, A Commentary on the Rome Statute (Oxford University Press 2010) at p. 1031.

¹⁶ Article 94(2) provides that “[i]f a decision to postpone is taken pursuant to paragraph 1, the Prosecutor may, however, seek measures to preserve evidence, pursuant to article 93, paragraph 1 (j).” Article 95 states that the State may postpone the execution of a request under this part “unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to article 18 or 19”.

¹⁷ Oxford Online Dictionary, <http://oxforddictionaries.com/definition/such?region=us&q=such>

¹⁸ After comparing article 94(1) with the *lex specialis* of article 89(4), and taking into consideration drafting history and the views of commentators, the Pre-Trial Chamber concluded that “article 94 only applies to cooperation requests other than surrender, such as those identified in article 93 of the Statute”. ‘Decision on Libya’s Submissions Regarding the Arrest of Saif Al-Islam Gaddafi’, ICC-01/11-01/11-72-Conf, 7 March 2012, at para. 15.

See also B. Swart, ‘International Cooperation and Judicial Assistance’ in Cassese, Gaeta and Jones (eds.) The Rome Statute of the International Criminal Court Vol. II (Oxford University Press, 2002) at. 1694.

Where the person sought for surrender brings a challenge before a national court on the basis of the principle of *ne bis in idem* as provided for in article 20, the requested State shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility. If the case is admissible, the requested State shall proceed with the execution of the request. If an admissibility ruling is pending, the requested State may postpone the execution of the request for surrender of the person until the Court makes a determination on admissibility.

24. If Article 95 were interpreted to include all types of cooperation requests, which would then give State parties the right to postpone the surrender of a defendant if any challenge to admissibility was made, then the existence of a lesser, included exception within Article 89(2) would be “mere *surplusage*”.¹⁹
25. It also cannot be extrapolated from the existence of a right to postpone in connection with *ne bis in idem* challenges filed by the defendant that the State parties intended to create such an exception as concerns challenges to admissibility filed by State parties. State parties have a right that the defendant is tried in an effective and impartial manner, whether it be by the State itself or the ICC. In contrast, a defendant has a series of additional rights, as reflected in article 67(1), which do not inhere in the State. If a defendant has been acquitted pursuant to a domestic decision, then their transfer to the custody of the ICC detention unit would obviously constitute an unjustified, and disproportionate hardship. The defendant has a vested interest in enforcing their right not to be subjected to such a hardship. Article 89(2) thereby evidences the intention of the drafters that the interests and rights of the defendant should not be sacrificed over debates concerning the appropriate legal forum: “the international division of labour in prosecuting crimes must not be to the detriment of the apprehended person”.²⁰

¹⁹ On this account K. Heller has noted that “[t]he first part of Article 95 seems to imply that a state does not have to surrender a suspect if it is challenging admissibility. The second part, however, seems to imply that Article 95 actually applies only to cooperation challenges that deal with the collection of evidence (“collection of such evidence”). I have no idea how to reconcile those two aspects of Article 95, although I think the narrower reading is better — if Article 95 applies to all admissibility challenges, Article 89(2), which deals specifically with pending *ne bis in idem* admissibility challenges, is mere surplusage. That seems unlikely to me. That said, Article 89(2) literally deals only with *ne bis in idem* challenges brought by the suspect in national court (whatever that means), so perhaps the drafters intended to distinguish between personal and state challenges — personal challenges being subject to Article 89(2), state challenges being subject to Article 95. But that doesn’t make much sense. I don’t see why the two challenges should be treated any differently — and in any case, Article 95 does not apply only to state admissibility challenges. Personal *ne bis in idem* challenges are also brought under Article 19.” K. Heller ‘Does Libya Have to Surrender Saif to the ICC? (Answer: Yes)’, *Opinio Juris*. <http://opiniojuris.org/2011/11/23/does-libya-have-to-surrender-saif-to-the-icc-answer-yes/>.

²⁰ Prosecutor v. Kajelijeli Appeals Judgment, ICTR-98-44A-A, 23 May 2005, at para. 220.

26. Nonetheless, it would not be consistent with this intention to interpret Article 95 broadly to vest States with an unfettered power to delay surrender, without giving any recourse to a defendant who wishes to be transferred to the ICC due to the fact that they will not face a fair and impartial trial in the domestic jurisdiction, or their basic rights and security is imperilled. Given that the security of the defendant, who is the central actor in the case, is of far more importance than the security of evidence, it would also be illogical to create an exception in Article 95 to postponement as concerns the collection of evidence, but none as concerns the surrender of the person.
27. The present situation of Mr. Gaddafi underscores the fact that the postponement of surrender to the ICC could be extremely detrimental to the welfare of an individual, who has not joined the admissibility challenge of the State. Since the confirmation phase does not commence until the person has appeared before the ICC, the postponement of surrender would also be contrary to the right to expeditious proceedings, as enshrined in article 67(1) of the Statute.
28. The ability to unilaterally postpone of the surrender of the person would also be contrary to the underlying tenor of the ICC admissibility regime that the ICC Chamber has the exclusive competence to decide on matters of admissibility.²¹ Representatives of the NTC have announced their intention to complete the proceedings against Mr. Gaddafi prior to the elections in June 2012.²² Mr. Gaddafi potentially faces the death penalty for the crimes in question. Bearing in mind that the NTC has announced that it will not file its challenge until 30 April 2012, the applicable deadlines for responses, the need to incorporate victim participation into the resolution of such a challenge, and the statutory right to appeal, it is clear that the ICC will not be in a position to render its decision on the admissibility of the case until after Mr. Gaddafi has been tried, and potentially sentenced and executed by national authorities. The postponement of Mr. Gaddafi's surrender could therefore be at the cost of his life, which would make the outcome of admissibility proceedings a *fait accompli*, and thereby undermine the authority of the ICC Pre-Trial Chamber to make an effective determination as to where Mr. Gaddafi should be tried.

²¹ Prosecutor v. Kony et al., Decision on the admissibility of the case under article 19(1) of the Statute, 10 March 2009, ICC-02/04-01/05-377, at paras. 45-46.

²² "“If Abdullah Senussi is extradited to Libya, his trial and that of [Gaddafi son] Seif Al Islam will be held in the near future and before the general election” scheduled for June, said Baaja.” ‘Libya ready to try Gaddafi aide Ex-spy chief to face court before polls. (Agence France-Presse/Gulf News, 23 March, 2012).

29. In contrast, the physical transfer of the defendant to the custody ICC does not impact upon any of the rights of the State. The only prejudicial impact, which could arise from the continuation of the proceedings before the ICC pending the resolution of the admissibility challenge, is that the Prosecution's *continuing* investigations could interfere with the ability of national authorities to collect their own evidence. For this reason, article 19(7) of the Statute requires the ICC Prosecutor to suspend investigations, until such time that the Court makes a determination on admissibility. In this regard, Article 95 is directly complementary to Articles 18(2) and (6), and Articles 19(7) and (8). In the same way that Articles 18(2) and Article 19(7) give voice to the principle that the Prosecution's investigations should be suspended so as not to interfere with national proceedings through the collection or contamination of evidence, Article 95 gives the State the power to postpone the execution of requests for cooperation. Similarly, Article 95 includes the explicit exception that the State cannot postpone the execution of requests concerning the collection of evidence, that are the subject of a Court order pursuant to Articles 18 and 19. Article 18 (6) and Article 19(8) both permit the Prosecution to seek the authorization from the Chamber to take investigative and evidential steps.
30. Adopting a broad interpretation of Article 95 would thus be inconsistent with the fact that Articles 18(2) and (6), and Article 19(7) and Article 19(8) do not extend to issues concerning the surrender of the person to the ICC. It would also place it in conflict with Article 19(9).
31. In this regard, it is notable that Article 19(9) of the Statute explicitly states that the making of a challenge to jurisdiction or admissibility "shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge" (emphasis added). The sole purpose of an arrest warrant is to bring the person into the custody of the ICC. If Article 95 were interpreted to vest States with the unilateral power to postpone the person's surrender to the ICC, this would undermine the objective of the arrest warrant, and render the reference to 'warrant' in Article 19(9) inutile.
32. Moreover, when Articles 19(7) and (9) are read together, it suggests that whereas the making of an admissibility challenge can affect investigative actions, which arise *after* the admissibility challenge is made (as per article 19(7)), the purpose of Article 19(9) is to preserve the legal status of investigative acts, orders and decisions, which were issued *prior* to the making of the admissibility challenge. The scope of Article 95 is

clearly limited to the time period *after* an admissibility challenge has been made (“Where there is an admissibility challenge under consideration by the Court [...]”). It therefore follows that Article 95 only has legal effect as concerns requests and obligations, which arose after the filing of the admissibility challenge.

33. If the State was under an extant obligation to comply with a request for cooperation prior to the making of the admissibility challenge, Article 95 would not have the power to retrospectively excuse the State for non-compliance with the request in question. Otherwise, States could avoid or pre-empt the consequences of a finding of sustained non-compliance by filing a meritless admissibility challenge, which a view to retroactively excusing their non-compliance. Even if the challenge is eventually dismissed in an expeditious manner, the State could remain in non-compliance for at least another five months due to the fact that there is a statutory right to appeal admissibility decisions.²³ In the current case, Libya could potentially remain in non-compliance with the obligation to surrender Mr. Gaddafi for a period of approximately 11 months (dating from November 2011). This would render Article 87(7) inoperative, and put key cooperation issues, which could be time sensitive, beyond the power of the Chamber, the Assembly of State Parties or the Security Council to adjudicate. Given that an Article 16 deferral for 12 months requires the unanimity of the permanent members of the Security Council, it would be astounding if a State could lawfully stymie the commencement of proceedings before the ICC for a similar period *via* Article 95.
34. Accordingly, in order to be consistent with Articles 19(7) and 19(9), the reference to requests in Article 95 should be construed to encompass requests, which were made *after* the admissibility challenge was made. This is consistent with the observation of B. Swart that:

Paragraph 9 of Article 19 provides that the making of a challenge shall not affect the validity of any order or warrant issued by the Court prior to the making of the challenge. Warrants for arrest and surrender issued prior to the making of a challenge must, therefore, be executed.²⁴

²³ The Kenya admissibility challenge was filed 31 March 2011, and the Appeals Chamber rendered its judgment on 30 August 2011.

²⁴ B. Swart, ‘International Cooperation and Judicial Assistance’ in Cassese, Gaeta and Jones (eds.) The Rome Statute of the International Criminal Court Vol. II (Oxford University Press, 2002) at 1694. See also C. Hall, ‘Article 19’ in O. Triffterer (ed.) Commentary on the Rome Statute of the International Criminal Court (Hart Publishing 2008) pp. 664-665. “Since the making of a challenge has no effect on the validity of any order or warrant issued before a challenge, that means that an order or warrant issued before the challenge, including a warrant based on a sealed application, can still be executed after the challenge, thus preventing uncooperative States - which could be non-State parties – from disrupting the investigation in a manner which could obstruct international justice.”

35. Since the obligation of the Libyan authorities to surrender Mr. Gaddafi predates the putative admissibility challenge by at least five months, Article 95 cannot be invoked to exempt them from their continued non-compliance with the terms of the arrest warrant, and Security Council Resolution 1970.

Even if article 95 extended to requests for surrender, it cannot be invoked in connection with hypothetical challenges to admissibility or challenges which are not filed in a timely and diligent manner

36. Article 95 commences with the phrase “[w]here there is an admissibility challenge under consideration by the Court [...]”. The Court can only consider something which has been filed before it. Accordingly, irrespective of the correct interpretation of Article 95, it is very clear that it only applies once an admissibility challenge has been filed. It is not possible for a State to seek suspensive effect in connection with the mere hypothetical possibility that they will file a challenge to admissibility in the future.
37. The underlying principles of complementarity also do not require the Court to interpret the reference to an admissibility challenge in Article 95 in a flexible manner. As found by the ICC Appeals Chamber, the so called ‘presumption in favour of domestic jurisdictions’ does not oblige the Court to accord domestic authorities leeway to allow domestic investigations to progress to such a point, where they would trigger the admissibility threshold; this presumption in favour of domestic jurisdictions only applies when there is, or has been, a concrete investigation and prosecution against the defendant.²⁵ Similarly, the right to postpone requests for cooperation only crystallizes where there has been a concrete admissibility challenge.
38. Article 95 can also only be invoked in connection with an admissibility challenge, which is itself, receivable. Article 19(5) of the Statute provides that a State challenging admissibility “shall make a challenge at the earliest opportunity”. Although national authorities are not required to file such a challenge as soon as the arrest warrant or summons was issued, they must do so that the earliest point, in which they were in a position to assert a conflict between jurisdictions.²⁶ The Appeals Chamber has also emphasized that in determining the imposition of an appropriate deadline, the

²⁵ ICC-01/09-01/11-307 at para. 44.

²⁶ Prosecutor v. Ruto et al., 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", 30 August 2011, ICC-01/09-01/11-307 at para. 100.

Chamber's must take into consideration their obligation to ensure that the proceedings are fair and expeditious,²⁷ and considerations of efficiency and judicial economy.²⁸ As elaborated by Trial Chamber II,

This emphasis, in article 19 of the Statute and rule 58 of the Rules, that challenges to admissibility be heard as early as possible and without undue delay, can be explained by the principle of complementarity. The drafters of the Statute clearly intended the Court to complement national courts, not to compete with them. Consequently, they endeavoured to avoid parallel and competing proceedings. In this regard, article 19(7) of the Statute specifically provides for the suspension of investigations by the Prosecutor when the admissibility of a case is challenged. Furthermore, given that investigations into crimes falling within the jurisdiction of the Court are very costly in terms of time and resources, it is in the interests of all, and primarily the suspects who have been deprived of their liberty, that the court with jurisdiction to try the case be determined as quickly as possible.²⁹

39. There is also an obligation on all participants involved in the judicial process to "to act in a diligent and expeditious manner in the performance of their obligations".³⁰ Strategic concerns regarding the optimum time for filing a motion are also ultimately subject to this requirement of diligence and expedition.³¹
40. The NTC has informed the Chamber that they intend to file their challenge to admissibility by 30 April 2012, which will be over five and a half months after Mr. Gaddafi was first arrested. If Mr. Gaddafi had been transferred to the ICC, it would have been possible to complete the confirmation phase within this time period. During this time period, Mr. Gaddafi has been available for questioning by national authorities. If the national authorities were in a position to commence investigations against Mr. Gaddafi for the crimes of murder, rape, and torture *inter alia*, there does not appear to be any security or technical reason as to why they were not able to extend these investigations to encompass the same conduct before the ICC. There therefore does not appear to be any objective basis for failing to file a challenge to admissibility at an earlier stage.
41. To the contrary, it would appear that the NTC's evinced intention to shift its investigative focus to encompass Article 7 crimes is purely strategic in nature. In the

²⁷ Prosecutor v. Katanga and Ngudjolo, 'Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings"', ICC-01/04-01/07-2259, 12 July 2012, at para. 33.

²⁸ ICC-01/04-01/07-2259, at para. 40.

²⁹ Prosecutor v. Katanga and Ngudjolo, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), 16 June 2009, ICC-01/04-01/07-1213-tENG.

³⁰ ICC-01/04-01/07-2259 at para. 43.

³¹ ICC-01/04-01/07-2259, at para. 77.

four and a half month period since Mr. Gaddafi was arrested, the NTC has sought an extension of time, within which to inform the Chamber as to if and when it intends to surrender Mr. Gaddafi, a postponement of surrender pursuant to Article 94, and now a postponement of surrender pursuant to Article 95.

42. The first request for the extension of time was motivated by the existence of 'security reasons', which hindered the NTC from being able to answer the questions of the Chamber.³² However, there does not appear to be anything in their resultant observations, which could have been impacted upon by such security reasons.³³
43. The request for postponement of surrender under Article 94 was motivated by the NTC's objective of investigating Mr. Gaddafi for the following crimes: "Murder, Mass Murder, Torture, Rape, and Financial Corruption, and stealing a very large sums of public funds in Libya and abroad".³⁴ The NTC therefore argued that the execution of the warrant of arrest would interfere with these investigations.
44. Notwithstanding these professed intentions, both the OPCD and the Representative of the Registrar were informed that Mr. Gaddafi had only been questioned in connection with his alleged failure to have licences for two camels, and cleaning of fish farms.³⁵ Such crimes would not have justified his detention under Libyan law, let alone the postponement of an arrest warrant for crimes against humanity. It is also clear that the transfer of Mr. Gaddafi to the ICC would not have impacted on the ability of the NTC to prosecute such allegations.
45. The Libyan coordinator for the ICC also informed both Mr. Gaddafi and the OPCD independently that the investigations against Mr. Gaddafi for more serious crimes had been terminated due to lack of evidence.³⁶ This lack of evidence has been attested to by Libyan authorities in news reports.³⁷
46. Notwithstanding these professed intentions, almost as soon as the Libyan authorities were notified of the Pre-Trial Chamber's decision rejecting the Article 94 request for

³² ICC-01/11-01/11-41-Conf-Exp-Anx2

³³ ICC-01/11-01/11-44-Conf-Anx1

³⁴ ICC-01/11-01/11-44-Conf-Anx1 at p. 3.

³⁵ Report of the Registry on the Trip to Libya, ICC-01/11-01/11-71-Conf-Exp, at para. 25; Addendum to the Urgent Report Concerning the Trip to Libya, ICC-01/11-01/11-70-Conf-Exp at para. 38.

³⁶ Addendum to the Urgent Report Concerning the Trip to Libya, ICC-01/11-01/11-70-Conf-Exp at paras. 39, and 49.

³⁷ "The I.C.C. wants Seif al-Islam for sure, because they say our justice system isn't effective," said Fathi Baja, a member of Libya's Transitional National Council. He noted that the Libyan authorities did not yet have the ability to properly gather evidence or present a case. "If you bring him to trial under these conditions, I think he will be found innocent," he said, adding, "We are asking the attorney general to speed up the process because of the pressure from the street." D. Kirkpatrick and M. Simons, 'Libya Resists International Court's Claim on War Crimes Case', 21 March 2012, [New York Times](#).

postponement,³⁸ the NTC informed the Court of their intention to challenge admissibility, and to seek a postponement on that basis.³⁹

47. The day after the notification of the decision, the Libyan authorities also sent an SMS to all mobile phones in Libya requesting “all citizens to come forward with any information, complaints or documents related to the former regime aides so as to enable the Public Prosecutor to bring them to trial as soon as possible.”⁴⁰ It is self-evident that it is not possible to conduct an independent, effective, and impartial investigation in such a manner, and that such an approach will not capture exculpatory evidence from persons, who may fear retaliation or prosecution if they come forward.
48. The above history demonstrates that the request to postpone the surrender of Mr. Gaddafi is not a means to an end associated with legitimate domestic investigations or a credible admissibility claim; it is an end in itself. The NTC’s requests to postpone the surrender of Mr. Gaddafi have not been driven by the independent and impartial requirements of domestic investigations; to the contrary, the prosecuting authorities appear to have manipulated the status of domestic investigations in order to meet the political and strategic imperative that Mr. Gaddafi should not be transferred to the ICC.
49. This appearance is underscored by the fact that the person allegedly responsible for framing the domestic charges against Mr. Gaddafi is the Libyan Coordinator to the ICC, who also professed the predetermined view that Mr. Gaddafi had committed the crimes in question.⁴¹ It was also patently clear during the OPCD Registry mission to Libya that key decisions concerning Mr. Gaddafi’s detention rights are the subject of political wrangling and financial negotiations.⁴²
50. As noted in the OPCD Request for a Finding of Non-Compliance, a good faith request for postponement under Article 95 presupposes that the State would, in principle, be willing to execute the request if the admissibility challenge had either not been filed, or if it is ultimately rejected. Nonetheless, the Libyan authorities have at no stage indicated that they would be willing, in principle, to surrender Mr. Gaddafi to

³⁸ According to the report of the Registry, it was notified on 15 March 2012. ICC-01/11-01/11-83-Conf-Corr-Anx1

³⁹ The unsigned version of the NTC request to postpone pursuant to article 95 was filed on 21 March 2012. ICC-01/11-01/11-83-Conf at p. 4.

⁴⁰ See Annex 1 (the message in Arabic and the English translation). This text message was sent by the Prosecutor General Abdelaziz Al Hasadi, ‘Libya ready to try Gaddafi aide Ex-spy chief to face court before polls. (Agence France-Presse/Gulf News, 23 March, 2012).

⁴¹ ICC-01/11-01/11-70-Conf-Exp, at para. 39; ICC-01/11-01/11-71-Conf-Exp at para. 33; ICC-01/11-01/11-69-Conf-Exp at para. 14.

⁴² ICC-01/11-01/11-69-Conf-Exp at paras. 30 and 39.

the ICC if the admissibility challenge is not filed, or is dismissed. Indeed, notwithstanding the existence of an ICC decision ordering them to surrender Mr. Gaddafi to the custody of the ICC, the Libyan authorities continued to maintain publicly that they had a right to try him in Libya.⁴³

51. Their lack of *bona fides* in this regard is further exemplified by the fact that they have never served the ICC arrest warrant on Mr. Gaddafi or brought him before a judge, as required by Article 59 of the Statute. In terms of the latter aspect, even if the Libyan authorities considered that they had a valid ground for eventually postponing surrender, there is no valid reason why they have failed to comply with these preliminary steps, which would have been without prejudice to his eventual surrender.⁴⁴
52. The fact that the Libyan authorities have not been able to obtain relevant evidence against the defendant also does not lessen either their evidential burden or their duty to bring such a challenge in an expeditious and diligent manner. As found by the Appeals Chamber in the Ruto et al. case, "if a State does not investigate a given suspect because of lack of evidence, then there simply is no conflict of jurisdictions, and no reason why the case should be inadmissible before the Court".⁴⁵ If the Libyan authorities were unable to collect any evidence of rape, murder, torture and serious financial corruption during their investigations from 18 November until the beginning of March, then it is difficult to give any credence to their stated intention to file an admissibility challenge, which must be supported by concrete evidence, within 42 days.
53. On the basis of the above, there does not appear to have been any change in circumstances, which would mean that the Libyan authorities are now in a position to

⁴³ "Mustafa Abu Shagour, deputy prime minister in the interim Libyan government, and other officials have said that the International Criminal Court consented to a trial in Libya under its supervision." D. Kirkpatrick, M. Simons 'Libya Resists The Hague in War Crimes Case' *New York Times*, 21 March 2012.

"Ahmed Jehani, Tripoli's representative at the ICC, said The Hague-based court has been putting "pressure on Libya to begin the trial of Saif al-Islam or to hand him over" to the tribunal." 'Libya vows trial for Gaddafi spy chief', 22 March 2012, <http://www.news24.com/Africa/News/Libya-vows-trial-for-Gaddafi-spy-chief-20120322>.

⁴⁴ In this regard, whilst Article 89(2) permits a State to defer surrender if the defendant files a *ne bis in idem* claim, it does not permit the State to defer the execution of the arrest warrant itself. B. Swart comments on Article 89(2) that if "an admissibility ruling is pending, the requested State may postpone the execution of the request for surrender until the Court makes a determination of admissibility. It follows *a contrario* from paragraph 2 that the execution of requests for arrest of the person may not be postponed". B Swart, 'International Cooperation and Judicial Assistance' in Cassese, Gaeta and Jones (eds.) *The Rome Statute of the International Criminal Court Vol. II* (Oxford University Press, 2002) at. 1694.

⁴⁵ Prosecutor v. Ruto et al., 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", 30 August 2011, ICC-01/09-01/11-307, at para. 43.

assert a conflict of jurisdiction, whereas they were not previously. Article 95 cannot be validly invoked in connection with a challenge, which the Libyan authorities failed to bring in an expeditious manner due to strategic concerns, which have ultimately proved detrimental to the interests of the defendant, and the objective of fair, impartial, and expeditious proceedings.

Article 95 must also be interpreted and applied in a manner which is consistent with Article 21(3), and the internationally recognized rights of the defendant

54. The provisions of the Statute must also be interpreted in a manner which is consistent with internationally recognised human rights. The resultant delay in the transfer of Mr. Gaddafi to the ICC has been and will continue to be extremely deleterious to the enforcement of his rights.
55. As the Libyan authorities have formally announced that they are now investigating him for conduct, which falls under the Rome Statute, it is indisputable that Mr. Gaddafi must be afforded the protections of the Rome Statute, including the protection against arbitrary detention, and the right to legal representation.
56. As noted above, irrespective as to the scope of Article 95, it is clear that it does not exempt the Libyan authorities from the obligation to apply Article 59, and to ensure that Mr. Gaddafi's rights under Article 55 are respected. Nonetheless, Mr. Gaddafi has not been brought before a Judge either in connection with the ICC arrest warrant or the domestic proceedings; the Libyan authorities have also indicated that they do not consider that such a right exists under Libyan law.⁴⁶ [Redacted].⁴⁷
57. Mr. Gaddafi has not had any visits from family members or friends, and was informed that it would not be possible to have such visits.⁴⁸ This information is consistent with the refusal of the NTC authorities to provide the OPCD with any information or contact details for the organisation of such family visits.⁴⁹ Apart from one two hour meeting, Mr. Gaddafi has not been able to benefit from legal representation either in connection with the domestic proceedings or the proceedings before the ICC, and has no ability to receive privileged documentation from his counsel on an ongoing basis or to make privileged communications.⁵⁰

⁴⁶ ICC-01/11-01/11-69-Conf-Exp at para. 25.

⁴⁷ ICC-01/11-01/11-71-Conf-Exp at para. 21; ICC-01/11-01/11-69-Conf-Exp at para. 26.

⁴⁸ ICC-01/11-01/11-70-Conf-Exp at para. 45.

⁴⁹ ICC-01/11-01/11-70-Conf-Exp at para. 48; ICC-01/11-01/11-69-Conf-Exp at paras. 20 and 22.

⁵⁰ ICC-01/11-01/11-69-Conf-Exp at para. 22.

58. [Redacted].⁵¹ Mr. Gaddafi has also suffered physical pain due to the absence of dental treatment.⁵² As of the date of this filing, the Libyan authorities have also failed to take any steps to remedy this pain by according Mr. Gaddafi the medical and dental treatment ordered by the Chamber almost a month ago.⁵³

59. The fact that Mr. Gaddafi has been kept in incommunicado detention without effective legal representation has also made him very vulnerable to the influence of prosecuting authorities. As noted above, Dr. Gehani informed Mr. Gaddafi and the OPCD that the domestic investigations against Mr. Gaddafi for serious crimes has been terminated for lack of evidence. Dr. Gehani also stressed to the OPCD that given the trivial nature of the crimes being pursued by the domestic authorities, it would be better for Mr. Gaddafi to be tried by domestic authorities. As noted by the OPCD in its report to the Chamber, in light of these circumstances, it is possible that:

Dr. Gehani may have provided Mr. Gaddafi with the information concerning the supposed termination of their investigation into other crimes immediately before Mr. Gaddafi's meeting with the Registry and the OPCD, in order to influence any preferences that Mr. Gaddafi expressed to the Registry and the OPCD.⁵⁴

60. During the OPCD's meeting with Mr. Gaddafi, Mr. Gaddafi also indicated that he had believed that it was not prejudicial to his interests to speak to the domestic Prosecutors or to sign documentation because of the trivial nature of their inquiries. Mr. Gaddafi therefore acted to his detriment on the basis of the Prosecutor's assertions that the domestic inquiries would be limited to these allegations.

61. Having sought to influence the legal strategy of Mr. Gaddafi in this manner, it is potentially an abuse of process for the Libyan authorities to completely reverse their position not because of objective, evidential issues (such as the emergence of new and compelling evidence), but simply because their strategic desire to defer his surrender to The Hague was thwarted.⁵⁵ Moreover, irrespective as to the outcome of the

⁵¹ ICC-01/11-01/11-70-Conf-Exp at paras. 23-27.

⁵² ICC-01/11-01/11-70-Conf-Exp at para. 29.

⁵³ ICC-01/11-01/11-75-Conf-Exp.

⁵⁴ ICC-01/11-01/11-70-Conf-Exp at para. 51.

⁵⁵ The ICC Appeals Chamber has explicitly mentioned "broken promises to an accused with regard to his prosecution" as an example of the abuse of process doctrine. *Prosecutor v. Lubanga*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772, at para. 29.

The European Court of Human Rights found in the case of *Mustafa Kamal Mustafa (Abu Hamza) (No. 1) v. UK* that "an issue may arise under Article 6 where a legitimate expectation is created by the actions of the authorities and a defendant acts upon that legitimate expectation to his detriment (see, for example, *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, §§ 138 and 139, ECHR 2009). Consequently, the Court would not exclude the possibility

Libyan's putative admissibility challenge, there is incontrovertible evidence that the Libyan authorities have either been unable or unwilling to accord Mr. Gaddafi the protections he deserves under the law.

62. If the Chamber were to countenance any further delays in the surrender of Mr. Gaddafi, the Chamber would effectively be condoning and protracting the above abuses: as forcefully stated by the ICTR Appeals Chamber, "[t]he Tribunal—an institution whose primary purpose is to ensure that justice is done—must not place its imprimatur on such violations".⁵⁶

63. The Chamber's duty to apply the Statute in a manner which is consistent with article 21(3) translates to a duty to not only provide a remedy in case there has been a violation of the accused's rights, but to also take pre-emptive steps to ensure that the procedures of the court are not abused or exploited, in a manner which is detrimental to the rights of the defendant. In the context of the shared duty between the International Tribunal and domestic authorities concerning the implementation of a suspect's rights, the ICTR Appeals Chamber has endorsed the statement of Judge Vohrah that:

if an accused is arrested or detained by a state at the request or under the authority of the Tribunal even though the accused is not yet within the actual custody of the

that, if a defendant were given an assurance by the prosecuting authorities that he would not be prosecuted for certain offences and the authorities subsequently reneged on that assurance, the subsequent criminal proceedings would be unfair." (Application no. 31411/07 (Decision on inadmissibility, 18 January 2011).

The jurisprudence of the United Kingdom also recognises that unfairness may arise where proceedings are commenced or continued in breach of a promise not to prosecute: *R v Croydon Justices ex parte Dean* [1993] Q.B. 769. In the case of *In R v Bloomfield* [1997] 1 Cr. App. R. 135, it was held to have been an abuse of process to proceed with a prosecution where, at a previous plea and directions hearing, prosecuting counsel had indicated informally to defence counsel that the prosecutor proposed to offer no evidence against the defendant. This proposal had been repeated before the judge in his chambers. The Court found that it was an abuse of process to proceed with the prosecution. In the case of *R v Abu Hamza* [2007] 1 Cr. App. R. 27, the Lord Chief Justice found, at para. 50, that "circumstances can exist where it will be an abuse of process to prosecute a man for conduct in respect of which he has been given an assurance that no prosecution will be brought. It is by no means easy to define a test for those circumstances other than to say that they must be such as to render the proposed prosecution an affront to justice." In the case of *R v (Nadarajah) v SoS Home Department, R (Abdi) v Same* [2005] TLR 14 December, the Court of Appeal found that where a public authority has issued a promise or adopted a practice which represented how it proposed to act in a given area, the law would require the promise or practice to be honoured unless there was a good reason not to do so.

In the Ugandan case of *Musoke v. Uganda* [1972] E.A. 137, the Court found that it was an abuse of process to first charge the defendant with a lesser offence, and then each and every time the defendant's bail came up, amend the charges to include more serious allegations with a view to ensuring that the defendant was not released. See also the Tanzanian case of *Director of Public Prosecutions v. Mehboob Akbar Haji & Another*, Cr. App. No. 28 of 1992 (The latter two cases are cited in D. Nsereko, 'The Abuse of Process Doctrine in the Administration of Criminal Justice Before National Courts and International Tribunals', 7 U. Botswana L.J. 29 2008).

⁵⁶ *Prosecutor v. Barayagwiza*, Decision (Appeals Chamber) 3 November 1999, at para. 112.

Tribunal, the Tribunal has a responsibility to provide whatever relief is available to it to attempt to reduce any violations as much as possible.⁵⁷

64. The Chamber also has an independent duty under Article 68(1) of the Statute to protect the safety, physical and psychological well-being of victims and witnesses. Mr. Gaddafi is a witness in his own case, a victim of moral and physical harm, and a person at risk on account of the activities of the Court. Article 57(3)(c) also permits the Chamber to take measures for the protection of a person who has been arrested.
65. The above duties translate to an obligation to ensure that there are no further delays in surrendering Mr. Gaddafi to the ICC, and that the Libyan authorities immediately take steps to surrender Mr. Gaddafi in a secure manner to the custody of the ICC.

4. Relief Sought

66. The OPCD respectfully requests the Honourable Pre-Trial Chamber to reject the request of the Libyan authorities to postpone the surrender of Mr. Saif Al-Islam Gaddafi, and order the Libyan authorities to immediately surrender him to the custody of the ICC.



Xavier-Jean Keïta, Principal Counsel of the OPCD

Dated this, 30th Day of March 2012

At The Hague, The Netherlands

⁵⁷ Prosecutor v. Kajelijeli Appeals Judgment, ICTR-98-44A-A, 23 May 2005 at para. 223, citing the Semanza, Decision, 31 May 2000, Declaration of Judge Lal Chand Vohrah, para. 6.