

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/11-01/11**

Date: **12 April 2012**

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

**Response to the “Government of Libya’s Application for Leave to Appeal the
“Decision Regarding the Second Request by the Government of Libya for
Postponement of the Surrender 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:

The Office of the Prosecutor

Mr. Luis Moreno-Ocampo, Prosecutor
Ms. Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

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

Mr. Xavier-Jean Keïta, Principal Counsel
Ms. Melinda Taylor, Counsel

States' Representatives

Mr. Philippe Sands
Mr. Payam Akhavan
Ms. Michelle Butler

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia, Registrar

Deputy Registrar

Mr. Didier Daniel Pereira, Deputy
Registrar

Victims and Witnesses Unit

Counsel Support Section

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Office of Public Counsel for the Defence (OPCD) respectfully requests the Honourable Pre-Trial Chamber to reject the Request for Leave to Appeal filed by the Libyan authorities due to the fact that firstly, the Libyan authorities have no standing to invoke Article 82(1)(d) of the Statute, particularly as concerns issues which are not related to the merits of the case, and secondly, the Libyan authorities have not satisfied the cumulative requirements of Article 82(1)(d) of the Statute.

2. The fact that the Libyan authorities have filed a request for leave to appeal does not exempt them from compliance with the Chamber's decision. ICC decisions are binding until such time as they are reversed, or suspended. Neither the Pre-Trial Chamber nor the Appeals Chamber have suspended the effect of the Pre-Trial Chamber's decision ordering the immediate surrender of Mr. Saif Al-Islam Gaddafi. The Libyan authorities were obliged to surrender Mr. Gaddafi to The Hague since the date of his arrest on 19 November 2011, and they continue to remain under this obligation.

3. The Libyan authorities have not submitted any information that they have brought Mr. Gaddafi before a judge pursuant to Article 59 of the Statute, or taken any steps to arrange for his surrender to the ICC. To the contrary, in several media reports, the Libyan authorities have definitively stated that he will be tried in Libya, and will not be surrendered to the ICC. The OPCD therefore submits that it is both appropriate and necessary to render a finding of non-compliance at this juncture.

Procedural History

4. 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 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.

¹ ICC-01/11-01/11-34-Anx.

5. 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
6. 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
7. 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.
8. The OPCD and the Prosecution filed their respective responses on 2 February 2012.⁶
9. 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.

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

11. 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 (the Notification).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.

12. On 4 April 2012, the Pre-Trial Chamber rendered its ‘Decision Regarding the Second Request b y the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi’ (the Decision), in which the Chamber rejected the request for postponement on the grounds that, irrespective as to whether Article 95 extends to surrender requests, it cannot be invoked in connection with an admissibility challenge which had not yet been filed.¹⁰

13. On 10 April 2012, the Libyan authorities filed their request for leave to appeal the Decision pursuant to Article 82(1)(d) of the Statute (the Request).¹¹ At the same time,

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 ICC-01/11-01/11-100 at para. 18.

¹¹ ‘Government of Libya’s Application for Leave to Appeal the “Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi”’, ICC-01/11-01/11-102.

the Libyan authorities also directly seized the Appeals Chamber of an appeal against the decision pursuant to Article 82(1)(a) of the Statute.¹²

Submissions

1. Libya has no standing to file an appeal under article 82(1)(d)

14. The possibility to request authorisation to file an interlocutory appeal under Article 82(1)(d) is subject to two important restrictions: firstly, it may only be invoked by a party to the proceedings, and secondly, its operation is confined to issues, which impact on the merits of the proceedings before the ICC. The Request is therefore irreceivable because Libya cannot be considered to be a party in relation to the present proceedings, and the present issues concerning the postponement of the surrender of Mr. Gaddafi are not related to the conduct of the proceedings before the ICC.

15. Article 82(1)(d) provides that “[e]ither party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence: [...] (d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”.

16. The introductory component of Article 82(1)(d) is even clearer in French: “L'une ou l'autre partie peut faire appel [...]”. The disjunctive reference to ‘one or the other party’ underscores the intention of the drafters that the operation of Article 82 is, in general, confined to the two parties to the proceedings, which are the Prosecution or the Defence. As found by Trial Chamber I in the Lubanga case:¹³

Although the Statute does not define the term "party" to the proceedings, the fact that certain provisions' in the Statute specifically enable a State to appeal particular decisions strongly suggests that the term "party to the proceedings" does not encompass a State Party. In addition, when dealing

¹² ‘Government of Libya’s Appeal Against the “Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi”’, ICC-01/11-01/11-103, 10 April 2012.

¹³ Prosecutor v. Lubanga, Decision on two requests for leave to appeal the "Decision on the request by DRC-DO1-WWW-0019 for special protective measures relating to his asylum application", ICC-01/04-01/06-2779, 4 August 2011, at para. 11.

with an appeal concerning the participation of victims during the proceedings, the Appeals Chamber decided that the term "parties" in Article 69 of the Statute refers to the defence and the prosecution only:

93. The Appeals Chamber considers it important to underscore that the right to lead evidence pertaining to the guilt or innocence of the accused and the right to challenge the admissibility or relevance of evidence in trial proceedings lies primarily with the parties, namely, the Prosecutor and the Defence. The first sentence of article 69 (3) is categorical: "[t]he parties may submit evidence relevant to the case, in accordance with article 64." It does not say "parties and victims may." [...].

17. This finding is consistent with the fact that according to the jurisprudence of the Court, victims, who are participants rather than parties, may not invoke the provisions of Article 82(1)(d) of the Statute, notwithstanding the fact that decisions concerning their status and modalities of participation directly impact on their rights.¹⁴ There is thus a clear distinction between the appellate rights of parties, and participants.
18. It is also apparent from a contextual reading of the Statute and Rules that the term ‘party’ in Article 82(1)(d) should be confined to the Prosecution and Defence. For example, Article 81(1) provides that a final appeal may only be appealed by the Prosecutor or the convicted person. Rule 150, which addresses the procedure for final appeals, uses the term ‘party’ to refer to the entities, which are entitled to file such an appeal.
19. Moreover, as noted by Trial Chamber I, where the drafters intended States to be able to appeal a decision, they expressly so provided. For example, Article 82(2) of the Statute provides that “[a] decision of the Pre-Trial Chamber under article 57, paragraph 3(d), may be appealed against by the State concerned or by the Prosecutor, with the leave of the Pre-Trial Chamber”. In accordance with the maxim of *ubi lex voluit dixit, ubi noluit tacuit*,¹⁵ it can be inferred from the explicit reference to States in article 82(2) that had the State parties wished to extend the general parameters of

¹⁴ DRC situation, Decision on the Application for Leave to Appeal the Decision on the Requests of the OPCV, ICC-01/04-437, 18 January 2008, at p. 3; DRC situation, Decision on the Requests of the OPCV, ICC-01/04-418, 10 December 2007, at para. 16.

¹⁵ Kenya situation, Decision on the "Application for Leave to Participate in the Proceedings before the Pre-Trial Chamber relating to the Prosecutor's Application under Article 58(7)", 11 February 2011, ICC-01/09-42, para.18.

Article 82(1) to States, then they would have explicitly so stated. The Statute also clearly enumerates instances in which States can invoke the provisions of Article 82, as is the case with Article 18(4) of the Statute, and Article 19(6) of the Statute. If Article 82(1) should be implicitly interpreted to encompass States, then it would not have been necessary to include such explicit provisions; the existence of express exceptions excludes any unwritten exceptions (*expressio unius est exclusio alterius*).¹⁶

20. Similarly, the Appeals Chamber has noted that “[t]he decisions that are subject to appeal are enumerated in article 81 and 82 of the Statute. There is nothing in Part 8 to suggest that a right to appeal arises except as provided thereunder”.¹⁷ The explicit reference in Article 82(2) to one specific type of issue concerning cooperation thus underscores the fact that the drafters did not consider that all cooperation issues or requests should be subject to appellate review. To the contrary, the Statute includes specific mechanisms, such as the complex interplay of consultation proceedings set out in Part 9, which obviate the need for potentially time consuming appellate review. According States an ability to seek leave to appeal decisions concerning Article 94 and 95 would also frustrate the purpose of these articles, which is to regulate and restrict the instances in which States may postpone time sensitive cooperation requests.

21. Article 82(1)(d) is also confined to issues, which impact on the conduct of the proceedings before the ICC. Trial Chamber II has observed as follows:¹⁸

The Chamber emphasises that the article deals with what is termed “interlocutory appeals”, that is, appeals against decisions termed “intermediate” that may, in any event, generally be contested in an appeal on the merits. Recalling that “the object of paragraph (d) of article 82 (1) of the Statute is to pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial”, the Chamber considers that appeals against such decisions are subject to the leave of the Trial Chamber because only the Trial Chamber is in a position to determine whether an immediate resolution of an issue by the Appeals Chamber is necessary to advance the proceedings. This mechanism ensures that appeals on issues that

¹⁶ Prosecutor v. Delalic, Trial Judgment, 16 November 1998, at para. 166.

¹⁷ DRC situation, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2008, at para. 35.

¹⁸ Prosecutor v. Katanga and Ngudjolo, Decision on three applications for leave to appeal Decision ICC-01/04-01/07-3003 of 9 June 2011, ICC-01/04-01/07-3073, at paras. 6 and 8.

could be addressed, where necessary, only in an appeal against a final judgment, do not unduly delay the proceedings. Hence, this article unequivocally concerns decisions falling within the ambit of the conduct of the trial. [...] Finally, it must indeed be acknowledged that individuals or organs and institutions on which this decision has a direct impact may not appeal against it when appeals against the final judgment are lodged. The Prosecutor rightly emphasises, in fact, that there is no realistic likelihood that the Decision can be reviewed within the framework of an appeal against a final judgment. This is therefore a decision that seems entirely discrete from the proceedings.

22. These findings are equally applicable to the present situation. The Libyan authorities will have no right to appeal either the confirmation decision, or if the charges are confirmed, the trial judgment. The Chamber's decision on the Libyan authorities' request to postpone Mr. Gaddafi's surrender to the ICC will also not form part of the confirmation decision or any future trial judgment, in particular, because the OPCD requested Mr. Gaddafi's surrender to the ICC, and the Prosecution took no position on the issue. The Decision therefore concerned a discrete issue, which is independent of the merits or conduct of the proceedings before the ICC. The issue therefore does not fall within the framework of interlocutory appellate review.

2. The Libyan authorities have failed to comply with the criteria under article 82(1)(d) of the Statute

23. Even if Article 82(1) of the Statute could be construed to encompass States, the Request has failed to demonstrate that the cumulative criteria of article 82(1)(d) are met. As a preliminary point, the Libyan authorities have failed to adduce any arguments as to how the issue in question impacts on the expeditiousness of the proceedings. Since the expeditiousness of the proceedings is an independent criterion, which must be satisfied, the Request can be dismissed on this basis alone.¹⁹ In any case, the Libyan authorities have failed to identify an issue, which arises from the decision, impacts on the fairness of the proceedings, or for which an immediate decision of the Appeals Chamber would materially advance the proceedings.

¹⁹ Prosecutor v. Lubanga, Decision on the prosecution request for leave to appeal the "Decision on Intermediaries", 2 June 2010, ICC-01/04-01/06-2463 at paras. 27 and 28.

The issue does not arise from the proceedings

24. Although the Libyan authorities submit argumentation as to why Article 95 should extend to surrender requests, this issue is entirely irrelevant as the Pre-Trial Chamber clearly stated that it was not predicated on such a basis.
25. The Libyan authorities' argument that the Chamber erred by failing to appreciate that the admissibility procedure could be a two step procedure, comprising a request under Rule 58, and an application or challenge filed pursuant to Article 19, must also be dismissed, due to the fact that this issue was never put before the Chamber for consideration.
26. As the Libyan authorities correctly note, "an appealable issue must emanate from the ruling of the decision concerned".²⁰ The purpose of interlocutory appeals is to address issues that have arisen for the Chamber's consideration; it is not to allow the participants to have a 'second bite at the cherry' or to correct any deficiencies in their initial pleadings.
27. In its Notification, the Libyan authorities informed the Chamber of their "intention to challenge the admissibility of the case".²¹ An intention pertains to something, which a person or entity plans to do in the future, not something which has actually occurred. This is evidenced by the fact that the Libyan authorities informed the Chamber that they would file such a challenge by 30 April 2012. Although the Libyan authorities cite Rule 58 in passing, they do not at any point in the Notification inform the Chamber that they were filing a request raising a challenge or question concerning admissibility. Rule 58(1) clearly stipulates that any such request must contain the basis for it. A vague reference to Rule 58 cannot in any way be construed as a Rule 58(1) request raising a question or challenge to admissibility.

²⁰ Request at para. 13, citing Prosecutor v. Bemba Leave to Appeal Confirmation Decision, para 17; Prosecutor v. Bemba, Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure, 25 August 2008, para. 11

²¹ The Notification at paras. 2 and 3.

28. The Libyan authorities have also fundamentally misconstrued the relationship between Article 19 and Rule 58. The Rules of Procedure and Evidence must be interpreted and applied in a manner which is consistent with the Rome Statute. As recognized by the Appeals Chamber, a rule, which implements an article (such as rule 89, which implements article 68(3)), cannot give rise to independent rights and powers.²² The reference to 'requests and applications' in Rule 58 merely implements the distinction in Article 19 between a challenge to admissibility, filed by a State or the defendant pursuant to Article 19(2), and a request for a ruling on admissibility, filed by the Prosecution pursuant to Article 19(3) of the Statute.

29. Moreover, in contradistinction to the assertion of the Libyan authorities that the Appeals Chamber has not yet had an opportunity on this issue, as Counsel for the Libyan authorities is aware,²³ the ICC Appeals Chamber has clearly found in the Kenyan cases that Rule 58 does not entitle a State to file a staggered admissibility challenge.²⁴ States have an obligation to support any challenge to admissibility with concrete evidence at the time when the challenge is first filed before the Court; they cannot invoke Rule 58 in order to reserve the right to file additional evidence or information at a later stage.²⁵ In light of this clear appellate jurisprudence, there was no basis for the Pre-Trial Chamber to anticipate or rule that the Notification comprised a request concerning a challenge to the admissibility of the case. As such, the issue did not arise for judicial determination.

²² DRC situation, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, 19 December 2008, ICC-01/04-556, at paras. 44 and 46.

²³ The OPCD notes that one of the Counsel for the Libyan authorities was assisting the Kosgey defence team in the Kenya 1 case.

²⁴ Prosecutor v. Ruto at 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", ICC-01/09-01/11-307, 30 August 2011.

²⁵ Prosecutor v. Ruto at 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", ICC-01/09-01/11-307, 30 August 2011 at paras. 2, 62, 82, 89, 97 and 98.

The issue does not significantly affect the fairness of the proceedings

30. Although the Libyan authorities have asserted that the decision is “unjust”, “unfair”, and “wrong”,²⁶ they have failed to adduce any arguments as to how the issue in question impacts on the fairness of the proceedings. A decision cannot be termed unfair simply because a participant disagrees with its outcome. Regulation 65 of the Regulations of the Court also imposes a positive obligation on the applicant to substantiate “the reasons warranting immediate resolution by the Appeals Chamber of the matter at issue”.²⁷
31. It is also erroneous to state that the denial of the request for postponement runs counter to the doctrine of complementarity.²⁸ The complementarity regime of the ICC is predicated on the obligation of States to surrender persons to the ICC at the time of their arrest. The Libyan authorities have also failed to provide any examples or information as to how the surrender of Mr. Gaddafi to the ICC would prejudice or affect their ability to file a challenge to admissibility, or otherwise impact on domestic proceedings, and thereby impinge on the principle of complementarity.
32. The OPCD also fully endorses the following arguments, submitted by the ICC Prosecutor in the Kenya cases, concerning the framework of complementarity.²⁹

The system created by the Rome Statute for the determination of admissibility relies on a mechanism of early notice (Article 18(1)); strict timelines for States to inform the Court that they are investigating or prosecuting (Article 18(2)); timely submission of challenges by a State which has jurisdiction over a case on the ground that is investigating or prosecuting the case (Article 19(5)); and confining the number of times a challenge can be brought by a State (Article 19(4)). The goal is to respect the right of the State and at the same time prevent a State from interfering with and obstructing Court’s proceedings by making admissibility challenges when it does not genuinely intend to prosecute in its national courts. Rule 58 also provides that, in deciding on the procedure to be followed upon an application under Article 19, the Chamber shall have regard that the procedure, including joining proceedings, “does not cause undue delay” and that it shall hear and decide on the

²⁶ Request at para. 26.

²⁷ See also Kenya situation, Decision on a Request for Leave to Appeal, 11 February 2011, ICC-01/09-38, at para. 17.

²⁸ Request at para. 26.

²⁹ Prosecutor v. Ruto et al., Prosecution Response to “Application on behalf of the Government of the Republic of Kenya pursuant to Article 19 of the ICC Statute”, 28 April 2011, ICC-01/09-01/11-69 at para. 21.

challenge first. Permitting a lengthy timetable for submissions in order to evaluate the evolution of the local judicial institutions has no basis in the Statute, does not entail a case specific inquiry, and would undermine the expeditious conduct of proceedings.

33. In line with the above arguments, the creation of a staggered admissibility regime would undermine the principles of complementarity by allowing States to make obstructive admissibility requests, which are not supported by any evidence, and by prejudicing the ability of the Chamber to make a timely decision concerning the appropriate forum for the case.

An immediate decision of the Appeals Chamber would not materially advance the proceedings

34. Rather than advancing the proceedings, subjecting this issue to appellate review would retard the commencement of the proceedings before the ICC. Until such time that Mr. Saif Al-Islam Gaddafi is transferred to the ICC, the confirmation process before the ICC cannot start. Mr. Gaddafi's presence before the ICC is also necessary to secure his right to effectively participate in any potential admissibility proceedings by designating counsel of his choice, and instructing such counsel in a privileged, and secure setting. Moreover, in light of the deadlines for filing the appeal, and responses by the OPCD and the Prosecution, it is clear that the Appeals Chamber will not be in a position to render its determination until after Libya has filed its admissibility challenge. The decision of the Appeals Chamber will therefore have no material impact on the question as to whether Libya should be obliged to surrender Mr. Gaddafi prior to the Chamber's decision on the admissibility of the case.

35. Finally, it is highly inappropriate for the Libyan authorities to claim that it would be 'absurd' and resource consuming to transfer Mr. Gaddafi to the ICC prior to the issuance of a admissibility decision, which could potentially revert the case back to Libya.³⁰ This situation has been created by their non-compliance with the orders of the ICC; the Libyan authorities must therefore bear the inconveniences, which stem from their own intransigence.

³⁰ Request at para. 27.

3. The Pre-Trial Chamber should make an immediate finding that Libya is in non-compliance with the orders of the Court

36. Until such time that a Chamber reverses or suspends a decision, parties and participants are obliged to comply with the terms of the decision, and have no right to defer or delay their compliance depending on the outcome of appeal requests.³¹ Neither the Appeals Chamber nor the Pre-Trial Chamber have granted suspensive effect of the Decision. The Libyan authorities are therefore subject to an outstanding obligation to surrender Mr. Gaddafi immediately to the ICC.

37. In this regard, it is notable that the Libyan authorities have not referred anywhere in their Request to the steps which have been taken in order to implement the Chamber's decision. The Libyan authorities have also failed to confirm whether they would surrender him to the ICC if their appeals were rejected, or at the very least, that they recognize their obligation to surrender him to the ICC in principle. To the contrary, the Request is predicated on the underlying assumption that Mr. Gaddafi should not be transferred to the ICC, and as result, it is both "absurd" and wasteful for the Libyan authorities to take any steps to comply with the Chamber's decision.³²

38. The absence of any professed intention or willing to surrender Mr. Gaddafi to the ICC should also be viewed in conjunction with the statements of high level Libyan authorities to the effect that Libya has no intention to surrender Mr. Gaddafi to the ICC,³³ and that irrespective as to the merits of their admissibility challenge, they intend to try him in Libya.³⁴ The Libyan authorities have also announced that they

³¹ Prosecutor v. Lubanga, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU", 8 October 2010, ICC-01/04-01/06-2582 at para. 1.

³² Request at para. 27.

³³ "[T]here is no intention to hand him [Saif Al-Islam] over to the ICC, and Libyan law is the right system to be used to try Saif Gaddafi" (9 April 2012) Mr Ali Ashour (Libya's justice minister) cited in – 'Libya rules out ICC trial for Saif al-Islam', *Al Jazeera*, 9 April 2012,

<http://www.aljazeera.com/news/africa/2012/04/2012499216767703.html>

³⁴ "The Libyan judicial system considers the jurisdiction of the ICC to be an exception. Libya is not a signatory to the Rome Statute that establishes the ICC's authority." [...] "We insist on trying Sayf-al-Islam in accordance with provisions that are well established in the Libyan law and can not be overlooked. It is a matter of sovereignty." Abd-al-Qadir al-Minsaz (a member of the ruling National Transitional Council in charge of legal affairs) cited in Trial of Sayf-al-Islam in Libya is question of sovereignty - NTC official', *BBC Monitoring Middle East*, 9 April 2012 <http://global.factiva.com.ezproxy.library.uq.edu.au/ha/default.aspx>

expect to issue a verdict before the elections in June.³⁵ When viewed in conjunction with statements concerning the fact that he has committed crimes,³⁶ it is manifestly apparent that the outcome of Libyan authorities' putative admissibility challenge is irrelevant to the question as to whether the Libyan authorities should surrender him to the ICC, as Mr. Gaddafi will have been tried and executed before the ICC will be in a position to render a decision on admissibility. These statements also underscore the necessity of taking strong measures at the earliest juncture possible to ensure Libya's compliance with the Decision.

39. Libya has now been in non-compliance with its obligation to surrender Mr. Gaddafi to the ICC for almost five months. As found by Pre-Trial Chamber I in the Bashir case, the fact that a State may consider that it has a legal entitlement not to cooperate is irrelevant; only the ICC Chamber has the competence to decide such matters.³⁷ The Libyan authorities have also been cautioned of the consequences of non-cooperation, but have taken no steps to commence the implementation of Mr. Gaddafi's surrender to the ICC, or at the very least, to indicate their willingness in principle to surrender Mr. Gaddafi to the ICC.³⁸ The present circumstances therefore fall squarely within the ambit of the circumstances in which a Pre-Trial Chamber will refer a State to the Security Council due to the State's failure to arrest and surrender a person to the ICC.³⁹ Indeed, unlike States which only had a temporary ability to arrest and surrender a suspect, Libya has had possibility to surrender Mr. Gaddafi to the ICC for almost

"Saif al-Islam "has to be tried in Libya where it is a well-known fact that he has committed more crimes against the Libyan people than he did to others" [...] "It's a priority to try him under the Libyan law by Libyan judges on Libyan soil." Mr Mohammed al-Hareizi (spokesman of the ruling National Transitional Council) cited in 'Gaddafi son to face Libyan trial', The Irish Examiner, 10 April 2012 <http://www.irisht Examiner.com/breakingnews/world/gaddafi-son-to-face-libyan-trial-546827.html>

³⁵ "He will be tried for rape, murder, corruption and we expect him to be tried and a verdict rendered before the upcoming elections in mid-June," Mr al-Hareizi told reporters in Tripoli." 'Gaddafi son 'to face Libyan trial' 10 April 2012, The Guardian <http://www.guardian.co.uk/uk/feedarticle/10187772>

³⁶ "Saif al-Islam "has to be tried in Libya where it is a well-known fact that he has committed more crimes against the Libyan people than he did to others" Mr Mohammed al-Hareizi cited in 'Gaddafi son to face Libyan trial', The Irish Examiner, 10 April 2012

³⁷ Prosecutor v. Bashir, Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-140, 13 December 2011, at para. 10.

³⁸ Prosecutor v. Bashir, Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-140, 13 December 2011 at para. 9.

³⁹ ICC-02/05-01/09-140. See also 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, 12 December 2011, ICC-02/05-01/09-139.

five months. The level of non-compliance in this case thus greatly exceeds the threshold, which has been sufficient to trigger a finding of non-compliance in other cases before the ICC.

Relief Sought

40. For the reasons set out above, the OPCD respectfully requests the Pre-Trial Chamber to:

- i. reject the request of the Libyan authorities for authorization to appeal the decision of 4 April 2012;
- ii. issue an immediate decision that Libya has failed to comply with its obligation to surrender Mr. Saif Al-Islam Gaddafi to the ICC; and
- iii. refer this non-compliance to the Security Council pursuant to Article 87(7) of the Statute.



Xavier-Jean Keïta, Principal Counsel of the OPCD

Dated this, 12th Day of April 2012

At The Hague, The Netherlands