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

Date: **12 April 2012**

THE APPEALS CHAMBER

Before: Judge Sang-Hyun Song, Presiding Judge
Judge Akua Kuenyehia
Judge Erkki Kourula
Judge Anita Ušacka
Judge Sanji Mmasenono Monageng

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 Appeal Against 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:

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Introduction

1. The present Appeal filed by the Libyan authorities should be rejected *in limine* due to the fact that the impugned decision did not concern a challenge to the admissibility of the Court, under Article 19 of the Statute. Since the Appeal is not receivable, the request for suspensive effect should also be rejected *in limine*.
2. Alternatively, should the Appeals Chamber find that the present Appeal is receivable, then the Appeals Chamber should confirm the admissibility of the case, and reject the Appeal on its merits due to the failure of the Libyan authorities to adduce any concrete evidence concerning either the nature of the charges against Mr. Saif Al Islam Gaddafi or investigative steps, which have been taken in his case. The admissibility of the case can only be challenged once. In invoking article 82(1)(a), the Libyan authorities have exhausted their right to challenge the admissibility of the case before the ICC.
3. Finally, the OPCD requests the Appeals Chamber to render an urgent determination on the receivability of the Appeal and the Libyan authorities' request for suspensive effect in order to dispel any erroneous perceptions that the mere filing of the present Appeal exempts the Libyan authorities from compliance with their obligation to immediately surrender Mr. Gaddafi to the ICC, and to mitigate any further prejudice to Mr. Saif Al-Islam Gaddafi.

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.
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

¹ ICC-01/11-01/11-34-Anx.

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 directly seized the Appeals Chamber of an appeal against the decision pursuant to Article 82(1)(a) of the Statute (the Appeal).¹¹

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 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.

At the same time, the Libyan authorities filed a request for leave to appeal the Decision pursuant to Article 82(1)(d) of the Statute before the Pre-Trial Chamber.¹²

Submissions

The Appeal should be dismissed in limine due to the fact that it does not concern a decision on the admissibility of the case

14. The Appeals Chamber has clearly confirmed on several occasions that the right to file an appeal under Article 82(1)(a) is restricted to decision on the merits of an admissibility challenge:¹³

Article 82 (1) (a) of the Statute provides that either party may appeal "a decision with respect to jurisdiction or admissibility". The Appeals Chamber understands from the phrase "decision with respect to" that the operative part of the decision itself must pertain directly to a question on the jurisdiction of the Court or the admissibility of a case. It is not sufficient that there is an indirect or tangential link between the underlying decision and questions of jurisdiction or admissibility. As previously held by the Appeals Chamber, a decision of a Pre-Trial or Trial Chamber may constitute a "decision with respect to [...] admissibility" only to the extent that it consisted of or "was based on" a ruling that a case was admissible or inadmissible.

15. Article 82(1)(a) therefore cannot be invoked in connection with ancillary matters, which precede a decision on admissibility under Article 82(1)(a). The fact that a decision might impact on admissibility matters is also insufficient to trigger the application of Article 82(1)(a) of the Statute.¹⁴

16. The impugned decision of the Pre-Trial Chamber concerned a request for the postponement of surrender under Article 95 of the Statute. The Pre-Trial Chamber made no determination concerning the admissibility of the case, and its decision has no impact on the right of the Libyan authorities to file an independent challenge to the admissibility of the case, under Article 19(2) of the Statute.

¹² ‘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.

¹³ See also Prosecutor v. Saif Gaddafi et al., Decision on the admissibility of the "Appeal Against Decision on Application Under Rule 103" of Ms Mishana Hosseinioun of 7 February 2012, ICC-01/11-01/11-74, 9 March 2012 at para. 10.

¹⁴ Prosecutor v. Saif Gaddafi et al., Decision on the admissibility of the "Appeal Against Decision on Application Under Rule 103" of Ms Mishana Hosseinioun of 7 February 2012, ICC-01/11-01/11-74, 9 March 2012, at para. 11.

17. Although the Libyan authorities have sought to argue, on appeal, that their Notification constituted a ‘request’ to challenge the admissibility of the case under rule 58, this argument does not in any way reflect the reality of their pleadings before the Pre-Trial Chamber.
18. In their Notification, the Libyan authorities informed the Chamber of their “intention to challenge the admissibility of the case” pursuant to article 19 of the Statute.¹⁵ 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 a challenge pursuant to Article 19(2)(b) by 30 April 2012.¹⁶ The only conclusion that can be drawn from the clear wording of the Notification was that the Libyan authorities had not filed a challenge to admissibility under Article 19(2)(b) at the time of the Notification, but would do so in the future.
19. The right to file an appeal under Article 82(1)(a) must also be interpreted in conjunction with Article 19(6) of the Statute, which provides that “[d]ecisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82”. A similar provision is included in Article 18(4) of the Statute. The direct correlation between Article 82 and Articles 18 and 19 underscores the fact that the drafters did not intend for Article 82(1)(a) to provide a vehicle for appealing decisions, which were issued outside of the framework of Articles 18 and 19 of the Statute. Since the Libyan authorities clearly stated that the Notification did not constitute a challenge to admissibility under article 19(2)(b) of the Statute as such a challenge would be forthcoming, there is no basis for invoking Article 82(1)(a) of the Statute.
20. Moreover, although the Libyan authorities cited Rule 58 in passing, they did 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

¹⁵ The Notification at paras. 2 and 3.

¹⁶ The Notification at para.3.

cannot be construed as a Rule 58(1) request raising a question or challenge to admissibility.

21. 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.¹⁷ 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.

22. 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,¹⁸ 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.¹⁹ 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.²⁰

23. Allowing States to file multiple requests and applications concerning admissibility would also be fundamentally contrary to the underlying principles of Article 19, in particular, the presumption that admissibility may only be challenged once (Article 19(4)), and the obligation on States to make a challenge to the admissibility of the

¹⁷ 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.

¹⁸ The OPCD notes that one of the Counsel for the Libyan authorities was assisting the Kosgey defence team in the Kenya 1 case.

¹⁹ 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.

²⁰ 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.

Court at the earliest opportunity (Article 19(5) of the Statute). Since the filing of an admissibility challenge triggers an obligation on the Prosecution to suspend the investigation (Article 19(8)), the implementation of a protracted, multi-tiered admissibility regime would impact on the expeditiousness of proceedings before the ICC, and the impinge on the right of the defendant to be promptly informed of the nature of the charges against him. It would also delay the ability of the Court to make a decision concerning the appropriate forum to adjudicate the case. 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.²¹

24. The underlying principles of complementarity also do not require the Court to interpret the admissibility regime under Article 19 and Rule 58 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.²²

25. It follows that if States cannot file multiple or staggered admissibility challenges, then they are also precluded from invoking Article 82(1)(a) on multiple occasions during the admissibility process. Accordingly, if the Appeals Chamber were to find the

²¹ 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.

²² 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, ICC-01/09-01/11-307 at para. 44.

present Appeal admissible under Article 82(1)(a), then it follows that the Libyan authorities will have exhausted their right to challenge and appeal the admissibility of the case before the ICC, and the issue as to the admissibility of the case should be determined on the basis of the record before the Pre-Trial Chamber. The Libyan authorities cannot assert that the Impugned decision constitutes a decision on the admissibility of the case, whilst at the same time, they request the Pre-Trial Chamber to hold off on their determination of admissibility until the Libyan authorities have filed an additional application at the end of April 2012.

26. In accordance with the present record before the Pre-Trial Chamber, the Libyan authorities have patently failed to meet their burden of demonstrating that the investigations in Libya cover the same conduct as the case before the ICC. Although they have made a vague reference to Article 7 in their Notification, they have not provided any concrete details concerning the time frame of the charges or the nature of the allegations against Mr. Gaddafi. They have also failed to adduce any information concerning the investigative steps taken in the case. In line with the Appeals Chamber's determination in the Kenya cases, there is an insufficient evidential basis to assert a conflict of jurisdictions, and the presumption that case continues to be admissible before the ICC remains in force.²³

The request for suspensive effect should also be rejected in limine

27. A request for suspensive effect cannot be granted in connection with an appeal, which is itself, inadmissible.²⁴ The request for suspensive effect must therefore be dismissed *in limine* due to the fact that the Appeal falls outside the framework of Article 82(1)(d).

²³ 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, ICC-01/09-01/11-307.

²⁴ Prosecutor v. Mbarushimana, Reasons for "Decision on the appeal of the Prosecutor of 19 December 2011 against the 'Decision on the confirmation of the charges' and, in the alternative, against the 'Decision on the Prosecution's Request for stay of order to release Callixte Mbarushimana' and on the victims' request for participation" of 20 December 2011, ICC-01/04-01/10-483, 24 January 2012, at para. 26.

28. Even if the Appeals Chamber were to find the Appeal admissible, there is no basis for granting suspensive effect in the present circumstances. The Libyan authorities have asserted that the present Appeal concerns a decision on the admissibility of the case. It is therefore illogical for the Libyan authorities to assert, in connection with their request for suspensive effect, that the suspensive effect of Mr. Gaddafi's surrender is required in order to ensure that the purpose of the Appeal – to postpone this surrender – is not defeated. The present Appeal either concerns a decision on admissibility, in which case it falls within the parameters of Article 82(1)(a), or it concerns a decision on postponement of surrender, in which case it falls outside of the scope of Article 82(1)(a).
29. Moreover, if the Appeals Chamber ultimately finds in favour of the Libyan authorities, the Chamber can order that Mr. Gaddafi be transferred back to Libya, to remain in their custody pending the Chamber's determination on admissibility. In contrast, if he is not surrendered pending the Appeals Chamber's decision, then the Libyan authorities will have obtained a *de facto* approval to postpone his surrender. Granting suspensive effect to their obligation to surrender Mr. Gaddafi would therefore predetermine the outcome of the Appeal by giving the Libyan authorities the requested postponement, outside of the framework of Article 95.
30. In terms of the purported subject matter of this Appeal, the Libyan authorities have failed to adduce any credible arguments as to how the surrender of Mr. Gaddafi to the ICC would frustrate their ability to challenge the admissibility of the case, or the ability of the Chamber to make a determination on the admissibility of the case. The Libyan authorities have had access to Mr. Gaddafi for the past five months. They have only utilised the opportunity to question him concerning his alleged failure to have a licence of camels, and issues concerning fish farms, and to give him assurances that he would not be prosecuted for serious crimes such as murder, and rape due to lack of evidence.²⁵ The Libyan authorities cannot rely upon their own lack of diligence as a reason for stymieing the ability of the ICC to expeditiously proceed with the case.

²⁵ Addendum to the Urgent Report Concerning the Trip to Libya, ICC-01/11-01/11-70-Red2 at para. 38; Addendum to the Urgent Report Concerning the Trip to Libya, ICC-01/11-01/11-70-Red2 at paras. 39, and 49.

31. Rather than prejudicing issues of admissibility, the immediate surrender of Mr. Gaddafi is also essential for the ICC to make an effective decision concerning the appropriate forum for adjudicating the case. High level Libyan authorities have issued statements to the effect that Libya has no intention to surrender Mr. Gaddafi to the ICC,²⁶ and that irrespective as to the merits of their admissibility challenge, they intend to try him in Libya.²⁷ The Libyan authorities have also announced that they expect to issue a verdict before the elections in June.²⁸ When viewed in conjunction with statements concerning the fact that he has committed crimes,²⁹ it is apparent that unless Mr. Gaddafi is immediately surrendered to the ICC, there is a strong probability that Mr. Gaddafi will be have been tried and executed, before the ICC will be in a position to render a decision on admissibility.

32. In terms of the logistical difficulties referred to by the Libyan authorities in order to justify the suspension of their obligation to surrender Mr. Gaddafi, the fact that there is a short time frame between his surrender and a future decision on the merits of a admissibility challenge has arisen due to the failure of the Libyan authorities to surrender him to the ICC for almost five months; the Libyan authorities must therefore bear the inconveniences, which stem from their own intransigence.

²⁶ “[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>

²⁷ “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>

“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.irishexaminer.com/breakingnews/world/gaddafi-son-to-face-libyan-trial-546827.html>

²⁸ ““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>

²⁹“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

33. The suspension of Mr. Gaddafi's surrender would also be extremely deleterious to the rights of the Defence. Mr. Gaddafi has not been brought before a judge notwithstanding the fact that he was arrested almost five months ago.³⁰ The Pre-Trial Chamber has ordered the Libyan authorities to bring Mr. Gaddafi before a judge, in accordance with Article 59. A suspension of this obligation would be fundamentally incompatible with the obligation of the Chamber to apply the Statute in a manner, which is consistent with internationally recognized standards.³¹

34. Mr. Gaddafi is held in isolation, and does not have the ability to communicate with counsel, family, or friends.³² There are significant security risks associated with his detention in Libya.³³ Every day that he continues to be held in Libyan custody constitutes a further aggravation of these violations, and hinders his ability to instruct his counsel before the ICC, and to effectively participate in these proceedings. It is therefore vital that he be brought within the custody of the ICC so that he can exercise his rights under the Rome Statute framework in an effective manner, as soon as possible.

The Appeals Chamber should render an urgent decision on the admissibility of the Appeal and the request for suspensive effect

35. In light of the clear jurisprudence of the Appeals Chamber concerning the inadmissibility of the present Appeal, and the impact, which any delays in the implementation of the surrender of Mr. Gaddafi, will cause to the rights of the Mr. Gaddafi, the OPCD respectfully requests the Appeals Chamber to render an urgent determination on these matters.

36. This would be consistent with the approach adopted by the Appeals Chamber in the Mbarushimana case, in which the Appeals Chamber issued a decision rejecting the

³⁰ ICC-01/11-01/11-69-Red at para. 25.

³¹ The Human Rights Committee (HRC) indicated that delays pending production before a judge should not exceed a few days. (Freemantle v. Jamaica, 625/1995). The HRC found violations of Article 9(3) in respect of periods of detention of four days (Grant v. Jamaica, 597/1994), seven days (Stephens v. Jamaica, 373/1989), and eight days (Stephens v. Jamaica, 373/1989). Similarly, the ECHR has understood the right to be brought promptly before a judge as not exceeding four days (O'Hara v. the United Kingdom, no. 37555/97, ECHR 2001-X, 16 October 2001).

³² ICC-01/11-01/11-70-Red2 at para. 45.

³³ ICC-01/11-01/11-70-Conf-Exp at paras. 23-27, ICC-01/11-01/11- 91-US-Exp, and ICC-01/11-01/11-91-US-Exp-Annx1.

Prosecution's appeal *in limine* one day after it had been filed.³⁴ In the present case, the Libyan authorities have filed extensive submissions concerning the receivability of the Appeal, and the merits of their request for suspensive effect. In light of the fact that the Prosecution filed no response to the Notification of the Libyan authorities, an expedited schedule would also not prejudice the Prosecution.

Relief Sought

37. For the reasons set out above, the OPCD respectfully requests the Honourable Appeals Chamber to urgently reject the Appeal and corresponding request for suspensive effect *in limine*.



Xavier-Jean Keïta, Principal Counsel of the OPCD

Dated this, 12th Day of April 2012

At The Hague, The Netherlands

³⁴ Reasons for "Decision on the appeal of the Prosecutor of 19 December 2011 against the 'Decision on the confirmation of the charges' and, in the alternative, against the 'Decision on the Prosecution's Request for stay of order to release Callixte Mbarushimana' and on the victims' request for participation" of 20 December 2011, ICC-01/04-01/10-483, at para.7; Decision on the appeal of the Prosecutor of 19 December 2011 against the "Decision on the confirmation of the charges" and, in the alternative, against the "Decision on the Prosecution's Request for stay of order to release Callixte Mbarushimana" and on the victims' request for participation, ICC-01/04-01/10-476, 20 December 2011.