

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 11 May 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

**Public Redacted Version of the “Response to the Request to Postpone the
Surrender of Mr. Saif Al Islam Gaddafi Pursuant to Article 95 of the Statute”**

Source: 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

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

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**

States' Representatives

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

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia, Registrar

Deputy Registrar

Mr. Didier Daniel Preira, Deputy
Registrar

Victims and Witnesses Unit

Counsel Support Section

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. Libya has been subject to an extant obligation to surrender Mr. Saif Al Islam Gaddafi to the ICC for almost 6 months.
2. At no point has Libya received any legal exemption from this obligation: filing successive requests to postpone Mr. Gaddafi's surrender "does not, in itself, suspend the effect of an order; only a judicial decision may alter the legal effects of a judicial order."¹
3. The current request to postpone the surrender of Mr. Gaddafi must also be rejected due to the fact that:
 - i. Article 95 of the Statute does not extend to surrender requests;
 - ii. Article 95 cannot be invoked in connection for requests for surrender or transfer which fall outside the scope of the Part IX cooperation regime; and
 - iii. Article 95 cannot be invoked in connection with a pre-existing obligation to surrender the defendant to the ICC.
4. Should Libya fail to comply with its obligations to the Court – including implementing the visit of the ICC to Mr. Gaddafi and surrendering Mr. Gaddafi to the ICC – then the Pre-Trial Chamber may suspend its consideration of Libya's admissibility challenge pending Libya's compliance. Continued non-compliance could warrant a permanent stay of the Chamber's consideration of the admissibility challenge.
5. Such measures are without prejudice to the Chamber's independent power to report non-compliance to the Security Council.
6. [REDACTED].

¹ ICC-01/04-01/06-2582, para. 49.

Submissions

1. Article 95 does not extend to surrender requests

It is clear from the plain text of Article 95 and its context and placement within Part IX, that it does not extend to surrender requests.

7. 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. The 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”.² If the term evidence is not intended to qualify the type of request, which may be postponed, then including ‘such’ would be redundant.
8. Article 95 should also be interpreted consistently with Article 94. The phrase ‘Postponement of execution of a request in respect of [...]’ precedes both articles; 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 95.³
9. The context and placement of Article 95 in the Statute clearly confines it to forms of cooperation other than surrender. 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.

² Oxford Online Dictionary, <http://oxforddictionaries.com/definition/such?region=us&q=such>

³ 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”. ICC-01/11-01/11-72, 7 March 2012, 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.

10. 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”,⁴ 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.
11. The deliberate placement of Article 94 after Article 93 and before Article 96 evidences the drafters’ intent to restrict Article 94 to other forms of cooperation.⁵ 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 similarly restricted to other forms of assistance.⁶
12. It is also notable that Article 89, the governing provision on surrender, authorises a State to postpone surrender when an admissibility challenge based on *ne bis in idem* is pending before the ICC Chamber.⁷ If Article 95 were interpreted to include all types of cooperation requests, and to 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*”.⁸
13. The right to postpone in connection with *ne bis in idem* challenges filed by the defendant also does not imply that the State parties intended to create a general exception for State parties that file admissibility challenges. While State parties have a

⁴ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 15-17 July 1998, Official Records, Vol. III, fn231.

⁵ ICC-01/11-01/11-72 at fn28, 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, fn6.

⁶ 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), p.1031.

⁷ “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” (Art.89(2)).

⁸ 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/>.

right that the defendant is tried effectively and impartially, a defendant has additional rights, 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 constitute an unjustified, and disproportionate hardship. The procedure set out in Article 89(2) thus affords the person the human-rights oriented protection against multiple convictions “expressed in the maxim *nemo debet bis vexari pro eadem causa*”.⁹

14. Article 89(2) thereby indicates the intention of the drafters that the interests and rights of the defendant should not be sacrificed over debates concerning the appropriate legal forum. Article 92(3) also evinces the underlying Statutory scheme that although the defendant must be arrested and surrendered in accordance with national laws, the State shall not unilaterally block the rights of a defendant to surrender to the Court, if the defendant wishes to do so.¹⁰ In contrast, interpreting Article 95 broadly would vest States with an unfettered power to delay surrender, without giving any recourse to a defendant who wishes to be transferred to the ICC when the domestic jurisdiction cannot provide an independent and impartial trial, or uphold their basic rights and security.

A broad interpretation of Article 95 is inconsistent with the object and purposes of the Statute

15. Under the principle of effective interpretation, the Statute must be interpreted and applied to ensure the efficacy of the proceedings before the Court. Interpreting Article 95 to extend to surrender requests would be contrary to this objective as it would contravene the Court’s Statutory duty to firstly, convene expeditious confirmation proceedings, secondly, ensure the defendant’s right to participate in such proceeding, and thirdly, take all reasonable measures to obtain the defendant’s arrest and surrender, and thereby eliminate impunity.

⁹ C. Van den Wyngaert and T. Ongena, ‘Ne bis in idem Principle, Including the Issue of Amnesty’, in Cassese, Gaeta and Jones (eds) The Rome Statute of the International Criminal Court Vol.1,p. 707.

¹⁰ Art.92(3) provides that a defendant can waive the right to receive documentation concerning the provisional arrest warrant, and surrender to the ICC if permitted by the law of the requested State. In such circumstances, the “requested State shall proceed to surrender the person to the Court as soon as possible”.

16. The first sentence of Article 95 indicates that a challenge to admissibility and request for postponement must be considered within the framework of Articles 18 and 19. Whereas Article 18 and 19 provide that a challenge to admissibility by a State impacts on the ability of the Prosecutor to conduct further investigations for the duration of the admissibility challenge, it does not affect continued prosecution of the case before the Court or judicial proceedings.¹¹ Since the ICC has the sole competence to determine admissibility,¹² it follows that until the Chamber decides otherwise, the ICC continues to exercise jurisdiction over the case.
17. Article 67(1)(c) enshrines the defendant's right to be tried without undue delay. This right is of heightened importance for a detained suspect with unconfirmed charges. The defendant also has a right, pursuant to Article 67(1)(d), to be present and participate in the proceedings.¹³ This extends to a right to receive legal filings *via* counsel, to instruct counsel on an ongoing basis,¹⁴ and to attend court hearings, in particular, if witnesses are being examined.¹⁵ Ordering Mr. Gaddafi's surrender to the ICC is the only practical mechanism for giving effect to this right.
18. Similarly, although Rule 58(2) contemplates admissibility hearings, hearing witnesses in relation to the domestic case against Mr. Gaddafi in Mr. Gaddafi's absence would violate his right to participate in his case.
19. Rule 123(3) also underscores that the Pre-Trial Chamber shall ensure that all reasonable measures are taken to arrest a person subject to a warrant, for the purpose of participating in the confirmation process. Although Rules 123-125 allow *in absentia* confirmation hearings in limited circumstances, Rule 126(3) and Rule 124 make clear that the circumstances should be restricted to when the defendant absconds, deliberately evades arrest, or waives the right to be present.

¹¹ ICC-01/09-01/11-62, ICC-01/09-02/11-64, 20 April 2012, paras. 8-9.

¹² ICC-02/04-01/05-377, paras. 45-46.

¹³ The only exception is Art. 63(2).

¹⁴ Prosecutor v. Strugar, Trial Chamber "Decision Re the Defence Motion to Terminate Proceedings", 26 May 2004, paras. 22, 36; Prosecutor v. Kovacevic, Trial Chamber "Public Version of the Decision on Accused's Fitness to Enter a Plea and Stand Trial", 12 April 2006, para. 23, 29.

¹⁵ Prosecutor v. Zigiranyirazo Decision on Interlocutory Appeal, 30 October 2006.

20. In the context of domestic proceedings, which could culminate in the death penalty and render the outcome of the challenge a *fait accompli*,¹⁶ unilateral postponement of a surrender order would also undermine the premise of the Article 19 admissibility regime that the ICC Chamber has the exclusive competence to decide on matters of admissibility.¹⁷
21. A broad interpretation of Article 95 would also be inconsistent with the objective of the Statute to eliminate impunity. Since Article 95 can be invoked in connection with a challenge filed by a defendant, interpreting Article 95 to encompass surrender requests could permit a fugitive defendant to flit with impunity between State parties, who have invoked Article 95, for the duration of the admissibility challenge, until the defendant alights at a safe-haven non-State party. Indeed, one can well-imagine the scenario in which a conspiring State and defendant file successive admissibility challenges in conjunction with Article 95 solely to protract the defendant's evasion of justice.
22. In contrast, placing the defendant in ICC custody does not impact on State rights. As demonstrated by the Milosevic case, International Tribunals can maintain the physical custody of the defendant while also granting national authorities access to the defendant in connection with domestic allegations.¹⁸ The costs of implementing surrender are also not a valid reason for failing to take measures to secure the rights of the defendant, or to ensure expeditious proceedings.¹⁹
23. Article 95 can be invoked by any State, for which cooperation has been requested, irrespective of the author of the admissibility challenge. It is difficult to ascertain the logic and legal basis for affording States, who might not have any extradition treaty or

¹⁶ ICC-01/11-01/11-107, para.31.

¹⁷ ICC-02/04-01/05-377, paras.45-46.

¹⁸ 'Sale of Telecom Serbia Prompts Investigation', SETimes.com; 11 November 2003; http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2003/11/031111-DAVOR-001; Talijanski parlamentarci saslušace Milosevica o slucaju Telekom, Unofficial translation: "Italian Parliamentary Commission will interview Milosevic about the Telecom affair"; Index.hr; 20 May 2004; <http://www.index.hr/vijesti/clanak/talijanski-parlamentarci-saslusat-ce-milosevica-o-slucaju-telekom-danas-rasprava-o-iraku/203128.aspx>

¹⁹ ICC-01/09-01/11-85, para.24; Prosecutor v. Prlic, Decision On Defendants Appeal Against 'Décision Portant Attribution du Temps à la Défense pour la Présentation des Moyens à Décharge', 1 July 2008, para.16.

obligation to surrender to the challenging State, with a unilateral right to refuse to surrender the person to the ICC pending the challenge.

24. The only valid prejudicial impact for the challenging State, which could arise from continued ICC proceedings 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 the Court rules on admissibility, but, as discussed above, does not suspend the prosecution of the case before the ICC.
25. The curtailment of State obligations in Article 95 should therefore be interpreted in reference to the curtailment of ICC investigative powers and duties. The corollary of Articles 18(2) and Article 19(7)'s recognition that the Prosecution's investigations should be suspended so as not to interfere with national proceedings through the collection or contamination of evidence, is the State's power under Article 95 to postpone the execution of related requests for cooperation. Similarly, just as Article 18 (6) and Article 19(8) permit the Prosecution to seek authorization from the Chamber to take investigative and evidential steps, 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.
26. 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, and the prosecution of the case before the ICC. Such an interpretation would result in a completely unbalanced Statutory regime, whereby the Prosecution and the Chamber would be obliged to take all necessary measures to advance the confirmation proceedings, but the State would be under no obligation to cooperate in transferring the defendant, whose presence is the *sine qua non* for the advancement of the confirmation proceedings.

27. Contrary to the submissions of the Libyan authorities,²⁰ the fact that Article 19(8)(c) permits the Prosecutor, with Court authorization, to seek the cooperation of States to prevent the person from absconding, favours a narrower rather than broader interpretation of Article 95. If Article 95 is defined to encompass all forms of cooperation under Part IX rather than just other forms of cooperation under Article 93 or evidence related requests, then all States could invoke Article 95 to refuse to cooperate with the Prosecutor in preventing the person from absconding, as Article 19(8)(c) does not fall within the express exceptions to postponement under Article 95. Applying Article 95 to all Part IX cooperation requests would permit a State to refuse to either arrest or surrender a defendant on its territory to the ICC, whilst for the duration of the admissibility challenge, the ICC would be powerless to seek assistance from surrounding State Parties (who could also invoke Article 95) to prevent the person from transiting to a non-State party.

28. The fact that Article 19(8)(c) permits the Prosecutor to take measures to prevent the person from absconding also does not carry an implicit assumption that a State may unilaterally retain the person in their territory for the duration of the admissibility challenge. Since the Pre-Trial Chamber may grant interim release, the Prosecutor may need to invoke Article 19(8)(c) to request the re-arrest of a person who has breached the conditions of interim release. Similarly, Article 19 permits a State to challenge admissibility after an arrest warrant has been issued and prior to the person's arrest. Article 19(8) would therefore apply when the person is at large and not yet arrested by a State party.²¹

2. Article 95 cannot in any case be invoked in connection with requests for surrender which fall outside the scope of the Part IX cooperation regime

The order to surrender Mr. Gaddafi to the ICC stems from SCRes1970, and not Part IX

29. Even if Article 95 is interpreted to encompass any cooperation request under Part IX, it cannot be invoked in connection with an order to surrender, which emanates from the authority of the Security Council, and which entails mandatory compliance.

²⁰ ICC-01/11-01/11-130 at p.57.

²¹ C. Hall therefore describes Article 19(8) as applying to fugitives. 'Article 19', in O Triffterer (ed), Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article (Hart Publishing 2008), p.664(n34).

30. In a report concerning the establishment of the ICTY, the Secretary-General noted that one of the consequences of eschewing a treaty-based approach in favour of utilising the Chapter VII powers of the Security Council is that the latter approach “would have the advantage of ... being immediately effective as all States would be under a binding obligation to take whatever action is required to carry out a decision taken as an enforcement measure under Chapter VII.”²² In terms of the concrete obligations of States towards the Tribunal, the Secretary-General further elaborated that “[e]ffect shall also be given to orders issued by the Trial Chambers, such as warrants of arrest, search warrants, warrants for surrender or transfer of persons, and any other orders necessary for the conduct of the trial. In this an order by a Trial Chamber for the surrender or transfer of persons to the custody of the International Tribunal shall be considered to be the application of an enforcement measure under Chapter VII of the Charter of the United Nations.”²³
31. During a 1996 Prepcom meeting, delegates referred to the relatively successful experience of the Security Council in creating two *ad hoc* Tribunals and a commission of inquiry in Burundi, and concluded that if “one of the purposes of the Court was to obviate the creation of *ad hoc* Tribunals ... the Council’s referral should activate a mandatory jurisdiction, similar to that of the *ad hoc* Tribunals”.²⁴ In recommending that the Security Council refer the Darfur situation to the ICC, the Commission of Inquiry also noted that referral would have “mandatory effect” vis-à-vis the Government of Sudan.²⁵
32. The specific wording of Security Council Resolution 1970 (S/RES/1970) imposes a mandatory obligation on Libya to “cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution”. The Security Council did not limit this obligation to the forms of cooperation set out in Chapter IX of the ICC Statute, but, to the contrary, explicitly stated framed the obligation as

²² Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, para 23.

²³ Paras.125-126.

²⁴ Proceedings of the Preparatory Committee during March - April 1996, para.133, in M Bassiouni The Statute of the International Criminal Court: A Documentary History (Transnational Publishers 1998), p.405.

²⁵ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25 January 2005, para.588.

“pursuant to this resolution”. At the same time, the Council “recogniz[ed] that States not party to the Rome Statute have no obligation under the Statute”, thereby emphasizing that Libya’s obligation to cooperate with the Court stems from SCRes1970 itself, and not the provisions of Part IX. Under Article 25 of the United Nations Charter, Libya is bound by the legal obligations set out in SCRes1970, and is therefore required to give effect to any orders issued by the ICC, independently of Part IX of the Statute.

33. Whereas any Security Council intervention under Chapter VII of the UN Charter necessarily “involves some surrender of sovereignty by the member nations of the United Nations,”²⁶ Part IX of the Statute is premised on the concept of the Rome Statute as a consensual treaty, which seeks to accommodate State sovereignty issues. It is therefore patently inadequate and inappropriate in the case of a referred non-State party. This is highlighted by Article 86, which limits the scope of the obligation to cooperate with the Court to State parties;²⁷ Article 87(5) only permits the Court to ‘invite’ non-State parties to cooperate with the Court. Applying Part IX to States subjected to the authority of the ICC pursuant to a Security Council referral would also create the anomalous situation whereby the Chamber would have the power under Article 87(7) to report the non-compliance of a State Party to the Security Council, but not the non-compliance of a State, which is the subject of the Security Council referral.

34. Applying Part IX to States referred by the Security Council would thus strip the ICC of any means to enforce its decisions concerning that State, and would be contrary to the principle of *effet utile*. As found by the ICTY Appeals Chamber in the Blaskic case,

the International Tribunal must possess the power to make all those judicial determinations that are necessary for the exercise of its primary jurisdiction. This inherent power inures to the benefit of the International Tribunal in order

²⁶ Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, at para. 63

²⁷ See also G Sluiter ‘Obtaining Cooperation from Darfur – Where is the Law?’, JICJ 6 (2008), 871- 884 at pp. 882-883.

that its basic judicial function may be fully discharged and its judicial role safeguarded.²⁸

35. This principle is reflected in Article 4(1) of the ICC Statute and the general principle of international law that an international organisation has the necessary authority to fulfill its primary mandate.²⁹

36. Given that a preambular purpose of the ICC is to “guarantee lasting respect for and the enforcement of international justice”, the ICC must be considered to have the power to issue mandatory orders to a State, which is the subject of an article 13(b) Security Council referral, irrespective of the absence of an express provision to the effect in Part IX of the Statute.

37. Drawing a distinction between the application of a horizontal cooperation regime to Article 13(a) and (c) referrals and a vertical regime to Article 13(b) referrals is further justified by the fact that Security Council referrals are predicated on a finding that an ICC investigation and prosecution is a necessary and proportionate response to a threat to peace and security in the State in question. This objective would be frustrated if the State in question could unilaterally delay prosecutions before the ICC through the postponement of the surrender of the defendant.

38. Indeed, whereas State parties are presumed to interpret and apply their obligations in good faith,³⁰ no such presumption can be applied to non-State parties, who have been involuntarily brought before the ICC. Applying Part IX, which is predicated on the assumption that State parties will comply with all cooperation requests in good faith, to Article 13(b) referred States would therefore frustrate the efficacious operation of the Court.

39. While the Pre-Trial Chamber must act within the framework of the Statute, and the powers vested in it by Article 57 of the Statute, issuing mandatory orders to Libya

²⁸ Prosecutor v. Blaskic, ‘Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997’, 29 October 1997, para.33.

²⁹ Reparation for Injuries Suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports 1949, p. 174 at p.182.

³⁰ Art.26 of the Vienna Convention on the Law of Treaties.

does not contravene the legal framework of the ICC Statute. The power to issue an arrest warrant under Article 58 of the Statute is independent of the mechanism for enforcing this order. Article 58(1) contains no reference to Part IX of the Statute, and the specific arrest warrant issued by the Pre-Trial Chamber against Mr. Saif Al Islam Gaddafi cited SCRes1970, and not Part IX of the Statute.³¹

40. Although the Pre-Trial Chamber may rely on the framework of Part IX for determining the procedure and modalities for cooperation issues, Libya's obligation to comply with such procedures and modalities stems from the Chamber's decision to apply the content of Part IX, and not Part IX itself, which does not impose obligations on non-State parties.

41. The application of Article 95 itself is limited to "requests under this Part" (i.e. Part IX). Article 87(1) of the Statute explicitly limits the authority of the Court to issue requests under Part IX to State Parties.³² It therefore follows that the ICC's order that Libya surrender Mr. Gaddafi to the ICC, cannot be considered to be a request for cooperation falling under Part IX of the Statute.

Even if the Pre-Trial Chamber finds that the order for surrender constitutes a request under Part IX of the Statute, the Chamber may invoke SCRes1970 to order the transfer of Mr. Gaddafi to the ICC for other purposes

42. Under Article 57(3)(b) and (c) of the Statute, the Pre-Trial Chamber has the power to "issue such orders ...as may be necessary to assist the person in the preparation of his or her defence". Although Article 57(3)(b) allows the Pre-Trial Chamber to seek cooperation pursuant to Part 9 to enforce such orders, the word 'may' in the chapeau of Article 57(3) grants the Chamber discretion to eschew Part IX, and invoke Libya's obligation to cooperate pursuant to SCRes1970.

43. The Chamber's power to "provide for ...the protection of persons who have been arrested" is also completely independent of the Part IX cooperation regime. Moreover,

³¹ ICC-01/11-01/11-3.

³² During the drafting process, the working group on Part 9 of the ICC Statute expressed the view that "[t]he Drafting Committee should consider using the terms 'requested State Party' wherever 'requested State' appears in part 9." Including an explicit caveat to restrict the Court's ability to issue requests under Part IX to State parties presumably obviated the need to make this distinction. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court held at Rome, 15 June - 17 July 1998, Official Records, Volume III (Reports and other documents), A/CONF.183/13(Vol.III), p. 334.

as confirmed by the Appeals Chamber, “[t]here is no exception to the general principle that the Prosecutor (or other parties and participants) must follow the orders of the Trial Chamber when it comes to issues of protection.”³³

44. [REDACTED].

45. [REDACTED].³⁴ [REDACTED]³⁵.

46. [REDACTED].³⁶ [REDACTED],³⁷ [REDACTED].

47. [REDACTED]³⁸.

3. Article 95 cannot be invoked in connection with a pre-existing obligation to surrender the defendant to the ICC

48. Libya’s obligation to surrender Mr. Gaddafi predates the admissibility challenge by over five months. It cannot now invoke Article 95 to excuse its continued non-compliance with the arrest warrant, and SCRes1970.

49. 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”. 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.

50. 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*

³³ ICC-01/04-01/06-2582, para.50.

³⁴ [REDACTED].

³⁵ [REDACTED].

³⁶ [REDACTED].

³⁷ [REDACTED].

³⁸ [REDACTED].

the admissibility challenge is made, 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. As the scope of Article 95 is limited to the time period *after* an admissibility challenge has been made,³⁹ it can only have legal effect as concerns requests and obligations, which arose after the filing of the admissibility challenge.

51. 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 made *after* the admissibility challenge was filed; as such, [w]arrants for arrest and surrender issued prior to filing an admissibility challenge must, therefore, be executed.⁴⁰

52. Allowing States to invoke Article 95 to excuse their non-compliance with prior requests would also be contrary to the object and purposes of the Statute as it would act as a serious disincentive for States to either immediately execute surrender requests, or file timely challenges to admissibility.

4. The Chamber has the power to suspend consideration of the admissibility challenge, pending Libya's compliance with its obligations under the Statute

53. In the event that the Chamber were to find Part IX of the Statute to be applicable *mutatis mutandis* to Libya, then it follows that in order to invoke its rights under Part IX, Libya would be obliged to fulfill its pre-existing obligations under the Statute, in the same manner as a State party. This is consistent with the general principle that States cannot invoke rights under a treaty or instrument if they do not comply with their obligations under the same treaty or legal instrument.

54. Pursuant to Article 60(2) of the 1969 Vienna Convention on the Law of Treaties: "A material breach of a multilateral treaty by one of the parties entitles: [...] (b) a party

³⁹ ICC-01/11-01/11-100.

⁴⁰ B. Swart, 'International Cooperation and Judicial Assistance' in Cassese, Gaeta and Jones(eds.)The Rome Statute of the International Criminal Court Vol. II, p.1694. See also C. Hall, 'Article 19' in 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."

specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State.” Article 60(3)(b) further specifies that a material breach consists of “the violation of a provision essential to the accomplishment of the object or purpose of the treaty.” The International Court of Justice has also recognized that “a state seeking the interpretation of a treaty must itself have completely fulfilled the obligations of that treaty”⁴¹ and that “the Court has some freedom to consider principles of equity as part of the international law which it must apply.”⁴²

55. The surrender of a defendant to the ICC clearly constitutes an obligation which is essential to the accomplishment of the object and purposes of the ICC, and as such, non-compliance constitutes a material breach.

56. El Zeidy has averred in the context of the ICC that “a state failing to comply with a provision set out in the Statute is de facto in breach of the treaty which would provide the ICC with implied powers to rule on such a violation and find a suitable remedy.”⁴³ In this regard, Rule 58 accords the Chamber with a wide degree of latitude in organising the procedure for an admissibility challenge, and to “take appropriate measures for the proper conduct of the proceedings”.⁴⁴ Such measures could include suspending the Chamber’s consideration of the admissibility challenge until Libya has complied with its outstanding obligations under the Statute (including facilitating the Defence and Registry visit with Mr. Gaddafi, and surrendering Mr. Gaddafi to the ICC). This would in turn suspend the application of Article 95, which is only triggered when the admissibility challenge is under consideration by the Court; the mere filing of the challenge does not necessarily trigger the right to postpone surrender, particularly as the challenge could be irreceivable.

57. A Chamber must also be in a position to control the fair and adversarial nature of the proceedings, and to secure compliance with its orders.⁴⁵ To this end, the Chamber may sanction any participant who deliberately refuses to comply with an order of the

⁴¹ I. Brownlie, Principles of Public International Law (Oxford University Press, 6th edition, 2003), p. 25

⁴² *Diversion of Water from the River Meuse* (1937), Publications of the Permanent Court of International Justice (PCIJ), Ser. A/B, no. 70, p. 77 (cited in I. Brownlie, Principles of Public International Law p. 25.

⁴³ M. El Zeidy, ‘Critical Thoughts On Article 59(2) Of The ICC Statute’, 4 J. Int’l Crim. Just. 448, pp. 457-458.

⁴⁴ ICC-01/09-01/11-307, para. 3.

⁴⁵ ICC-01/04-01/06-2582, para. 47

Chamber, and, should continued non-compliance impact the ability of the Chamber to control the fairness of the proceedings, stay the proceedings and order the release of the defendant.⁴⁶

58. In the event that a person refuses to comply with an order, Rule 171(1) permits the Chamber, after warning the relevant offender, to order the interdiction of that person from the proceedings. In the present case, since the Libyan authorities have failed to comply with the order of the Chamber to bring Mr. Gaddafi before a judge pursuant to Article 59, surrender him to the ICC, and more recently, implement the ICC visit to Mr. Gaddafi, the Chamber could – after warning the Libyan authorities – interdict them from participating in the judicial proceeding. Concretely, this would suspend their ability to pursue their admissibility challenge before the ICC, which would have the corollary effect of suspending their right to invoke Article 95. Since sanctions are a means to enforce compliance with Court orders,⁴⁷ Libya's interdiction from the proceedings would not exempt them from their extant obligations to the ICC. It would also be inconsistent with the punitive nature of this remedy to allow Libya to utilise this time period to supplement its admissibility challenge.

59. A right to stay the proceedings as a whole necessarily encompasses a right to stay discrete aspects of the proceedings, which are impacted by the non-compliance. Libya's continued non-compliance could thus require the Chamber to temporarily or permanently stay its consideration of Libya's admissibility challenge. Mr. Gaddafi's surrender to the ICC is necessary to secure his right to participate in the admissibility proceedings, and to allow the Defence to meaningfully represent his interests before the ICC. The ability of the Defence to visit Mr. Gaddafi as soon as possible is also profoundly important to his security and well-being, and implementation of his rights under Article 55 of the Statute. Failure to respect these rights will destroy fundamental elements of the fair and adversarial nature of the proceedings, and thereby require the Chamber to stay its consideration of the admissibility challenge.

⁴⁶ Para. 58.

⁴⁷ ICC-01/04-01/06-2582, para. 59.

Relief Sought

60. For the reasons explained above, the Defence respectfully requests the Honourable Pre-Trial Chamber to:

- i. reject the request for postponement and thereby affirm Libya's continuing obligation to immediately surrender Mr. Gaddafi to the ICC; and
- ii. take any measures necessary to secure Libya's compliance with this obligation.



Xavier-Jean Keita, Counsel for Mr. Saif Al Islam Gaddafi

Dated this, 11th Day of May 2012

At The Hague, The Netherlands