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PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernandez 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

**Libyan Government Application for leave to reply and reply to OPCD Response
to the request to postpone the surrender of Mr Saif Al-Islam Gaddafi
pursuant to article 95 of the Statute**

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

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INTRODUCTION

1. The Government of Libya seeks permission to reply to the “Response to the Request to Postpone the Surrender of Mr. Saif Al Islam Gaddafi Pursuant to Article 95 of the Statute”,¹ filed by the OPCD (“OPCD Response”), in response to the request for postponement of surrender in the Libyan Government’s “Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute” (“Article 19 Application”).²
2. Regulation 34(c) states that “[s]ubject to leave being granted by a Chamber in accordance with regulation 24, sub-regulation 5, a reply shall be filed within ten days of notification in accordance with regulation 31 of the response”. In case the Chamber should see fit to grant Libya’s request to reply, the Libyan Government also hereby files its substantive submissions in reply to the OPCD Response, in order to ensure compliance with the deadline imposed by Regulation 34(c).

SUBMISSIONS

a. Leave to reply

3. The Government of Libya hereby requests leave to reply to the OPCD

¹ ICC-01/11-01/11-141.

² ICC-01/11-01/11-130, paras 103-106.

Response. Pursuant to Regulation 24(5), “[p]articipants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations”.

4. While the Article 19 Application outlined, in three paragraphs, the reasons for the application of Article 95 to the present circumstances, the OPCD Response addresses this at considerable length. The OPCD Response, moreover, raises a number of issues which were not dealt with in the Article 19 Application. These include, for example, interpretation of the meaning and effect of the word “such” in article 95;³ the issue of consistency between articles 95 and the rest of Part 9 of the Statute;⁴ several arguments concerning the object and purpose of the statute, as well as the effect thereof upon the interpretation of article 95;⁵ and a number of issues concerning the source and legal character of Libya’s obligation co-operate with the ICC – in particular, whether this arises directly from Security Council Resolution 1970, or the ICC Statute.⁶ These are specific arguments which have not been raised in this way at any prior stage and which the Libyan government should, as a matter of procedural fairness, be given an opportunity to reply.

b. Application of Article 95 to surrender requests

5. The OPCD argues that article 95 does not extend to surrender requests.⁷ Article 95 states, first, that “[w]here there is an admissibility challenge under consideration by the Court pursuant to article 18 or 19, the requested State may postpone the execution of a request under this Part pending a determination by the Court” (hereinafter “the first part of article 95”). It then qualifies this as follows: “unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to article 18

³ OPCD Response, para. 7.

⁴ OPCD Response, paras 8-11.

⁵ OPCD Response, paras 15-28.

⁶ OPCD Response, paras 29-41.

⁷ OPCD Response, paras 7-28.

or 19” (hereinafter “the second part of article 95”).

6. The OPCD argues that the proposition conveyed by article 95 is that, where an admissibility challenge is under consideration, states are not required to co-operate with the Prosecutor’s attempts to collect evidence unless the Court orders them to do so. The Libyan government contends, contrary to the OPCD Response, that the provision should be interpreted such that the first part creates a general right to postpone co-operation (including surrender requests), pending the Court’s consideration of an admissibility challenge; while the second part provides a limited caveat to allow the Prosecutor to pursue collection of evidence, under particular conditions, pending determination of admissibility.

Content of article 95

7. The OPCD argues that use of the term “such” in article 95 demonstrates that article 95 is not applicable to requests to surrender. It contends that this term means “of the type previously mentioned”,⁸ thereby establishing a link between the scope of the state’s right to postpone co-operation, and the content of the exception – the latter being pursuit of “collection of such evidence pursuant to article 18 or 19”.
8. In seeking support for its preferred position, however, the OPCD’s portrayal of the definition of “such” in the Oxford English Dictionary is incomplete, misleading, and self-serving. The entry to which it refers does not restrict the meaning of the term “such” to “of the type previously mentioned”. While the latter is given as *part* of the definition, so is “of the type about to be

⁸ OPCD Response, para. 7.

mentioned”.⁹ In the context of article 95 – in which “such evidence” is followed by “pursuant to article 18 or 19” – the full version of the dictionary definition supports the very opposite of the OPCD’s argument: that “such evidence” simply refers to that which, within the terms of article 18 or 19, might be collected, with the Court’s permission, notwithstanding the freeze on investigation. This would mean that the second part of article 95 is not explanatory of the first, but that it is a *caveat* thereto.

Relationship with articles 18 and 19

9. The interpretation of article 95 supported by the Government of Libya is consistent with other parts of the Statute. When there is an admissibility challenge by a State under articles 18 or 19, articles 18(2) and 19(7) require the Prosecutor to suspend investigation until the Court determines the issue of admissibility. Article 19(8) regulates such suspensions, and while it allows for collection of evidence – with the court’s permission – when an article 95 suspension of the obligation to surrender is in place, it does not provide for surrender during the suspension. Under article 95, the measures “specifically ordered [so] that the Prosecutor may pursue the collection of such evidence pursuant to article 18 or 19”, include measures directed at the prevention of absconding under article 19(8)(c). If suspension of investigation until determination of admissibility did not allow for the invocation of article 95 to prevent surrender, there would be no reason for the existence of Article 19(8)(c).¹⁰ Use of the word “abscond” simply means that the provision can include the situation where the accused is in custody, but this does not indicate that it is restricted to such circumstances. As Akande notes, it might have been better to use the words “prevent escape”, but choice of vocabulary

⁹ Oxford Online Dictionary, <http://oxforddictionaries.com/definition/such?region=us&q=such>, cited in OPCD Response, fn. 2. A third aspect of the definition is also given – “to so high a degree; so great (often used to emphasize a quality)” – but this does not impact upon the issue under consideration.

¹⁰ See Dapo Akande, “Is Libya Under an Obligation to Surrender Saif Gaddafi to the ICC? Part I (What Does the Rome Statute Say?)” <http://www.ejiltalk.org/is-libya-under-an-obligation-to-surrender-saif-gaddafi-to-the-icc-part-i-what-does-the-rome-statute-say/>

is not determinative here, because one could imagine a situation in which the person had been arrested and is in custody, but there was still a threat of absconding because of the possibility of interim release pursuant to article 59.¹¹

10. The OPCD's argument that article 19(7) suspends the Prosecution's investigations, but does not suspend the prosecution itself¹² is counter intuitive on its face and would lead to an absurd consequence. The only explanation offered refers to the combination of two assertions: first, that 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";¹³ and second, that there is no reason to afford states "a unilateral right to refuse to surrender the person to the ICC pending the challenge".¹⁴ Both, however, are misguided.

11. As to the former argument, there is a plethora of evidence that a state's sovereign rights can be prejudiced by continuing investigations pending resolution of admissibility in ways other than interference with national authorities' collection of evidence. In certain circumstances, for example, international investigations can cause witness intimidation, and other security concerns, or otherwise threaten public order. Indeed, the very exercise of criminal jurisdiction is seen as a central aspect of sovereignty itself.¹⁵

¹¹ See Dapo Akande, "Is Libya Under an Obligation to Surrender Saif Gaddafi to the ICC? Part I (What Does the Rome Statute Say?)" <http://www.ejiltalk.org/is-libya-under-an-obligation-to-surrender-saif-gaddafi-to-the-icc-part-i-what-does-the-rome-statute-say/>

¹² OPCD Response, para. 24.

¹³ OPCD Response, para. 24.

¹⁴ OPCD Response, para. 23.

¹⁵ I. Brownlie, *Principles of Public International Law*, 5th ed., 1998, pp. 289, 303; D. D. Ntanda Nsereko, "The International Criminal Court: Jurisdictional and Related Issues", *Criminal Law Forum*, 10 (1999), p. 87 et seq.

12. As to the reference to the undesirability of allowing states to unilaterally refuse to surrender a person to the ICC pending the challenge, it should be noted that the very nature of the ICC's jurisdiction is to prioritise genuine domestic prosecutions over a trial before the ICC.¹⁶ In this regard, the ability of a state to unilaterally bar continuation of an ICC prosecution by arguing that the case is inadmissible (perhaps on the basis of the existence of a domestic investigation or prosecution), is entirely appropriate. Moreover, the fact that states are restricted, by article 19(4), to making only one such challenge (other than in exceptional circumstances) deals adequately with the concern underlying the OPCD's argument – that states might use the suspension mechanism obstructively, and in bad faith.

Relationship with article 89(2)

13. The OPCD's argument that, if article 95 applies to all admissibility challenges, article 89(2) is rendered superfluous,¹⁷ is palpably false, as the two provisions relate to two entirely different scenarios.

14. Article 89(2) applies to the situation in which “the person sought for surrender brings a challenge before a national court on the basis of the principle of *ne bis in idem*”. It is submitted that the distinctive nature of article 89(2) arises from the fact that it applies when the *ne bis in idem* admissibility challenge is brought *before a national court*. The effect of article 89(2), then, is simply to make clear that it is the ICC – not the domestic court – which has jurisdiction to decide whether a case, in relation to which an ICC arrest warrant has been issued, is barred from proceeding to trial before the ICC due to *ne bis in idem*. The provision makes clear that this applies whether “there has been a relevant ruling [by the ICC] on admissibility” or “an admissibility ruling [by the ICC] is pending”. The other possible grounds for inadmissibility – failure to reach

¹⁶ See Statute, article 17.

¹⁷ OPCD Response, paras 12-14.

the ICC's gravity threshold and complementarity – are not mentioned here simply because they are not the kind of argument, as *ne bis in idem* is, that could found a challenge to admissibility in the context of both the domestic jurisdiction and the ICC. For similar reasons, a *ne bis in idem* challenge by the state would never arise in domestic proceedings, and is, therefore, not mentioned in article 89(2).

15. While both article 95 and article 89(2) are applicable in the case of *ne bis in idem* admissibility challenges, article 89(2) is applicable *only* in relation to such challenges. However, as just noted, this is not the essence of the difference between the provisions. Article 89(2) concerns the jurisdictional relationship between domestic courts and the ICC with regard to admissibility challenges, which it resolves in favour of the ICC. Article 95, in contrast, aims to prevent a state's sovereign rights from being compromised by a case which might be deemed inadmissible before the ICC. These provisions are part of the ICC's fine balance between intervention and respect for state sovereignty.

16. The OPCD argues that the effect of interpreting article 95 as applicable to requests for surrender would be to sacrifice the rights of the accused “over debates concerning the appropriate legal forum”.¹⁸ It argues that article 89(2) affords “human rights-oriented protection against multiple convictions”¹⁹ and “indicates the intention of the drafters that a defendant has additional rights, reflected in article 67(1), which do not inhere in the State”.²⁰ The implied assertion seems to be that it would be wrong to privilege consideration of forum selection over the protection of the rights of the accused. The OPCD seems to argue that protection of such rights requires surrender of a defendant to the ICC, even where the admissibility of the case is being challenged on the basis that the domestic state is genuinely able and willing to investigate and

¹⁸ OPCD Response, para. 14.

¹⁹ OPCD Response, para. 13.

²⁰ OPCD Response, para. 13.

prosecute. This argument falls into error in a number of ways, including by diminishing the importance, within the legal regime applicable to the ICC, of a state's sovereign rights and the entire system set up by the Statute, which is premised on the central principle of complementarity.²¹

17. Provisions as to co-operation and admissibility are to be interpreted with complementarity as a guiding principle.²² The importance of this was highlighted by the UN Secretary-General in his report on the UN Support Mission in Libya of 22 November, 2011.²³ In particular, he highlighted the need to uphold the "principles of Libyan ownership".²⁴ Recognising that Libya is a post-conflict environment engaged in judicial sector reform as part of a "historic transition",²⁵ the Secretary-General stated that "[t]o succeed, Libya must be given the space required to determine its future", adding that "[i]n this context, the role of the United Nations should be to support Libyans in their efforts".²⁶ He went on to state that "the international community as a whole, will best support Libya not by being driven by the supply side of post-conflict assistance, but by being responsive to Libya's own emerging sense of its needs for international support".²⁷

18. A further error which is apparent in this argument re-appears throughout the

²¹ The Preamble to the Statute and article 1 refer to the ICC as an international institution to "shall be complementary to national criminal jurisdictions". The Report of the Preparatory Committee described complementarity with domestic jurisdictions as essential for the acceptance of the Statute by states (Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, GAOR, 51st Session, Supplement no. 22 (doc. A/50/22), para. 29. It has also been described as the "underlying principle" or "cornerstone" of the Statute (J. I. Charney, "International Criminal Law and the Role of Domestic Prosecutions", AJIL 95 (2001), p. 120 et seq; E. La Haye, "The Jurisdiction of the International Criminal Court: Controversies over the Preconditions for Exercising its Jurisdiction" NILR 46 (1999), p. 1 et seq.

²² See Preparatory Committee, 1996 Report, vol. 1, para. 316.

²³ United Nations Security Council, Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2011/727, 22 November 2011 ["Report of the Secretary-General, 22 November 2011"].

²⁴ Report of the Secretary-General, 22 November 2011, pp. 12, 16, 19.

²⁵ Report of the Secretary-General, 22 November 2011, pp. 1, 11, 12.

²⁶ Report of the Secretary-General, 22 November 2011, pp. 11, 12.

²⁷ Report of the Secretary-General, 22 November 2011, p. 19

OPCD Response, in various forms. In sum, the OPCD fails to appreciate the significance of admissibility as a threshold requirement (this is reflected in the statute, but is also fundamental in general international law in relation to the functioning of any international court or tribunal). While important, the protection of due process rights (under article 67(1)) becomes relevant only on the assumption that the case is admissible before the ICC. The admissibility inquiry is backward-looking in that it essentially seeks to determine whether the Prosecutor was right to seek a warrant of arrest or summons to appear and/or the Pre-Trial Chamber was right to grant it in light of subsequent events. It looks back to review the decision made at the moment that the ICC officially began to deal with one or several accused persons in relation to a particular criminal act or set of criminal acts while taking into account the current situation in the State concerned. At the time of the inquiry, there may well be a case which has been, up to that point, eligible for consideration by the ICC only because of the lack of challenge, or indeed, as in the present situation, a case where the ICC became involved in a situation because the persons for whom ICC arrest warrants were issued were then in power and accordingly there was no prospect of a domestic prosecution. Now that there is a new Government in power in Libya, this previous state of affairs has been abruptly changed, thus necessitating anxious scrutiny of the rights of Libya to try the individual suspects in a domestic court. It is notable that where there is a finding of inadmissibility, those involved in the case are left in the state it was in before the arrest warrant, or any request for co-operation, was issued. Article 89(2) is therefore not aimed primarily at protecting the rights of the accused – it applies at a stage prior to this concern.

Placement of article 95 within Statute

19. The OPCD asserts that the content and placement of article 95 within the ICC Statute means that it must not apply to requests surrender of an accused to the

ICC.²⁸ It contends that “Articles 88 to 92 explicitly concern the details of arrest and surrender” while “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”.²⁹

20. The OPCD’s description of Part 9 of the Statute is seriously flawed. Articles 86-93 are concerned with the nature and scope of the legal obligation to co-operate, and the procedures which validly give rise to such an obligation. Arrest and surrender are covered first, as these are – as they would have appeared to the drafters – the central form of co-operation. Then “other forms of co-operation” are described in a manner which is equivalent to the coverage of arrest and surrender in the preceding articles. Following that, articles 94 and 95 refer to the situation in which the implementation of an obligation of co-operation may be postponed, but is not invalidated *ab initio*, as may be the effect of failure to comply with articles 86-93, or of assertion of an obligation outside of the scope of those provisions.

21. The OPCD’s interpretation rests upon the observation that the final version of the Statute retained the grouping of Article 94 and Article 95 after Article 93, despite a footnote of the Working Group Reports having drawn “the attention of the Drafting Committee to the need to consider the question of the placement of this article”.³⁰ However, the Working Group’s exhortation simply demonstrates that there was some uncertainty as to the ramifications of the placement of Article 95. It may also indicate that the matter was specifically considered by the Drafting Committee. It does not, however, support a particular interpretation where there are several possible interpretations of the current placement of the provision. Schabas agrees that the comment of the Working Group and the placement of Article 95 within the

²⁸ OPCD Response, paras 9-11.

²⁹ OPCD Response, para. 9.

³⁰ OPCD Response, para. 10, referring to Working Group Reports, fn. 231.

Statute do not provide a resolution to the issue of the scope of Article 95, but his position cannot be said to provide support for the conclusion of the OPCD.³¹ Other respected academic commentators argue, like the Libyan Government, that the exception provided by article 95 applies to requests for surrender.³²

22. The OPCD also argues that article 92(3) is indicative of an underlying scheme in which arrest and surrender are to take place in accordance with national laws, but the state is not to unilaterally block the right of the defendant to surrender.³³ The assertion here seems to be that the complementarity principle does not apply where the accused wishes to be tried by the ICC. Aside from the fact that there is no clear evidence of Saif Al-Islam Gaddafi having expressed a definitive preference for trial at the ICC (given that he expressed the opposite preference to Libyan ICC Coordinator Professor Ahmed El-Gehani),³⁴ the more important point is that, where the domestic state is able and willing to genuinely investigate and to prosecute if appropriate following the investigation, the effect of the state taking such action *is* to unilaterally block the progress of the case before the ICC, by rendering it inadmissible.

Object and purpose of the Statute

23. The OPCD makes a number of arguments to the effect that the application of article 95 to surrender of suspects would undermine the object and purpose of

³¹ William Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2010, p. 1031.

³² Kress & Prost, "Article 95" in Triffterer, "Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article", 2nd edition, p. 1594, at 4; Carsten, S., Libya, the International Criminal Court and Complementarity: A Test for 'Shared Responsibility', *Journal of International Criminal Justice*, 2012, Vol 10, Issue 2 (May); Akande, D., 'The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC', *Journal of International Criminal Justice*, 2012, Vol 10, Issue 2 (May).

³³ OPCD Response, para. 14.

³⁴ See for instance assertions by Mr Saif Al-Islam Gaddafi to Professor Ahmed El-Gehani in paragraph 26 of Witness Statement of Professor Ahmed El-Gehani (Confidential Annex A to the Libyan Government's 25 April 2012, Response to the OPCD); re-filed with perfected translation on 15 May 2012, ICC-01/11-01/11-146-Conf.

the Statute. It asserts that postponement of surrender in light of an admissibility challenge would contravene (i) the Court's statutory duty to convene expeditious confirmation proceedings;³⁵ (ii) the defendant's right to participate in confirmation proceedings and/or the case against him/her more generally;³⁶ and (iii) the court's duty to take all reasonable measures to obtain arrest and eliminate impunity.³⁷

24. Each of these arguments palpably overlooks the prior and central importance of admissibility, and in particular, the complementarity principle, as noted above. Clearly, the Court has no duty to ensure expeditious hearings, or to ensure that the defendant can participate in such proceedings, or take all reasonable measures to obtain arrest, in relation to a case which is inadmissible. For this reason, the Statute ensures that admissibility challenges can take place without interference from concerns, such as those to which the OPCD refers, which become applicable only where a case is rightly before the ICC.

25. While the purposes asserted by the OPCD are all subsequent to the issue of admissibility, there is a concern which is relevant and operative at the time of an admissibility challenge: that the Prosecutor's ability to continue with the prosecution, if the Court should determine that the case is indeed admissible, not be unduly harmed by the freeze on investigation pending determination of admissibility. The Statute duly responds to this concern, in the form of articles 18(6) and 19(8), as well as the second part of article 95.

c. Application of Article 95 to requests not based on Part 9 of the ICC Statute

26. The OPCD argues that the legal obligation which underpins the surrender

³⁵ OPCD Response, paras 15, 17.

³⁶ OPCD Response, paras 15; 17-19.

³⁷ OPCD Response, paras 15, 21.

order emanates directly from Security Council Resolution 1970 – not from the ICC Statute. It argues, as a result, that even if article 95 usually applies to surrender, it does not apply to an obligation to surrender which is rooted in Security Council Resolution 1970, as this entails mandatory compliance.³⁸ These submissions are based upon an inappropriate analogy between the ICC and the *ad hoc* tribunals, as well as upon a misreading of Resolution 1970. Indeed, the ICC itself has already ruled definitively on this issue by holding that the Statute the obligation to “cooperate fully” with the Court “means that the Statute, and especially its Part IX, is the legal framework” to apply to consideration of the surrender request.³⁹

27. Even if we were to consider this issue from first principles, the key part of Resolution 1970 refers to the Security Council’s decision to “refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the *Prosecutor* of the International Criminal Court”.⁴⁰ It is from the specific nature of this referral that the regime applicable to co-operation between Libya and the Court must be understood. In particular, the Prosecutor was provided with jurisdiction *to carry out an investigation*, on the basis of Chapter VII of the UN Charter. While this requires Libya to facilitate this investigation; the “Prosecutor”, any “investigation” that he/she might pursue, and the possible consequences thereof in terms of criminal proceedings, are all creatures of the ICC Statute. The Resolution clearly requires Libya to “cooperate fully with and provide any necessary assistance to the Court and the Prosecutor”. The fact that it states that this obligation arises “pursuant to this resolution” simply refers to the fact that the Prosecutor has been given jurisdiction to investigate, and that certain obligations to co-operate flow from that. The nature of such

³⁸ OPCD Response, para. 29.

³⁹ See *Prosecutor v Gaddafi and Al-Senussi*, Decision on Libya’s submissions regarding the arrest of Saif Al-Islam Gaddafi, 7 March 2012, ICC-01/11-01/11-72-Conf, paragraph 12 citing Statute, art. 1 “The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute”; *Prosecutor v Al-Bashir*, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al-Bashir, 4 March 2009, ICC-02/05-01/09-03, para. 45.

⁴⁰ Security Council Resolution 1970, para. 4 (emphasis added).

obligations must be determined by the ICC Statute. There is nothing in the Resolution that purports to – or could – depart from the ordinary meaning and effect to be given to the Statute.

28. To interpret the situation in the manner advocated by the OPCD would radically alter the nature of the ICC's jurisdiction and its legal personality. It would, in effect, amount to a rewriting of the Statute, rather than construing it in accordance with its proper interpretation. Moreover, this radical shift would apply only where the ICC's exercise of jurisdiction is based upon article 13(b) of the Statute – which provides for the possibility of referral by the Security Council to the ICC Prosecutor. Such inconsistency would introduce an appearance of arbitrariness. The approach taken to co-operation, under the Statute, is deeply connected with the nature of the ICC's jurisdiction as based upon complementarity. The OPCD falls into error by assuming that jurisdiction which is, in some way, based upon or which results from, a Resolution of the Security Council, pursuant to Chapter VII of the UN Charter, should necessarily be likened to that of the *ad hoc* tribunals, whose jurisdiction and legal personality are characterised by the notion of 'primacy'".

29. The equivalent part of Security Council Resolution 827, establishing the ICTY, refers to the Security Council's decision "to establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined".⁴¹ The requirement for "all States to cooperate fully [...] in accordance with the present resolution",⁴² makes clear that the nature of legal obligation to co-operate relates, *inter alia*, to all aspects of the criminal process. A key distinction between the impact of Resolutions 827 and 1970 is that while the former requires co-operation in relation to actual prosecutions, the latter

⁴¹ Security Council Resolution 927 (1993), para. 2.

⁴² Security Council Resolution 927 (1993), para. 4.

requires co-operation, at the outset, only in relation to the Prosecutor's investigations, after which point, the state concerned is treated as though it were party to the Statute.

d. Application of Article 95 to pre-existing obligations to surrender

30. The OPCD argues that the effect of Articles 19(7) and (9), read together, is that only "investigative acts, orders and decisions", which were issued after the admissibility challenge is made, are affected by the making of such a challenge.⁴³ Article 19(7) states that "[i]f a challenge is made by a State referred to in paragraph 2 (b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17". Article 19(9) states that "[t]he making of a challenge [to 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".

31. The OPCD's argument errs in that the application of article 95 to surrender of Saif Al-Islam Gaddafi does not in any sense 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 OPCD's interpretation of the Statute is wrong in this regard, because it fails to appreciate the distinction between mere postponement of certain acts in fulfilment of a legal obligation, and the rendering void *ab initio* of that asserted obligation. The effect of article 19(9) is to clarify this distinction with regard to the effect of challenges to admissibility. The implicit corollary of this is that any investigative act, order or warrant, obtained after an admissibility challenge is launched, would be invalidated *ab initio*. This is qualified by article 19(8), which provides for a limited list of investigative acts that the Prosecutor can pursue, with the

⁴³ OPCD Response, paras 48-51.

Court's permission, after an admissibility challenge is launched. As noted above, such an interpretation is consistent with article 95.

e. Suspension or stay of admissibility challenge / report to Security Council

32. The OPCD argues 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.⁴⁴ It contends that under Rule 58, in taking "appropriate measures for the proper conduct of the proceedings",⁴⁵ the Chamber could suspend consideration of the admissibility challenge until Libya has facilitated the Defence and Registry visit to Mr. Gaddafi, and surrendered him to the ICC.⁴⁶ The OPCD argues that this, in turn, would suspend application of article 95.⁴⁷

33. It must be noted at this juncture that the Libyan Government has expended and continues to expend considerable efforts in negotiating with the local authorities in Zintan to arrange for a visit by the Registrar and the OPCD in compliance with the Pre-Trial Chamber's order to do so. Unfortunately, these efforts have not been assisted by the Zintani authorities' mistrust of the OPCD, having regard to the previous false and unverified allegations regarding Mr Saif Al-Islam's treatment and conditions. It is hoped that the situation will be resolved in the coming week and that the said visit can take place imminently after that.

34. In any event, the Libyan Government argues that such measures are necessarily inappropriate for the proper conduct of admissibility proceedings. Articles 17, 18, and 19 indicate that the Court cannot refuse to assess admissibility when it is raised within the process provided for in the Statute and Rules. As with several of the arguments noted above, this fails to

⁴⁴ OPCD Response, para. 53.

⁴⁵ Rule 58.

⁴⁶ OPCD Response, para. 56.

⁴⁷ OPCD Response, para. 56.

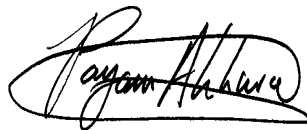
appreciate the significance of admissibility as a threshold requirement. By pursuing a case which may be inadmissible, the Court would be acting *ultra vires*. The Libyan Government notes, in this regard, that, the Court is under a duty, pursuant to article 19(1), to “satisfy itself that it has jurisdiction in any case brought before it”.

RELIEF SOUGHT

35. For the reasons set out above, the Libyan Government respectfully requests the Honourable Pre-Trial Chamber to:

- a. grant leave to file this Reply; and
- b. grant the Libyan Government’s article 95 request to postpone surrender of Mr Saif Al-Islam Gaddafi pending resolution of its admissibility challenge.

Respectfully submitted:


Professor Philippe Sands QC

Professor Payam Akhavan

Michelle Butler

Counsel on behalf of the Government of Libya

Dated this 16th day of May 2012

At London, United Kingdom