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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

Government of Libya's Application for Leave to Appeal the "Decision on the Urgent Application on behalf of Abdullah Al-Senussi for Pre-Trial Chamber to order the Libyan Authorities to comply with their obligations and the orders of the ICC"

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

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I. INTRODUCTION

1. The Government of Libya files this application before Pre-Trial Chamber I (“the Chamber”) for leave to appeal its “Decision on the Urgent Application on behalf of Abdullah Al-Senussi for Pre-Trial Chamber I to order the Libyan Authorities to comply with their obligations and the orders of the ICC”, dated 06 February 2013 (“the Impugned Decision”).¹ It does so pursuant to Article 82 (1)(d) of the ICC Statute, Rule 155 of the Rules of Procedure and Evidence, and Regulation 65 of the Regulations of Court.
2. The Government of Libya seeks leave to appeal on the basis that the Chamber committed an error of law by applying an incorrect interpretation of articles 19 and 95 of the ICC Statute and Rule 58 of the ICC Rules of Procedure and Evidence. This incorrect interpretation resulted in the Pre-Trial Chamber erroneously finding that there was no admissibility challenge under consideration and, accordingly, that Libya remained under an obligation to comply with the Request for Surrender of Mr Al-Senussi.
3. It is submitted on behalf of the Government of Libya that the requirements of Article 82(1)(d) for leave to appeal to be granted are satisfied. Specifically, the errors identified concern issues that would significantly affect the fair and expeditious conduct of the proceedings, and for which an immediate resolution by the Appeal Chamber may materially advance the proceedings.
4. In making this application, Libya invites the Chamber to recognise that it has cooperated with the Court in good faith since the earliest days of the National Transitional Council. Libya has had to contend with difficult post-conflict circumstances and to initiate admissibility proceedings under significant pressures because of the manner with which the Court has sought to execute

¹ ICC-01/11-01/11-269. The parties were notified of this Decision on 7 February 2013.

arrest warrants despite a fundamental change of circumstances since Security Council Resolution 1970 was adopted, in the face of mass-atrocities perpetrated by the Gaddafi regime. There are genuine national proceedings relating to Mr Al-Senussi, yet Libya has been ordered to immediately surrender him notwithstanding the fact that further submissions in support of its admissibility challenge are imminent. Giving effect to an order to surrender Mr Al-Senussi prior to Libya filing its supplemental submissions on its admissibility challenge on 29 March 2013 would likely have significant consequences on Libya's security and stability. Having regard to the principle of complementarity, a State in a transitional situation that is acting in good faith should not be subjected to arbitrary and unreasonable deadlines. Libya is entitled to expect that Article 95 will be interpreted and applied in a reasonable manner that is consistent with the object and purpose of the Statute, having regard also to the urgent priorities and resource constraints that impact upon its ability to comply with its obligations. A demand for immediate action that is premised upon a rigid and narrow interpretation of the Statute cannot assist in meeting that instrument's object and purpose.

II. PROCEDURAL HISTORY

5. On 27 June 2011, the Chamber issued warrants of arrest for, among others, Abdullah Al-Senussi ("Mr Al-Senussi").²
6. On 4 July 2011, the Registrar filed a request for Libya to arrest Mr Al-Senussi and surrender him to the Court (the "Surrender Request").³
7. On 1 May 2012, the Chamber received the "Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute" (the "Admissibility Challenge"), challenging the admissibility of the case against Saif

² ICC-01/11-01/11-4

³ ICC-01/11-01/11-5

Al-Islam Gaddafi ("Mr Gaddafi") and Mr Al Senussi and requesting "postponement and suspension of the Pre-Trial Chamber's order to surrender Mr Gaddafi pending a final determination of th[e] challenge" in accordance with article 95 of the Rome Statute (the "Statute").⁴ At that stage, Mr Al-Senussi was not in the custody of the Libyan Government.

8. On 4 May 2012, the Chamber determined, *inter alia*, that the admissibility challenge would be "understood to only concern the case against Mr Gaddafi".⁵
9. On 1 June 2012, the Chamber decided that "Libya may postpone the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Statute until such time that the Chamber has ruled on the Admissibility Challenge".⁶
10. On 9 January 2013, counsel for Mr Al-Senussi filed an Application requesting that the Chamber refer Libya and Mauritania to the Security Council for non-compliance with their obligations to cooperate with the Court. Alternatively, or in addition, counsel for Mr Al-Senussi requested that the Chamber order Libya to: (i) transfer Mr Al-Senussi to the custody of the Court within 5 calendar days; (ii) cease immediately all actions and proceedings in respect of Mr Al-Senussi's case which could in any way impede his arrest and surrender to the Court, including commencement of any national trial proceedings; and (iii) facilitate a secure and privileged visit to Mr Al-Senussi by his counsel and family with all necessary immunities and protections on an urgent basis.⁷
11. On 15 January 2013, Libya informed the Chamber, *inter alia*, of the fact that the investigation into the national case against Mr Al-Senussi is approaching

⁴ ICC-01/11-01/11-130-Red, para 103.

⁵ ICC-01/11-01/11-134, para 8.

⁶ ICC-01/11-01/11-163.

⁷ ICC-01/11-01/11-248, paras 6, 60 to 64, 68 and 69.

completion, and the case will accordingly be transferred in the next month to the Chamber of Accusation for pre-trial proceedings.⁸

12. On 16 January 2013, the Libyan authorities confirmed that Mr Al-Senussi is at present in their custody and that judicial proceedings are currently ongoing at the domestic level.⁹ The Government of Libya also provided the requested information regarding the detention centre in which Mr Al-Senussi is being held and his state of health.¹⁰

13. On 18 January 2013, the Chamber requested that the Government of Libya provide observations on the way Libya intends to fulfil its obligations to cooperate with the Court in relation to the arrest and surrender of Mr Al-Senussi.¹¹

14. On 28 January 2013, Libya filed the "Libyan Government's Observations regarding the case of Abdullah Al-Senussi" ("Libya's Observations") reiterating its intention to submit further supplemental evidence in regard to the admissibility of the case against Mr Al-Senussi and to postpone the order for his surrender pursuant to article 95 and, in the alternative Rule 58(2).¹²

15. On 1 February 2013, Libya filed its response to the Defence Application ("Libya's Response") emphasising that "there is no proper basis upon which a finding of a lack of cooperation by Libya can be made" and that "it is manifestly unarguable that any lack of cooperation on the part of Libya is preventing the court from exercising its functions and powers under the Statute."¹³ The Libyan Government reiterated its intention to continue to comply with its obligations to

⁸ ICC-01/11-01/11-251, paras 4 and 5.

⁹ ICC-01/11-01/11-252-Anx3.

¹⁰ Ibid.

¹¹ ICC-01/11-01/11-254

¹² ICC-01/11-01/11-260

¹³ ICC-01/11-01/11-266, para 20.

the Court and that it was seeking postponement of the surrender request pending the full consideration and determination of the admissibility of the case. It is submitted on behalf of the Government of Libya that this is consistent with the principle of complementarity and the object and purpose of the Rome Statute.

16. On 6 February 2013, the Chamber handed down its “Decision on the Urgent Application on behalf of Abdullah Al-Senussi for Pre-Trial Chamber I to order the Libyan Authorities to comply with their obligations and the orders of the ICC”, dated 06 February 2013 (“the Impugned Decision”).¹⁴ In that decision the Chamber rejected the arguments put forward by Libya and emphasised that the obligation to surrender is not subject to any suspension.

17. Leave to appeal that decision is now sought on the basis that the Chamber erred in its interpretation of the applicable law which led to, in particular (but not limited to), the following erroneous determinations:

- i. That Libya’s submissions are presently not sufficient to trigger the applicability of Article 95 regardless of whether the Admissibility Challenge of 1 May 2012 can be considered as an expression of Libya’s intention to challenge the admissibility of the case against Mr Al-Senussi or instead as a fractional admissibility challenge to be supplemented in due course.
- ii. That, given its silence in this regard, Rule 58(2) cannot be used as a legal basis for postponement of surrender and, in any event, it is dependent upon the existence of admissibility proceedings as properly triggered in accordance with the appropriate procedure in the Statute and no such procedure has been undertaken by Libya with respect to Mr Al-Senussi.

¹⁴ ICC-01/11-01/11-269.

III. APPLICABLE LAW

18. Leave to appeal is sought pursuant to Article 82(1)(d) on the basis that the

Impugned Decision:

Involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which ... an immediate resolution by the Appeals Chamber may materially advance the proceedings.

19. For the purposes of this test an "issue" is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion.¹⁵ In addition, the Chamber has held that an appellable issue must emanate from the ruling of the decision concerned and not merely represent an abstract question or a hypothetical concern.¹⁶ Libya submits that the interpretation and application of articles 18 and 95 and Rule 55 and the relationship between them is an issue which continues to require resolution. Although similar issues were raised in the case against Mr Gaddafi, the case against Mr Al-Senussi is factually and materially distinguishable in that it involves more than the mere notification of an intention to challenge the admissibility of the case. Accordingly, there is a clear question regarding the requisite content and form of an admissibility challenge.

20. The Chamber has previously found that the principle of fairness of proceedings is a fundamental element to all judicial proceedings, and is enshrined in various

⁸ Situation in the Democratic Republic of the Congo, ICC-01/04-168, Appeals Chamber, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, para. 9 ("Lubanga Extraordinary Review Decision").

¹⁶ Pre-Trial Chamber II, Bemba Leave to Appeal Confirmation Decision, para 17. See also, Prosecutor v. Bemba, ICC-01/05-01/08-75, Pre-Trial Chamber III, Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure, 25 August 2008, para. 11.

international legal instruments.¹⁷ Fairness is preserved when a party is provided with the genuine opportunity to present its submissions and to be appraised of, and comment on, the observations and evidence submitted to the Court that might influence its decision.

21. The expedition of proceedings is closely linked to the concept of judicial proceedings "within a reasonable time",¹⁸ and complements the guarantees afforded to the suspect, such as the right to fair and public proceedings. The issue concerned must be of such a nature as to significantly affect the expedition of the proceedings, namely its speedy conduct without prejudice to the rights of the parties concerned.

22. The Appeals Chamber has held that the Pre-Trial Chamber "must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence".¹⁹

23. As the Appeals Chamber has previously determined, the issue must be such "that its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial." Furthermore, "advancing" the proceedings has been identified by the Appeals Chamber as "removing doubts about the correctness of a decision or mapping a course of action along the right

¹⁷ Article 10 of the Universal Declaration of Human Rights, article 14(1) of the International Covenant on Civil and Political Rights, Article 6(1) of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, Article 8(1) of the American Convention on Human Rights and Article 7(1) of the African Charter on Human Rights.

¹⁸ See e.g. ECtHR, *Pélissier and Sassi v. France*, Reports of Judgments and Decisions, 1999-11, Application no 25444/94, paras 67; Inter-American Court of Human Rights ("IACtHR"), *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, Judgment of 21 June 2002, Series C, No 94 (2002), para. 143; M. Nowak (ed.), U.N. Covenant on Civil and Political Rights, CCPR Commentary, (Engel Publisher, 2nd rev. ed., 2005), p. 333 et seq., with further references to case law.

¹⁹ *Lubanga Extraordinary Review Decision*, para. 13.

lines"; the term "immediate" has been defined as "underlin[ing] the importance of avoiding errors through the mechanism provided by subparagraph (d) by the prompt reference of the issue to the court of appeal".²⁰

24. The relevant provisions of the ICC Statute and Rules of Procedure which are relied upon by the Government of Libya for the purposes of this application for leave to appeal are: articles 19 and 95 of the Rome Statute and Rule 58 of the Rules of Procedure and Evidence.

IV. SUBMISSIONS

- i. The Chamber erred in determining that there is no admissibility challenge under consideration*

25. Libya submits that the Chamber erred in ruling that there is no admissibility challenge under consideration by the Court and, therefore, that there is no basis for postponing the request for surrender pursuant to article 95 or Rule 58(2). This conclusion was based on three erroneous determinations by the Chamber.

26. First, the Chamber erroneously concluded that the Libyan Government relies on its enunciation of an *intention* to challenge the admissibility of the case in support of the contention that there is an admissibility challenge under consideration which triggers the application of article 95. In reaching this determination, the Chamber applied its earlier ruling in the case of Mr Gaddafi without due consideration to the differences between the two cases.²¹ Specifically, at paragraph 30 of the Impugned Decision, the Chamber held that:

[A]ny expression of intention to challenge the admissibility of the case against Mr Al-Senussi – whether made in the Admissibility Challenge,

²⁰ Ibid, paras 14-19.

²¹ Second Postponement Decision, paragraph 18.

the Observations of 28 January 2013, the Response to the Application, or in any other filing in the record of the case – is of no consequence for the application of article 95 of the Statute. In fact, the Chamber has already held specifically that article 95 of the Statute cannot constitute a legal basis to postpone a request for surrender following a mere announcement that an admissibility challenge is forthcoming and, therefore, in the absence of any such challenge before the Chamber.²² (emphasis added)

27. This conclusion ignores the critical difference between the two cases, namely that the Government of Libya has taken significant steps that go beyond simply evincing an intention to challenge the admissibility of the case against Mr Al-Senussi. Rather, the very documents referred to by the Chamber in the Impugned Decision – the Admissibility Challenge, the Observations on 28 January 2013, the Response to the Application – do significantly more than simply “announce that an admissibility challenge is forthcoming”. Rather, they set out in writing the parameters of Libya’s challenge to the admissibility of the case and the basis upon which it is made, whilst seeking to rely on supplemental material in due course to provide further clarifications of the developments in the case since 1 May 2012. Accordingly, there was no proper basis for the Chamber’s determination that the documents merely announced an intention to make an admissibility challenge which is insufficient to trigger the application of article 95.

28. Secondly, the Chamber erred in ruling that the Admissibility Challenge of 1 May 2012 does not constitute a challenge with respect to Mr. Al-Senussi. Contrary to the finding of the Chamber, the Admissibility Challenge with regard to Mr Al-Senussi is not vitiated by the submission advanced by the Government in the Admissibility Challenge (and subsequently accepted by the Chamber) that

²² ICC-01/11-01/11-269, referring to Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi, ICC-01/11-01/11-100, para 18.

it should be determined only in relation to the Mr Gaddafi.²³ Rather than vitiating the existence of the challenge, this submission simply postpones the determination of that challenge and it must be read alongside the alternative submission put forward by the Government of Libya, namely:

In the alternative, if, notwithstanding the above, the Chamber considers that the term “case”, within the meaning of Article 19 does not refer to the proceedings against both Mr Gaddafi and Mr Al-Senussi as a whole, the Government of Libya has provided sufficient evidence concerning the investigation and prosecution of both individuals and hereby challenges the admissibility of the case against each and both of these two persons.²⁴

29. It is submitted that this alternative submission by the Government of Libya was sufficient to seize the Chamber of the question of the admissibility of the case against Mr Al-Senussi; it is “an admissibility challenge under consideration” regardless of the fact that it did not fall to be determined at the same time as the admissibility challenge in relation to Mr Gaddafi.

30. Thirdly, the Chamber further erred in finding that “an incomplete challenge which needs to be supplemented in due course cannot be considered as “properly made within the terms of article 19 of the Statute and rule 58 of the Rules.”²⁵ There is nothing in the text of the Statute or the Rules to support this conclusion. The Chamber’s reliance on the finding of the Appeals Chamber that a State has the duty to ensure that its admissibility challenge is sufficiently substantiated by evidence as it has no right to expect to be allowed to present any additional evidence after the initial challenge” does not support the Chamber’s contention, having regard to the terms of the Statute. The finding of the Appeals Chamber was limited to the right or otherwise to make further written submissions regarding a challenge already before the Court and it

²³ ICC-01/11-01/11-134, para 8.

²⁴ Admissibility Challenge, paras 69-73.

²⁵ ICC-01/11-01/11-269, para 32.

makes no reference to, or determination of, the requirements for a “properly made” challenge in order for that challenge to be said to be extant.

31. Libya submits that there is no basis in the text of the Statute or the Rules for the Chamber’s restrictive interpretation as to how an admissibility challenge may properly be brought. Rule 58(1) provides that “a request or application made under article 19 shall be in writing and contain the basis for it.” That is the full extent of the explicit requirements for an admissibility challenge. There is no further indication as to how a challenge can “properly be brought”, whether it be in the form of an “application” or a “request”. Nor is there any explicit elaboration of the meaning of those two words

32. Accordingly, a purely textual analysis suggests that the Chamber has erred in demanding the level of formality required by its ruling that an incomplete challenge is not a challenge. The Libyan Government set out the basis of its admissibility challenge in relation to Mr Al-Senussi in its written application of 1 May 2012. Accordingly, the Libyan Government submits that the effect of that Application is that the Court is sufficiently seized of the matter such that there is an “admissibility challenge under consideration” and, in turn, that there was no proper basis for the ruling that article 95 could not be relied upon to found the postponement request.

ii. *The Chamber erred in failing to give full consideration to the manner in which an admissibility challenge can be brought*

33. Further and alternatively, even if the information currently before the Court in relation to the admissibility of the case against Mr Al-Senussi cannot be construed as an “application” and, accordingly an admissibility challenge within the meaning of Rule 55, it is submitted that it can properly be construed as a “request”. The Libyan Government submits that the disjunctive “or” clearly

suggests that there is a difference between a “request” and an “application” for the purposes of Article 19. Accordingly, even if it is determined that an “application” requires the level of formality inherent in the Chamber’s ruling in the Impugned Decision, a “request” is conceptually and practically different and the information currently before the Court can rightly be considered to be a “request” and therefore “an admissibility challenge”, thereby triggering the application of article 95.

34. The Chamber failed to engage with the previous submissions raised by the Libyan Government regarding the proper interpretation of the terms “request” and “application”, simply deciding that there was no admissibility challenge before the Court.²⁶ The Libyan Government reiterates its previous submissions and submits that a “request” can properly be interpreted as something requiring less formality than an “application” (if that is interpreted as requiring a filing formally detailing all the arguments and evidence in support of an admissibility challenge), namely a notification of an admissibility challenge pending the collation of evidence. Indeed, it is very common in the procedural law of many legal systems to have a two-step process for substantive legal proceedings involving a notification of intention to file a submission followed by a fully reasoned submission. It is the Libyan Government’s submission that the drafters of the Rome Statute envisaged such a process in relation to article 19 admissibility challenges, and it is for this reason that the terms “request” and “application” were inserted into rule 58.

35. This restrictive interpretation of an “admissibility challenge under consideration by the Court” is not only unsupported by the text of the Statute but also displays insufficient regard to its object and purpose, contrary to the principles of

²⁶ ICC-01/11-01/11-102, para 22.

interpretation set out in the Vienna Convention.²⁷ The principal goal of the Statute is to 'end impunity' for the 'most serious crimes of concern to the international community'. This objective is informed by an express desire to replace a culture of impunity with one of accountability so as to reinstate the rule of law in situations where it has been ignored or usurped. There is a clear presumption that this is best done by imposing accountability at a national level.

36. The model of accountability agreed upon at the Rome Conference is one in which the ICC 'complements' national judicial systems in the prosecution of 'serious crimes of concern to the international community', rather than replaces them. The ICC is, therefore, a tribunal of last resort, exercising jurisdiction only when the national court has failed to act or is unwilling or unable to do so genuinely.²⁸ The Rome Statute is underpinned by a presumption that national courts are the most appropriate and effective fora for ensuring such accountability and, as such, the Court, through the complementarity regime embodied in the admissibility provisions, should not seek to limit or infringe upon a State's sovereign right and duty to conduct national proceedings. Rather, the Court should facilitate the good faith efforts of states to ensure accountability by interpreting the provisions of the Statute and Rules in a manner which is consistent with the presumption in favour of domestic prosecution.

37. As articulated in its Article 19 application dated 1 May 2012, the Libyan Government has shown a clear commitment to post-conflict transitional justice and national reconciliation. It is determined to bring both Mr Gaddafi and Mr Al-Senussi to justice in accordance with its international obligations and with the objective of building a new and democratic Libya governed by the rule of

²⁷ *Vienna Convention on the Law of Treaties* 1969, Article 31(1) sets out the general rule of treaty interpretation: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

²⁸ Rome Statute, article 17.

law. To insist upon a restrictive interpretation of the Rome Statute and thereby impede or deny the Libyan people an opportunity to eradicate the country's long-standing culture of impunity would be manifestly inconsistent with the object and purpose of the Rome Statute.

iii. The Chamber erred in failing to consider the applicability of article 95 to the request for surrender of Mr Al-Senussi

38. The Libyan Government relies upon and reiterates its submissions on the application of article 95 to surrender requests, as set out in its application for leave to appeal and appeal filed in April 2012 in the case of Mr Gaddafi. Specifically, it is submitted that article 95 operates in effect as an exception (in cases where there is an admissibility challenge) to the article 89(1) duty to surrender an individual to the Court. Indeed, the first part of article 95 specifically clarifies that it applies to all requests "under this Part" (ie. including requests for surrender). The second part of article 95 enables the Court to rule that the state has to comply even before the jurisdictional challenge is resolved, but this duty to cooperate only applies to requests for the collection of evidence (ie. it is not applicable to requests for surrender). Indeed, the application of the first limb of article 95 to requests for surrender is supported by learned commentators.²⁹

39. This interpretation of article 95 is consistent with several other provisions of the ICC Statute which contemplate a situation where a State maintains custody of a suspect until the Court decides on that State's admissibility challenge. Such provisions include article 19(8) which enables the Prosecutor to "prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58" while challenges to admissibility are pending. This provision is redundant if a State was under an obligation to turn

²⁹ Kress & Prost, 'Article 95' in Triffterer, "Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article", 2nd Edition, page 1594 at 4.

over anyone subject to an arrest warrant immediately. This interpretation of article 95 would also provide for a consistent approach for state challenges to admissibility pursuant to article 19 and *ne bis in idem* challenges brought by a suspect in a national court pursuant to article 89(2).³⁰ There is no logical reason for the two challenges to be treated any differently and this adds weight to the reason for adopting the Libyan Government's preferred construction of article 95. This is all the more pressing when one considers that the provisions of the ICC Statute pertaining to cooperation and admissibility are rightly interpreted with the principle of complementarity at the forefront of one's mind.³¹

40. Had the Pre-Trial Chamber properly concluded that there was an article 19 admissibility challenge under consideration for the purposes of article 95 - and subsequently that article 95 applied - the request for postponement of the surrender of Mr Al-Senussi pending the determination of its admissibility challenge would have been granted. In Libya's submission there was no proper reason for the request to have been denied.

iv. The Chamber erred in finding that Rule 58(2) does not apply and erred in its interpretation of Rule 58(2)

41. Further and alternatively, the Libyan Government submits that the Chamber could properly have postponed the request for surrender as an "appropriate measure for the conduct of the proceedings" within the purview of Rule 58(2). For the reasons outlined above, the Government of Libya asserts that the Chamber erred in law by finding that an admissibility challenge is not currently under consideration by the Court in relation to the Mr Al-Senussi and, consequently, that Rule 58 cannot apply.

³⁰ Kress & Prost, 'Article 89' in Triffterer, "Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article", 2nd Edition, page 1538 at 2.

³¹ Preparatory Committee, 1996 Report, Vol 1, para 316.

42. Further, the Chamber erred in its interpretation of Rule 58(2) by ruling that its silence regarding the possible postponement of a Request for Surrender means that Rule 58(2) cannot be used as a legal basis for postponement of surrender. Rule 58(2) contains a non-exhaustive list of measures that the Court may apply and it is entirely a matter for the Court's discretion as to what measures are appropriate for the conduct of the proceedings and, it is submitted, this may include the postponement of a request for surrender. In view of Libya's imminent supplemental submissions, there can be no justification for the order for the immediate surrender of Mr Al-Senussi, given the lengthy legal proceedings and security arrangements that it would entail, as well as the serious disruption to the ongoing national investigations which are approaching the accusatory stage. Therefore, in the event that the Chamber found that article 95 did not apply, it would nevertheless be an appropriate exercise of the Court's discretion under Rule 58(2) to postpone the surrender of Mr Al-Senussi: there is no proper basis for the Chamber's refusal to exercise its discretion in this way.

v. *These errors of law satisfy the requirements of article 82(1)(d)*

43. In summary, it is submitted on behalf of the Government of Libya that the Pre-Trial Chamber's decision is premised on an incorrect assessment of the status and impact of the Government's admissibility challenge regarding Mr Al-Senussi. In clear contradiction of the principle of complementarity, this has the effect of denying the Libyan Government, as a state with jurisdiction over Mr Al-Senussi, the right to have its admissibility challenge properly and completely determined. Moreover, the refusal to postpone the order for surrender and, in effect, its hampering of current domestic proceedings, will cause immeasurable harm to the new Government's efforts to reinstate the rule of law in Libya. Again, this is a clear contradiction of the core principles underlying the Rome Statute and guiding its interpretation. Finally, satisfaction of the request of surrender is likely to have serious ramifications for national security at a time

when the Government of Libya is attempting to rebuild its country within the context of an already volatile security environment. To ignore this reality is to seek to impose a form of supranational accountability upon a Government that has continuously displayed good faith towards the Court. Again, this is in clear contravention of the principles guiding the interpretation and application of the Rome Statute.

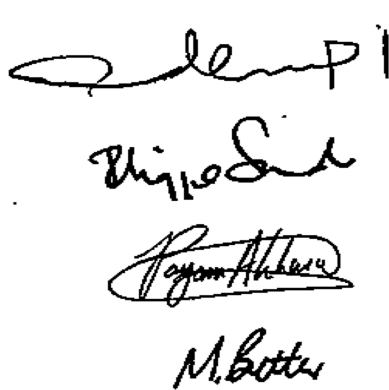
44. The Pre-Trial Chamber's errors significantly affect the fair and expeditious conduct of the proceedings. It is manifestly unfair to deny the Government of Libya's request for a postponement of the order to surrender Mr Al-Senussi in circumstances where it has made an admissibility challenge pursuant to articles 19 and 95 and rule 58, whether it be construed as an "application" or, more broadly, as a "request" based on the Libyan Government's proposed interpretation of that term. Such a decision plainly runs counter to the doctrine of complementarity upon which the Rome Statute is based and the object and purpose of the Rome Statute. It would be unjust and wrong to fail to recognize the applicability of article 95 to the present situation in circumstances where an admissibility challenge can be said to be under consideration.

45. An immediate resolution of the issue by the Appeal Chamber would materially advance the proceedings. Were the Appeals Chamber to decide that the Pre-Trial Chamber had committed a legal error, it could overrule the Pre-Trial Chamber's decision and decide whether the Government of Libya should be granted a postponement of the order to surrender. Such a postponement would avoid the absurd situation where Libya is forced, under difficult and volatile security conditions, to surrender Mr Al-Senussi to the Court only for him to have to be subsequently returned to Libya in the event that Libya's admissibility challenge is successful. This scenario would pose an unnecessary risk to Mr Al-Senussi's security, waste costs and would also set back the progress of Libya's domestic proceedings which are the subject of the extant admissibility challenge.

V. CONCLUSION

46. For these reasons, the Government of Libya respectfully requests the Chamber to grant it leave to appeal against the identified errors of law in the Impugned Decision.

Respectfully submitted:



Professor Ahmed El-Ghani
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Dated this 12th day of February 2013

At London, United Kingdom