Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-01/11-01/11**
Date: **20 May 2013**

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's reply to "Response on behalf of Abdullah Al-Senussi to the Submission of the Government of Libya for Postponement of the Surrender Request for Mr. Al-Senussi"

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I. INTRODUCTION

1. The Government of Libya makes this submission in reply to the "Response on behalf of Abdullah Al-Senussi to the Submission of the Government of Libya for Postponement of the Surrender Request for Mr. Al-Senussi"[1] ("Al-Senussi Response"), filed on 24 April 2013. The submission to which Mr. Al-Senussi refers is that concerning Article 95 in the "Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute" of 2 April 2013[2] ("Al-Senussi Admissibility Challenge").

2. Mr. Al-Senussi seeks (i) dismissal of the Article 95 submission; (ii) confirmation of the order to surrender; and (iii) issuance of a scheduling order in relation to the admissibility proceedings,[3] on the bases that:
   a. No Article 95 submission may be made because the admissibility challenge was not filed promptly;[4]
   b. Application of Article 95 is not an automatic right which follows from the filing of an admissibility challenge;[5]
   c. Libya has not complied with various international law obligations;[6]
   d. The ICC regime does not support the notion of 'positive complementarity';[7] and
   e. Article 95 does not provide a basis for postponing surrender.[8]

[1] ICC-01/11-01/11-319.
[2] ICC-01/11-01/11-307. Paragraph 206 refers to the "right [of the Libyan Government] to postpone the order for surrender of Abdullah Al-Senussi, pursuant to article 95 of the Statute, pending determination of the Government's Article 19 admissibility challenge in relation to Abdullah Al-Senussi.
[3] Al-Senussi Response, paras 4, 63.
[4] Al-Senussi Response, para. 35.
[5] Al-Senussi Response, paras 3(a), 45-47.
[6] Al-Senussi Response, paras 3(a), 37-44.
[7] Al-Senussi Response, para. 56.
[8] Al-Senussi Response, paras 59, 60. As Mr. Al-Senussi concedes, this argument has already been raised before, and dismissed by, the Chamber. It will not, therefore, be considered in this Reply.

II. PRELIMINARY ARGUMENT: TIMING OF ADMISSIBILITY CHALLENGE

3. Mr. Al-Senussi argues that the Al-Senussi Admissibility Challenge cannot give rise to any submission under article 95 because it was not filed timeously.[9] Mr. Al-Senussi refers, in this regard, to the Appeals Chamber's decision of 30 August 2011 in the *Muthaura et al*. case.[10]

4. It should be noted, however, that taken in context, the jurisprudence relied upon actually cautions against a *premature* admissibility application. It states that:

> *[…] the argument that once the summons to appear was issued, Kenya was constrained, under article 19(5) of the Statute, to bring the admissibility challenge "at the earliest opportunity" and therefore it could not be "expected to have prepared every aspect of its Admissibility Application in detail in advance of this date is also misconceived. Article 19(5) of the Statute requires a State to challenge admissibility as soon as possible once it is in a position to actually assert a conflict of jurisdictions. The provision does not require a State to challenge admissibility just because the Court has issued a summons to appear.*[11]

5. This becomes yet clearer later in the same decision:

> *Article 19 (5) of the Statute requires States to challenge the admissibility of a case "at the earliest opportunity". This provision must be seen in the context of the other provisions on admissibility, in particular article 17 (1) of the Statute. As explained in paragraph 37 above, the purpose of an admissibility challenge under article 17 (1) of the Statute is to resolve existing conflicts between competing jurisdictions - the Court's on the one hand, and a national jurisdiction on the other hand. As mentioned in paragraph 46 above, the "earliest opportunity" in article 19 (5) of the Statute refers to the earliest point in time after the conflict of jurisdictions has actually arisen. The State cannot expect to be allowed to amend an admissibility challenge or to submit additional supporting evidence just because the State made the challenge prematurely.*[12]

6. Mr. Al-Senussi's argument that the Libyan Government did not file the admissibility challenge at the earliest opportunity after a conflict of jurisdictions

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[9] Al-Senussi Response, para. 35.

[10] "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'", 30 August 2011, ICC-01/09-02/11-274.

[11] Para. 46.

[12] Para. 100.

arose fails entirely to address the relevant facts. Mr. Al-Senussi's submissions refer to the chronology of proceedings set out in the Al-Senussi Response itself, (at paragraphs 5-21[13]) together with the fact that the Libyan Government has been filing submissions with the Court and has custody of Mr. Al-Senussi.

7. The facts surrounding the timing of the Libyan Government's admissibility challenge are complex and are set out in detail in the Al-Senussi Admissibility Challenge (necessarily, even in that lengthy document, in a summary manner).[14] The Al-Senussi Response fails entirely to address these facts. The chronology narrated refers simply to procedural developments at the ICC – not to the real substance of the Libyan criminal case against Mr. Al-Senussi or other salient issues that explain its timeline. The material facts are very different from those pertaining to the *Gaddafi* case, as indicated, for example, by the fact that the two cases were separated for the purposes of the admissibility assessment. In light of the complex nature of these facts, the fact that they are summarised in the Al-Senussi Admissibility Challenge, and the failure of the Al-Senussi Response to address them, they will not be rehearsed in this Reply. The facts do, however, clearly indicate that the Al-Senussi admissibility challenge was filed as soon as possible and in compliance with Article 19(5).

III. ROLE OF ARTICLE 95

8. Mr. Al-Senussi argues that article 95 does not allow Libya, upon making an admissibility challenge, to "unilaterally" or "automatically" defer compliance with the order to surrender.[15] Mr. Al-Senussi makes the above argument in conjunction with the assertion that Article 19(9) provides that the filing of an admissibility challenge "shall not affect the validity of […] any order or warrant issued by the Court prior to the making of the challenge".[16] Whilst it is correct, that the effect of Article 95 is not to render invalid any of the orders or warrants

[13] Al-Senussi Response, para. 35.
[14] Al-Senussi Admissibility Challenge, paras 2, 10-17, 136-138, 152-158, 167-169, 175, 176, 180-193.
[15] Al-Senussi Response, paras 3(a), 45, 46.
[16] Al-Senussi Response, para. 31.

issued by the Court, as discussed below, Mr. Al-Senussi's arguments are mistaken as to the effect of article 95, and ultimately, wrong.

9. Ultimately, Mr. Al-Senussi's argument is that these provisions should be interpreted to prevent Libya from profiting from violations of international law. Whilst such allegations of violations are, themselves, entirely without basis (addressed directly below [17]), the Al-Senussi Response profoundly misunderstands article 19, the complementarity principle, and the role of article 95 therein. In sum, the Al-Senussi Response makes unfounded allegations of violations of international law and then misinterprets their ramifications.

10. Article 95 provides that:

> *Where 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, unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to article 18 or 19.*

11. It has been repeatedly held that "there is a close relationship between the cooperation regime of Part IX and the complementarity regime contained in Part II of the Statute".[18] The Chamber has held, further, that:

> *[…] the Court must fulfil its mandate in accordance with its legal framework and that the complementarity principle is a central aspect thereof and a key feature of the institution. The suspension of the investigation and the corresponding postponement of the cooperation requests is one major consequence of this principle.*[19]

12. This applies, in particular, to article 95:

> *"certain provisions of the cooperation regime are directly linked to complementarity provisions. In particular, there are intimate links between article 95 in Part IX and articles 18 and 19 in the Statute.*[20]

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[17] See *infra*, "Alleged violations of international law".
[18] See, for example, Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Rome Statute, 1 June 2012, ICC-01/11-01/11-163, para. 25.
[19] Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Rome Statute, 1 June 2012, ICC-01/11-01/11-163, para. 36, referring to Articles 18(2) and 19(7) of the Statute.
[20] Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Rome Statute, 1 June 2012, ICC-01/11-01/11-163, para. 31.

13. The precise character of the link between article 95, the complementarity regime and the Chamber's resulting lack of discretion in relation to article 95 can be understood only through the role of article 95 in upholding states' rights, particularly the procedural elements. Complementarity is a corollary of the modified sovereign right to conduct criminal proceedings within domestic jurisdiction (including in respect of international crimes). Following the Rome Statute (in relation to states subject to its jurisdiction), the substantive right subsists in relation to international crimes, which are subject to ICC jurisdiction, if the state is willing and able to conduct a genuine domestic investigation and/or prosecution. Accordingly, although modified by the complementarity regime, it remains a state's *right*.

14. Rights, as consistently held by the European Court of Human Rights, must not be "theoretical or illusory", but rather "practical and effective". As regards the rights protected by the ECHR, this is the rationale for the procedural elements of those rights.[21] As regards the sovereign rights of states, it is the rationale for features of the ECHR regime such as the obligation to exhaust domestic remedies and, in the context of the EU, this same notion underpins the concept of subsidiarity. It must, equally, be true of a state's right to conduct *genuine* criminal proceedings in respect of international crimes perpetrated on its territory.

15. Ensuring that the right to conduct genuine criminal proceedings is "practical and effective" – that is, the procedural element of the state's right to conduct genuine criminal proceedings – requires protection of the state's criminal processes pending determination of whether criminal proceedings are indeed genuine. If this did not occur, unjustifiable prejudice could be caused to the domestic criminal process. The *risk* of prejudice is the critical focus.

[21] See, for example, *Artico v. Italy* (1980) 3 EHRR 1, para. 33; *Liu v. Russia (No. 2)* [2011] ECHR29157/09; *Scordino v. Italy (No. 1)* (GC) No. 36813/97.

16. Throughout ICC jurisprudence, as well as within international criminal law generally, interim measures are consistently applied to disputes where, if absent, the matter pending determination would be prejudiced. The central function of interim measures is to avoid consequences that "may *be* irreversible";[22] or "*could* potentially defeat the purpose of the […] appeal".[23]

17. For this reason, the Chamber has taken the view that article 95 requires that once an admissibility challenge "has been properly made within the terms of article 19(2) of the Statute and rule 58(1) of the Rules", a request for surrender is postponed.[24] The court does not have any discretion in the matter, once a challenge is properly made and remains unresolved.

18. To delay the suspension of the surrender until it was apparent that actual prejudice had occurred would subvert the central tenet of complementarity. The state's right to conduct genuine criminal proceedings would be rendered uncertain and illusory. This explains the Chamber's finding that "[i]t would be untenable for the Court to insist on compliance with a request for arrest and surrender, even at the *risk* of hampering the national proceedings, while its own

[22] *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the requests of the Prosecutor and the Defence for suspensive effect of the appeals against Trial Chamber I's Decision on Victim's Participation of 18 January 2008", Appeals Chamber, 22 May 2008, ICC-01/04-01/06-1347, paras 19, 20, 23.

[23] *Prosecutor v. Thomas Lubanga Dyilo*, "Reasons for the decision on the request of the Prosecutor for suspensive effect of his appeal against the 'Decision on the release of Thomas Lubanga Dyilo'", Appeals Chamber, 22 July 2008, ICC-01/04-01/06-1444, para. 10. This approach is reflected in comparable interim measures the law of England and Wales: "The purpose of a stay in judicial review proceedings is clear. It is to suspend the ?proceedings? that are under challenge pending the determination of the challenge. It preserves the status quo. This will aid the judicial review process and make it more effective. It will ensure, so far as possible, that if a party is ultimately successful in his challenge, he will not be denied the full benefit of his success" (*R v Licensing Authority Established By The Medicines Act 1968, ex p Rhone Poulenc Rorer* [1998] EuLR 127).

[24] Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Rome Statute, 1 June 2012, ICC-01/11-01/11-163, para. 39. It should be noted that while the Chamber used the word "may" in the final sentence of paragraph 39, it is eminently clear that this finding was determinative of the application of article 95.

investigation is suspended".[25] This illuminates the key role played by article 95 in underpinning the state's right to conduct genuine criminal proceedings.

19. The reason for the mandatory language of article 95 is that failure to respect a state's valid postponement of surrender would *necessarily* entail unacceptable risks of adverse and irreversible consequences for pursing genuine domestic criminal proceedings of international crimes. This is especially clear where the first part of the admissibility assessment (existence of a domestic investigation or prosecution) is satisfied.

20. Mr. Al-Senussi seeks to remove article 95 from its context, so as to assert (i) that the Chamber's decision is discretionary; and (ii) that neither this or any other provision prevents the Chamber from requiring surrender during admissibility proceedings.[26] The plain language of article 95, the jurisprudence and the complementarity principle indicates that the Defence submissions are misconceived: the discretion as to its invocation belongs to the state.

21. This does not mean that Libya's right, protected by Article 95, is absolute nor has this ever been the Libyan Government's position (as erroneously argued by Mr. Al-Senussi). Pursuant to article 95, the state may exercise its discretion to "postpone the execution of a request" for surrender unless the "Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to article 18 or 19". This allows the Chamber to insist upon the collection of specific pieces of relevant evidence ("such evidence").

IV. ALLEGED VIOLATIONS OF INTERNATIONAL LAW

22. Mr. Al-Senussi argues that the article 95 submission should be rejected because Libya has allegedly not complied with its obligations to the Security Council and

[25] Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Rome Statute, 1 June 2012, ICC-01/11-01/11-163, para. 36, referring to Articles 18(2) and 19(7) of the Statute [emphasis added].
[26] Al-Senussi Response, para. 47.

the ICC.[27] Mr. Al-Senussi refers, in particular, to the alleged failure to allow or make provision for privileged visits by counsel; failure to surrender Mr. Al-Senussi to the ICC; political statements that Mr. Al-Senussi will be tried in Libya; and the ongoing progress in the domestic criminal process against Mr. Al-Senussi.[28] Mr. Al-Senussi also refers to alleged violations by Mauritania of obligations owed to the Security Council.[29]

23. The Libyan Government of course accepts the provisions of the UN Charter (cited by Mr. Al-Senussi), and it accepts that Security Council Resolution 1970, and the correlative obligations to the ICC, are binding upon it. But the reference to the ICC under the Statute incorporates the Statute as a whole, including Article 95.

24. Mr. Al-Senussi seeks to employ the jurisdiction of the ICC as a form of retribution or punishment for alleged past violations. The ICC does not constitute a general means of international law enforcement. Such an approach would be both illegitimate and regressive. As regards matters of due process, to the extent that issues impact upon the assessment of whether a burgeoning domestic criminal prosecution is "genuine", they are properly to be addressed to the issue of admissibility, the subject of Libya's application, and not with other matters.

A. Political statements & progress with the domestic criminal process

25. Contrary to the assertions of Mr. Al-Senussi,[30] political statements of intent to carry out a domestic trial of Mr. Al-Senussi do not, in any sense, indicate defiance or refusal on the part of Libya to comply with its international obligations. To the contrary, such statements indicate an intention and desire to carry out genuine, fair domestic trials within the Libyan legal system thereby

[27] Al-Senussi Response, paras 3(a), 37, 41. Mr. Al-Senussi also refers to all of the arguments in the submissions of Mr. Al-Senussi dated 9 January 2013 and 19 March 2013.
[28] Al-Senussi Response, paras 3(b), 11, 48, 49, 53, 54, 57.
[29] Al-Senussi Response, paras 38, 39.
[30] Al-Senussi Response, para. 48.

retaining jurisdiction over trials of profound importance to the Libyan transition. Mere political statements of intent cannot *themselves* amount to a violation of the request for assistance.[31]

26. Mr. Al-Senussi's application relies upon the erroneous presumption that progress in the Libyan criminal investigation in relation to Mr. Al-Senussi indicates defiance as regards its international obligations. Despite Mr. Al-Senussi's submissions to the contrary, encouraging domestic criminal prosecutions is one of the central aims of the ICC's complementarity-based jurisdiction. It would be a subversion of this principle to allow the admissibility assessment to be essentially a race with the ICC pitted *against* the domestic jurisdiction or to otherwise attempt to draw adverse inferences on the mere basis that Libya had made progress in its domestic criminal proceedings.[32]

B. Actions of Mauritania

27. This response is filed on behalf of the Government of Libya, and there is no obvious prospect of submissions by Mauritania on alleged violations of Security Council Resolution 1970. In the absence thereof, it would not be proper for the Libyan Government to make any submissions: the Chamber cannot possibly make findings in respect of alleged violations by Mauritania in its absence, as sought by Mr Al-Senussi.

28. If Mauritania had violated its international obligations, this would not in any event provide any basis for reporting Libya to the Security Council unless probative evidence was presented to the Chamber that established a failure, *by Libya*, to comply with the Court's requests for assistance.

29. To re-state a previous submission, counsel must properly substantiate all allegations made to the Court, the Security Council, and others.[33] To the contrary, Mr. Al-Senussi's allegations that Libya incited, participated in, or

[31] See International Law Commission's Articles on State Responsibility, article 1 & commentary, para. 1
[32] See *infra*, section V, "Positive complementarity".
[33] See eg. Article 54(6) of the African Charter on Human Rights.

rewarded a violation of Resolution 1970 by Mauritania payment for receipt of Mr. Al-Senussi are manifestly unsubstantiated. As has been stated in previous filings, Libyan Government records establish that the payment of 250 million dinars to Mauritania which was approved by the Libyan General National Congress and recorded in a GNC Decision of 14 November 2012 (ie. more than 70 days following the extradition of Mr Al-Senussi to Libya from Mauritania), was in fact consistent with Libya's many other investments in Mauritania and was made specifically in order to assist the Mauritanian economy.

30. Also as previously noted, even if Libya could somehow be shown to be responsible for a violation of international law arising from Mr. Al-Senussi's extradition, the obligation under the law of state responsibility to restore the *status quo ante* could not entail any order that Libya should transfer Mr Al-Senussi to the ICC. It would entail no more than the return of Mr. Al-Senussi to Mauritania: it would be for Mauritania to consider its international law obligations and decide afresh Mr Al-Senussi's place of detention.

C. Privileged visits for Defence counsel

31. Among the assertions concerning Libyan violations of international law, the Al-Senussi Response refers in particular to the alleged violation of the Chamber's orders to arrange a privileged legal visit,[34] and the banning of ICC personnel from Libya.[35]

32. It was noted in the Admissibility Challenge that

> *Libya remains keen to facilitate a privileged legal visit to Abdullah Al-Senussi by his lawyer and wishes to conclude a Memorandum of Understanding with the ICC as soon as possible for this purpose. Due to the recent replacement of the Prosecutor-General, there has been some delays caused with respect to finalising this Memorandum. Now that the new Prosecutor-General, Mr Radwan, is in office, this issue will be addressed as a matter of priority.*[36]

[34] Al-Senussi Response, para. 3(b).
[35] Al-Senussi Response, para. 51.
[36] Admissibility Challenge, para. 179.

33. The credibility of the Libyan Government's submissions in this regard is resoundingly confirmed by the ICC Registrar in the "Second report of the Registry on the visit of the defence team to Libya":[37]

> *On 19 April 2013, the Libyan authorities transmitted the MOU with a number of comments. On the same day, the Registry asked the focal point whether the visit of the defence team could then take place shortly. The Libyan authorities indicated that "the Libyan Government invite[s] the defense team for Mr. Al-Senussi to visit Libya forthwith at any time convenient for them. They will of course need to apply for the requisite visas for entry to Libya and, upon entry, they will be subject to Libya's domestic laws. They will also need to provide the Government with formal confirmation of their retention by Mr. Al Senussi or his family".*[38]

V. POSITIVE COMPLEMENTARITY

34. Mr. Al-Senussi rejects the idea that Libya must be given a chance to prove that it can deliver justice, asserting that this "constitutes an admission that Libya is in fact not presently capable of 'proper investigation and prosecution' or capable of conducting 'fair trials which meet applicable international standards'".[39] In this regard, Mr. Al-Senussi asserts that the Libyan Government's reference to the notion of a 'positive' approach to complementarity is a misunderstanding of the nature of its relationship with the Court.

35. This is misconceived, and is illustrative of a misguided conception of the ICC's mandate. Not only has the positive approach to complementarity been implicit in the law of the ICC and the aims of the Rome Statute from the outset, its importance and influence has become yet clearer in, *inter alia*, the work of the Assembly of States Parties (ASP); and in the practice of the Prosecutor – including in the Libyan case.

36. The Office of the Prosecutor stated, in its "Report on Prosecutorial Strategy", of September 2006:

> *With regard to complementarity, the Office emphasizes that according to the Statute national states have the primary responsibility for preventing and punishing atrocities*

[37] 3 May 2013, ICC-01/11-01/11-328
[38] *Ibid*, para. 5.
[39] Al-Senussi Response, para. 56.

> *in their own territories. In this design, intervention by the Office must be exceptional – it will only step in when States fail to conduct investigations and prosecutions, or where they purport to do so but in reality are unwilling or unable to genuinely carry out proceedings. A Court based on the principle of complementarity ensures the international rule of law by creating an interdependent, mutually reinforcing international system of justice. With this in mind, the Office has adopted a positive approach to complementarity, meaning that it encourages genuine national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation.*

37. Further, it is clearly the intent of the States Parties that positive complementarity be applied within the extant regime. As well as a burgeoning literature that addresses the topic,[40] several aspects of the ICC's legal regime explicitly or impliedly cater for it.

38. For example, the Negotiated Agreement (between the ICC and the UN) establishes a general provision for co-operation, allowing the UN, its programmes, funds or offices to agree to Court requests for forms of co-operation and assistance not included within the Negotiated Agreement, where compatible with the UN Charter and the ICC Statute provisions.[41] The UN's work provides legal technical assistance on themes relevant to the substantive and procedural requirements of the ICC Statute (e.g., crime prevention criminal justice reform, human rights, and institutional development).[42]

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[40] For example, C.K. Hall, "Developing and implementing an effective positive complementarity strategy", in C. Stahn and G. Sluiter, The Emerging Practice of the International Criminal Court, Martinus Nijhoff, 2009, vol. 48; J.K. Kleffner, Complementarity in the Rome Statute and National Criminal Jurisdictions, Oxford University Press, 2008; W.W. Burke-White, "Implementing a Policy of Positive Complementarity in the Rome System of Justice", Criminal Law Forum, 2008, vol. 19, pp. 59–85; W.W. Burke-White, "Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of Justice", SSRN eLibrary; M.M. El Zeidy, "Principle of Complementarity: A New Machinery to Implement International Criminal Law", Michigan Journal of International Law, 2001, vol. 23, p. 869.

[41] Negotiated Relationship Agreement between the International Criminal Court and the United Nations, article 15(2).

[42] Examples include the Office for Drug-Control and Crime Prevention: Centre for International Crime Prevention (ODCCP/CICP), Office of the High Commissioner for Human Rights (OHCHR), Office of Legal Affairs Codification Division (OLA/COD).

39. Article 87 establishes grounds for co-operation requests and authorises the Court to conclude assistance agreements with intergovernmental organisations that are consistent with its mandate or competence.[43]

40. The 8th Session of the Assembly of States Parties to the Rome Statute (ASP) in November 2009 adopted a resolution which "[e]ncourages States Parties to further discuss issues related to the principle of complementarity and to explore proposals by States Parties introduced as 'positive complementarity'.[44]

41. The report of the Bureau of the ASP (March 2010), annexed to the Resolution on the Review Conference,[45] accepted positive complementarity as an element of the complementarity principle[46] (defining it as "all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Statute").[47]

42. In the recent "Fifth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970", the Prosecutor stated that

> *The Office is of the firm view that the strength of the Rome system lies in the possibility for shared responsibility and complementary actions between the Court and Libyan national judicial institutions and hopes to explore possibilities for mutually reinforcing activities between the Government of Libya and the Court in fostering complementarity.*[48]

43. With regard to Libya in particular, the Prosecutor noted as follows:

> *On 19 April 2013 Mr. Radwan and the designated ICC focal point, Dr. Ahmed El Gehani, visited the The Hague at the invitation of the Prosecutor. The ensuing constructive and fruitful discussions between the Office and the Libyan delegation focused on cooperation and coordination of efforts to advance the Office's*

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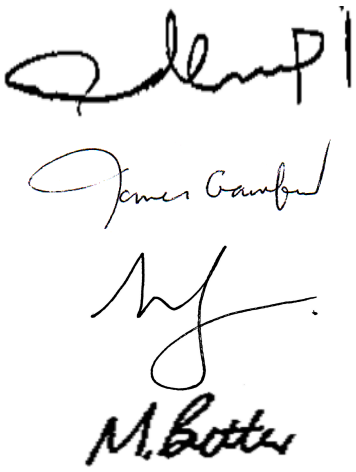
[43] Article 87(6)
[44] ICC-ASP/8/Res.3, Strengthening the International Criminal Court and the Assembly of States Parties, Adopted at the 8th plenary meeting, on 26 November 2009.
[45] "Taking stock of the principle of complementarity: bridging the impunity gap". Resolution ICC-ASP/8/Res.9, "Review Conference", adopted at the 10th plenary meeting, on 25 March 2010, by consensus, Appendix.
[46] ICC Assembly of States Parties, "Report of the Bureau on Stocktaking: Taking stock of the principle of complementarity: bridging the impunity gap", para 14
[47] Para. 4
[48] Fifth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970, para. 11.

> *investigative activities both within and outside Libya. Areas of future possible cooperation and coordination of investigations were explored. These preliminary positive discussions illustrated the willingness of the Office and of the Government of Libya to cooperatively work together in furthering investigations that could lead to arrest and surrender of alleged perpetrators, both inside and outside Libya.*[49]

VI. RELIEF SOUGHT

44. Libya therefore respectfully requests that the Pre-Trial Chamber reject Mr. Al-Senussi's response and interpret article 95 to allow Libya to postpone execution of the surrender request pending determination of the admissibility challenge.



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Dated this 20th day of May 2013
At London, United Kingdom

[49] Fifth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970, para. 10.