



Original: **English**

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

Date: 20 September 2013

THE APPEALS CHAMBER

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

SITUATION IN LIBYA

IN THE CASE OF

***THE PROSECUTOR v. SAIF AL-ISLAM GADDAFI and ABDULLAH AL-
SENUSSI***

PUBLIC

**Defence Response to “Appeal on behalf of Mr. Abdullah Al-Senussi against the
‘Decision on Libya’s postponement of the execution of the request for arrest and
surrender of Abdullah Al- Senussi pursuant to article 95 of the Rome Statute
and related Defence request to refer Libya to the UN Security Council”**

Source: Defence for Mr. Saif Al-Islam Gaddafi

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

The Office of the Prosecutor

Ms. Fatou Bensouda

Counsel for the Defence

Counsel for Saif Al-Islam Gaddafi:

Mr. John R.W.D Jones QC

Ms. Sarah Bafadhel

Counsel for Abdullah Al-Senussi:

Mr. Ben Emmerson QC

Mr. Rodney Dixon

Ms. Amal Alamuddin

Mr. Anthony Kelly

Professor William Schabas

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

Ms. Paolina Massidda

Ms. Sarah Pellet

Mr. Mohamed Abdou

The Office of Public Counsel for the Defence

States' Representatives

Professor Ahmed El-Ghani

Professor Phillipe Sands QC

Professor Payam Akhavan

Ms. Michelle Butler

Amicus Curiae

REGISTRY

Registrar

Mr. Herman von Hebel, Registrar

Deputy Registrar

Mr. Didier Daniel Preira, Deputy Registrar

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I. Introduction

1. In deciding to postpone the surrender Mr. Abdullah Al-Senussi, the Pre-Trial Chamber found that it had no discretion to reject an Article 95 request if the corresponding admissibility challenge was 'properly made'.
2. In so doing, the Pre-Trial Chamber treated Article 95 as a stand-alone provision, which confers enforceable rights upon a State, without any deference to or consideration of other obligations and rights arising under the Statute.
3. This is not a case in which the Chamber found that the interests of the challenging State to retain custody of the defendant on its territory outweighed the putative disadvantages of such a deferral: the Chamber's approach admits of no balancing test, nor does it permit the Chamber to consider any factors other than whether the admissibility challenge was 'properly made'. The right to postpone cooperation pursuant to Article 95 is thus, according to the Pre-Trial Chamber, unfettered by any consideration of the fundamental principles of necessity and proportionality.
4. Moreover, even though Article 21(3) of the Statute requires the Chamber to interpret and apply the Statute in a manner which is consistent with internationally recognised human rights, in accordance with the approach mandated by the Chamber, the Chamber would have no power to reject a surrender request, even if the defendant's continued detention in the State in question could endanger the life of the defendant, or severely prejudice the ability of the defendant to exercise his rights under the Statute.
5. Apart from the limited exceptions which are expressly set out in Article 95, the Pre-Trial Chamber's approach would deprive the Chamber of any power to enforce its decisions for the duration of the admissibility proceedings.
6. Although the ICC is dependent on State co-operation, it is, ultimately, a court of law. When the drafters crafted the Rome Statute, they clearly intended that it should function as an effective court of law, and that the ICC Statute should be

interpreted to ensure that it is able to function effectively. The Pre-Trial Chamber's decision on Article 95 has privileged the rights of a State to such an extent that the Chamber has no means to control the proceedings or to give effect to the rights of the defendant under the Statute. This position is not tenable, and must be reversed.

Standing of the Defence

7. Regulation 65(5) of the Regulations of the Court provides that participants may file a response within 10 days of the notification of a document filed in support of an Article 82(1)(d) appeal. The Defence for Mr. Saif Al-Islam Gaddafi is a party in the present case before the ICC, and should thus be considered to be a participant for the purposes of Regulation 65(5).
8. Although the Defence did not file any submissions before the Pre-Trial Chamber in relation to the request to postpone the surrender of Mr. Al-Senussi, this fact does not preclude participation at the appellate phase. There are numerous examples, in which a party, who has not filed submissions at the first instance level, has nonetheless participated in subsequent appellate litigation.¹
9. Since the case of Mr. Al-Senussi is joined to that of Mr. Gaddafi, the decision to postpone Mr. Al-Senussi's surrender also directly impacts on the proceedings against Mr. Gaddafi.

¹ See for example, ICC-01/04-01/07-776, which concerned an appeal in which both Defence teams filed responses to the Prosecutions Appeal Brief, even though the appealed decision had been issued on the basis of *ex parte* litigation limited to the Prosecution. In the Kenyatta *et alia* case, the Defence for Mr. Ali filed a substantive response to the appeal brief filed by the Kenyan Government which endorsed the appeal (ICC-01/09-02/11-166), even though the Defence had taken no position on the challenge at first instance (ICC-01/09-02/11-70, para. 6). See also ICC-01/04-01/06-3054-Red2, para.13, and Prosecutor v. Gotovina *et al.*, 'Decision on Ivan Cermak's Interlocutory Appeal Against Trial Chamber's Decision on Conflict of Interest', 29 June 2007, para.12.

10. Libya is currently obliged to surrender Mr. Gaddafi to the ICC but not Mr. Al-Senussi. In line with the Pre-Trial Chamber's recent decision that the confirmation process cannot commence until the defendant has physically appeared before the ICC,² the postponement of Mr. Al-Senussi's surrender could thus have significant implications for the organisation and progress of the pre-confirmation proceedings against the two defendants.
11. Although the particular issue certified for appeal arose in connection with the Government of Libya's request to postpone the surrender of Mr. Al-Senussi, any decision of the Appeals Chamber would be directly binding in connection with a future request to postpone surrender, should the admissibility appeal be upheld, or in the event of a second challenge to the admissibility of the case against Mr. Gaddafi.
12. It is notable in this regard that prior to the issuance of the Senussi Article 95 decision, the Defence for Mr. Gaddafi had argued that the Pre-Trial Chamber had the discretion to revoke a postponement decision in circumstances in which the domestic authorities had significantly violated the rights of Mr. Gaddafi and exploited their jurisdiction over him by launching abusive court proceedings against Mr. Gaddafi.³ In disposing of the related Defence requests, the Pre-Trial Chamber did not address these particular arguments, reserving its position until the issuance of the Senussi Article 95 decision.
13. If Appeals Chamber were to uphold the appeal of the Libyan Government or if the Libyan Government were to request the postponement of Mr. Gaddafi's surrender in connection with a second admissibility challenge, the present appellate proceedings would determine whether the Defence for Mr. Gaddafi will be entitled to maintain such arguments.
14. The Defence of Mr. Gaddafi was also precluded from seeking leave to appeal of the initial Article 95 decision postponing the surrender of Mr. Gaddafi as a

² ICC-01/11-01/11-440.

³ ICC-01/11-01/11-332.

result of the fact that Counsel for Mr. Gaddafi had been illegally detained by the Libyan authorities, and was only released after the five day deadline for appealing the decision had expired.⁴

II. Submissions

15. Although the Defence for Mr. Al-Senussi presented several arguments as to how the postponement of the surrender of Mr. Al-Senussi would unduly prejudice the rights of the Defence and endanger the security of the defendant,⁵ the Pre-Trial Chamber declined to consider these arguments on their merits.
16. Instead, the Pre-Trial Chamber stated that it “shares the view expressed by Libya to the effect that “[t]he Court does not have any discretion in the matter, once a challenge is properly made and remains unresolved”.⁶ The Chamber subsequently elaborated that it would not consider any Defence arguments which did not “bear on the only consideration that the Chamber is called upon to make in the present decision, i.e. whether the Admissibility Challenge has been duly made within the terms of the relevant statutory provisions.”⁷
17. The Pre-Trial Chamber’s finding on this specific point must also be considered in conjunction with the Chamber’s position that Article 95 can be invoked to postpone the execution of all requests for cooperation under Part 9, apart from specific exceptions concerning the ability of the Prosecution to collect evidence.⁸
18. Consequently, whereas the Chamber has the power to take counterbalancing measures as concerns cooperation pertaining to prosecution investigative matters, it does not have any power to regulate or qualify the ability of a State

⁴ The decision was issued on 1 June 2012. Counsel was detained on 7 June 2012, and released on 2 July 2012. It is understandable that the Principal Counsel would not have had the time and resources to submit a request for leave to appeal, whilst taking measures to secure the release of Counsel.

⁵ ICC-01/11-01/11-439, paras. 41-44.

⁶ ICC-01/11-01/11-354, para.25.

⁷ ICC-01/11-01/11-354, para.34.

⁸ ICC-01/11-01/11-354, para.21.

to suspend cooperation in relation to far more sensitive issues, such as surrender or matters pertaining to Defence rights.

19. The Pre-Trial Chamber provided no legal analysis or justification for its position; the Chamber simply indicated as above that it shared the views of the Libyan Government on this point, which were in turn, unsubstantiated. The Chamber thus failed to give a reasoned decision. The Pre-Trial Chamber also failed to consider whether its interpretation of Article 95 was consistent with internationally recognised human rights law, as required by Article 21(3) of the Statute, and whether it was consistent with a contextual interpretation of Article 95, and the object and purposes of the Statute.

The Pre-Trial Chamber's interpretation of Article 95 is contrary to internationally recognised human rights

20. The creation of an unfettered right to suspend cooperation in connection with all forms of cooperation (except cooperation requests relating to the collection of evidence by the Prosecution) creates an unacceptable lacuna as concerns the enforcement of Defence rights under the Statute, and results in a fundamental inequality of arms.
21. In its earlier June 2012 Article 95 decision, the Pre-Trial Chamber found that Article 95 must be applied in accordance with the principle of complementarity, and that consequently, the ICC cannot insist that State's comply with its orders at a time when its own investigations are suspended.⁹ It was, however erroneous for the Chamber to have viewed the proceedings before the ICC solely through the lens of Prosecution investigations.
22. Although an admissibility challenge suspends the ability of the Prosecution to conduct investigations, it does not suspend the proceedings before the Court,¹⁰ nor does it qualify the duty of the Chamber to take measures to ensure the protection of all persons who are at risk on account of the activities of the Court

⁹ ICC-01/11-01/11-163, para.36.

¹⁰ ICC-01/09-01/11-62, paras.8-9.

(which includes the defendant and Defence witnesses),¹¹ or to protect the rights of the defendant under the Statute, such as those enshrined in Article 55.

23. However, according to the Pre-Trial Chamber, although the Chamber is empowered to qualify the State's power to suspend cooperation during the admissibility proceedings in order to take measures for the benefit of the Prosecution, it has absolutely no such power to do so for the Defence.
24. Such a position fundamentally contradicts the overriding requirement of adversarial proceedings that both sides must have equal access to the Court.¹² This notion of equality of arms is interwoven into the power of the Pre-Trial Chamber to issue orders or seek cooperation for the benefit of the Defence and the protection and security of Defence witnesses and the defendant, and at the request of the Defence, to take measures to preserve evidence which might subsequently disappear.¹³
25. However, whereas the Chamber may override an Article 95 request in order to take measures to preserve the interests of the Prosecution during the admissibility challenge, in accordance with the Pre-Trial Chamber's ruling, Article 95 can be invoked by all and any State party to postpone cooperation concerning vital Defence requests, including those which might be required to protect the life of the defendant.
26. No fair and impartial Court of law can maintain the position that the life and security of the defendant are less important than the ability of the Prosecution to interview witnesses for a limited period of time, particularly considering that, if the defendant is harmed or his or her rights irretrievably prejudiced, than the judicial process might be frustrated in its entirety.
27. In addressing the concerns of the Defence for Mr. Al-Senussi concerning the potential impact of the postponement request on the rights of Mr. Al-Senussi, it was not sufficient for the Chamber to find that, since the text of Article 95 only

¹¹ ICC-01/04-01/06-2582, fn.117.

¹² Separate opinion, Judge Pikis, ICC-01/04-01/06-424, para.6.

¹³ Article 57(3)(b) and (c) of the Statute.

provides for exceptions concerning the gathering of prosecution evidence, it was unnecessary for the Chamber to consider the impact of the postponement request on the rights of the Defence. Article 21(3) of the Statute required the Chamber to consider whether the postponement of surrender in the particular circumstances of Mr. Al-Senussi would be consistent with internationally recognised human rights.

28. Even if the Statute does not expressly provide for a particular remedy for the Defence before the ICC, such a remedy can and should be incorporated, if required by internationally recognised human rights.
29. For example, in the Lubanga case, the Appeals Chamber found that even though the Statute does not explicitly provide for an abuse of process remedy, such a remedy existed by virtue of Article 21(3).¹⁴ The Appeals Chamber also stressed that Article 21(3) modifies all aspects of the Statute,¹⁵ not all aspects apart from Article 95.
30. The Appeals Chamber has also relied upon Article 21(3) in order to find that statutory provisions which govern agreements between organs of the Court and third parties, such as States, must be interpreted and applied in a manner which is consistent with the rights of the Defence.¹⁶ The Chamber thereby underscored that although certain statutory provisions were created to protect the interests of States and third parties, any such deference to State sovereignty must not be permitted to override fundamental rights of the Defence.¹⁷ The Appeals Chamber has further confirmed that the ICC has jurisdiction to assess

¹⁴ ICC-01/04-01/06-772, para. 37.

¹⁵ ICC-01/04-01/06-772, para.37.

¹⁶ ICC-01/04-01/06-1486, para 46.

¹⁷ This is consistent with the findings of the ICTY Appeals Chamber that “deference to States’ interests does not go so far as to supersede a Trial Chamber’s authority to maintain control over the fair and expeditious conduct of the trial”, Prosecutor v. Milutinovic et al., Decision on Interlocutory Appeal Against Second Decision Precluding the Prosecution from Adding General Wesley Clark to its 65 *ter* Witness List, 20 April 2007, para.18.

whether a defendant's detention in a domestic State impacts on their ability to exercise their rights under the ICC Statute.¹⁸

31. The principle of equality of arms, the right to life, the right to legal representation, the right to expeditious proceedings and the right not to be detained for an unreasonable period of time are all internationally recognised human rights. As set out above, the postponement of the defendant's surrender to the ICC significantly impacted on all of these rights, and yet the Chamber refused to engage in any consideration of these countervailing factors.
32. The fact that the postponement of a surrender request might impact on the rights of the Defence might not in itself, justify a refusal of the request. Rather, in weighing the competing interests, the Chamber should have been guided by the fundamental principles of necessity and proportionality:¹⁹ that is, in circumstances in which the request impacts on the rights of the Defence, the Chamber should only permit postponement where necessary to achieve the underlying objective of the request, and where the impact on the rights of the Defence is proportionate to this objective.
33. Considerations of proportionality also derive from a textual interpretation of Article 95. The ability of a State to postpone co-operation is linked to the right of a State to pursue domestic investigations pending a ruling on admissibility. Article 95 is drafted in the same permissive terms as Article 54(3)(e). In the same manner that Article 54(3) does not give the Prosecution an unfettered ability to enter into confidentiality agreements, but can only be relied on for a specific purpose, which can be scrutinised by the Chamber,²⁰ Article 95 should only be invoked for specific purposes linked to the conduct of domestic proceedings.
34. In terms of the Chamber's failure to consider the necessity of the postponement of Mr. Al-Senussi's surrender versus the impact on the rights of the Defence,

¹⁸ ICC-01/04-02/12-67, para.8.

¹⁹ ICC-01/04-01/06-108-Corr, para.13, and fn.10.

²⁰ ICC-01/04-01/06-1486, para. 41.

the Chamber acknowledged that apart from a blanket statement that it exercised its right to postpone the execution of the surrender of Mr. Al-Senussi, Libya had failed to provide any further submissions as to why the postponement of his surrender was necessary or justified.²¹ The Chamber's decision was therefore not predicated on any actual need for Libya to retain custody over Mr. Al-Senussi to further its domestic investigations.

35. Moreover, at the time of the challenge, the Government had interviewed Mr. Al-Senussi on several occasions (albeit without any legal representation),²² and there was no indication that his presence on Libyan territory was required to further the investigations or proceedings. The proceedings in the Kenya cases also demonstrate that neither the appearance of the defendants before the ICC nor the commencement of substantive proceedings before the ICC prejudice the ability of a State to challenge admissibility.

36. Rule 185(2) also sets out the procedure which applies in relation to the release of a defendant if a State is successful in its challenge to the admissibility of the case. The drafters therefore clearly envisaged that the transfer of a defendant to the custody of the ICC pending the resolution of an admissibility challenge would be the norm, and would not, in itself, prejudice the ability of a State to pursue an admissibility challenge.²³

37. In terms of the proportionality of the requested postponement, according to a recent decision of the Pre-Trial Chamber, the non-surrender of the defendant to the ICC effectively prevents the pre-confirmation proceedings from commencing before the ICC.²⁴ This has profound implications for the right of

²¹ ICC-01/11-01/11-354, para 8.

²² ICC-01/11-01/11-281-Conf-Red, para.47.

²³ It also bears noting that Article 89(4) does not serve as a precedent for the Pre-Trial Chamber's broad interpretation of Article 95, insofar as Article 89(4) serves to protect the internationally recognised right of the defendant not to be prosecuted (and detained) for the same crime twice. Whereas Article 20(3) explicitly prohibits the ICC from conducting such a prosecution, the Statute does not prohibit the ICC from continuing its proceedings during an admissibility challenge based grounds other than *ne bis in idem*.

²⁴ ICC-01/11-01/11-440.

the (detained) defendant to expeditious proceedings, and the right of victims to justice.

38. The Defence for Mr. Al-Senussi presented evidence that it was not possible for the Defence to have any contact or communications with Mr. Al-Senussi whilst he was detained in Libya.²⁵ The Defence also referred to significant violations of the rights of Mr. Al-Senussi: for example, he had been interrogated without counsel, and had not been accorded an opportunity to challenge his detention before a judge.²⁶ The Defence also expressed concerns regarding Mr. Al-Senussi's treatment in detention, which the Court had no means of verifying whilst Mr. Al-Senussi remained detained in Libya and was unable to meet with Counsel on a privileged basis.²⁷

39. In dismissing these concerns of the Defence, the Pre-Trial Chamber averred that:

“the postponement of the execution of the Surrender Request in no way affects Libya's continuing obligation to cooperate with the Court [...]. Libya remains under the duty to provide all assistance required by the Court in particular in order to ensure the full and effective exercise of Mr Al-Senussi's rights before the Court and to facilitate a timely determination of the Admissibility Challenge.”²⁸

40. When viewed against the Chamber's earlier findings to the effect that once Libya had filed a 'proper admissibility challenge', Libya had an unqualified right to suspend all forms of cooperation under Part IX, the Chamber's finding that the postponement of the execution of the Surrender Request in “no way affects Libya's continuing obligation to cooperate with the Court” was clearly erroneous and contradictory.

²⁵ ICC-01/11-01/11-319, paras.51-54.

²⁶ ICC-01/11-01/11-319, para.55.

²⁷ ICC-01/11-01/11-439, para.42.

²⁸ ICC-01/11-01/11-354, para.37.

41. In circumstances in which a State has an unqualified right to invoke Article 95 in relation to almost all cooperation requests, allowing a State to retain custody over the defendant may expose the defendant, their counsel or persons attempting to exercise their right to visit the defendant - to an unacceptable level of risk. For example, the State in question could suspend their obligation to implement a privileged visit, or to respect the privileges and immunities of ICC officials. The Chamber was aware at the time it issued its decision that this was not a hypothetical risk.²⁹
42. The Chamber also did not seek to mitigate this risk by seeking any assurances from the Libyan Government that they would comply with ICC orders and requests for cooperation for the duration of the admissibility proceedings. To the contrary, at the time when it had issued its decision, Libya had failed to enter into a Memorandum of Understanding with the ICC on privileges and immunities, and had failed to comply with several key ICC decisions, which related to the rights of the Defence.³⁰ The Chamber further found that these acts of non-compliance were irrelevant to the question as to whether Libya had the right to invoke Article 95.³¹
43. The Appeals Chamber has stated that “[t]here is no exception to the general principle that the Prosecutor (or other parties and participants) must follow the orders of the Trial Chamber when it comes to issues of protection (emphasis added).”³² Since Libya can invoke Article 95 to legitimise its non-implementation of ICC orders directed at securing the rights and protection of Mr. Al-Senussi whilst on the territory of Libya, the only effective method to protect the integrity of Mr. Al-Senussi would be to transfer him to the custody of the ICC. However, according to the Pre-Trial Chamber, the fact that Libya failed to implement ICC orders which are necessary to protect Mr. Al-Senussi

²⁹ Cf ICC-01/11-01/11-141-Conf-Exp, para.45.

³⁰ ICC-01/11-01/11-439, para.41.

³¹ ICC-01/11-01/11-354, para.35.

³² ICC-01/04-01/06-2582, para.50.

(for example, the order that Mr. Al-Senussi's lawyers should be entitled to meet with him on a privileged basis) does not entitle the Pre-Trial Chamber to curtail the postponement of Mr. Al-Senussi's surrender.

44. As such, the Chamber's interpretation of Article 95 prevented Mr. Al-Senussi from being able to exercise his rights before the ICC from the protection of the custody of the ICC, whilst simultaneously exempting Libya from any obligation to extend these rights to Mr. Al-Senussi for the duration of the admissibility proceedings.
45. The Chamber's decision thus effectively deprived Mr. Al-Senussi of the protection of the law, and left the Defence with no judicial recourse as concerns any rights under the Rome Statute, which are dependent on the co-operation of Libya.

The Chamber erred by failing to interpret Article 95 in a manner which is consistent with the object and purposes of the Rome Statute, the Article 19 complementarity regime, and the regime for enforcement of arrest warrants

46. In its June 2012 decision, the Pre-Trial Chamber found that in interpreting Article 95, "it appears advisable to resort to a systematical interpretation that guarantees the coherency between the solution found in Part 9 and the relevant rule(s) in Parts 2 and/or 5".³³ In so doing, the Chamber referred to the links between Article 19 and Article 95,³⁴ and found that notwithstanding the ambiguous language employed in Article 95, it should be considered to encompass all Part IX cooperation requests.
47. However, while the Chamber was willing to resort to a contextual and purposive analysis in order to expand the type of cooperation requests covered

³³ ICC-01/11-01/11-163, para. 25, citing C. Kress et al., "International Cooperation and Judicial Assistance: Preliminary Remarks" in O. Triffterer (Ed.), Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article (2nd ed.), p. 1503 at 1506.

³⁴ Para. 31.

by Article 95, in its later decision, the Chamber failed to consider whether there was any contextual or purposive basis under the Statute for further restricting the ability of Libya to withdraw its cooperation with the Court.

48. Moreover, in determining whether an admissibility challenge had been ‘properly made’ for the purposes of Article 19, the Chamber arbitrarily restricted its analysis to the timing of the challenge, and excluded any consideration of the illegality of the means by which Libya had obtained jurisdiction over Mr. Al-Senussi, and the fact that its admissibility challenge had been built at the expense of its obligation to cooperate with the ICC.
49. In so doing, the Chamber failed to give due import to Article 19(9), and the overarching concept of the complementarity regime that it is the ICC, and not the challenging State, which is ultimately responsible for determining whether the case is admissible. The Chamber also failed to interpret Article 95 in a manner which is consistent with Article 59(7), and the mandatory surrender regime set out in the Rome Statute.
50. Although the Statute is built upon the notion of complementarity – this notion subjugates the right of a State to exercise jurisdiction over a particular person to the Statute’s overarching objective to ‘eliminate impunity’.³⁵ The Statute’s admissibility provisions are thus framed to require a challenging State to adduce concrete evidence concerning the existence of actual proceedings, which meet the criteria for effective prosecution, as set out in Article 17.
51. These important safeguards aim to protect the interest of the international community and the victims that:

“the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution

³⁵ It should be noted that the Appeals Chamber has relied upon the Statute’s objective to eliminate impunity to interpret a range of legal provisions, including Regulation 55 of the Regulations of the Court: ICC-01/04-01/06-2205, para.77.

must be ensured by taking measures at the national level and by enhancing international cooperation”.³⁶

52. These safeguards governing the Chamber’s final determination on admissibility, would, however, be rendered nugatory if the Chamber completely fettered its power to impose safeguards during the admissibility proceedings to ensure that the Chamber will be in a position to enforce its decision on admissibility and the related surrender order, if the challenge is unsuccessful. The Court cannot ensure the effective prosecution of these crimes, if its ability to protect the defendant and prosecute the case before the ICC is prejudiced during the admissibility proceedings.

53. The ICC Appeals Chamber has recognised that a Chamber must be in a position to control the fair and adversarial nature of the proceedings, and to secure the compliance of participants with its orders.³⁷ The Chamber clearly would not be in a position to control the admissibility proceedings if, upon the submission of any admissibility challenge, all States –irrespective of their interest in the challenge - possess an unqualified right to invoke Article 95 in order to postpone compliance with all and any Court orders for the duration of the admissibility proceedings, apart from limited exceptions concerning the ability of the Prosecution to collect evidence and testimony.

54. In the context of domestic proceedings, which could culminate in the death penalty and thereby render the outcome of the challenge a *fait accompli*, the ability to unilaterally postpone the surrender of the person and any related co-operation requests would also be contrary to the underlying tenor of the Article 19 admissibility regime that the ICC Chamber has the exclusive competence to decide on matters of admissibility.³⁸

55. For these reasons, both Article 19(9) and the role of the Chamber as the ultimate arbiter of the admissibility proceedings require that Chamber must be

³⁶ Preamble to the Rome Statute.

³⁷ ICC-01/04-01/06-2582, para.47

³⁸ ICC-02/04-01/05-377, paras.45-46.

in a position to ensure that if the challenging State fails to satisfy the admissibility criteria, the ICC is “able to step in”, and thereby satisfy “the goal of the Rome Statute ‘to put an end to impunity’”.³⁹

56. In particular, Article 19(9) stipulates that the “making of a challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Chamber prior to the making of the challenge” (emphasis added).

57. The use of the mandatory phrase ‘shall not’ clearly imposes a positive obligation on the Chamber to take measures to ensure the continuing validity and enforceability of these orders; the Chamber cannot passively ‘hope’ that their validity is not impacted by the admissibility proceedings or through the unfettered operation of Article 95.

58. For this reason, C. Hall observed that the underlying purpose of Article 19(9) was as follows:

“Since the making of a challenge has no effect on the validity of any order or warrant issued before a challenge, that means that an order or warrant issued before the challenge, including a warrant based on a sealed application, can still be executed after the challenge, thus preventing uncooperative States - which could be non-State parties – from disrupting the investigation in a manner which could obstruct international justice.”⁴⁰

59. This purpose would, however, be frustrated by the Pre-Trial Chamber’s approach to Article 95.

60. Although the Pre-Trial Chamber found that pursuant to Article 19(9), the surrender order concerning Mr. Al-Senussi remained valid for the duration of the admissibility proceedings, and Libya remained subject to an obligation to

³⁹ ICC-01/04-01/07-1497, para.85.

⁴⁰ C. Hall, ‘Article 19’ in O. Triffterer (ed.) Commentary on the Rome Statute of the International Criminal Court 2nd ed. pp. 664-665.

“ensure that its ongoing criminal proceedings do not hinder or delay Mr Al-Senussi's surrender to the Court should the case eventually be declared admissible”,⁴¹ the Chamber's interpretation of Article 95 deprived this finding of any legal import or enforceability.

61. Since Libya can invoke Article 95 in order to suspend its obligation to implement *any* cooperation request under Part IX, the Chamber has no means to ensure that Libya does not take steps to frustrate the eventual execution of the surrender request. Indeed, the fact that Libya can – according to the Pre-Trial Chamber's decision – rely upon Article 95 to lawfully suspend all cooperation for the duration of the admissibility proceedings, means that Libya is not under any obligation to ensure that its ongoing criminal proceedings do not impede or frustrate the future execution of the surrender request. The Pre-Trial Chamber's interpretation of Article 95 thus directly undermines the objective of Article 19(9), which is to ensure that the ICC is in a position to effectively prosecute the case should the challenge be rejected.
62. The Pre-Trial Chamber also erred by excluding past and present instances of non-compliance from its consideration, and thereby failed to consider the direct causal nexus between such non-compliance, and the ability of the Chamber to ensure the future enforceability of ICC orders, as required by Article 19(9).
63. The right to postpone the execution of a co-operation request presupposes that the State in question does not dispute its obligation to implement the request, and is merely seeking relief concerning the timing. A State can only 'legitimately' postpone a request to surrender a defendant if the State has first accepted and agreed to surrender the defendant; a State cannot postpone an obligation, which the State disputes exists.⁴²

⁴¹ ICC-01/11-01/11-354, para. 36.

⁴² Pursuant to Article 60(2) of the 1969 Vienna Convention on the Law of Treaties: “A material breach of a multilateral treaty by one of the parties entitles: [...] (b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations

64. This is consistent with the fact that the provisions concerning arrest and surrender set out in Article 89 require a State to first acknowledge that they are subject to an obligation to surrender the defendant to the ICC, before they are entitled to enter into consultations with the Court concerning the modalities of surrender or the inter-relationship of the surrender obligation and domestic proceedings.⁴³
65. If the Chamber were to fail to take into consideration the fact that a State has not recognised that it is legally required to implement the cooperation request, but for the operation of Article 95, it would allow States to exploit Article 95 to create a legal facade for what is in effect, non-compliance - pure and simple.
66. In the present case, by disregarding Libya's failure to implement the surrender request, coupled with repeated expressions from Libyan Counsel and Government authorities that they had no intention to surrender Mr. Al-Senussi to the ICC at any point in time, the Pre-Trial Chamber allowed Libya to utilise Article 95 to stave off a finding of non-compliance, and to interrupt any momentum as concerns the ability of the ICC to garner international support in favour of the execution of the surrender request.
67. Moreover, by stating that non-compliance is irrelevant to Libya's continued ability to benefit from Article 95, the Pre-Trial Chamber fettered its power to address the multiple statements and actions of Libyan authorities, which are an expression of their obdurate intention to maintain custody over Mr. Al-Senussi

between itself and the defaulting State." Article 60(3)(b) further specifies that a material breach consists of "the violation of a provision essential to the accomplishment of the object or purpose of the treaty." The International Court of Justice has also recognised that "a state seeking the interpretation of a treaty must itself have completely fulfilled the obligations of that treaty" and that "the Court has some freedom to consider principles of equity as part of the international law which it must apply". *Diversion of Water from the River Meuse* (1937), Publications of the Permanent Court of International Justice (PCIJ), Ser. A/B, no. 70, p. 77.

⁴³ For example, Article 89(4) states that "[i]f the person is being proceedings against or is serving a sentence in the requested State for a crime different from that for which surrender to the Court is sought, the requested State, after making the decision to grant the request, shall consult with the Court".

- irrespective of the outcome of the admissibility proceedings, and which are likely to hinder the future ability of the Court to enforce the surrender order.

68. Contrary to the position of Libya – the rejection or revocation of a request for postponement of surrender in order to address Libya’s failure to recognise its legal obligation to comply with the surrender request should not be viewed as “retribution or punishment”,⁴⁴ but as a means of ensuring compliance with the ICC Pre-Trial Chamber’s orders.

69. In line with the requirement that Article 95 should have been construed in a manner which is consistent with the overarching object and purpose of the ICC to eliminate impunity, the Chamber also erred by failing to take into consideration whether its interpretation of Article 95 was consistent with the Statutory regime for securing the arrest and surrender of defendants.

70. Article 59(1) provides that a “State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with the laws and procedures of Part 9” (emphasis added). Article 59(7) further stipulates that “[o]nce ordered to be surrendered by the custodial State, the person shall be delivered to the Court as soon as possible” (emphasis added). Article 59 thus imposes an unequivocal obligation on States to execute an ICC surrender request.

71. Apart from Article 95, there is nothing in the complementarity regime which qualifies this obligation to execute ICC arrest warrants in an expeditious fashion. For example, Article 89(4), which permits a State to postpone surrender pending a challenge filed by a defendant on the basis of *ne bis in idem*, requires a State to immediately surrender the defendant if there is no actual challenge currently pending before the Chamber, and no prior ruling that the case is inadmissible.⁴⁵ It is not permissible for a State to retain custody over the defendant, and launch domestic proceedings against the defendant,

⁴⁴ ICC-01/11-01/11-354, para. 17.

⁴⁵ A case can only be admissible or inadmissible. It follows that if a case is before the ICC, it must be considered to be admissible until such time as the Chamber finds that it is inadmissible.

with a view to allowing the defendant to challenge admissibility at a later stage on the basis of a *ne bis in idem* conflict which has been created after the surrender obligation arose.

72. Moreover, although the Pre-Trial Chamber found that a State can invoke Article 95 to postpone surrender once it has filed a 'proper admissibility challenge', it cannot do so in connection with a mere intention to file a challenge in the future.⁴⁶
73. From the above legal provisions and jurisprudence, it should be clear that the only options available to a State are to either surrender the defendant to the ICC, and then challenge admissibility as and when domestic proceedings have progressed sufficiently to do so, or challenge admissibility at the time of the arrest, and invoke Article 95 in order to defer the obligation to immediately surrender the defendant.
74. It should not be open to a State to continuously ignore surrender requests and binding decisions to surrender the defendant, whilst the State takes its time to build a challenge to admissibility from scratch.
75. However, by finding that Libya's previous and protracted failure to comply with the surrender request was completely irrelevant to the Pre-Trial Chamber's assessment of Article 95,⁴⁷ the Pre-Trial Chamber effectively undermined the emphasis in Article 57 on complying with surrender requests in an expeditious manner, and its own prior decisions.
76. In its decision, the Pre-Trial Chamber explicitly stated that "Libya may legitimately decide to postpone, pursuant to article 95 of the Statute, the execution of the Surrender Request",⁴⁸ referred to Article 95 as having a 'legitimising effect' on the postponement of surrender,⁴⁹ and cited the legitimisation of Libya's decision to postpone surrender through Article 95 as

⁴⁶ ICC-01/11-01/11-269.

⁴⁷ ICC-01/11-01/11-354, para. 35.

⁴⁸ ICC-01/11-01/11-354, para. 39. *See also* para.42.

⁴⁹ *Ibid.* para.28

being relevant to its decision not to issue a finding of non-compliance in relation to Libya's previous failure to surrender Mr. Al-Senussi to the ICC.⁵⁰

77. In so doing, the Pre-Trial Chamber also gave Libya the green light to ignore a future surrender request with impunity, protected by the knowledge that at some unspecified point in the future, Libya could invoke Article 95 in connection with a second challenge to admissibility, and thereby create a 'legitimate' basis for their non-compliance.

III. Relief Sought

78. The Defence for Mr. Saif Al-Islam Gaddafi respectfully requests the Honourable Appeals Chamber to reverse the "Decision on Libya's postponement of the execution of the request for arrest and surrender of Abdullah Al-Senussi pursuant to article 95 of the Rome Statute and related Defence request to refer Libya to the UN Security Council".



John R.W.D. Jones QC, Counsel for Mr. Saif Al-Islam Gaddafi

Dated this, 20th Day of September 2013

At London, United Kingdom

⁵⁰ *Ibid.* para.42.