



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**

**Prosecution's Response to the "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:** Office of the Prosecutor

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

**The Office of the Prosecutor**

Fatou Bensouda  
James Stewart

**Counsel for Saif Al-Islam Gaddafi**

John R.W.D. Jones

**Counsel for Abdullah Al-Senussi**

Benedict Emmerson  
Rodney Dixon

**Legal Representatives of Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for Victims**

Paolina Massidda  
Sarah Pellet  
Mohamed Abdou

**The Office of Public Counsel for the  
Defence**

**States Representatives**

Philippe Sands  
Payam Akhavan  
Michelle Butler

**Amicus Curiae**

**REGISTRY**

---

**Registrar**

Herman von Hebel

**Counsel Support Section**

**Deputy Registrar**

Didier Preira

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section Other**

## Introduction

1. The Defence for Mr Al-Senussi (also “the Appellant”) filed on 9 September 2013 an appeal (“Appeal”)<sup>1</sup> against Pre-Trial Chamber I (“Chamber”)’s decision whereby Libya may suspend the surrender request of Mr Al-Senussi to the Court pending the determination of the admissibility of the case (“Decision”).<sup>2</sup> The appeal should be dismissed. First, the Chamber correctly exercised its discretion when it found that Libya’s admissibility challenge was not tardy and had been filed within the terms of Article 19(5). Second, the Chamber’s interpretation of Article 95, which affords a right to requested States to suspend the execution of cooperation requests pending the determination of an admissibility challenge, is consistent with a literal, teleological and contextual reading of the provision.

## Procedural Background

2. On 27 June 2011, the Chamber issued a warrant of arrest against Mr Al-Senussi.<sup>3</sup>
3. On 4 July 2011, the Registrar transmitted a request to Libya to arrest and surrender Mr Al-Senussi to the Court (“Surrender Request”).<sup>4</sup>
4. On 19 March 2013, the Defence for Mr Al-Senussi filed an application to refer Libya and Mauritania to the UN Security Council for their failure to comply with their obligations *vis-à-vis* the Court.<sup>5</sup> The Defence referred to Libya’s failure to surrender Mr Al-Senussi to the Court, its involvement in an unlawful rendition from Mauritania and its failure to arrange a privileged legal visit for the Defence.<sup>6</sup>

---

<sup>1</sup> ICC-01/11-01/11-439.

<sup>2</sup> ICC-01/11-01/11-354.

<sup>3</sup> ICC-01/11-01/11-1; ICC-01/11-01/11-4.

<sup>4</sup> ICC-01/11-01/11-5.

<sup>5</sup> ICC-01/11-01/11-304.

<sup>6</sup> *Ibid.*, para.18.

5. On 2 April 2013, Libya challenged the admissibility of the case against Mr Al-Senussi before the Court and notified the Chamber of the exercise of its right to postpone the execution of the Surrender Request pursuant to Article 95 (“Admissibility Challenge”).<sup>7</sup>
6. On 24 April 2013, the Defence for Mr Al-Senussi requested the Chamber to reject Libya’s notification to exercise its Article 95 right, and to confirm its order for the immediate surrender of Mr Al-Senussi to the Court.<sup>8</sup>
7. On 14 June 2013, the Chamber issued the Decision. The Chamber found that Article 95 applies to all requests for cooperation under Part 9 of the Statute and therefore requests for arrest and surrender may be postponed pursuant to Article 95.<sup>9</sup> The Chamber also considered that Article 95 provides a prerogative to requested States to suspend the execution of requests for cooperation when there is an admissibility challenge before the Court, which does not require the Chamber’s prior authorisation.<sup>10</sup> The Chamber has, however, the power and duty to verify that the pre-requisites for the exercise by a State of this prerogative are met, namely that a proper admissibility challenge pursuant to Article 19 has been made,<sup>11</sup> in particular if there is a dispute on the matter.<sup>12</sup> Once a challenge is properly made, the Court does not have any discretion.<sup>13</sup>
8. The Chamber concluded that, contrary to the Defence submissions, Libya had filed its Admissibility Challenge “at the earliest opportunity” according to Article 19(5).<sup>14</sup> The Chamber decided not to consider an array of arguments

---

<sup>7</sup> ICC-01/11-01/11-307-Red2.

<sup>8</sup> ICC-01/11-01/11-319.

<sup>9</sup> Decision, paras.21-22.

<sup>10</sup> Decision, paras.25,27.

<sup>11</sup> Decision, paras.25,27.

<sup>12</sup> Decision, para.25.

<sup>13</sup> Decision, para.25. See also ICC-01/11-01/11-163, para.37 (“Since it is the Chamber that has issued the warrant of arrest and the related request for surrender to the Court, the Chamber has the authority to decide that a state may postpone the execution of a surrender request to the extent that such a challenge has been properly made pursuant to article 19(2) of the Statute and rule 58(1) of the Rules”).

<sup>14</sup> Decision, paras.29-33.

which, according to the Chamber, had no bearing on whether the Admissibility Challenge had been duly made within the terms of the relevant statutory provisions.<sup>15</sup> In particular, the Chamber disregarded the Defence's arguments about Libya's obtaining and/or maintaining Mr Al-Senussi in custody in non-compliance with the Court's request for his arrest and surrender,<sup>16</sup> that domestic criminal proceedings have not been terminated pending the Court's determination of the Admissibility Challenge,<sup>17</sup> that a number of political statements demonstrating Libya's intent to carry out the trial against Mr Al-Senussi at the national level have been made,<sup>18</sup> and that his transfer to the seat of the Court was necessary in order for him to exercise his rights under the Statute and the Rules.<sup>19</sup>

9. The Chamber also stated that Libya must refrain from taking any action which could frustrate or hinder the execution of the Surrender Request should the case be found admissible,<sup>20</sup> and rejected the Defence's request of 19 March 2013 to refer Libya to the Security Council due to its failure to arrange a visit between Mr Al-Senussi and his Defence Counsel as requested by the Chamber.<sup>21</sup>
10. On 9 August 2013, the Defence for Mr Al-Senussi again requested the Chamber to find Libya in non-compliance with the Chamber's order of 6 February 2013<sup>22</sup> to arrange a privileged visit of the Defence to Mr Al-Senussi in Libya and to refer the matter to the Security Council.<sup>23</sup>
11. On 28 August 2013, the Chamber granted Mr Al-Senussi's application for leave to appeal the Decision on the issue of "[t]he postponement of the surrender order

---

<sup>15</sup> Decision, para.34.

<sup>16</sup> Decision, para.35.

<sup>17</sup> Decision, para.36.

<sup>18</sup> Decision, para.36.

<sup>19</sup> Decision, para.37.

<sup>20</sup> Decision, para.40.

<sup>21</sup> Decision, para.45.

<sup>22</sup> ICC-01/11-01/11-269.

<sup>23</sup> ICC-01/11-01/11-399.

on the narrow basis that all the Chamber needed to consider was whether an admissibility challenge had been properly filed before the ICC”.<sup>24</sup>

12. On 9 September 2013, the Defence for Mr Al-Senussi filed its Appeal. The Appellant’s submissions are twofold. First, the Appellant disagrees with the Chamber’s conclusion that Libya filed its challenge at the “earliest opportunity” within the meaning of Article 95.<sup>25</sup> Second, the Appellant submits that the Chamber should have considered three additional factors in its determination under Article 95 of whether an application has been properly made: (i) Libya taking custody of Mr Al-Senussi in violation of the ICC orders; (ii) evidence of Libya’s intention not to cooperate with the Court; and (iii) the need to ensure Mr Al-Senussi’s rights under the Rome Statute.<sup>26</sup>
13. The Appellant does not indicate the nature of the errors alleged. The Prosecution submits that they appear to be largely factual, combined with elements of an abuse of discretion argument: the Appellant merely disagrees with the Chamber’s conclusion on the timely nature of Libya’s application, and with the factors that the Chamber considered – or disregarded – in its determination of whether Libya’s Admissibility Challenge had been properly made.<sup>27</sup> Accordingly, the Prosecution will apply the standard of reasonableness that the Appeals Chamber has endorsed for errors of fact.<sup>28</sup> Should the Appeals Chamber

---

<sup>24</sup> ICC-01/11-01/11-419. The issue on appeal is not whether Article 95 applies to requests for surrenders. The Prosecution nevertheless submits that the Chamber correctly held that “the execution of all requests for cooperation under Part 9 of the Statute, including requests for arrest and surrender, may be postponed pursuant to article 95 pending the resolution of an admissibility challenge, with the only explicit exception of cooperation requests related to the collection of evidence that the Chamber, pursuant to articles 18 or 19 [...] ‘has specifically ordered that the Prosecutor may pursue’” (Decision, para.21). See also ICC-01/11-01/11-163, paras.32,34.

<sup>25</sup> Appeal, paras.12-18.

<sup>26</sup> Appeal, paras.10, 19-24.

<sup>27</sup> The Appeals Chamber has stated that there is an error of fact when the Trial Chamber misappreciated facts, disregarded relevant facts or took into account facts extraneous to the *sub judice* issues. See ICC-01/05-01/08-631-Red OA2, para.66.

<sup>28</sup> ICC-01/04-01/10-283 OA, para.17 (“The Appeals Chamber will not interfere with a Pre-Trial or Trial Chamber’s evaluation of the evidence just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case of a clear error, namely where it cannot discern how the Chamber’s conclusion could have reasonably been reached from the evidence before it. In the absence of any clear error on the part of the Pre-Trial Chamber, the Appeals Chamber defers to the Pre-Trial Chamber.”). A standard of

consider that the Appellant advances a procedural error in the form of an abuse of discretion, the result is the same, as no such error has been demonstrated. Finally, an error of law regarding the Chamber's interpretation of Article 95 should be similarly dismissed because the Appellant has failed to show that the Chamber erred in its interpretation of the provision.

### **Submissions**

14. The Prosecution submits that the Appeal should be dismissed. The Appellant fails to show that the Chamber abused its discretion and/or erred in fact when it found that Libya's Admissibility Challenge was not tardy and had been filed according to Article 19(5), and that the Chamber's decision to disregard the Appellant's arguments on Libya's purported actions and intentions was unreasonable.

A. The Chamber correctly held that Libya filed its Admissibility Challenge at the earliest opportunity within the terms of Article 19(5).

15. The Appellant submits that the Chamber erred when it found that Libya had filed the Challenge within the terms of Article 19(5), namely, "at the earliest opportunity".<sup>29</sup> The crux of the Appellant's argument is that on 1 May 2012, when Libya challenged the admissibility of Mr Gaddafi's case, it indicated that it was also actively investigating Mr Al-Senussi's case and that it was in a position to also challenge the admissibility of his case, however, Libya only submitted the Admissibility Challenge on 2 April 2013.<sup>30</sup> According to the Appellant, the Chamber should have considered Libya's assertion that it was ready to challenge the admissibility of Mr Al-Senussi's case on 1 May 2012.<sup>31</sup>

---

reasonableness is also applied by the ICTY Appeals Chamber in the review of purported errors of fact in a final appeal. See *Gotovina*, Appeal Judgment, para.13 and authorities cited therein.

<sup>29</sup> Decision, para.33.

<sup>30</sup> Appeal, paras.14-15, 18.

<sup>31</sup> Appeal, para.18.

16. This argument lacks merit. The Chamber's conclusion that "the information before the Chamber does not appear to indicate that Libya, despite being in a position to properly and timely challenge the admissibility of the case against Mr Al-Senussi, unduly failed to do so in violation of article 19(5)"<sup>32</sup> was reasonable because the Chamber *did* consider Libya's 1 May 2012 assertion, finding it not determinative in light of the overall facts of the case, in particular, as Libya only gained custody of Mr Al-Senussi in September 2012.<sup>33</sup>
17. The Chamber correctly noted the relevant jurisprudence of the Appeals Chamber and stated that the terms "at the earliest opportunity" within Article 19(5) should be interpreted to mean "as soon as there are grounds on the basis of which the case would be inadmissible before the Court",<sup>34</sup> meaning that a State shall file an admissibility challenge "without delay once in a position to demonstrate the inadmissibility of the case before Court, given that [...] it 'cannot expect to be allowed' to amend or complement a challenge made prematurely".<sup>35</sup>
18. Thus, the Chamber concluded that the chronology of events and the fact that Libya had filed its Admissibility Challenge seven months after Mr Al-Senussi's transfer to Libya from Mauritania did not mean that the Admissibility Challenge violated Article 19(5).<sup>36</sup>

B. The Chamber's interpretation of Article 95 is consistent with a literal, purposive and contextual reading of the provision.

19. The Appellant argues that the Chamber erred in refusing to consider other arguments advanced by the Appellant in its assessment of Libya's Admissibility Challenge,<sup>37</sup> in particular, (i) Libya's track record of non-compliance with the

---

<sup>32</sup> Decision, para.31.

<sup>33</sup> Decision, para.30.

<sup>34</sup> ICC-01/09-01/11-274, para.98, cited by the Decision, para.31.

<sup>35</sup> Decision, para.31, referring to ICC-01/09-01/11-274, paras.45,98.

<sup>36</sup> Decision, para.30.

<sup>37</sup> Appeal, paras.19-20, referring to Decision, para.34.

orders of the Court, (ii) whether Libya has demonstrated that it intends to surrender Mr Al-Senussi if so ordered at the conclusion of the admissibility proceedings, and (iii) whether postponement of the Surrender Request would undermine the protection of Mr Al-Senussi's rights under the Statute.<sup>38</sup>

20. According to the Appellant, Article 95 should not be viewed in isolation and should not permit States to postpone surrender requests without consideration of the effect that any such postponement could have on the Court's ability to carry out its essential functions and protect the rights of the accused.<sup>39</sup> The Appellant adds that the Chamber did not explain why it entertained his submissions as to the tardiness of the challenge in violation of Article 19(5) but it disregarded the above-mentioned factors.<sup>40</sup>
21. The Appellant's submissions ignore the literal, purposive and contextual interpretation of Article 95. The terms of the provision are clear: "[w]here there is an admissibility challenge under consideration by the Court pursuant to article 18 or 19, the requested State *may* postpone the execution of a request under this Part pending a determination by the Court".<sup>41</sup>
22. Article 95 affords requested States a right to suspend the execution of a request under Part IV of the Statute, including requests for arrest and surrender, when there is an admissibility challenge before the Court.<sup>42</sup> Therefore, the Chamber correctly found that "the postponement of the execution of a surrender request while an admissibility challenge is pending falls within the prerogatives of the requested state and does not require a Chamber's prior authorization".<sup>43</sup>

---

<sup>38</sup> Appeal, paras.19,24.

<sup>39</sup> Appeal, paras.21-22.

<sup>40</sup> Appeal, para.23.

<sup>41</sup> Emphasis added.

<sup>42</sup> Although Libya is not a State party, the Chamber held that "the entire legal framework of the Statute, including its complementarity and cooperation regimes, applies also in the situations following a referral by the Security Council under article 13(b) of the Statute". Decision, para.20. See also ICC-01/11-01/11-163, paras.27-30.

<sup>43</sup> Decision, para.27.

23. The terms of this provision contrast with other provisions which expressly envisage prior intervention of Chambers so that parties and/or participants can exercise certain prerogatives. For example, Article 82(1)(d) – read together with Rule 155 – permits parties to appeal a decision as long as the Chamber that issued the decision grants authorisation upon the party’s showing that certain requirements are met. To the contrary, Article 81(1)(a) to (c) – read together with Rule 154 – permit a direct appeal against a decision on admissibility or jurisdiction, denying or granting interim release or a Pre-Trial Chamber’s decision under Article 56(3).
24. Further, the Chamber indicated that its involvement under Article 95 fell within its authority and duty to ensure the fairness of the proceedings and was limited to ensure that the challenge was properly made within the terms of Articles 18 and 19 if a dispute arose.<sup>44</sup> This limited role of the Chamber is consistent with Article 95, which permits the suspension of surrender requests if there is “an admissibility challenge under consideration by the Court *pursuant to articles 18 and 19*”.<sup>45</sup> Hence, the Chamber’s intervention will not delve into the merits of the Admissibility Challenge and instead merely seeks to determine that the challenge accords with Articles 18 and 19. For example, the Chamber may determine whether the challenging State has standing under Article 19(2)(b) or (c), whether it is the first time that the State challenges the admissibility within the terms of Article 19(4), or whether the State submitted its challenge “at the earliest opportunity” pursuant to Article 19(5).<sup>46</sup> In sum, the Chamber’s conclusion is reasonable and seeks to prevent filings that are on their face

---

<sup>44</sup> Decision, paras.25,27.

<sup>45</sup> Emphasis added.

<sup>46</sup> Appeal, para.23. Thus, the fact that the Chamber addressed the Appellant’s arguments about the tardiness of the Challenge and Article 19(5), but disregarded it as non relevant the other set of factual submissions advanced by the Appellant, is consistent. Because the timeliness of the Challenge is a prerequisite under Article 19(5), the Chamber is entitled to consider it if there is a dispute.

frivolous and abusive and that result in the illegitimate postponement of the execution of a cooperation request.<sup>47</sup>

25. Second, the Decision is consistent with the purpose of Article 95, which seeks to promote judicial efficiency and not prejudice the rights of the requested States pending a final determination on the admissibility of the case. For instance, domestic proceedings may be unnecessarily compromised if a State is obliged to surrender the person during the Chamber's determination of the admissibility of the case, only to have a Chamber subsequently conclude that the case is inadmissible.<sup>48</sup>
26. Third, a comprehensive reading of the Rome Statute reveals that the three facts that the Appellant claims the Chamber should have considered under Article 95 (Libya's past violations of ICC court orders, its evinced intention not to execute the arrest warrant and the fact that Mr Al-Senussi has not been provided with rights which are afforded by the Rome Statute) are better addressed through recourse to other provisions. For example, if Libya does not comply with the Court's orders, the Chamber may consider to issue a finding of non-cooperation and refer the matter to the Security Council pursuant to Article 87(5).

C. The Chamber correctly disregarded the Defence's submissions on Libya's purported violations, declared intentions not to comply and Mr Al-Senussi's rights under the Rome Statute.

27. The Chamber correctly found that the Appellant's submissions had no bearing on the Chamber's determination that the Admissibility Challenge had been properly made.

---

<sup>47</sup> Decision, para.35.

<sup>48</sup> ICC-01/11-01/11-163, para.36. ICC-01/11-01/11-387OA4, para.22, referring to ICC-01/11-02/12-12OA, para.18. Although, unlike Article 95, Article 82(3) expressly requires a discretionary decision of the Appeals Chamber. See ICC-01/11-01/11-387OA4, para.22 referring to ICC-01/04-01/07-3344OA13, para.6.

(i) *The Chamber correctly disregarded the Appellant's submissions on Libya's taking custody of Mr Al-Senussi in violation of the Court's orders.*

28. The Appellant argues that the Chamber erred when it did not consider, in the context of its Article 95 determination, his submissions on Libya's purported violation of its international obligations when it obtained custody of Mr Al-Senussi from Mauritania.<sup>49</sup> For the reasons outlined above,<sup>50</sup> the Chamber correctly concluded that Libya's conduct had no bearing on whether the Admissibility Challenge had been properly made and, as a result, correctly disregarded these submissions.
29. First, the Chamber correctly noted "the limited purposes of article 95 of the Statute" and that "[t]he purpose of the Chamber's evaluation of the applicability of article 95 of the Statute in the instant case is not to determine whether or not the State has previously fulfilled its obligation to cooperate with the Court, but is rather limited to preventing an abusive filing of an admissibility challenge automatically resulting in the illegitimate postponement of the execution of a cooperation request".<sup>51</sup> Second, the Chamber correctly noted that the relief sought by the Appellant is better addressed in other provisions: "[...] a determination of whether the State obtained and/or maintained custody of the suspect in non-compliance with the Court's request for his arrest and surrender [...] might be relevant in another context and for other statutory purposes."<sup>52</sup>
30. As a result, the Chamber correctly concluded that the Appellant's "arguments in relation to Libya's alleged non-compliance with its international obligations do not refute that currently there is an admissibility challenge pending, which has

---

<sup>49</sup> Appeal, paras.27,29.

<sup>50</sup> See above, paras.1514-25.

<sup>51</sup> Decision, para.35.

<sup>52</sup> Decision, para.35.

been properly made under article 19 of the Statute, as required by article 95 of the Statute”.<sup>53</sup>

31. The Chamber’s reasoning and conclusion is beyond any reproach. The Appellant invokes Article 95 to seek a remedy that is addressed in other statutory provisions, such as Article 87(5). In the event of non-compliance with a request for cooperation by a State not party to the Rome Statute but acting within the context of an Article 13(b) referral, Article 87(5) permits the Chamber to refer the matter to the UN Security Council. In fact, the Appellant has sought,<sup>54</sup> and has been denied<sup>55</sup> this relief before the Chamber. The Appellant’s application for leave to appeal this issue was also rejected.<sup>56</sup>
32. Finally, the Appellant’s submission that he has also sought leave to appeal the Chamber’s decision finding that Mauritania had not violated the Court’s orders<sup>57</sup> should be dismissed. That application – even if leave is granted – is irrelevant to the present appeal, which addresses Libya’s – not Mauritania’s – purported violations. Moreover, the Appellant’s submissions before the Chamber are incorrect. While Resolution 1970 (2011) requires that Libya “*shall* cooperate fully with and provide any necessary assistance to the Court and the Prosecutor”, all other States are “*urge[d]*” to cooperate.<sup>58</sup> Thus, although a surrender request was sent to Mauritania,<sup>59</sup> which regretfully chose not to execute it, Mauritania does not have an obligation *vis-à-vis* the ICC under Resolution 1970 (2011), and in addition Mauritania is not a State party to the Statute and there is no *ad hoc* arrangement pursuant to Article 87(5)(a).

---

<sup>53</sup> Decision, para.35.

<sup>54</sup> ICC-01/11-01/11-248, para.15; ICC-01/11-01/11-304, paras.26-34.

<sup>55</sup> ICC-01/11-01/11-269, para.15; Decision, para.44.

<sup>56</sup> ICC-01/11-01/11-419, paras.48-65.

<sup>57</sup> ICC-01/11-01/11-431.

<sup>58</sup> See ICC-01/11-01/11-435, para.10; ICC-01/11-01/11-420, paras.13-14.

<sup>59</sup> ICC-01/11-01/11-180-Red.

(ii) *The Chamber correctly disregarded that Libya purportedly intends not to surrender Mr Al-Senussi should it be ordered.*

33. The Appellant submits that the Chamber erred in finding that Libya's stated intention to proceed with Mr Al-Senussi's trial in Libya and not to surrender him to the Court does not amount to non-cooperation and should be taken into account in its Article 95 determination.<sup>60</sup>
34. As described in (i), the Chamber's decision to disregard the Appellant's submissions on some statements of Libyan officials expressing a desire to try Mr Al-Senussi domestically is correct.<sup>61</sup> The Chamber correctly noted that Article 95 has a limited purpose, which is to determine whether an admissibility challenge is properly before the Chamber and to ensure that the challenging State has not abused the provision and improperly suspended a request for surrender.
35. Further, and although not within the issue under appeal, the Chamber's conclusion that the mere fact that "domestic criminal proceedings against Mr Al-Senussi have not been terminated pending the Court's determination of the Admissibility Challenge, and that a number of political statements demonstrate Libya's intent to carry out the trial against Mr Al-Senussi at the national level [...] do not, *per se*, amount to a violation of Libya's obligation to cooperate with the Court, insofar as Libya must 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" is similarly reasonable.<sup>62</sup> What really matters is that if and when the Chamber finds the case against Mr Al-Senussi admissible, Libya will have the obligation to surrender him to the Court.

---

<sup>60</sup> Decision, para.31.

<sup>61</sup> Decision, para.36.

<sup>62</sup> Decision, para.36.

(iii) *The Chamber correctly found that Article 95 does not permit the Chamber to reject the suspension of the request for surrender in order to ensure that Mr Al-Senussi's rights under the Rome Statute are complied with.*

36. The Appellant disagrees with the Chamber's decision to disregard his argument that the transfer of Mr Al-Senussi to the seat of the Court is necessary in order for him to exercise his rights under the Rome State for the purpose of the Chamber's determination under Article 95.<sup>63</sup> In support, the Appellant rehearses his prior submission before the Chamber, namely: that Libya has not provided Mr Al-Senussi with access to counsel and that this right can only be guaranteed if he is surrendered to the Court.<sup>64</sup> The Appellant also explains that he has sought referral of Libya to the UN Security Council for non-compliance on this matter.<sup>65</sup>
37. As described in (i) and (ii) above, the Chamber correctly dismissed this submission and held that even if Mr Al-Senussi's rights under the Statute can only be guaranteed with his transfer to the Court, this "would not negate Libya's entitlement to postpone the execution of the Surrender Request in the presence of an admissibility challenge that has been properly made consistently with the terms of the relevant statutory provisions".<sup>66</sup> The Chamber's conclusion is consistent with the terms and purpose of Article 95.
38. Nevertheless, the Chamber emphasised that the postponement of the execution of the Surrender Request under Article 95 "in no way affects Libya's continuing obligation to cooperate with the Court, as decided by the Security Council and within the statutory legal framework. Accordingly, *Libya remains under the duty to provide all assistance required by the Court in particular in order to ensure the full and*

<sup>63</sup> Appeal para.38, referring to Decision, para.37.

<sup>64</sup> Appeal, paras.41,44.

<sup>65</sup> Appeal, para.41 referring to ICC-01/11-01/11-399.

<sup>66</sup> Decision, para.37.

*effective exercise of Mr Al-Senussi's rights before the Court and to facilitate a timely determination of the Admissibility Challenge*".<sup>67</sup>

39. If Libya fails to comply, the Statute provides for other remedies, such as a referral to the UN Security Council pursuant to Article 87(5). In fact, the Appellant acknowledges that he has already availed himself of this recourse, seeking from the Chamber a finding of non-compliance and Libya's referral to the Security Council due to its failure to arrange the privileged visit of the Defence ordered by the Chamber on two occasions.<sup>68</sup> In the Decision, the Chamber noted the on-going discussions between Libya and the Registry on a memorandum of understanding to arrange a privileged visit of the Defence and refused to exercise its discretion to make a finding of non-cooperation and refer the matter to the Security Council, although it indicated that its decision was subject to revision "[s]hould circumstances ultimately evolve into indicating that Libya will fail to cooperate with the Court in the arrangement of the privileged legal visit to Mr A-Senussi".<sup>69</sup> The Appellant's latest request for non-cooperation and referral to the Security Council on this matter was filed on 9 August 2013,<sup>70</sup> on which the Chamber is yet to rule.
40. Hence, as described in (i) above, the Appellant is invoking Article 95 to seek a remedy that is provided for in other provisions of the Statute.<sup>71</sup>

<sup>67</sup> Decision, para.37. Emphasis added.

<sup>68</sup> ICC-01/11-01/11-304, paras.35-40; ICC-01/11-01/11-399.

<sup>69</sup> Decision, para.45.

<sup>70</sup> ICC-01/11-01/11-399. See also ICC-01/11-01/11-429.

<sup>71</sup> The Prosecution notes that the Appeals Chamber has rejected appeals where the appellant tried to by-pass the statutory framework by erroneously characterising an impugned decision to avail itself of the right to file direct appeals. See, e.g., ICC-01/04-01/10-438OA2.

### Conclusion

41. For the foregoing reasons, the Prosecution requests that the Appeal be rejected in its entirety.



---

Fatou Bensouda,  
Prosecutor

Dated this 20<sup>th</sup> day of September 2013

At The Hague, The Netherlands