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

Date: 11 May 2012

**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 Document**

**Prosecution's Response to Government of Libya's Request for the Postponement  
of the Surrender of Saif Al-Islam Gaddafi Brought Within their Application to  
Challenge the Admissibility of the Case under Article 19**

**Source:** Office of the Prosecutor

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## Introduction

1. The Libyan government seeks a postponement, pursuant to Article 95 of the Statute, of the surrender of Saif Al-Islam to this Court pending the Libyan government's admissibility challenge to the case. The Prosecution does not oppose Libya's Request.

## Background

2. On 27 June 2011, the Chamber issued a warrant of arrest against, among others, Saif Al-Islam Gaddafi.<sup>1</sup> On 5 July 2011, the Registrar notified the Libyan authorities of a request for cooperation asking for their assistance in arresting Saif Al-Islam and surrendering him to the Court (the "Surrender Request").<sup>2</sup>
3. On 23 November 2011, a letter from the National Transitional Council was transmitted to the Chamber. The letter confirmed the arrest of Saif Al-Islam on 19 November 2011 in Libya.<sup>3</sup>
4. On 23 January 2012, the Libyan authorities sought, pursuant to article 94, postponement of the Surrender Request pending the completion of national proceedings in relation to other crimes against Saif Al-Islam (the "First Postponement Request").<sup>4</sup>
5. On 7 March 2012, the Chamber dismissed the First Postponement Request and requested that Libya make its decision to grant the Surrender Request and inform the Chamber accordingly.<sup>5</sup>
6. On 22 March 2012, Libya notified the Chamber of its intention to challenge the admissibility of the case concerning Saif Al-Islam pursuant to articles 19(2)(b), (5), and (6) by 30 April 2012 and requested, pending a decision on this challenge, that

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

<sup>2</sup> ICC-01/11-01/11-5 and ICC-01/11-01/11-25-Conf.

<sup>3</sup> ICC-01/11-01/11-34 with annex.

<sup>4</sup> ICC-01/11-01/11-44 with confidential annex 1.

<sup>5</sup> ICC-01/11-01/11-72.

the Pre-Trial Chamber suspend its Surrender Request in accordance with, *inter alia*, article 95 and rule 58 (the "Second Postponement Request").<sup>6</sup>

7. On 4 April 2012, the Pre-Trial Chamber denied the Second Postponement Request ("the Decision").<sup>7</sup> The Chamber stated that the provisions relied upon by Libya (article 95 and rule 58) only apply if there is an admissibility challenge under consideration by the Court pursuant to articles 18 or 19. Since the Libyan authorities had not yet made an admissibility challenge, the Chamber rejected Libya's Second Postponement Request.<sup>8</sup>
8. On 10 April 2012, Libya sought leave to appeal the Decision and simultaneously filed a direct appeal before the Appeals Chamber.<sup>9</sup> The direct appeal was rejected on 25 April 2012,<sup>10</sup> but the leave to appeal application is still pending.
9. On 1 May 2012, the Libyan authorities brought an application challenging the admissibility of the case against Saif Al-Islam under article 19. In the context of this challenge, the Libyan authorities are now requesting the postponement of the surrender of Saif Al-Islam under article 95 ("Request").
10. On 4 May 2012, this Court issued its "Decision on the Conduct of the Proceedings Following the 'Application on behalf of the Government of Libya pursuant to Article 19 of the Statute', in which it invited submissions on the Request no later than 11 May 2012.

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<sup>6</sup> ICC-01/11-01/11-82.

<sup>7</sup> ICC-01/11-01/11-100.

<sup>8</sup> *Ibid.*, para.18.

<sup>9</sup> ICC-01/11-01/11-102 and ICC-01/11-01/11-103 OA2.

<sup>10</sup> ICC-01/11-01/11-126 OA2

## Submissions

11. The Prosecution is not opposed to the Request. Article 95 permits the postponement of a request, whether for surrender or another form of cooperation, pending an admissibility challenge.
12. First, article 95 specifically refers to the postponement of requests “under this Part,” meaning Part 9 of the Statute which deals with international cooperation and judicial assistance. The ability to postpone the surrender of the suspect is intrinsic to several provisions in this part of the Statute, including articles, 89, 90, and 94.
13. Second, the rationale underpinning article 95 is deference to the principle of complementarity. The principle of complementarity serves as a catalyst for states to comply with their obligation to “exercise [their] criminal jurisdiction over those responsible for international crimes”,<sup>11</sup> as stated in the Preamble of the Rome Statute.
14. Accordingly, postponing the surrender of the suspect under article 95 once an admissibility challenge is brought is consistent with that principle because, as envisaged by the drafters of the provision, it would not be efficient nor beneficial to the State or the Court to require compliance with a request where admissibility or jurisdiction were an issue and the matter had yet to be determined by the Court.<sup>12</sup>
15. Further support for this analysis is found in the counterpart provision to article 95, namely article 89(2). This provision deals with the scenario where a suspect has brought an admissibility challenge (here limited to claims based on the principle of *ne bis in idem*) before a *national* court. The article permits the requested state to postpone the execution of the surrender request if an admissibility challenge is pending before this Court. It follows that if a state has the ability to

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<sup>11</sup> Rome Statute, preamble, para. 6 and see Article 1

<sup>12</sup> Otto Triffterer, Claus Kreft/Kimberly Prost, p .1593-1594

postpone surrender of a person pending an admissibility ruling based on a challenge brought before its national courts under article 89(2), it should also be permitted to postpone surrender when a challenge is lodged before the ICC pursuant to article 95.

### Conclusion

16. The Prosecution does not oppose the Request of the Libyan authorities to postpone the surrender of Saif Al-Islam Gaddafi pending the determination of the outstanding admissibility challenge.



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Luis Moreno-Ocampo,  
Prosecutor

Dated this 11<sup>th</sup> Day of May 2012

At The Hague, The Netherlands