

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 1 June 2012

PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernández 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

**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**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Luis Moreno-Ocampo

Fatou Bensouda

Counsel for the Defence

Xavier-Jean Keita

Melinda Taylor

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

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Victims**

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REGISTRY

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Deputy Registrar

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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Pre-Trial Chamber I (“Chamber”) of the International Criminal Court (“Court”) issues the following decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi (“Mr Gaddafi”) pursuant to article 95 of the Rome Statute (“Statute”).

I. Procedural history

1. On 26 February 2011, the United Nations Security Council adopted Resolution 1970, whereby it referred to the Prosecutor the situation in the Libyan Arab Jamahiriya since 15 February 2011.¹

2. On 27 June 2011, the Chamber issued a warrant of arrest against, among others, Mr Gaddafi.² On 5 July 2011, the Registrar notified the Libyan authorities of a request for cooperation asking for their assistance in arresting Mr Gaddafi and surrendering him to the Court (“Surrender Request”).³

3. On 23 November 2011, a letter from the National Transitional Council was transmitted to the Chamber⁴, confirming the arrest of Mr Gaddafi on 19 November 2011 in Libya.

4. On 6 December 2011, the Chamber authorised the Office of Public Counsel for the defence (“OPCD”) to represent the interests of the Defence in all instances related to the proceedings against Mr Gaddafi in the present case until otherwise decided.⁵

5. On 22 March 2012, Libya notified the Chamber of its intention to challenge the admissibility of the case concerning Mr Gaddafi and requested that the Chamber suspend the execution of the Surrender Request in

¹ S/RES/1970 (2011).

² ICC-01/11-01/11-3.

³ ICC-01/11-01/11-5 and ICC-01/11-01/11-25-Conf.

⁴ The official English translation of this letter was formally put into the case record six days later. ICC-01/11-01/11-34 with annex.

⁵ ICC-01/11-01/11-39-Conf-Exp. A public redacted version is also available (ICC-01/11-01/11-39-Red).

accordance with, *inter alia*, article 95 of the Statute and rule 58 of the Rules of Procedure and Evidence (“Rules”) (“Second Postponement Request”).⁶

6. On 4 April 2012, the Chamber issued the “Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi”, whereby it rejected the Second Postponement Request on the ground that there was no admissibility challenge pending before the Chamber at that time and reiterated its request that Libya proceed immediately with the surrender of Mr Gaddafi to the Court.⁷

7. On 10 April 2012, Libya filed the “Government of Libya’s Application for Leave to Appeal the ‘Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi’” (“Application for Leave to Appeal”).⁸ The OPCD and the Prosecutor filed their responses to the Application for Leave to Appeal respectively on 12 and 16 April 2012.⁹

8. On 16 April 2012, Libya filed the “Application on behalf of the Government of Libya for leave to reply to the ‘Response to the Government of Libya’s application for leave to appeal the Decision regarding the second request by the Government of Libya for postponement of the surrender of Saif Al-Islam Gaddafi’”.¹⁰

⁶ ICC-01/11-01/11-82.

⁷ ICC-01/11-01/11-100.

⁸ ICC-01/11-01/11-102.

⁹ ICC-01/11-01/11-106 and ICC-01/11-01/11-110.

¹⁰ ICC-01/11-01/11-111-Conf-Exp. A public redacted version is also available (ICC-01/11-01/11-111-Red).

9. On 17 April 2012, the Chamber appointed counsel from the OPCD as Mr Gaddafi's counsel pursuant to regulation 76(2) of the Regulations of the Court ("Regulations").¹¹

10. On 24 April 2012, the OPCD filed its "Response to the 'Application on behalf of the Government of Libya for leave to reply to the Response to the Government of Libya's application for leave to appeal the Decision regarding the second request by the Government of Libya for postponement of the surrender of Saif Al-Islam Gaddafi'".¹²

11. On 1 May 2012, the Chamber received the "Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute", wherein Libya requests for the Chamber: (i) to postpone execution of the Surrender Request pursuant to article 95 of the Statute ("Postponement Request"); and (ii) to declare the case inadmissible and quash the Surrender Request ("Admissibility Challenge").¹³

12. On 11 May 2012, pursuant to the Chamber's decision,¹⁴ the OPCD and the Prosecutor filed their respective responses to the Postponement Request ("OPCD Response"¹⁵ and "Prosecutor's Response",¹⁶ respectively).

13. On 16 May 2012, Libya filed the "Libyan Government Application for leave to reply and reply to OPCD Response to the request to postpone the surrender of Mr Saif Al-Islam Gaddafi pursuant to article 95 of the Statute".¹⁷

¹¹ ICC-01/11-01/11-113.

¹² ICC-01/11-01/11-123.

¹³ ICC-01/11-01/11-130-Conf and annexes. A public redacted version is also available (ICC-01/11-01/11-130-Red).

¹⁴ "Decision on the Conduct of the Proceedings Following the 'Application on behalf of the Government of Libya pursuant to Article 19 of the Statute'", ICC-01/11-01/11-134.

¹⁵ ICC-01/11-01/11-141-Red.

¹⁶ ICC-01/11-01/11-142.

¹⁷ ICC-01/11-01/11-149.

14. On 18 May, the OPCD filed the “Defence Response to Libyan Application for Leave to Reply and Reply”.¹⁸

II. Submissions

A. Libya’s Postponement Request

15. Libya requests postponement and suspension of the Pre-Trial Chamber’s order to surrender Mr Gaddafi pending a final determination of its Admissibility Challenge and provides a number of reasons for which it submits that the scope of article 95 of the Statute indeed covers the request for arrest and surrender.

16. In particular, Libya argues that: (i) article 95 of the Statute specifically states that it applies to requests under Part IX of the Statute, which includes article 89, entitled “Surrender of persons to the Court”; (ii) the application of article 95 of the Statute to requests for arrest and surrender is consistent with other provisions of the Statute, such as article 19(8)(c), which allows the Prosecutor to take steps to prevent “absconding” where an investigation has been suspended due to an admissibility challenge, and 89(2) of the Statute with respect to *ne bis in idem* challenges brought by a suspect in a national court; (iii) the application of article 95 of the Statute to requests for arrest and surrender is necessary for consistency in the approach to State challenges to admissibility under article 19 of the Statute; (iv) a more restrictive interpretation, such that requests for arrest and surrender are not covered by article 95 of the Statute, would be contrary to the principle of complementarity; and (v) “the argument that the exception provided by Article 95 applies to requests for surrender is supported by distinguished commentators”.¹⁹

¹⁸ ICC-01/11-01/11-151.

¹⁹ Postponement Request, para. 105.

B. The Prosecutor's Response

17. In his Response the Prosecutor does not oppose the request of Libya to postpone the surrender of Mr Gaddafi pending the determination of the outstanding admissibility challenge. In particular, according to the Prosecutor, the scope of article 95 of the Statute also covers postponement of requests for arrest and surrender since: (i) "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";²⁰ (ii) "postponing the surrender of the suspect under article 95 once an admissibility challenge is brought is consistent with [the] principle [of complementarity] 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";²¹ and (iii) this is also consistent with the "the counterpart provision to article 95, namely article 89(2) of the Statute".²²

C. The OPCD Response

18. In its Response, the OPCD opposes Libya's request for several reasons. The principal submission of the OPCD is that article 95 of the Statute does not extend to surrender requests. In particular, the OPCD asserts that "[t]he reference in Article 95 to 'the collection of such evidence' qualifies the type of request, which may be postponed, to requests concerning evidentiary issues".²³ Further, in support of its contention, the OPCD submits "[t]he context and placement of Article 95 in the Statute clearly confines it to forms of cooperation other than surrender", namely requests for other forms of

²⁰ Prosecutor's Response, para. 12.

²¹ *Ibid.*, para. 14.

²² *Ibid.*, para. 15.

²³ OPCD Response, para. 7

cooperation under article 93 of the Statute.²⁴ The OPCD also avers that, if article 95 of the Statute were interpreted to include all types of cooperation requests, including those for arrest and surrender, then article 89(2) of the Statute would be rendered superfluous, as the latter “authorises a State to postpone surrender when an admissibility challenge based on *ne bis in idem* is pending before the ICC Chamber”.²⁵ Finally, it is the OPCD argument that interpreting article 95 of the Statute to extend to requests for arrest and surrender would be inconsistent with the object and purposes of the Statute as it would contravene the Court’s duty to: (i) convene expeditious confirmation proceedings; (ii) ensure the suspect’s right to participate in such proceeding; and (iii) take all reasonable measures to obtain the suspect’s arrest and surrender, and thereby eliminate impunity.²⁶

19. In the alternative, the OPCD submits that, should the Chamber determine that article 95 of the Statute is to be interpreted to encompass any cooperation request under Part IX of the Statute, such provision “cannot be invoked in connection with an order to surrender, which emanates from the authority of the Security Council, and which entails mandatory compliance”.²⁷ In particular, according to the OPCD, “[u]nder Article 25 of the United Nations Charter, Libya is bound by the legal obligations set out in SCRes1970, and is therefore required to give effect to any orders issued by the ICC, independently of Part IX of the Statute”.²⁸

20. The OPCD further asserts that, in any case, article 95 of the Statute cannot be invoked in connection with a pre-existing obligation to surrender the defendant to the Court, since article 19(9) of the Statute states that the making of a challenge to jurisdiction or admissibility “shall not affect the

²⁴ *Ibid.*, para. 9.

²⁵ *Ibid.*, para. 12.

²⁶ *Ibid.*, para. 15.

²⁷ *Ibid.*, para. 29.

²⁸ *Ibid.*, para. 32.

validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge”.²⁹

21. Ultimately, the OPCD submits that the Chamber has the power, pursuant to rules 58 and 171(1) of the Rules, to suspend consideration of the Admissibility Challenge, pending Libya’s compliance with its obligations under the Statute, given that “[t]he surrender of a defendant to the ICC clearly constitutes an obligation which is essential to the accomplishment of the object and purposes of the ICC, and as such, non-compliance constitutes a material breach”.³⁰

III. Applicable law

22. The Chamber notes articles 1, 13, 21, 17, 18, 19, 82, 86, 87, 89, and 95 of the Statute and regulation 24 of the Regulations.

IV. Analysis and conclusions of the Chamber

23. Article 95 of the Statute states that “[w]here there is an admissibility challenge under consideration by the Court pursuant to article 18 and 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”.

24. The Chamber will examine (i) whether article 95 in particular, and Part IX of the Statute in general, are applicable following a Security Council referral under article 13(b) of the Statute and, if so, (ii) whether requests for arrest and surrender are cooperation requests within the ambit of article 95 of the Statute.

²⁹ *Ibid.*, paras 45-52.

³⁰ *Ibid.*, para. 55.

25. In doing this analysis, the Chamber will apply the relevant rules of interpretation of the Vienna Convention of the Law of treaties,³¹ taking into account that there is a close relationship between the cooperation regime of Part IX and the complementarity regime contained in Part II of the Statute. With respect to treaty exegesis, the Chamber shares the view that “[i]n so far as a legal problem of cooperation arises that is directly interrelated with issues covered in Parts 2 and 5 and that is not specifically dealt with in Part 9, 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” (emphasis in the original).³²

26. Following the submission of the Postponement Request and the responses by the OPCD and the Prosecutor, the Chamber considers to be in possession of sufficient information to enable it to decide on the Request, and that no further submissions on the proper interpretation of article 95 of the Statute are necessary. Accordingly, Libya’s request for leave to reply to the OPCD Response shall be rejected, and the substantive submissions contained therein shall be disregarded for the purposes of the present decision.

(i) The applicability of Part IX of the Statute in proceedings following Security Council referrals under article 13(b) of the Statute

27. This Chamber has already found that the order to Libya to cooperate fully with the Court contained in the Security Council Resolution 1970 (2011) “means that the Statute, and especially its Part IX, is the legal framework within which Libya must comply with the Surrender Request” and that

³¹ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 United Nations Treaty Series 18232, Article 31; see also Appeals Chamber, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, ICC-01/04-168, para. 33.

³² 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.), 1503 at 1506.

“Libyan authorities [...] are required to work within the cooperation framework provided by the Statute”.³³

28. Furthermore, the Court has consistently held that the legal framework of the Statute applies in the situations referred by the Security Council in Libya and Darfur, Sudan, including its complementarity and cooperation regimes.³⁴

29. This interpretation is in line, *inter alia*, with article 1 of the Statute, which provides that “[t]he jurisdiction and functioning of the Court shall be governed by the provisions of the Statute”; article 13 of the Statute, which states that “[t]he Court may exercise its jurisdiction [...] in accordance with the provisions of the Statute”, regardless of how the exercise of jurisdiction is triggered in the particular situation; and article 21, which mandates the Court to apply, “in the first place”, the Statute, Elements of Crimes and its Rules of Procedure and Evidence.

30. For the above reasons, the Chamber concludes that Part IX of the Statute, including article 95, applies in principle to the current case.

³³ “Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi”, ICC-01/11-01/11-72, para. 12.

³⁴ “Decision on ‘Defence Application pursuant to articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of the Sudan’”, ICC-02/05-03/09-169, para. 15. Similarly, this Chamber has indicated that by making a referral pursuant to article 13(b) of the Statute, the Security Council has accepted that the investigation and prosecution would take place in accordance with the Court’s statutory framework (“Decision on Application under Rule 103”, ICC-02/05-185, para. 31); see also Pre-Trial Chamber, “Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, ICC-02/05-01/09-3, para. 45. It is also of significance that this Chamber has also previously considered the admissibility of those cases arising out of the situation in Darfur, Sudan, thus implicitly recognizing the full applicability of the complementarity regime also when the situation is triggered by a referral from the Security Council. See, *inter alia*, “Decision on the Prosecution Application under Article 58(7) of the Statute”, ICC-02/05-01/07-1-Corr; “Decision on the Confirmation of Charges”, ICC-02/05-02/09-243-Conf; “Corrigendum of the ‘Decision on the Confirmation of Charges’”, ICC-02/05-03/09-121-Corr-Red..

ii. The applicability of article 95 of the Statute to requests for arrest and surrender

31. As indicated above, certain provisions of the cooperation regime are directly linked to complementarity provisions.³⁵ In particular, there are intimate links between article 95 in Part IX and articles 18 and 19 in Part II of the Statute.

32. Pursuant to article 95 of the Statute the requested State may postpone the execution of any request under Part IX where there is an admissibility challenge under consideration by the Court pursuant to article 18 or 19. Regardless of its placement, the ordinary meaning of the terms “a request under this Part”, as well as a systematic reading of this provision with its related complementarity norms, support the interpretation that article 95 encompasses all requests for cooperation under Part IX, including requests for arrest and surrender made before or after the admissibility challenge.

33. The Chamber does not consider that the reference to “such evidence pursuant to article 18 or 19” contained in the last sentence of article 95 of the Statute has the effect of narrowing its scope to requests concerning evidentiary issues only, as suggested by the OPCD.³⁶

34. Article 95 of the Statute reflects the consequences of the suspension of the Prosecutor’s investigation pursuant to articles 18 and 19 for cooperation. The word “such” therefore refers to the evidence that, despite the suspension, the Prosecutor may be exceptionally authorised to collect pursuant to articles 18(6) and 19(8)(a) and (b) of the Statute. In other words, article 95 of the Statute mirrors the safeguards that the Prosecutor may seek to obtain pursuant to those provisions and which are intended to make the suspension of the investigation and the corresponding postponement by the State less

³⁵ See above, para. 25.

³⁶ OPCD Response, para. 7.

strict. The reference to “such evidence” thus has no bearing on the *type* of cooperation requests that can be postponed pursuant to article 95 of the Statute.

35. In addition, the Chamber is not persuaded by the argument that interpreting article 95 of the Statute in this manner would be inconsistent with the object and purpose of the Statute as it would, *inter alia*, contravene the Court’s duty to convene expeditious confirmation proceedings, ensure the suspect’s right to participate in such proceedings, and thereby eliminate impunity.³⁷

36. In this respect, the Chamber considers 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.³⁸ It 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 investigation is suspended.

37. In light of the above, the Chamber concludes that article 95 of the Statute is applicable to requests for arrest and surrender, pending determination of an admissibility challenge brought before the Court. 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.

³⁷ OPCD Response, para. 15.

³⁸ Articles 18(2) and 19(7) of the Statute.

38. In the case at hand, Libya challenges the admissibility of the case against Mr Gaddafi on the grounds that it is investigating “[his] alleged criminal responsibility for multiple acts of murder and persecution, committed pursuant to or in furtherance of State policy, amounting to crimes against humanity”, including “crimes committed in Tripoli, Benghazi, and Misrata, during the period commencing from 15 February 2011 until the liberation of Libya”.³⁹ In support of its submission, Libya relies on a number of materials attached thereto.⁴⁰

39. Without entering into the discussion of whether the case is admissible, the Chamber considers that Libya’s Admissibility Challenge has been properly made within the terms of article 19(2) of the Statute and rule 58(1) of the Rules. Accordingly, the request for arrest and surrender for Mr Gaddafi may be postponed.

40. Finally, the Chamber emphasises that, under article 95 of the Statute, States may only temporarily suspend the execution of a request for cooperation until such time that a determination on admissibility is made by the Court. The arrest warrant remains valid in accordance with article 19(9) of the Statute, and accordingly Libya must ensure that all necessary measures are taken during the postponement in order to ensure the possibility of an immediate execution of the Surrender Request should the case be found admissible.

41. The Chamber further emphasises Libya’s continuing obligation to cooperate with the Court, as decided by the Security Council and within the legal framework of Part IX of the Statute. In particular, it is expected that

³⁹ Admissibility Challenge, para. 1.

⁴⁰ Annexes A to K to the Admissibility Challenge.

Libya will provide all required assistance in order to facilitate an expeditious determination of the Admissibility Challenge.

iii) Additional issues

42. The Chamber notes that Libya has requested leave to appeal the “Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi” on the issue whether the Chamber correctly held at the time of this decision that there was no admissibility challenge pending, and therefore that Libya was not entitled to postpone the Surrender Request. In light of the present decision, the Chamber is of the view that the issue has become moot, and accordingly, that it is not necessary to entertain the matter any further. By the same token, the Chamber also considers that it is not necessary to grant Libya’s request for leave to reply to the OPCD response to the Application for Leave to Appeal.

FOR THESE REASONS, THE CHAMBER

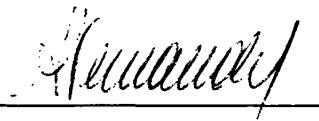
DECIDES that Libya may postpone the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Statute until such time that the Chamber has ruled on the Admissibility Challenge;

REJECTS Libya's application for leave to reply to the OPCD Response;

REJECTS the Application for Leave to Appeal;

REJECTS Libya's request for leave to reply to the OPCD response to the Application for Leave to Appeal.

Done in both English and French, the English version being authoritative.

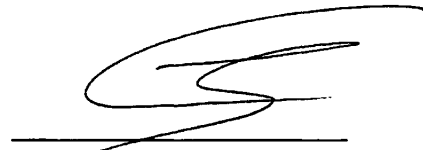


Judge Silvia Fernández de Gurmendi

Presiding Judge



Judge Hans-Peter Kaul



Judge Christine Van den Wyngaert

Dated this 1 June 2012

At The Hague, The Netherlands