

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 14 June 2013

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

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

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

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John R.W.D. Jones

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Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

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Detention Section

**Victims Participation and Reparations
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Others

Pre-Trial Chamber I (the “Chamber”) of the International Criminal Court (the “Court” or the “ICC”) issues the following decision in relation to Libya’s postponement of the execution of the Court’s request for arrest and surrender of Abdullah Al-Senussi (“Mr Al-Senussi”) under article 95 of the Rome Statute (the “Statute”), and the related request on the part of the Defence of Mr Al-Senussi to refer Libya’s non-cooperation with the Court to the Security Council.

I. Procedural history

1. On 26 February 2011, the United Nations Security Council adopted Resolution 1970, whereby it referred the situation in Libya since 15 February 2011 to the Prosecutor of the Court and decided that the Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor.¹

2. On 27 June 2011, the Chamber issued a warrant of arrest against Mr Al-Senussi.²

3. On 4 July 2011, the Registrar transmitted the “Request to the Libyan Arab Jamahiriya for the arrest and surrender of Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI”, requesting Libya to arrest and surrender to the Court, *inter alia*, Mr Al-Senussi (the “Surrender Request”).³

4. On 19 March 2013, the Defence of Mr Al-Senussi filed an application to refer Libya and Mauritania to the UN Security Council for their failure to

¹ S/RES/1970 (2011).

² Pre-Trial Chamber I, Decision on the “Prosecutor's Application Pursuant to Article 58 as to the Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi”, ICC-01/11-01/11-1, 27 June 2011; *id.*, Warrant of Arrest for Abdullah Al-Senussi, 27 June 2011, ICC-01/11-01/11-4.

³ ICC-01/11-01/11-5.

comply with their obligations *vis-à-vis* the Court.⁴ Libya filed a response on 10 April 2013,⁵ and, on 3 May 2013, the Defence, with the leave of the Chamber,⁶ submitted its reply to Libya's response.⁷

5. On 2 April 2013, Libya filed the "Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute" (the "Admissibility Challenge"), challenging the admissibility of the case against Mr Al-Senussi before the Court and notifying the Chamber of the exercise of its right to postpone the execution of the Surrender Request pursuant to article 95 of the Statute.⁸

6. On 24 April 2013, the Defence of Mr Al-Senussi filed the "Response on behalf of Abdullah Al-Senussi to the Submission of the Government of Libya for Postponement of the Surrender Request for Mr Al-Senussi" (the "Defence Response"),⁹ requesting the Chamber "(i) to reject Libya's argument that it is entitled to postpone the surrender request pursuant to Article 95 and (ii) to confirm its order for the immediate surrender of Mr. Al-Senussi to the ICC".¹⁰

7. On 20 May 2013, with the leave of the Chamber,¹¹ Libya filed the "Libyan Government's reply to 'Response on behalf of Abdullah Al-Senussi to the Submission of the Government of Libya for Postponement of the Surrender Request for Mr. Al-Senussi'" ("Libya's Reply"),¹² requesting that the Chamber "reject Mr. Al-Senussi's response and interpret article 95 to allow Libya to

⁴ ICC-01/11-01/11-304.

⁵ ICC-01/11-01/11-310.

⁶ Pre-Trial Chamber I, Decision on the request of Abdullah Al-Senussi for leave to reply, 26 April 2013, ICC-01/11-01/11-324.

⁷ ICC-01/11-01/11-329.

⁸ ICC-01/11-01/11-307-Conf-Exp. A confidential redacted version (ICC-01/11-01/11-307-Conf-Red) and a public redacted version (ICC-01/11-01/11-307-Red2) are also available.

⁹ ICC-01/11-01/11-319.

¹⁰ *Ibid.*, para. 63.

¹¹ Pre-Trial Chamber I, Decision on Libya's application for leave to reply to the Defence of Abdullah Al-Senussi, 10 May 2013, ICC-01/11-01/11-335.

¹² ICC-01/11-01/11-339.

postpone execution of the surrender request pending determination of the admissibility challenge”.¹³

II. Submissions of the parties

A. *Libya’s initial submission in the Admissibility Challenge*

8. In its Admissibility Challenge, Libya notifies the Chamber that it “exercises its right pursuant to article 95 of the Statute, for the postponement of the execution of the Court’s request for the surrender of Abdullah Al-Senussi pending the determination of th[e] admissibility challenge by the Court”.¹⁴ No further submissions on the point were made by Libya in the Admissibility Challenge.

B. *The Defence Response*

9. In its Response, the Defence of Mr Al-Senussi argues that, “Article 95 does not confer a *right*. [...] [T]here is nothing automatic about it – it is for the Chamber to consider whether and how it applies to the specific facts in question”.¹⁵ Considering the specific circumstances of the case against Mr Al-Senussi, the Defence requests the Chamber “(i) to reject Libya’s argument that it is entitled to postpone the surrender request pursuant to Article 95 and (ii) to confirm its order for the immediate surrender of Mr. Al-Senussi to the ICC”.¹⁶

10. In particular, after arguing that the Chamber is vested with the power to decide on requests under article 95 of the Statute and noting that, in any case, “Libya’s application [...] provides no justification for *why* postponement is warranted”,¹⁷ the Defence of Mr Al-Senussi advances some arguments in support of its submission that the Chamber must reject Libya’s submission

¹³ *Ibid.*, para. 44.

¹⁴ Admissibility Challenge, para. 5.

¹⁵ Defence Response, para. 22 (emphasis in the original)

¹⁶ *Ibid.*, para. 63.

¹⁷ *Ibid.*, para. 22 (emphasis in the original).

relating to article 95 of the Statute. These Defence arguments fall within three main categories related to: (i) the timing of the Admissibility Challenge;¹⁸ (ii) the violation on the part of Libya of its international obligations with respect to the transfer of Mr Al-Senussi to the Court;¹⁹ and (iii) the need to ensure Mr Al-Senussi's presence at the seat of the Court in order to advance the admissibility proceedings and give effect to his rights under the Statute and the Rules of Procedure and Evidence (the "Rules").²⁰

11. In relation to the timing of the Admissibility Challenge, the Defence of Mr Al-Senussi submits that the Admissibility Challenge "is not properly filed and therefore cannot trigger article 95 postponement" on the grounds that Libya, which had held custody of Mr Al-Senussi for over 7 months at the time, has not filed its challenge expeditiously.²¹ In support of its argument, the Defence refers to a judgment of the Appeals Chamber, in which it is stated that "Article 19 (5) of the Statute requires a State to challenge admissibility as soon as possible once it is in a position to actually assert a conflict of jurisdictions".²² On this basis, the Defence argues that Libya "should [...] not be allowed to use article 95 to cause further unacceptable [...] delay".²³

12. The second set of arguments advanced by the Defence of Mr Al-Senussi relate to a number of alleged violations on the part of Libya of its international obligations. In particular, the Defence argues that there is no legal basis for Libya to retain custody of Mr Al-Senussi while the Admissibility Challenge is

¹⁸ *Ibid.*, para. 35.

¹⁹ *Ibid.*, paras 3(a) and 37 to 50.

²⁰ *Ibid.*, paras 51 to 58.

²¹ *Ibid.*, para. 35.

²² Appeals Chamber, *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", 30 August 2011, ICC-01/09-01/11-307, para. 46.

²³ Defence Response, para. 35.

pending given that Libya: (i) “obtained custody of Mr. Al-Senussi from Mauritania in September 2012 in violation of Security Council Resolution 1970 and the order and requests of the ICC for Mr. Al-Senussi to be surrendered to the ICC”;²⁴ (ii) “has continued to act in violation of [its] obligations [...] in failing to transfer Mr. Al-Senussi to the ICC”;²⁵ and (iii) “has given no assurance that it will not commence Mr. Al-Senussi’s trial until the ICC has decided on its admissibility challenge [...] despite the Chamber’s order that Libya should not take any steps to hinder Mr. Al-Senussi’s immediate transfer to the ICC”.²⁶ On this basis, the Defence avers that Libya should be prevented from profiting from violations of its international obligations, and therefore “should not be permitted to retain custody of Mr. Al-Senussi merely because it has now filed an admissibility challenge”.²⁷

13. As for the third set of arguments, the Defence of Mr Al-Senussi submits that “Libya has violated the Chamber’s orders by failing to arrange a privileged legal visit for Defence Counsel to Mr. Al-Senussi”,²⁸ whose presence at the seat of the Court is therefore required in order to “advance proceedings on admissibility and because it is the only way to give effect to his rights under the Court’s Statute and Rules”.²⁹ More specifically, the Defence avers that only if Mr Al-Senussi is transferred to the Court, will he be in a position to, *inter alia*, provide instructions to his counsel, discuss with him factual issues relevant to the admissibility of the case, receive a copy of the warrant of arrest issued by the Chamber against him as well as of the admissibility filings, and attend the

²⁴ *Ibid.*, para. 3(a).

²⁵ *Ibid.*

²⁶ *Ibid.*, para. 48.

²⁷ *Ibid.*, para. 44.

²⁸ *Ibid.*, para. 3(b).

²⁹ *Ibid.*, para. 58.

confirmation of charges hearing in case the Chamber decides to join the admissibility proceedings with the confirmation of charges.³⁰

14. Finally, and in the alternative, the Defence submits that the postponement of the execution of the Surrender Request must be rejected on the grounds that Libya is not investigating the same case as the one before the Court, and that therefore article 95 of the Statute does not apply in the circumstances at hand.³¹ In this regard, the Defence additionally requests the Chamber to “consider the further argument that will be made in the Defence admissibility-response showing that this is not the same ‘case’ and then reconsider its decision on surrender at that time and that basis”.³²

C. Libya’s Reply

15. In its reply, Libya submits that “[t]he plain language of article 95, the jurisprudence and the complementarity principle indicates that the Defence submissions are misconceived: the discretion as to its invocation belongs to the state”.³³ In particular, according to Libya, article 95 of the Statute has a “key role [...] in underpinning the state’s right to conduct genuine criminal proceedings”³⁴ and “[t]he reason for the mandatory language of article 95 is that failure to respect a state’s valid postponement of surrender would necessarily entail unacceptable risk of adverse and irreversible consequences for purs[u]ing genuine domestic criminal proceedings of international crimes”.³⁵ In addition, Libya refers to a decision issued in relation to Saif Al-Islam Gaddafi, in which the Chamber held that a State may postpone the execution of a surrender request once an admissibility challenge has been

³⁰ *Ibid.*, para. 58.

³¹ *Ibid.*, paras 60 and 61.

³² *Ibid.*, para. 62.

³³ Libya’s Reply, para. 20.

³⁴ *Ibid.*, para. 18.

³⁵ *Ibid.*, para. 19.

properly made within the terms of article 19(2) of the Statute and rule 58(1) of the Rules.³⁶

16. As regards the timing of the Admissibility Challenge, Libya submits that the same jurisprudence of the Appeals Chamber relied upon by the Defence of Mr Al-Senussi, also “cautions against a *premature* admissibility application”.³⁷ Further, in relation to the case at hand, Libya argues that the complex facts surrounding the timing of the Admissibility Challenge, and as set out therein, “clearly indicate that the [...] admissibility challenge was filed as soon as possible and in compliance with Article 19(5)”.³⁸

17. With respect to the Defence arguments that Libya should not be allowed to benefit from violations of international law, Libya submits that, “whilst [the Defence] allegations of violations are, themselves, entirely without basis [...], [the Defence] profoundly misunderstands article 19, the complementarity principle, and the role of article 95 therein”.³⁹ In sum, according to Libya, the Defence “makes unfounded allegations of violations of international law and then misrepresents their ramification”.⁴⁰ In particular, Libya takes issue with the Defence attempt to “employ the jurisdiction of the ICC as a form of retribution or punishment for alleged past violations”, as “[t]he ICC does not constitute a general means of international law enforcement. Such an approach would be both illegitimate and regressive”.⁴¹

³⁶ *Ibid.*, para. 17, with reference to Pre-Trial Chamber I, Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Rome Statute, 1 June 2012, ICC-01/11-01/11-163, para. 39.

³⁷ Libya’s Reply, para. 4 (emphasis in the original).

³⁸ *Ibid.*, para. 7.

³⁹ *Ibid.*, para. 9.

⁴⁰ *Ibid.*, para. 9.

⁴¹ *Ibid.*, para. 24.

III. Analysis of the Chamber

18. The Chamber notes articles 1, 13, 17, 19, 86, 87, 89 and 95 of the Statute, and rule 58 of the Rules.

19. 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 [of the Statute]”.

20. In interpreting the scope of applicability of article 95 of the Statute, the Chamber previously 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.⁴²

21. In addition, the Chamber already clarified 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 of the Statute 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 of the Statute, “has specifically ordered that the Prosecutor may pursue”.⁴³

22. Accordingly, the Chamber considers that, in principle, article 95 of the Statute provides the applicable legal basis for the postponement of the execution of the Surrender Request in the present case.

⁴² Pre-Trial Chamber I, Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Rome Statute, 1 June 2013, ICC-01/11-01/11-163, paras 27 to 30.

⁴³ *Ibid.*, paras 31 to 37.

23. On the basis of the arguments raised by the parties, the Chamber will hereunder determine: (i) if, and to what extent, a Chamber's prior authorization is necessary in order for a State to postpone the execution of a surrender request when an admissibility challenge is pending before the Court; and (ii) whether the conditions for the applicability of article 95 of the Statute are met in the case against Mr Al-Senussi.

A. The Chamber's authority under article 95 of the Statute

24. As recalled above, according to article 95 of the Statute, "[w]here there is an admissibility challenge under consideration by the Court [...], the requested State may postpone the execution of a request under [...] Part [9 of the Statute]".

25. The provision at hand does not require a prior authorization on the part of the Chamber in order for a State to avail itself of a statutory prerogative, insofar as the necessary pre-requisites for its exercise are met. Nevertheless, when a dispute arises as to whether these pre-requisites for the application of article 95 of the Statute are met, such dispute cannot be unilaterally settled by the State. It is for the Chamber to determine whether an admissibility challenge has been duly made within the terms of the applicable statutory provisions. In this sense, the Chamber 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".⁴⁴

26. The Chamber recalls that, in the present case, it has already held that "the postponement of a surrender request pursuant to [article 95 of the Statute] can only be made '[w]here there is an admissibility challenge under

⁴⁴ Libya's Reply, para. 17.

consideration'''.⁴⁵ On that occasion, the Chamber determined that Libya's submissions at that time were not "sufficient to trigger the applicability of article 95 of the Statute and justify a postponement of the execution of the Surrender Request", given the absence of a proper challenge to the admissibility of the case against Mr Al-Senussi to be disposed of by the Chamber.⁴⁶

27. The Chamber therefore concludes 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. However, as stated above, it falls within the Chamber's powers and duties 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 of the Statute is under consideration by the Court.

28. On this basis, the Chamber will proceed to the second limb of its analysis with a view to determining whether the challenge to the admissibility of the case against Mr Al-Senussi has been properly made and, therefore, whether Libya may legitimately decide to postpone the execution of the Surrender Request under article 95 of the Statute.

B. Whether there is an admissibility challenge under consideration by the Court pursuant to article 19 of the Statute

29. Acting pursuant to article 19(2)(b) of the Statute, Libya challenges the admissibility of the case against Mr Al-Senussi within the meaning of article 17(1)(a) of the Statute, on the grounds that "its national judicial system is actively investigating Abdullah Al-Senussi for his alleged criminal

⁴⁵ Pre-Trial Chamber I, Decision on the "Urgent Application on behalf of Abdullah Al-Senussi for Pre-Trial Chamber to order the Libyan Authorities to comply with their obligations and the orders of the ICC", ICC-01/11-01/11-269, para. 30.

⁴⁶ *Ibid.*, para. 33.

responsibility for multiple acts of murder and persecution, committed pursuant to or in furtherance of a State policy, amounting to crimes against humanity”, which “include but are not limited to crimes committed in Benghazi during the period from 15 to 20 February 2011”.⁴⁷ In support of its challenge, Libya relies on a number of materials attached thereto.⁴⁸

30. The Admissibility Challenge was filed by Libya on 2 April 2013, almost seven months after Mr Al-Senussi’s transfer to Libya from Mauritania.⁴⁹ The Chamber notes the Defence argument to the effect that this fact “shows without a doubt that Libya [...] has not filed its challenge expeditiously”.⁵⁰ The Chamber is not persuaded that this mere chronology *per se* renders the Admissibility Challenge tardy, and, as such, abusive. Indeed, the Chamber must take into account the circumstances of the individual case, with a view to determining whether the challenge was filed in violation of article 19(5) of the Statute.

31. In this regard, the Chamber observes that, according to article 19(5) of the Statute, a State shall make a challenge to the admissibility of a case “at the earliest opportunity”. The Chamber understands this reference to indicate that a State shall seize the Chamber of an admissibility challenge as soon as there are grounds on the basis of which the case would be inadmissible before the Court.⁵¹ Indeed, a State is required to challenge admissibility without delay once in a position to demonstrate the inadmissibility of the case before the

⁴⁷ Admissibility Challenge, para. 1.

⁴⁸ Admissibility Challenge, Annexes 1 to 30.

⁴⁹ Libya submitted previously, that Mr Al-Senussi was extradited to Libya on 5 September 2012, see ICC-01/11-01/11-205, para. 13.

⁵⁰ Defence Response, para. 35.

⁵¹ See also Appeals Chamber, *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, 30 August 2011, ICC-01/09-02/11-274, para. 98.

Court, given that, as held by the Appeals Chamber, it “cannot expect to be allowed” to amend or complement a challenge made prematurely.⁵²

32. In the case at hand, and without entertaining, for the purposes of the present decision, the validity of the arguments advanced by Libya in support of its Admissibility Challenge, the Chamber is of the view 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) of the Statute.

33. In these circumstances, the Chamber concludes that the Admissibility Challenge has been properly made within the terms of article 19(2) and (5) of the Statute and rule 58(1) of the Rules.

34. This conclusion is not affected by the other arguments advanced by the Defence relating to the inapplicability of article 95 of the Statute in the present case, as they do 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.

35. In particular, in relation to Libya’s alleged violations of its international obligations, the Chamber considers immaterial, for the limited purposes of article 95 of the Statute, 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. While these facts might be relevant in another context and for other statutory purposes, they do not have the potential to preclude the application of article 95 of the Statute that is triggered by the filing of an admissibility challenge properly made. In this regard, the Chamber notes the view expressed by Libya that “Mr. Al-Senussi seeks to employ the

⁵² *Ibid.*, paras 45 and 98.

jurisdiction of the ICC as a form of retribution or punishment for alleged past violations” and that the approach that the Court “constitute[s] a general means of international law enforcement [...] would be both illegitimate and regressive”.⁵³ The 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. In this sense, the Chamber is of the view that the Defence 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 been properly made under article 19 of the Statute, as required by article 95 of the Statute.

36. For the same reasons, the Chamber is not persuaded by the Defence argument that Libya’s submission under article 95 of the Statute should be dismissed on the grounds 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.⁵⁴ With respect to this argument, the Chamber additionally observes that these mere facts 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.

37. The Chamber further notes the Defence argument that the transfer of Mr Al-Senussi to the seat of the Court is necessary in order for him to exercise

⁵³ Libya’s Reply, para. 24.

⁵⁴ Defence Response, paras 48 and 49.

his rights under the Statute and the Rules.⁵⁵ However, the Chamber is of the view that such argument, even if upheld, 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. Nevertheless, the Chamber emphasizes that the postponement of the execution of the Surrender Request 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 effective exercise of Mr Al-Senussi's rights before the Court and to facilitate a timely determination of the Admissibility Challenge.

38. Finally, in relation to the Defence alternative argument that article 95 of the Statute is not applicable to the case at hand as Libya failed to demonstrate that it is investigating the same case as that before the Court,⁵⁶ the Chamber observes that an evaluation on this point is rather an inherent part of the determination of an admissibility challenge made under article 17(1)(a) of the Statute. Should Libya be unable to satisfactorily demonstrate that it is investigating the same case as the one before the Court, the result of this finding by the Chamber would not be the rejection of the postponement of the execution of the Surrender Request under article 95 of the Statute, but rather the determination that the case against Mr Al-Senussi is admissible before the Court pursuant to article 17 of the Statute. The natural consequence of any such determination would therefore be that article 95 of the Statute would not be applicable any longer, as there would be no "admissibility challenge under

⁵⁵ *Ibid.*, para. 51 to 58.

⁵⁶ *Ibid.*, paras 59 to 62.

consideration by the Court”, and that the duty to execute the Surrender Request would be in full force again.

C. Conclusion

39. In light of the above, the Chamber is satisfied that Libya may legitimately decide to postpone, pursuant to article 95 of the Statute, the execution of the Surrender Request pending a final determination by the Chamber of the Admissibility Challenge.

40. The Chamber emphasises that said postponement is only temporary and that, in accordance with article 19(9) of the Statute, the arrest warrant issued by the Chamber against Mr Al-Senussi remains valid. Accordingly, during the postponement, Libya must refrain from taking any action which could frustrate or hinder a prompt execution of the Surrender Request should the case be found admissible, and must take all the positive measures that are necessary to this effect. In the same vein, as emphasised above, the Chamber recalls that the postponement of the Surrender Request in no way affects Libya’s continuing obligation to cooperate with the Court and to provide the assistance required by the Court with a view to ensuring, in particular, Mr Al-Senussi’s exercise of his statutory rights, including to receive a visit of the appointed counsel, and a timely and effective disposal of the Admissibility Challenge.

IV. Additional related issues

41. The Chamber will now turn to a related issue of which it has been seized by the Defence of Mr Al-Senussi on 19 March 2013, *i.e.* the submission that Libya’s non-compliance with its obligation *vis-à-vis* the Court also warrants a referral of Libya’s conduct to the Security Council.⁵⁷ In particular, according to

⁵⁷ ICC-01/11-01/11-304.

the Defence, “Libya should be reported on account of (i) its failure to surrender Mr. Al-Senussi to the ICC, (ii) its involvement in the unlawful rendition of Mr. Al-Senussi from Mauritania to Libya, and (iii) its failure to arrange a privileged legal visit for the Defence”.⁵⁸

42. In light of the present decision, Libya may legitimately decide to postpone the execution of the Surrender Request until the determination on the Admissibility Challenge. Further, the Chamber recalls that a similar request to refer Libya to the Security Council on the grounds of Libya’s alleged violation of its international obligations in obtaining and maintaining custody of Mr Al-Senussi had been previously made by the Defence on 9 January 2013⁵⁹. On 6 February 2013, the Chamber, taking into account the information provided by the Defence of Mr Al-Senussi in relation to Libya’s conduct until that date, reserved its right to “determine in due course what actions may be required to ensure States’ compliance with their obligations *vis-à-vis* the Court regarding the arrest and surrender of Mr Al-Senussi”.⁶⁰ In addition, the Chamber ordered Libya to proceed to the immediate surrender of Mr Al-Senussi to the Court⁶¹ and considered it appropriate “to request the Libyan authorities to arrange, in consultation and in cooperation with the Registrar, a visit of the appointed counsel for Mr Al-Senussi to his client on a privileged basis as soon as practicable”.⁶²

43. The present determination is therefore limited to whether Libya should be referred to the Security Council for: (i) its involvement in Mr Al-Senussi’s extradition to Libya by Mauritania in September 2012; (ii) its non-compliance

⁵⁸ *Ibid.*, para. 18.

⁵⁹ ICC-01/11-01/11-248.

⁶⁰ Pre-Trial Chamber I, Decision on the “Urgent Application on behalf of Abdullah Al-Senussi for Pre-Trial Chamber to order the Libyan Authorities to comply with their obligations and the orders of the ICC”, ICC-01/11-01/11-269, para. 23.

⁶¹ *Ibid.*, p. 15.

⁶² *Ibid.*, para. 40.

with the request for surrender of Mr Al-Senussi between September 2012 and the filing of the Admissibility Challenge (*i.e.* 2 April 2013) in which Libya invoked its right under article 95 of the Statute; and (iii) its failure to date to arrange a privileged visit to Mr Al-Senussi by his Defence, as requested by the Chamber. In this regard, the Chamber recalls that a determination of whether to make a finding of non-cooperation and refer the matter to the Security Council is discretionary in nature.

44. On the first two points the Chamber considers it unwarranted and of no benefit to exercise its discretion to refer Libya to the Security Council on the grounds of its failure to surrender Mr Al-Senussi to the Court in the months preceding the filing of the Admissibility Challenge that was made before the Chamber in accordance with the relevant statutory provisions, as anticipated by Libya on 28 January 2013.⁶³

45. In relation to the privileged visit to Mr Al-Senussi, the Chamber notes that according to the latest information received from the Registrar on 3 May 2013,⁶⁴ Libya, on 19 April 2013, transmitted to the Court the draft Memorandum of Understanding between the Court and Libya with a number of comments before finalisation, and indicated, *inter alia*, that “the Libyan Government invite[s] the defense team for Mr. Al-Senussi to visit Libya forthwith at any time convenient for them”.⁶⁵ In these circumstances, the Chamber considers it unwarranted to resort at the moment to a finding of non-cooperation before the Security Council. The Chamber however notes that to date the privileged legal visit to Mr Al-Senussi is yet to take place. Should the circumstances ultimately evolve into indicating that Libya will fail to cooperate with the Court in the arrangement of the privileged legal visit to Mr Al-Senussi,

⁶³ ICC-01/11-01/11-260, para. 11.

⁶⁴ ICC-01/11-01/11-328.

⁶⁵ *Ibid.*, para. 5.

the Chamber will determine what measures would be necessary to ensure compliance on the part of Libya with the Chamber's order to that effect.

FOR THESE REASONS, THE CHAMBER

DECIDES that Libya, pursuant to article 95 of the Statute, may postpone the execution of the Surrender Request pending determination of the Admissibility Challenge; and

REJECTS the request of the Defence of Mr Al-Senussi to make a finding of non-cooperation by Libya and refer the matter to the Security Council.

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 Friday, 14 June 2013
At The Hague, The Netherlands