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APPEALS CHAMBER

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

SITUATION IN LIBYA
IN THE CASE OF
THE PROSECUTOR v.
SAIF AL-ISLAM GADDAFI and ABDULLAH AL-SENUSSI

Public

Document in Support the Government of Libya's Appeal Against the "Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi"

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

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I. Introduction

1. This document in support of its appeal is filed under article 82(1)(a) of the Rome Statute, rule 154 of the Rules of Procedure and Evidence and regulation 64(2) of the Regulations of the Court. It is submitted in support of the Libyan Government's appeal against the Pre-Trial Chamber's "Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi" ("Second Postponement Decision").[1]

2. The Libyan Government argues: (i) that the present appeal was properly brought pursuant to article 82(1)(a); (ii) that the Pre-Trial Chamber erred in finding that at the time of the 22 March 2012 request for postponement of the surrender of Saif Al-Islam Gaddafi to the ICC ("Second Postponement Request"),[2] there was no admissibility challenge "under consideration" for the purposes of article 95 of the Statute; and (iii) that as a result of this error, the Pre-Trial Chamber erred further in failing to find that requests for surrender fall within the scope of postponements available pursuant to article 95 of the Statute.

3. The Libyan Government requests that the Appeals Chamber: (i) suspend the order to surrender Saif Al-Islam Gaddafi until the appeal has been concluded; and (ii) reverse the Second Postponement Decision and grant the Government's request for postponement of the order to surrender Saif Al-Islam Gaddafi pending determination of the article 19 admissibility challenge.

II. Procedural History

4. On 26 February 2011, the chaos that reigned in the wake of mass-atrocities in Libya, led the Security Council to adopt Resolution 1970, referring the situation in

[1] *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi", Pre-Trial Chamber I, 4 April 2012, ICC-01/11-01/11-100. As to the appeal, *see* "Government of Libya's Appeal Against the Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi", 10 April 2012, ICC-01/11-01/11-103.

[2] *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "Notification and Request by the Government of Libya in response to 'Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi'", 22 March 2012, ICC-01/11-01/11-82.

the Libyan Arab Jamahiriya since 15 February 2011 to the ICC Prosecutor, pursuant to article 13(b) of the ICC Statute.[3]

5. On 27 June 2011, the Chamber issued a warrant of arrest against, among others, Saif Al-Islam Gaddafi ("Mr Gaddafi").[4]

6. On 5 July 2011 the Registrar notified the Libyan Government of a request for cooperation asking for their assistance in arresting Mr Gaddafi and surrendering him to the Court.[5]

7. On 23 November, Pre Trial Chamber I received, by facsimile, a letter confirming that Saif Al-Islam Gaddafi had been captured on 19 November, 2011 from the Libyan Government.[6] The letter stated, with reference to article 94 of the Statute, that the possibility of surrender to the ICC would be discussed and that the Court would be officially informed when a decision is made.

8. On 6 December 2011, Pre-Trial Chamber I issued its "Decision Requesting Libya to file Observations Regarding the Arrest of Saif Al-Islam Gaddafi".[7]

9. On 23 January 2012 the Libyan Government filed observations regarding the arrest of Saif Al-Islam Gaddafi in which it sought postponement of the surrender of Mr Gaddafi to the Court pending the completion of national proceedings in relation to other crimes against Mr Gaddafi ("First Postponement Request").[8] This postponement request was based on article 94(1) of the ICC Statute.

10. On 7 March 2012 the Chamber issued the "Decision on Libya's Submissions regarding the arrest of Saif Al-Islam Gaddafi" ("First Postponement Decision") dismissing the request for postponement and requesting that the Libyan Government make their decision to surrender Mr Gaddafi to the Court and

[3] United Nations Security Council, Resolution 1970 (2011), UN Doc. S/RES/1970, adopted by the Security Council at its 6491st meeting, 26 February 2011 ["Resolution 1970"].
[4] ICC-01/11-01/11-3.
[5] ICC-01/11-01/11-5; ICC-01/11-01/11-25-Conf.
[6] ICC-01/11-01/11-34-Anx.
[7] ICC-01/11-01/11-39-Red.
[8] ICC-01/11-01/11-44, with confidential Annex 1.

inform the Chamber accordingly within seven days of notification of the Arabic translation of the decision.[9]

11. On 22 March 2012, in the Notification and Request by the Government of Libya in response to the First Postponement Decision ("Second Postponement Request"), the Government notified the Chamber of its intention to challenge the admissibility of the case concerning Mr Gaddafi pursuant to articles 19(2)(b), (5) and (6) of the Rome Statute ("Statute") on 30 April 2012. In this filing the Libyan Government also requested that, pending a decision on this challenge, the Pre-Trial Chamber suspend its surrender request in relation to Mr Gaddafi in accordance with, *inter alia*, Article 95 of the Statute and Rule 58 of the Rules of Procedure and Evidence.[10]

12. On 4 April 2012, the Chamber rendered its Second Postponement Decision in which it rejected the Second Postponement Request and "reiterate[d] its request that Libya make its decision to grant the Surrender Request and proceed immediately with the surrender of Mr Gaddafi to the Court". In this Decision, Pre-Trial Chamber I noted that neither article 95 nor rule 58 applies, as rule 58 does not provide for postponements of requests for co-operation and article 95 may be invoked only where an admissibility challenge is under consideration by the Court at the time.[11]

13. On 10 April 2012, the Libyan Government directly seized the Appeals Chamber of the appeal to which this document relates, against the Second Postponement Decision pursuant to article 82(1)(a) of the Statute.[12] At the same time, the Libyan Government filed a request for leave to appeal the decision pursuant to article 82(1)(d) of the Statute.[13]

14. On 12 April 2012, the Office of the Public Counsel for the Defence (OPCD) filed a

[9] ICC-01/11-01/11-72-Conf.
[10] ICC-01/11-01/11-82-Conf.
[11] ICC-01/11-01/11-100.
[12] ICC-01/11-01/11-103.
[13] ICC-01/11-01/11-102.

"Response to the 'Government of Libya's Appeal Against the 'Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi'" ("OPCD Response").[14]

15. On 17 April 2012, the Libyan Government filed its "Application on behalf of the Government of Libya for leave to reply to the 'Response to the 'Government of Libya's appeal against the Decision regarding the second request by the Government of Libya for postponement of the surrender of Saif Al-Islam Gaddafi'"[15]

III. Preliminary issue: appeal properly brought under article 82(1)(a)

16. The government of Libya filed this appeal pursuant to article 82(1)(a) and in accordance with rule 154(1).[16] Article 82(1)(a) allows appeals, in accordance with the Rules, of decisions "with respect to jurisdiction or admissibility". Such appeals can be based on errors of law, errors of fact and procedural irregularities.[17]

17. The Appeals Chamber has stated that, in order for a decision to fall within the scope of this provision, "the operative part of the decision itself must pertain directly to a question on the jurisdiction of the Court or the admissibility of a case. It is not sufficient that there is an indirect or tangential link between the underlying decision and questions of jurisdiction or admissibility".[18] In other words,

> *It is the nature, and not the ultimate effect or implication of a decision, that determines whether an appeal falls under article 82(1)(a) of the*

[14] 12 April 2012, ICC-01/11-01/11-107.
[15] ICC-01/11-01/11.
[16] ICC-01/11-01/11-103, para. 1.
[17] *Prosecutor v. Jean-Pierre Bemba Gombo* "Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled 'Decision on the Admissibility and Abuse of Process Challenges'", 19 October 2010, ICC-01/05-01/08-962, paras 100, 101.
[18] *Situation in the Republic of Kenya*, "Decision on the admissibility of the 'Appeal of the Government of Kenya against the 'Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence'", 10 August 2011, ICC-01/09-78, para. 15 ["*Kenya* 10 August 2011 Decision"].

> *Statute. Even if the ultimate impact of a decision of a Pre-Trial or Trial Chamber were to affect the admissibility of cases, that fact would not, in and of itself, render the decision a "decision with respect to [...] admissibility" under article 82(1)(a).*[19]

18. The Appeals Chamber has held that a decision "may constitute a 'decision with respect to [...] admissibility' only to the extent that it consisted of *or 'was based on'* a ruling that a case was admissible or inadmissible".[20]

19. The Second Postponement Decision pertains directly to a question on admissibility and accordingly is such a decision for the purposes of article 82(1)(a). As the OPCD argues, the relevant distinction is between a decision that merely "might impact on admissibility" and one that *does* do so.[21] A refusal to postpone the surrender of Saif Al-Islam Gaddafi, in the present – and novel – circumstances must be considered in the latter category, for the following reasons.

20. First, at the time of the Second Postponement Decision, an admissibility challenge was pending before the Pre-Trial Chamber. This challenge arose by virtue of the Second Postponement Request, which invoked rule 58 and article 19, and "requested" that the order for surrender be suspended pending resolution of the article 19 admissibility challenge.[22] This was the first stage in the Libyan government's article 19 admissibility challenge, and is to be followed by the filing of a fully argued "application" pursuant to rule 58 on 30 April 2012.[23] The issue of whether there was an admissibility challenge "under consideration" for the purposes of article 95 of the ICC Statute, is considered below.[24] It suffices to note, for present purposes, that on the basis that an admissibility challenge was indeed under consideration, it *could* be directly impacted upon by the Second

[19] *Ibid*, para. 17.
[20] *Ibid*, para. 15; *Situation in the Democratic Republic of the Congo*, "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58'", 13 July 2006, ICC-01/04-169, para. 18 (emphasis added).
[21] OPCD Response, para. 15.
[22] Second Postponement Request, para. 4.
[23] Second Postponement Request, paras 3, 4.
[24] See *infra*, para. 29 *et seq.*

Postponement Decision.

21. Second, this admissibility challenge *was* directly impacted upon by the Second Postponement Decision. Although the admissibility challenge had not, by that point, reached the stage at which it could be finally determined by the Chamber, the Second Postponement Decision pertained directly to certain elements of the test as to admissibility. In particular, one element of a chamber's decision in the final determination of admissibility is assessment of whether the state has taken "concrete investigative steps". The decision as to postponement of surrender, under article 95, is directly relevant to this element of the chamber's admissibility inquiry, because failing to postpone surrender would, *per se*, mean that Libya's concrete investigative steps would be stopped, and further investigative steps would be prevented outright. This is more than the indirect, "ultimate effect or implication"[25] – it is the *direct and immediate* effect.

22. As noted, the Appeals Chamber has recognised that, in addition to decisions about admissibility themselves, decisions which "are based on" a ruling of admissibility or inadmissibility are appealable under article 82(1)(a). It is submitted, therefore, that while the phrase "with respect to" in article 82(1)(a), connotes a certain, high, level of relevance as between the decision concerned and the issue of admissibility (or jurisdiction), it does not *only* allow for appeals of decisions which "consist of" a decision that a case is admissible or inadmissible.

23. The novelty of the present situation arises from the fact that this decision, which directly affects admissibility, was taken by the Pre-Trial Chamber in advance of final determination of admissibility, but while the matter of admissibility was under consideration by the Court. In this regard, the circumstances should be distinguished from the situation in which an appeal is launched under article 82(1)(a) after a challenge to admissibility has been finally determined, which is the scenario to which the "based on"/"consists of" test relates. It is submitted that the association between the decision which is the subject of the present

[25] See *infra*, and *Kenya* 10 August 2011 Decision, para. 17.

application, and the pending determination of admissibility, is of an equivalently high level of association with a determination of admissibility as a decision which takes place after the determination of admissibility, but which "was based on" an admissibility ruling.

24. For the reasons noted above, the circumstances of the case mean that the impugned decision is of such importance in relation to certain of the elements of the admissibility inquiry that it must be considered a "decision with respect to admissibility". In other words, the impugned decision is as closely associated to the pending decision on admissibility as a decision "based on" an admissibility determination. It would be absurd if the question of when, during the process of resolving the admissibility challenge, such a decision happens to be made were to decisively affect whether that decision can be appealed.

25. The OPCD argues that, in light of the reference to article 82 in both article 18 and article 19, the drafters did not intend to allow for appeals, under article 82(1)(a) outside of the framework of articles 18 and 19. In relation to this assertion, it is submitted, first, that to the extent that articles 18 and 19 are part of a "framework", article 95 must be considered part of this (and, indeed, article 17, likewise). The nature of article 95 is to prevent cases from being affected by exercise of the ICC's jurisdiction in relation thereto when there is a possibility of domestic proceedings. The fundamental importance of this possibility is reflected in the complementarity principle, which articles 18, 19, and 95 are designed to protect. All three of these provisions are, likewise, designed to protect two other fundamental principles as to the question of when the jurisdiction of the ICC is to be exercised: the principle of *ne bis in idem*, or the gravity threshold for exercise of ICC jurisdiction.

26. Second, the references to article 82 in both article 18 and article 19 may demonstrate that decisions taken within the framework of these two provisions constitute "decisions with respect to admissibility". They do not, however, sustain the converse: that article 82(1)(a) relates *only* to decisions taken within the

framework of articles 18 and 19. In this regard, the OPCD Response relies on a misinterpretation of the Appeals Chamber's decision of 10 August 2011.[26]

27. It should be noted, moreover, that the strict approach to interpretation of "with respect to jurisdiction or admissibility" stands in stark contrast to the approach taken in relation to the equivalent provisions before the *ad hoc* tribunals.[27] While the jurisprudence of the *ad hoc* tribunals does not amount to binding authority for the purposes of the ICC, it is of analytical value. There are, of course, significant differences between the nature of the ICC's jurisdiction and that of the *ad hoc* tribunals – particularly as a result of the complementarity principle in the ICC, which is not applicable to the *ad hoc* tribunals. However, in light of the nature of the differences between these jurisdictions – and the complementarity principle as a key aspect of these differences – it is suggested that to the extent that there is a difference between the *ad hoc* tribunals and the ICC in this regard, the ICC should take a more permissive approach to the interpretation of provisions which provide states with an avenue of appeal in relation to decisions which impact directly upon their ability to try criminal cases which might otherwise be subjected to the jurisdiction of the ICC.

IV. The Pre-Trial Chamber's error in interpretation of article 95: "under consideration by the Court"

28. The Pre-Trial Chamber found that article 95 could not constitute a valid basis for a request for postponement of the surrender of Saif Al-Islam Gaddafi to the Court, because it provides such a possibility only when there is an admissibility challenge, pursuant to article 18 or article 19, "under consideration by the court".[28] The Chamber erred in finding that, at the time of the Second Postponement Request, there was no such challenge under consideration. This error arose, in particular, from the Pre-Trial Chamber's interpretation of articles

[26] *Kenya* 10 August 2011 Decision, para. 16.
[27] *See* Christopher Staker, "Article 82", in Otto Triffterer (ed.) "Commentary on the Rome Statute of the International Criminal Court, 2nd ed. (Nomos, 2008) p. 1477.
[28] Second Postponement Decision, para. 18, referring to article 95, ICC Statute.

19 and 95 of the Statute and rule 58 of the Rules of Procedure and Evidence.

29. The Chamber's error consisted of failing to consider whether a challenge was "under consideration" as a result of a "request" as opposed to an "application". In this regard, the Chamber failed to take proper account of the complex relationship between article 19 of the Statute and rule 58 of the Rules. While the Chamber did not err in finding that "rule 58 of the Rules only details some specific points of procedure which are involved when making an admissibility challenge under article 19 of the Statute",[29] this observation is not determinative as to the matter at hand. The nature of the relationship between article 19 and rule 58 is clear from their respective contents.

30. The issues covered by article 19 itself are: (i) identification of categories of persons who possess standing to challenge jurisdiction or admissibility under article 19, and to make submissions to the Chamber in a hearing;[30] (ii) the number of opportunities for such persons to make such a challenge;[31] (iii) the Chamber which should receive such a challenge;[32] (iv) the state of affairs pending resolution of such a challenge;[33] (v) measures that may be undertaken by the Prosecutor despite deferring to a state;[34] and (vi) the possibilities of appeal and review following a decision on such a challenge.[35] Article 19 does not, however, deal with the formal procedure by which such a challenge can be brought before the Court, other than to require states to "make a challenge at the earliest opportunity".[36] This does not mean that the law is silent on the matter: the relevant requirements are set out in rule 58 of the Rules, which specifically states that it is applicable only to article 19. Rule 58 provides the formal requirements[37]

[29] Second Postponement Decision, para. 17.
[30] Article 19(1), 2(a)-(c), (3)
[31] Article 19(4).
[32] Article 19(3).
[33] Article 19(7), (8)(a), (9).
[34] Article 19(11).
[35] Article 19(6), (10).
[36] Article 19(5).
[37] Rule 58(1).

and the procedural requirements[38] as to putting an admissibility challenge, pursuant to article 19, before the Court. As regards the formal requirements, rule 58 states that "[a] request or application made under article 19 shall be in writing and contain the basis for it".[39]

31. To view rule 58 thus, as the Libyan Government does, does not amount to treating it as "a legal basis […] in support of its Second Postponement Request" as the Pre-Trial Chamber found to be the case.[40] Article 19 remains the basis for the admissibility challenge upon which the Libyan government relies for its invocation of article 95. The issue of whether the challenge was under consideration depends upon whether it had been initiated – a question which depends, in turn, upon whether a "request" or an "application" had been made.

32. Neither the Rules nor the Statute, however, define "request" for the purposes of article 19 and rule 58. Nonetheless, the question of whether a "request" had been made is decisive, in the present circumstances, as to whether an article 19 admissibility challenge was "under consideration" for the purposes of article 95. It is submitted that the Pre-Trial Chamber erred by interpreting this provision such as to render "request" devoid of any independent meaning. The Pre-Trial Chamber has, itself, recognised that in the absence of other guidance as to a term within the Statute, interpretation of provisions, should be undertaken "with a view to giving independent content to each".[41]

33. "Request" and "application" under rule 58 must have been intended to operate in such a way that a "request" is akin to a notification of a challenge pending collation of evidence; while "application" is the subsequent filing which details all the arguments and evidence in support of the admissibility challenge. It is very common in the procedural law of many domestic legal systems to have a two-step process of this kind (notification of intention to file a submission,

[38] Rule 58(2)-(4).
[39] Rule 58(1).
[40] Second Postponement Decision, paras 17, 18.
[41] ICC-01/11-01/11-72, para. 15.

followed by a duly reasoned submission), as an element of 'natural justice'.[42] The drafters of the Rome Statute envisaged such a process in relation to article 19 admissibility challenges, and this explains why the terms "request" and "application" were inserted into rule 58.

34. As to the argument that reading rule 58 and article 19 such as to differentiate between "request" and "application" would allow for "staggered admissibility challenges", it is submitted, first, that such an assertion would involve denying the independent meaning of the term "request" for the purposes of rule 58 and article 19 – an interpretation which involves, as argued above, an erroneous approach to the interpretation of the text. Moreover, the decision to which the OPCD refers does not refer to the notion to "staggered admissibility challenges".[43] It demonstrates, rather, the flexibility that is available to the Chamber with regard to the procedure employed in dealing with challenges to admissibility.[44]

35. Similarly, recognition of the existence (and indeed, importance) of the distinction between requests and applications does not entail violating the prohibition upon states (and others), in article 19(4) from challenging admissibility more than once. Requests and applications form part of the same overall challenge. Indeed, they must do so for the challenge to be "under consideration by the Court" for the purposes of article 95.

36. The OPCD has argued that characterisation of the "notification" as a "request" "does not in any way reflect the reality of [Libya's] pleadings before the Pre-Trial

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[42] To give one example among many, committal proceedings in England and Wales must be commenced either by an application notice or a claim form (see Civil Procedure Rules, Sch. 1 RSC Ord 54 r 2). An 'application notice' is "a document in which the applicant states his intention to seek a court order" (see Civil Procedure Rules, Part 23, para. 2.1). The grounds of an application must be included in the notice of motion or summons: (*R v Governor of Brixton Prison, ex p Shure* [1926] 1 KB 127, DC).

[43] *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'", ICC-01/09-01/11-307, 30 August 2011 ["*Ruto, Kosgey and Sang*, 30 August 2011 Decision"].

[44] *Ruto, Kosgey and Sang*, 30 August 2011 Decision, paras 110, 111, for example.

Chamber".[45] However, in making this argument, it failed to respond to the most obvious indication that the Second Postponement Request was a "request" – i.e., a notification of intention to file a full submission. In the Second Postponement Request, the Libyan government "respectfully *notifies* Pre-Trial Chamber I of its intention to file its admissibility challenge within 42 days", going on to clarify that the reason for this intervening period is to "allow for a proper submission that sets forth Libya's arguments in full in relation to the admissibility challenge".[46]

37. In the Second Postponement Request, the Libyan government made clear that its "request" for postponement (under article 95 and rule 58) was made in connection with its article 19 admissibility challenge which would be fully detailed in an "application" on 30 April 2012. This complied with the requirements of Rule 58. Clearly, the Second Postponement Request was made in writing. As to basis, it states that "Libya is investigating Saif Al-Islam Gaddafi before its national judicial system with respect to allegations of crimes against humanity (including but not limited to murders and acts of persecution committed across Libya from 15 February 2011 until at least 28 February 2011), falling within the scope of Article 7 of the Statute".[47]

38. Further, the submissions of the OPCD, in this regard, involve a fundamental misinterpretation of the nature of the formal requirements applicable to an admissibility challenge under article 19. The very nature of formal requirements is such that it is not for the litigants to decide whether they are fulfilled. The Court must consider the steps through which Libya went, and assess whether they met the relevant formal requirements –mere assertion that these requirements were fulfilled is not decisive as to the issue.

39. Moreover, the interpretation advocated for here does not involve a "flexible" interpretation of article 19 and rule 58. To the contrary, seeking to interpret

[45] OPCD Response, para. 17.
[46] Second Postponement Request, para. 3 (emphasis added).
[47] Second Postponement Request, para. 2.

articles 19 and 95, as well as rule 58, in the manner favoured by the OPCD itself involves stretching the provisions to such an extent that they are no longer compatible with the overall tenor of a criminal regime guided by the complementarity principle.

40. The importance of article 95 in the maintenance of the complementarity regime is particularly apparent from the fact that it permits postponement of execution of a request, merely as a result of the existence of an admissibility challenge. By comparison, article 94, for example, requires the state concerned to show that execution would, in fact "interfere with an on-going investigation or prosecution of a case different from that to which the request relates". The Pre-Trial Chamber's approach has the effect of penalising Libya for not filing an "application" prematurely – when there had been insufficient time to gather necessary evidence or properly brief counsel. In light of the desire, underlying the nature of the ICC's complementarity principle, to facilitate domestic proceedings where they are possible, the Pre-Trial Chamber's approach must be considered unreasonable.

41. Throughout its Response, the OPCD asserts, in various forms, that "[t]he Libyan authorities cannot assert that the Impugned decision constitutes a decision on the admissibility of the case, whilst at the same time, they request the Pre-Trial Chamber to hold off on their determination of admissibility until the Libyan authorities have filed an additional application at the end of April 2012".[48] The argument of the Libyan government is not accurately portrayed in this assertion. It is submitted that the Second Postponement Decision was not a determination of admissibility, but did directly affect the admissibility assessment because the issue of admissibility had been "under consideration" by the Pre-Trial Chamber since the Second Postponement Request. This argument does not imply that all of the Libyan government's arguments were before the Chamber throughout this time, but nor does the article 95 require them to be. The underlying rationale to

[48] OPCD Response, para. 25. *See also* paras 19, 28.

article 95 must be as a lynchpin to the maintenance of complementarity – that is to say, it is clear on the face of article 95 that it exists in order to protect the possibility of an admissibility challenge, and thereby to protect the possibility of domestic proceedings (as well as – as with articles 18 and 19 – the principle of *ne bis in idem* and the seriousness threshold for the exercise of the jurisdiction of the ICC).

42. In this regard, any argument that Libya has not – in advance of submitting its fully reasoned submission on 30 April – shown evidence or made arguments such as to satisfy all elements of the test for inadmissibility, is misplaced. This undercuts several of the arguments made by the OPCD in its Response, in particular, its assertions that the Libyan authorities "have patently failed to meet their burden of demonstrating that the investigations in Libya cover the same conduct as the case before the ICC";[49] "have not provided any concrete details [as to the charges to be faced by Saif Al-Islam Gaddafi]";[50] and "have failed to adduce any information concerning the investigative steps taken in the case".[51] The same applies to the OPCD's arguments concerning the quality of due process in Libya,[52] and the conditions of Saif Al-Islam Gaddafi's detention.[53] All of these arguments would be relevant objections to a fully reasoned submission concerning the merits of an admissibility challenge, but as has been the consistent position of Libya, such a submission has not yet been made. In circumstances such as these, the determination of the merits of the issue of admissibility is not a prerequisite to an admissibility challenge being "under consideration".

43. Similarly, the fact that the issue of admissibility was rendered "under consideration" by the Second Postponement Request, although it has not yet been finally determined, is a complete answer to the OPCD's allegation that Libya did not comply with the "obligation on States to make a challenge to the admissibility

[49] OPCD Response, para. 26.
[50] OPCD Response, para. 26.
[51] OPCD Response, para. 26.
[52] OPCD Response, para. 33.
[53] OPCD Response, para. 34.

of the Court at the earliest opportunity".[54]

V. Surrender requests are within the scope of article 95

44. The Pre-Trial Chamber rejected the Second Postponement Request on the basis that there was no article 19 admissibility challenge under consideration. In light of the above submissions, the Pre-Trial Chamber erred in this regard, and as a consequence, it failed to consider whether article 95 applies to surrender requests. The Libyan government submits that it does indeed apply to surrender requests.

45. Article 95 operates, in effect, as an exception to the duty, under article 89(1), to surrender an individual to the Court. Article 95 specifies that it applies to "request[s] under this Part". Given that the latter is Part 9 of the Statute, which includes article 89, entitled "Surrender of persons to the court", it is clear that article 95 applies to such requests. That article 95 applies to requests for surrender is also supported by the following arguments:

46. First, such an interpretation is consistent with other provisions of the Statute. In particular, under articles 18(2) and 19(7), if there is an admissibility challenge, the Prosecutor must suspend investigation until admissibility is determined, although under article 19(8), the Prosecutor is permitted, with the Court's permission, to take certain particular actions, despite the suspension. It is also clear that article 19(8)(c) includes steps to prevent "absconding" within these actions – such as asking the Court to make orders requiring the state to prevent this. In light of this, there must be no obligation to surrender during a suspension of this kind, as this would render such steps unnecessary.[55]

47. Second, it might be argued that, if article 95 applies to requests for surrender, it renders obsolete article 89(2) (which specifically permits suspension of the surrender obligation where there is a *ne bis in idem* challenge). However, article

[54] OPCD Response, para. 23.

[55] See Dapo Akande, "Is Libya Under an Obligation to Surrender Saif Gaddafi to the ICC? Part I (What Does the Rome Statute Say?)" http://www.ejiltalk.org/is-libya-under-an-obligation-to-surrender-saif-gaddafi-to-the-icc-part-i-what-does-the-rome-statute-say/

95 applies only where there is an admissibility challenge under article 18 or article 19. Article 89(2) concerns challenges made in domestic courts, where there is no admissibility challenge at the ICC, and in such circumstances article 95 is not applicable.[56] Similarly, the interpretation of article 95 advocated here is necessary for consistency in the approach to (i) state challenges to admissibility under article 19; and (ii) *ne bis in idem* challenges brought by a suspect in a national court under article 89(2).[57] There is no logical reason why these two types of challenges should be treated differently.

48. Third, the argument that the exception provided by article 95 applies to requests for surrender is supported by the writings of learned commentators.[58]

49. Finally, this interpretation is also the more compatible with the principle of complementarity. It should be noted that provisions as to co-operation and admissibility are to be interpreted with complementarity as a guiding principle.[59] The importance of this was highlighted by the UN Secretary-General, in his report on the UN Support Mission in Libya, of 22 November, 2011.[60] In particular, it highlighted the need to uphold the "principles of Libyan ownership".[61] Recognising that Libya is a post-conflict environment engaged in judicial sector reform as part of a "historic transition",[62] the Secretary-General stated that "[t]o succeed, Libya must be given the space required to determine its future", adding that "[i]n this context, the role of the United Nations should be to support Libyans in their efforts".[63] He went on to state that "the international community as a whole, will best support Libya not by being driven by the supply side of post-conflict assistance, but by being responsive to Libya's own emerging

[56] Ibid
[57] Kress & Prost, "Article 95" in Triffterer, "Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article", 2nd edition, p. 1538, at 2.
[58] Ibid, p. 1594, at 4.
[59] See Preparatory Committee, 1996 Report, vol. 1, para. 316.
[60] United Nations Security Council, Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2011/727, 22 November 2011 ["Report of the Secretary-General, 22 November 2011"].
[61] Ibid, pp. 12, 16, 19.
[62] Ibid, pp. 1, 11, 12.
[63] Ibid, pp. 11, 12.

sense of its needs for international support".[64]

VI. Relief requested

50. For the reasons set forth above, the Government of Libya respectfully requests:

i. Suspension of the order to surrender Saif Al-Islam Gaddafi until the appeal has been concluded;

ii. Reversal of the Second Postponement Decision.

A. Suspension

51. The Appeals Chamber has held that article 82(3) provides that an appeal shall not have suspensive effect "unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence".[65] Any such order is within the discretion of the Appeals Chamber, and in the exercise of such discretion, the Appeals Chamber will consider the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under the circumstances.[66]

52. Significant factors in past decisions by the Appeals Chamber as to suspensive effect have included whether implementation of the appealed decision "would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the appellant"[67] or "could

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[64] Ibid, p. 19

[65] *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the Prosecutor's request to give suspensive effect to the appeal against Trial Chamber I's oral decision to release Mr. Thomas Lubanga Dyilo", Appeals Chamber, 23 July 2010, ICC-01/04-01/06-2536, para. 7 ["*Lubanga*, 23 July 2010 Decision"]; *Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision on the Request of Mr. Bemba to Give Suspensive Effect to the Appeal Against the 'Decision on the Admissibility and Abuse of Process Challenges'", Appeals Chamber, 9 July 2010, ICC-01/05-01/08-817 para. 6 ["*Bemba*, 9 July 2010 Decision"]; *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the request of Mr. Thomas Lubanga Dyilo for suspensive effect of his appeal against the oral decision of Trial Chamber I of 18 January 2008", 22 April 2008, ICC-01/04-01/06-1290, para. 7 ["*Lubanga*, 22 April 2008 Decision"].

[66] *Lubanga*, 23 July 2010 Decision, para. 7; *Bemba*, 9 July 2010 Decision, para. 6; *Lubanga*, 22 April 2008 Decision, para. 7.

[67] *Lubanga*, 22 April 2008 Decision, para. 8. Likewise, the Appeals Chamber has noted that it would be a relevant consideration if it would lead to consequences that "would be very difficult to correct and may be irreversible" (*Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the requests of the Prosecutor and the Defence for suspensive effect of the appeals against Trial Chamber I's Decision on Victim's

potentially defeat the purpose of the […] appeal".[68] Judge Pikis has stated that the "guiding principle in the exercise of the discretion of the Court lies in the evaluation of the consequences that enforcement of an erroneous decision, if that is found to be the case by the decision of the Appeals Chamber could have on proceedings before the first instance court".[69]

53. Such discretion should be exercised in favour of suspension in the present case because failing to do so would have adverse consequences which would be very difficult to correct and may be irreversible. These include the following:

i. Prevention of the Libyan Government from conducting interviews with Saif Al-Islam Gaddafi and obtaining further evidence to support its case against him;

ii. Frustration of the Libyan authorities' ability to demonstrate concrete evidence of ongoing investigations for the purposes of its admissibility challenge;

iii. Defeating the purpose of, or rendering moot, the appeal – it would pre-empt the subject of the appeal: namely the surrender of Saif Al-Islam Gaddafi;

iv. Defeating the object and purpose of the complementarity principle, one of the core tenets on which the International Criminal Court was founded.

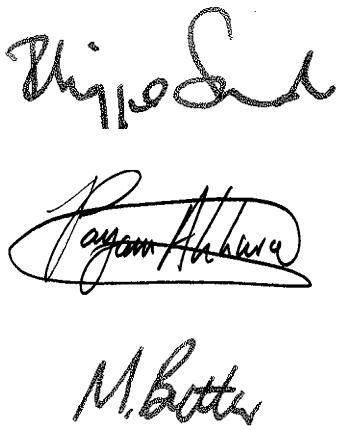
Participation of 18 January 2008", Appeals Chamber, 22 May 2008, ICC-01/04-01/06-1347, paras 19, 20, 23).

[68] *Prosecutor v. Thomas Lubanga Dyilo*, "Reasons for the decision on the request of the Prosecutor for suspensive effect of his appeal against the 'Decision on the release of Thomas Lubanga Dyilo'", Appeals Chamber, 22 July 2008, ICC-01/04-01/06-1444, para. 10.

[69] *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the request of Mr. Thomas Lubanga Dyilo for suspensive effect of his appeal against the oral decision of Trial Chamber I of 18 January 2008, Dissenting Opinion of Judge Georghios M. Pikis", Appeals Chamber, 13 May 2008, ICC-01/04-01/06-1290-Anx, para. 9.

B. Reversal

54. The Libyan government also seeks reversal of the Second Postponement Decision, by granting the government's request for postponement of the order to surrender Saif Al-Islam Gaddafi pending determination of the article 19 admissibility challenge.



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Counsel on behalf of the Government of Libya

Dated this 25th day of April 2012

At London, United Kingdom