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Date: **18 February 2013**

**PRE-TRIAL CHAMBER I**

**Before:** Judge Silvia Fernandez de Gurmendi, Presiding Judge  
Judge Hans-Peter Kaul  
Judge Christine Van den Wyngaert

**SITUATION IN LIBYA  
IN THE CASE OF  
*THE PROSECUTOR***

*v.*

***SAIF AL-ISLAM GADDAFI and ABDULLAH AL-SENUSSI***

**Public Document**

**Prosecution Response to the Government of Libya's Application for Leave to Appeal the "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"**

**Source:** Office of the Prosecutor

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

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## Introduction

1. On 6 February 2013, Pre-Trial Chamber I (“Chamber”) held that the Government of Libya (“Libya”) must surrender Abdullah Al-Senussi to the International Criminal Court (“Court”) since Libya had not challenged the admissibility of his case and the proceedings could not therefore be suspended. Libya is seeking leave to appeal this decision (“Libya’s Application”).
2. The Prosecution submits that Libya’s Application should be rejected. Libya does not identify any appealable issue and either seeks to re-litigate the Chamber’s findings, present abstract and hypothetical issues or challenge the Chamber’s prior rulings. Further, should the Chamber find that any of the issues raised by Libya constitute appealable issues, the Prosecution submits that they do not meet the criteria for leave to appeal under Article 82(1) (d).

## Procedural History

3. On 22 March 2012, Libya submitted its "Notification and Request by the Government of Libya in response to 'Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi'".<sup>1</sup> Libya thereby notified the Chamber of its intention to challenge the admissibility of the case against Saif-Al-Islam Gaddafi.<sup>2</sup> Libya requested the Chamber to suspend the surrender request in accordance with, *inter alia*, Article 95 and Rule 58.<sup>3</sup> On 4 April 2012, Pre-Trial Chamber I held in its “Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi”<sup>4</sup> that:

[R]ule 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. This rule *makes no mention of postponing a request*

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<sup>1</sup> ICC-01/11-01/11-82.

<sup>2</sup> ICC-01/11-01/11-82, para.2 .

<sup>3</sup> ICC-01/11-01/11-82, para.4.

<sup>4</sup> ICC-01/11-01/11-100.

*for cooperation and cannot therefore be used as a legal basis by the Government of Libya in support of its [request for postponement of the surrender of Mr Gaddafi].*<sup>5</sup>

4. In the same decision, Pre-Trial Chamber I also made findings on the scope and applicability of article 95:

With regard to article 95 of the Statute, on which the Government of Libya further bases its Second Postponement Request, the Chamber recalls that this provision may be invoked only "*[w]here there is an admissibility challenge under consideration by the Court pursuant to article 18 or 19*" (emphasis added).<sup>6</sup> Consequently, article 95 of the Statute only applies when there is an admissibility challenge under consideration. Though Libya has announced that an admissibility challenge is forthcoming, there is currently no such challenge before the Chamber. Therefore, the Chamber holds that article 95 of the Statute cannot serve as a legal basis for Libya's Second Postponement Request.<sup>7</sup>

5. On 1 May 2012, Libya filed the "Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute" ("Admissibility Challenge"),<sup>8</sup> challenging the admissibility of the case against Saif Al-Islam Gaddafi ("Mr Gaddafi") and requesting "postponement and suspension of the Pre-Trial Chamber's order to surrender Mr Gaddafi pending a final determination of th[e] challenge" in accordance with Article 95.<sup>9</sup>
6. In the Admissibility Challenge, Libya stated that: "...the proper scope of this admissibility challenge, relates only to the case against Mr Gaddafi."<sup>10</sup> Libya added that:

"In the alternative, if, notwithstanding the above, the Chamber considers that the term "case", within the meaning of Article 19 does refer to the proceedings against both Mr Gaddafi and Mr Al-Senussi as a whole [...] Libya [...] challenges the admissibility of the case against [...] both of these two persons."

<sup>5</sup> ICC-01/11-01/11-100, para.17.

<sup>6</sup> Article 95 of the Statute (emphasis added).

<sup>7</sup> ICC-01/11-01/11-100, para.18.

<sup>8</sup> ICC-01/11-01/11-130-Red.

<sup>9</sup> ICC-01/11-01/11-130-Red, para.103

<sup>10</sup> ICC-01/11-01/11-130-Red, para.73

7. On 4 May 2012, in its "Decision on the Conduct of the Proceedings Following the "Application on behalf of the Government of Libya pursuant to Article 19 of the Statute""<sup>11</sup> Pre-Trial Chamber I held that:

"[T]he Chamber has considered Libya's submissions as to the scope of the Article 19 Application and *considers that it must be understood to only concern the case against Mr Gaddafi*". Accordingly, the Chamber will not consider the admissibility of the case against Mr Al-Senussi in resolving the Article 19 Application.<sup>12</sup>

8. On 1 June 2012, the Chamber found that the challenge to the admissibility of the case against Mr Gaddafi had been properly made within the terms of Article 19(2) and Rule 58(1),<sup>13</sup> and postponed the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to Article 95 until the Chamber had ruled on the Admissibility Challenge.<sup>14</sup>
9. On 10 December 2012, the Chamber issued the "Corrigendum to the Order in relation to the request for arrest and surrender of Abdullah Al-Senussi", whereby it instructed the Registrar to, *inter alia*, "reiterate to the Libyan authorities the request for arrest and surrender of Mr. Al-Senussi and remind them of their obligation to comply with the request".<sup>15</sup>
10. On 15 January 2013, Libya informed the Chamber, *inter alia*, that the investigation into the national case against Mr. Al-Senussi is approaching completion, and the case will accordingly be transferred in the next month to the Chamber of Accusation for pre-trial proceedings.<sup>16</sup>
11. On 18 January 2013, the Chamber, noting that Libya had neither surrendered Mr. Al-Senussi to the Court nor sought to postpone his surrender to the Court, requested the Libyan authorities to provide observations on the way Libya

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<sup>11</sup> ICC-01/11-01/11-134

<sup>12</sup> ICC-01/11-01/11-134 para. 8, emphasis added.

<sup>13</sup> ICC-01/11-01/11-163, para.39.

<sup>14</sup> *Ibid*, p.16.

<sup>15</sup> ICC-01/11-01/11-241-Corr.

<sup>16</sup> ICC-01/11-01/11-251, paras.4-5.

intends to fulfil its obligations to cooperate with the Court in relation to his arrest and surrender, and especially its duty to comply with the Surrender Request.<sup>17</sup>

12. On 28 January, Libya filed the "Libyan Government's Observations regarding the case of Abdullah Al-Senussi"<sup>18</sup> ("Libya's Observations"). Libya stated that in the Admissibility Challenge it had expressed an intention to challenge the admissibility of the case against Mr. Al-Senussi as well Mr. Gaddafi.<sup>19</sup> It "once again" notified the Chamber of its challenge to the admissibility of the case against Mr. Al-Senussi and stated that it will submit further supplemental evidence in this regard as soon as practicable.<sup>20</sup> Regarding the non-surrender of Mr. Al-Senussi, Libya relied on Article 95<sup>21</sup> and in the alternative, on Rule 58(2).<sup>22</sup>
13. On 6 February 2013, the Chamber found that Libya's obligation to surrender Mr. Al-Senussi to the Court stands fully and is not subject to any suspension under Article 95 because Libya has not challenged the admissibility of the case with respect to him (the "Impugned Decision").<sup>23</sup> Referring to a prior ruling, the Chamber also found that Rule 58 was not relevant since it makes no mention of postponing a request for cooperation.<sup>24</sup>
14. On 12 February 2013, Libya sought leave to appeal the Impugned Decision ("Libya's Application").<sup>25</sup>
15. On 14 February 2013 the Defence team of Abdullah Al-Senussi submitted its response to Libya's Application.<sup>26</sup>

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<sup>17</sup> ICC-01/11-01/11-254.

<sup>18</sup> ICC-01/11-01/11-260.

<sup>19</sup> ICC-01/11-01/11-260, para.2.

<sup>20</sup> ICC-01/11-01/11-260, para.2.

<sup>21</sup> ICC-01/11-01/11-260, para.9.

<sup>22</sup> ICC-01/11-01/11-260, para.10.

<sup>23</sup> ICC-01/11-01/11-269 para.28.

<sup>24</sup> ICC-01/11-01/11-269 para.35.

<sup>25</sup> ICC-01/11-01/11-277.

<sup>26</sup> ICC-01/11-01/11-278.

## Submissions

16. The Prosecution notes as a preliminary observation that Libya primarily devotes its submissions to arguing the merits of its case, as opposed to applying the factors of Article 82(1)(d) to an identified issue. This approach is misconceived. When deciding whether to grant leave to appeal, a Chamber does not have to engage in determining errors of law or fact in its own decision,<sup>27</sup> but only has to assess whether the requirements of Article 82(1)(d) have been met in relation to a specifically identified issue. The Prosecution further submits that to the limited extent<sup>28</sup> Libya does engage with the requirements of Article 82(1)(d), its submissions are unpersuasive.

## The issues

*Libya disagrees with the Chamber's conclusion*

17. Libya has not clearly identified the precise issues for which leave to appeal is sought. In the Introduction, Libya states that it seeks leave to appeal "...on the basis that the Chamber committed an error of law by applying an incorrect interpretation of articles 19 and 95 of the ICC Statute and Rule 58 of the ICC Rules ...."<sup>29</sup> In the section on Applicable Law, Libya refers to the issue proposed for appeal as "...the interpretation and application of articles 18 and 95 and Rule 55 and the relationship between them..."<sup>30</sup> Further in the same section, Libya then seems to couch the issue as "...the requisite content and form of an admissibility challenge."<sup>31</sup>

<sup>27</sup> See for example ICC-02/11-01/11-389, paras.28-29.

<sup>28</sup> Substantive analysis of the factors in Article 82(1)(d) is found in paragraphs 43-45 of Libya's Application.

<sup>29</sup> Libya's Application, para.2.

<sup>30</sup> Libya's Application, para.19.

<sup>31</sup> Libya's Application, para.19.

18. In the section on Procedural History, Libya states that it seeks leave to appeal “...on the basis that the Chamber erred in its *interpretation of the applicable law*”<sup>32</sup> which led to, “...*in particular (but not limited to)*...”<sup>33</sup>, the following allegedly erroneous determinations:

- i. That Libya’s submissions are presently not sufficient to trigger the applicability of Article 95 regardless of whether the Admissibility Challenge of 1 May 2012 can be considered as an expression of Libya’s intention to challenge the admissibility of the case against Mr. Al-Senussi or instead as a fractional admissibility challenge to be supplemented in due course.
- ii. That, given its silence in this regard, Rule 58(2) cannot be used as a legal basis for postponement of surrender and, in any event, it is dependent upon the existence of admissibility proceedings as properly triggered in accordance with the appropriate procedure in the Statute and no such procedure has been undertaken by Libya with respect to Mr. Al-Senussi.

19. In the section on Submissions, Libya makes submissions on the merits (as opposed to the requirements of Article 82(1)(d)) under the following headings:

- i. The Chamber erred in determining that there is no admissibility challenge under consideration.<sup>34</sup>
- ii. The Chamber erred in failing to give full consideration to the manner in which an admissibility challenge can be brought.<sup>35</sup>
- iii. The Chamber erred in failing to consider the applicability of Article 95 to the request for surrender of Mr. Al-Senussi.<sup>36</sup>
- iv. The Chamber erred in finding that Rule 58(2) does not apply and erred in its interpretation of Rule 58(2).<sup>37</sup>

<sup>32</sup> Libya’s Application, para.17, emphasis added.

<sup>33</sup> Libya’s Application, para.17.

<sup>34</sup> Libya’s Application, paras.25-32.

<sup>35</sup> Libya’s Application, paras.33-37.

<sup>36</sup> Libya’s Application, paras.38-40.

<sup>37</sup> Libya’s Application, paras.41-42.



20. In the Conclusion, Libya requests leave to be granted to "...to appeal *against the identified errors of law* in the Impugned Decision."<sup>38</sup>
21. In light of the different ways in which the issues for appeal are couched and the repeat of Libya's arguments in the merits, it appears that Libya disagrees with the Chamber's overall ruling that Libya has not challenged the admissibility of Mr. Al-Senussi's case and that, as a result, Mr. Al-Senussi's surrender cannot be suspended.<sup>39</sup> The Prosecution submits that these are not appealable issues but mere disagreements with the Chamber's ruling.<sup>40</sup> Further, and as established by the jurisprudence of this court, leave to appeal "...cannot be granted if the party seeking to appeal, instead of identifying appealable issues, seeks leave to litigate *ex novo* before the Appeals Chamber the entire decision."<sup>41</sup>

*Hypothetical and abstract questions are not appealable issues*

22. Further, and if the issue for which leave to appeal is sought is "...the interpretation and application of Articles 18 and 95 and Rule 55 and the relationship between them...",<sup>42</sup> then it is an overly broad hypothetical question that does not arise from the Impugned Decision. Such questions are not appealable issues.<sup>43</sup>

*Issues arising from previous decisions*

23. Moreover, Libya seeks to challenge rulings that were made in decisions issued by the Chamber prior to the Impugned Decision. First, Libya submits that the Chamber erred when it found that the Admissibility Challenge of 1 May 2012

<sup>38</sup> Libya's Application, para.46. Emphasis added.

<sup>39</sup> See in particular, Libya's Application, paras.25-32.

<sup>40</sup> ICC-01/04-168OA3, para.9. ICC-02/04-01/05-367, para.22; ICC-02/05-02/09-267, p.6; ICC-01/04-01/06-2463, para.8; ICC-01/09-02/11-27, para.7.

<sup>41</sup> ICC-02/11-01/11-307, para.70.

<sup>42</sup> Libya's Application, para.19.

<sup>43</sup> ICC-01/05-01/08-532, para.17.

does not constitute a challenge with respect to Mr. Al-Senussi.<sup>44</sup> Second, Libya argues that Pre-Trial Chamber I also erred in its interpretation of Article 95<sup>45</sup> and Rule 58(2).<sup>46</sup>

24. All these issues were litigated and decided upon in prior decisions. First and as noted above, on 4 May 2012, Pre-Trial Chamber I found that Libya's Admissibility Challenge "*must be understood to only concern the case against Mr Gaddafi*" and that it would not consider the admissibility of the case against Mr. Al-Senussi in resolving the Article 19 Application.<sup>47</sup> Hence, the Pre-Trial Chamber had already concluded that Libya had not challenged the admissibility of the case with respect to Mr. Al-Senussi prior to the issuance of the Impugned Decision.
25. Second, it was in the same decision that the Chamber further held that "[R]ule 58 [...] *makes no mention of postponing a request for cooperation and cannot therefore be used as a legal basis by the Government of Libya in support of its [request for postponement of the surrender of Mr Gaddafi]*".<sup>48</sup> The Chamber also held that Article 95 may be invoked only "*[w]here there is an admissibility challenge under consideration by the Court pursuant to article 18 or 19*" (emphasis added).<sup>49</sup> In that case, as in the instant scenario, Libya had announced that an admissibility challenge would be forthcoming, but there was no such challenge before the Chamber.
26. In light of the above, the issues raised by Libya do not arise from the impugned Decision. Libya's Application cannot be used to re-litigate prior decisions.<sup>50</sup>
27. If however, the Chamber finds that an appealable issue does arise from the Impugned Decision, then the Prosecution submits in the alternative that Libya

<sup>44</sup> Libya's Application, paras.25-32.

<sup>45</sup> Libya's Application, paras.38-40.

<sup>46</sup> Libya's Application, para.42.

<sup>47</sup> ICC-01/11-01/11-134 para.8, emphasis added. See also Impugned Decision, para.31 whereby the Chamber notes that it was also Libya's own submission that the challenge only covered Saif Al-Islam.

<sup>48</sup> ICC-01/11-01/11-100, para.17. This finding was noted in the Impugned Decision, para.35.

<sup>49</sup> ICC-01/11-01/11-100, para.18.

<sup>50</sup> ICC-01/04-01/06-338, p.8.

has failed to prove that the issue meet the requirements for leave to appeal under Article 82(1)(d).

**Libya's Application does not meet the requirements under Article 82(1)(d)**

28. First, Libya claims that the Pre-Trial Chamber's alleged errors significantly affect the *fair and expeditious* conduct of the proceedings. According to Libya, it is unfair to deny the Government of Libya's request for a postponement of the order to surrender Mr. Al-Senussi in circumstances where it has made an admissibility challenge pursuant to Articles 19 and 95 and Rule 58.<sup>51</sup> Libya then makes general references to "*immeasurable harm*" to efforts to "*reinstate the rule of law in Libya*"<sup>52</sup> and also "*serious ramifications for national security*"<sup>53</sup>.
29. Libya's submissions appear to be grounded on the erroneous premise that Libya has challenged the admissibility of the case with respect to Mr. Al-Senussi. As already established by a decision prior to the Impugned Decision, this is not the case.
30. The Prosecution submits that Libya has not made any clear link between the alleged procedural violations and the fairness of proceedings. It does not make any attempt to substantiate these speculative predictions. Nor does it link such predictions to any aspect of a fair process. A "purely general complaint"<sup>54</sup> or descriptions of a hypothetical impact<sup>55</sup> of this nature will not meet the threshold set by Article 82(1) (d).
31. Second, Libya claims that an immediate resolution of the issue by the Appeal Chamber would *materially advance the proceedings*. According to Libya, were the Appeals Chamber to decide that the Pre-Trial Chamber had committed a legal error, it could overrule the Pre-Trial Chamber's decision and decide whether the

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<sup>51</sup> Libya's Application, para.44.

<sup>52</sup> Libya's Application, para.43.

<sup>53</sup> Libya's Application, para.43.

<sup>54</sup> ICC-01/04-01/07-2463, para.31.

<sup>55</sup> ICC-01/04-01/07-1958, para.20.

Government of Libya should be granted a postponement of the order to surrender.<sup>56</sup>

32. This argument is not persuasive. The Prosecution notes that the term “advance” in Article 82(1)(d) requires that the immediate and authoritative determination by the Appeals Chamber of the issue will ensure that “the proceedings follow the right course” by “[r]emoving doubts about the correctness of a decision or mapping a course of action along the right lines [...]”<sup>57</sup> It is settled law that an admissibility challenge has to be fully substantiated at the time it is made and the applicant has no right to expect to be allowed to present any additional evidence after the initial challenge.<sup>58</sup> Consequently the course of action proposed by Libya – i.e. appellate review – is not necessary to materially advance the proceedings and will only cause an unnecessary delay in the proceedings.<sup>59</sup>

### Relief sought

33. For the reasons set out above, the Prosecution requests that Pre-Trial Chamber I reject Libya’s Application.




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Fatou Bensouda, Prosecutor

Dated this 18th day of February 2013

At The Hague, The Netherlands

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<sup>56</sup> Libya’s Application, para.45.

<sup>57</sup> ICC-01/04-168, para.15.

<sup>58</sup> ICC-01/09-02/11-274OA, para.95 referred to in the Impugned Decision, para.32.

<sup>59</sup> As the Prosecution has regularly submitted, the extent of any likely delay is one factor to consider in whether immediate resolution of the issue would materially advance the proceedings, although it is certainly not decisive in its own right - see e.g. ICC-01/04-103, para.37, and authorities cited therein (in particular at footnote 22).