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Date: **24 April 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 Document**

**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**

**Source: Mr. Abdullah Al-Senussi, represented by Ben Emmerson QC, Rodney  
Dixon, Amal Alamuddin, Anthony Kelly, and Prof. William Schabas**

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

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## **REGISTRY**

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**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

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## **Introduction**

1. Counsel for Mr. Abdullah Al-Senussi file this Response to the Government of Libya's submission on postponing the surrender of Mr. Al-Senussi to the ICC under Article 95, as set out in the "Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute" of 2 April 2013.<sup>1</sup>
2. This Response is filed pursuant to Regulation 24(1) of the Regulations of the Court.<sup>2</sup> The Defence will respond to Libya's admissibility application pursuant to Article 19 within the time period to be determined by the Chamber in accordance with Rule 58.
3. The Defence for Mr. Al-Senussi submits that the Chamber's present and effective order to transfer Mr. Al-Senussi to the ICC should not be postponed on account of Libya's filing of 2 April 2013:
  - a. The filing of an admissibility application does not permit Libya unilaterally to defer its compliance with the orders of the Trial Chamber to transfer Mr. Al-Senussi immediately to the ICC. Libya obtained custody of Mr. Al-Senussi from Mauritania in September 2012 in violation of Security Council Resolution 1970 and the orders and requests of the ICC for Mr. Al-Senussi to be surrendered to the ICC. Libya has continued to act in violation of the binding obligations owed to the Security Council and to the ICC in failing to transfer Mr. Al-Senussi to the ICC. There is no legal basis for Libya to retain custody of Mr. Al-Senussi while any admissibility application is pending.
  - b. In addition, Libya has violated the Chamber's orders by failing to arrange a privileged legal visit for Defence Counsel to Mr. Al-Senussi. He should be transferred to The Hague without delay in accordance with the Chamber's

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<sup>1</sup> Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11-307-Conf-Red (hereinafter "Admissibility Challenge of 2 April 2013"), para. 206. Due to the urgency of this matter, the number of important issues to address in a single urgent motion, and the necessity of referring to the full background and sources in support of this Application, Counsel for Mr. Al-Senussi wish to request that the Chamber permit an extension of the page limit for this Application by 1 page pursuant to Regulation 37 of the Regulations of the Court.

<sup>2</sup> Following a request by Defence Counsel, the legal officer of the Pre-Trial Chamber confirmed that any Defence submissions in response on the issue of postponement should be submitted by the Defence within the usual time for the filing of responses, namely 21 days, while a scheduling order would be issued under Rule 58 for the filing of responses to Libya's admissibility application itself.

orders so that he can have access to Defence Counsel for the purpose of the admissibility proceedings and any proceedings that may follow before the ICC.

4. The Chamber should therefore (i) dismiss Libya's submission under Article 95, (ii) confirm its order to Libya to surrender Mr. Al-Senussi immediately to the ICC, and (iii) issue a scheduling order for the admissibility proceedings to be heard in which Defence Counsel can have access to Mr. Al-Senussi while in custody in The Hague.

### **Proceedings to date**

5. Resolution 1970 was adopted by the United Nations Security Council on 26 February 2011. Acting under Chapter VII of the UN Charter, the Security Council referred the situation in Libya since 15 February 2011 to the Prosecutor of the ICC and decided that the Libyan authorities shall cooperate fully with, and provide any necessary assistance, to the ICC.
6. On 27 June 2011, the Pre-Trial Chamber granted the Prosecutor's application for arrest warrants to be issued for Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi. The Chamber ordered the Registry to "prepare and transmit to any State any request for transit which may be necessary for the surrender of Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi to the Court."<sup>3</sup>
7. On 4 July 2011, the Registry transmitted a Request for Arrest and Surrender to the Libyan authorities. It stated that "considering that the United Nations Security Council 'decide[d] that the Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor'" the Court "requests Libya to arrest and surrender" Abdullah Al-Senussi to the Court.<sup>4</sup>
8. In March 2012, shortly after it was reported that Mr. Al-Senussi had been arrested in Mauritania on 17 March 2012, the Registry transmitted to the Minister of Foreign Affairs of Mauritania a confidential request for the arrest and surrender of Mr. Al-

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<sup>3</sup> Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah ALSENUSSI, ICC-01/11-12, 27 June 2011, p. 42.

<sup>4</sup> 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, ICC-01/11-01/11-6, 4 July 2011, p. 3-5.

Senussi to the ICC in accordance with the provisions of Security Council Resolution 1970 and the ICC's orders.<sup>5</sup>

9. On 5 September 2012, Mr. Senussi was unlawfully rendered from Mauritania to Libya in violation of the Resolution 1970 and the orders and requests of the ICC.<sup>6</sup>
10. On 10 December 2012, the Chamber issued an Order to the Libyan authorities which "[r]eiterate[d] to the Libyan authorities the request for arrest and surrender of Mr Al-Senussi and remind[ed] them of their obligation to comply with the request".<sup>7</sup>
11. Despite these repeated orders, Libya failed to transfer Mr. Al-Senussi to the ICC. On 9 January 2013, the Defence for Mr. Al-Senussi requested the Pre-Trial Chamber immediately to refer Libya and Mauritania to the Security Council for failing to surrender Mr. Al-Senussi to the ICC in violation of Resolution 1970 and the orders of the ICC.<sup>8</sup> The Defence also asked the Chamber to order Libya immediately to "transfer Mr. Senussi to the custody of the ICC"<sup>9</sup> within 5 calendar days; to "immediately cease all actions and proceedings in respect of Mr. Al-Senussi's case in the national courts"<sup>10</sup> which would impede his immediate surrender to the Court; and, to facilitate urgently a secure and privileged visit to Mr. Al-Senussi by his Counsel with all necessary immunities and protections.<sup>11</sup>
12. In its decision of 18 January 2013, the Chamber noted that "Libya has neither surrendered Mr Al-Senussi to the Court nor has it undertaken any of the proceedings

<sup>5</sup> See, Public Redacted Version With a confidential annex of the "Report of the Registry regarding the arrest of Abdullah Al-Senussi" (ICC-01/11-01/11-80-Conf-Exp), ICC-01/11-01/11-80-Red, 21 March 2012, para. 2.

<sup>6</sup> The Defence refers to its previous submissions on the unlawful rendition of Mr. Al-Senussi from Mauritania and incorporates these submissions in this filing: 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-01/11-01/11-248, 9 January 2013, paras. 4, 6, 15-24, 28, 36-48, 52-55, 67-69 (hereinafter "Urgent Application of 9 January 2013"); Renewed Application on behalf of Mr. Abdullah Al-Senussi to Refer Libya and Mauritania to the UN Security Council with Public Annex 1 and Confidential and Ex Parte (Registry only) Annexes 2 and 3, ICC-01/11-01/11-304, 19 March 2013, paras. 6, 18, 26-34, 41, 42, 48-51 (hereinafter "Renewed Application of 19 March 2013").

<sup>7</sup> Order in relation to the request for arrest and surrender of Abdullah Al-Senussi, ICC-01/11-01/11-241, 10 December 2013, p. 5.

<sup>8</sup> 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-01/11-01/11-248, 9 January 2013, para. 4 (hereinafter "Urgent Application of 9 January 2013").

<sup>9</sup> Urgent Application of 9 January 2013, para. 6(i).

<sup>10</sup> Urgent Application of 9 January 2013, para. 6(ii).

<sup>11</sup> Urgent Application of 9 January 2013, para. 6(iii).

prescribed under the Statute.”<sup>12</sup> The Chamber requested “the Libyan authorities to provide observations, no later than 1 February 2013, on the way Libya intends to fulfil its obligations to cooperate with the Court in relation to the arrest and surrender of Mr Al-Senussi.”<sup>13</sup>

13. On 23 January 2013, the Defence for Mr. Al-Senussi filed an application pursuant to Regulation 35 requesting the Chamber, *inter alia*, to shorten the time period until 28 January for the Libyan authorities to submit their observations in response to the Chamber’s Decision of 18 January 2013.<sup>14</sup> The application was made on account of information that indicated that the Libyan authorities were planning to put Mr. Al-Senussi on trial before a military court before the end of January 2013.<sup>15</sup>
14. On 23 January 2013, the Pre-Trial Chamber ordered Libya to file its observations on the way Libya intends to fulfil its obligations to cooperate with the Court in relation to the arrest and surrender of Mr Al-Senussi by no later than 28 January.<sup>16</sup>
15. Accordingly, Libya submitted its observations on 28 January indicating that it intended to challenge the admissibility of the case, but required until 28 March to file substantial admissibility submissions.<sup>17</sup> Libya requested that the order for the surrender of Mr. Al-Senussi be postponed pursuant to Article 95.<sup>18</sup>
16. On 1 February 2013, Libya responded to the Defence Application of 9 January 2013, arguing that it should be rejected.<sup>19</sup> Libya however conceded that if it could be shown that Libya was responsible for a violation of international law arising from Mr Al-Senussi’s transfer to Libya from Mauritania, it would require restoration of the *status quo ante*.<sup>20</sup>

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<sup>12</sup> Decision requesting Libya to provide observations concerning the Court’s request for arrest and surrender of Abdullah Al-Senussi, ICC01/11-011/11-254, 18 January 2013, para. 12 (hereinafter “Decision of 18 January 2013”).

<sup>13</sup> Decision of 18 January 2013, p. 6.

<sup>14</sup> Urgent Application pursuant to Regulation 35, ICC-01/11-01/11-256, 23 January 2013, para. 5.

<sup>15</sup> Urgent Application pursuant to Regulation 35, ICC-01/11-01/11-256, 23 January 2013, para. 4.

<sup>16</sup> Decision of 23 January 2013, p. 6.

<sup>17</sup> Libyan Government’s Observations regarding the case of Abdullah Al-Senussi, ICC-01/11-01/11-260, 1 February 2013, para. 8 (hereinafter “Libya’s Observations of 1 February 2013”).

<sup>18</sup> Libya’s Observations of 1 February 2013, para. 9.

<sup>19</sup> Response of the Libyan Government to 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-01/11-01/11-264, 1 February 2013, para. 9 (hereinafter “Libya’s Response of 1 February 2013”).

<sup>20</sup> Libya’s Response of 1 February 2013, para. 19.

17. On 6 February 2013, the Chamber handed down its decision on the Defence Application of 9 January 2013. The Chamber held that there was no proper admissibility challenge before the Chamber<sup>21</sup>, and that “Libya's obligation to surrender Mr Al-Senussi to the Court stands fully and is not subject to any suspension.”<sup>22</sup> The Chamber ordered Libya “to proceed to the immediate surrender of Mr Al-Senussi to the Court” and “refrain from taking any action which would frustrate, hinder or delay Libya’s compliance with its obligation to surrender Mr Al-Senussi to the Court.”<sup>23</sup> The Chamber also ordered “a privileged visit to Mr Al-Senussi by his Defence”.<sup>24</sup>

18. On 12 February 2013, Libya sought leave to appeal the Chamber’s decision of 6 February 2013.<sup>25</sup> The Defence opposed this application<sup>26</sup>. The Chamber rejected the application on 25 February 2013 on the basis that “Libya has not advanced any argument or even allegation that the issues would significantly affect the expeditiousness of the proceedings ... [and] ...has failed to advance any consideration as to how the impugned decision may affect the outcome of the trial.”<sup>27</sup>

19. Libya still did not comply with the Chamber’s order to surrender Mr. Al-Senussi to the ICC immediately. Accordingly, on 19 March 2013, the Defence filed its Renewed Application to refer Libya and Mauritania to the Security Council “on account of their respective failures to comply with UN Security Council Resolution 1970 and the orders and requests of the ICC.”<sup>28</sup>

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<sup>21</sup> 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, 6 February 2013, para. 31 (hereinafter “Order of 6 February 2013”).

<sup>22</sup> Order of 6 February 2013, para. 28.

<sup>23</sup> Order of 6 February 2013, p. 15.

<sup>24</sup> Order of 6 February 2013, p. 15.

<sup>25</sup> 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”, ICC-01/11-01/11-277, 12 February 2013, para. 3.

<sup>26</sup> Defence Response on behalf of Mr. Abdullah Al-Senussi to 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”, ICC-01/11-01/11-278, 14 February 2013, para. 3.

<sup>27</sup> Decision on 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"", ICC-01/11-01/11-287, 25 February 2013, para. 36.

<sup>28</sup> Renewed Application on behalf of Mr. Abdullah Al-Senussi to Refer Libya and Mauritania to the UN Security Council with Public Annex 1 and Confidential and Ex Parte (Registry only) Annexes 2 and 3, ICC-01/11-01/11-304, 19 March 2013, para. 51 (hereinafter “Renewed Application of 19 March 2013”).

20. On 2 April 2013, the Government of Libya filed an admissibility application under Article 19 in respect of Mr. Al-Senussi's case before the ICC. In this application Libya asserted 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 this admissibility challenge by the Court.*"<sup>29</sup>
21. On 10 April 2013, Libya responded to the Defence's Renewed Application of 19 March 2013, arguing that it should be dismissed. Libya denied "any wrongdoing or non-compliance with its international law obligations, including any violation of Mr. Al-Senussi's human rights"<sup>30</sup> and argued that it had not failed to cooperate with the Chamber in not surrendering Mr. Al-Senussi to the ICC.<sup>31</sup>

### **Applicable legal provisions and jurisprudence**

22. Libya relies exclusively on Article 95 of the Rome Statute to assert that the surrender request should be postponed. Even assuming that Article 95 applies, Libya's application in relation to article 95 provides no justification for *why* postponement is warranted. Rather, the State hopes that mere invocation of this Article will do. Thus its argument is limited to the fact that "the Government of Libya 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 this admissibility challenge by the Court".<sup>32</sup> But Article 95 does not confer a *right*. Rather it has been interpreted as providing a basis for postponing surrender (as an exception to article 19(9)) under certain circumstances, not applicable in this case. And there is nothing automatic about it – it is for the Chamber to consider whether and how it applies to the specific facts in question.

23. Article 95 provides that:

*Where there is an admissibility challenge under consideration by the Court pursuant to article 18 or 19, the requested State may postpone the execution of*

<sup>29</sup> Admissibility Challenge of 2 April 2013, para. 5, 206.

<sup>30</sup> Response of the Libyan Government to the "Renewed Application on behalf of Mr. Abdullah Al-Senussi to Refer Libya and Mauritania to the UN Security Council with Public Annex 1 and Confidential and Ex Parte (Registry only) Annexes 2 and 3", ICC-01/11-01/11, ICC-01/11-01/11-310, 10 April 2013, para. 4 (hereinafter "Libya's Response of 10 April 2013").

<sup>31</sup> Libya's Response of 10 April 2013, para. 23.

<sup>32</sup> Admissibility Challenge of 2 April 2013, para. 5.



*a request under this Part pending a determination by the Court, unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to article 18 or 19.*

24. The relevant “Part” of the Statute is “Part 9: International Cooperation and Judicial Assistance”. The Pre-Trial Chamber has stated that even though Libya is not a party to the Rome Statute, it is bound to comply with the provisions of Part 9 (and the rest of the Statute) on account of the referral of the situation in Libya to the ICC pursuant to Security Council Resolution 1970.<sup>33</sup>

25. Libya makes no reference to the applicable provisions of the UN Charter which govern cases that are initiated by the ICC pursuant to a referral by the Security Council, acting under Chapter VII of the UN Charter. In particular, Article 25 of the UN Charter provides that:

*The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.*

Article 103 of the UN Charter states:

*In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.*

26. The relevant provisions of Part 9 of the ICC Statute underline the obligations of States to comply with the ICC’s requests. Article 86 requires States “to cooperate fully” with the Court in accordance with the provisions of the Statute.

27. Article 87(5) and (7) provide that States that do not cooperate with the Court may be reported to the Security Council where the Security Council referred the matter to the Court.

28. Article 89(1) requires States to comply with the Court’s requests for arrest and surrender. This Article re-enforces the provisions of Article 59(7) which states that

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<sup>33</sup> 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, ICC-01/11-01/11-163, 1 June 2012, para. 19.

“[o]nce ordered to be surrendered by the custodial State, the person shall be delivered to the Court *as soon as possible*” (emphasis added).

29. As the Chamber has noted, these provisions of the ICC’s cooperation regime are “directly linked” to the complementarity provisions in Article 19.<sup>34</sup> Under this article, a State is required “at the earliest opportunity” to challenge the admissibility of a case in accordance with the provisions of Article 19.<sup>35</sup>

30. In terms of Article 19(7), the Prosecutor “shall suspend the investigation until such time as the Court makes a determination” of the admissibility challenge, subject to the provisions of Article 19(8).

31. Most significantly, Article 19(9) provides that the filing of an admissibility challenge “shall not affect the validity of ... any order or warrant issued by the Court prior to the making of the challenge”.

32. In Saif Gaddafi’s case, the Chamber twice considered whether Libya could postpone the surrender request under Article 95 in respect of Mr. Gaddafi, who had been arrested and detained in Libya.<sup>36</sup> The Chamber ultimately determined, having heard from all the parties, that on the basis of the facts at issue it had the authority to consider whether the surrender request could be postponed,<sup>37</sup> and held that the surrender request could be postponed on the basis that Libya had properly made an admissibility challenge within the terms of Article 19.<sup>38</sup>

33. It is clear from the above that Libya is not entitled to assume that the transfer of Mr Al-Senussi can be postponed as of right, without consideration and determination of the matter by the Chamber after hearing the parties. The question of whether the

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<sup>34</sup> 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, ICC-01/11-01/11-163, 1 June 2012, para. 31.

<sup>35</sup> Article 19(5). 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, para. 46.

<sup>36</sup> Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi, ICC-01/11-01/11-100, 4 April 2012; 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, ICC-01/11-01/11-163, 1 June 2012.

<sup>37</sup> 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, ICC-01/11-01/11-163, 1 June 2012, para. 37.

<sup>38</sup> 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, ICC-01/11-01/11-163, 1 June 2012, para. 39.

surrender request can be postponed falls to be decided by the Pre-Trial Chamber which issued the arrest warrant and ordered Libya to comply with its execution on several occasions.<sup>39</sup>

### **No legal basis to postpone Mr Al-Senussi's immediate surrender to the ICC**

34. The Defence submits that there is no legal basis under the Statute to postpone the surrender request in Mr. Al-Senussi's case under Article 95 or for any other reason. On the contrary, for the reasons set out below, the Chamber should confirm its present order for Libya to surrender Mr. Al-Senussi to the ICC without any further delay.

35. As a preliminary point the Defence notes that Libya's admissibility application is not properly filed and therefore cannot trigger article 95 postponement. The ICC Appeals Chamber made clear in the Kenya situation that where a State considers that there are grounds to file an admissibility challenge, it is under a duty to do so *promptly*. In the words of the Appeals Chamber, "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".<sup>40</sup> The chronology of these proceedings outlined above shows without a doubt that Libya – which has been filing pleadings in respect of admissibility for Mr. Gaddafi for over a year – and has held Mr. Al-Senussi for over 7 months – has not filed its challenge expeditiously. It should therefore not be allowed to use article 95 to cause further unacceptable and unnecessary delay.

36. As regards the substance of Libya's request for postponement, the Defence makes the following arguments.

37. *First*, Mr. Al-Senussi only ever came into the custody of Libya, and therefore became subject to its jurisdiction, as a result of the violations committed by both Libya and Mauritania of their indisputable obligations to comply with the ICC's orders to

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<sup>39</sup> Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah ALSENUSSI, ICC-01/11-12, 27 June 2011, p. 42; Order in relation to the request for arrest and surrender of Abdullah Al-Senussi, ICC-01/11-01/11-241, 10 December 2013, p. 5; Decision requesting Libya to provide observations concerning the Court's request for arrest and surrender of Abdullah Al-Senussi, ICC01/11-011/11-254, 18 January 2013, para. 12; Order of 6 February 2013, p. 15.

<sup>40</sup> 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, para. 46 (emphasis added).

transfer Mr. Al-Senussi to the ICC. The Defence incorporates all of its previous arguments made in its filings of 9 January 2013 and 19 March 2013 on this issue. Libya has failed to address many of these arguments, and has not provided meaningful answers to any of them.

38. As consistently recognised by the Chamber, these obligations are founded on the binding nature of Security Council Resolution 1970, issued under Chapter VII of the UN Charter, which referred Libya to the ICC.<sup>41</sup> When Mr. Al-Senussi was arrested in Mauritania in March 2012, Mauritania was obligated under Resolution 1970 and the ICC's orders to surrender him immediately to the ICC. It is irrefutable that Mauritania acted in violation of its binding legal obligations under the UN Charter (Chapter VII and Articles 24(1), 25 and 103) and the ICC Statute (Articles 59, 86, 87 and 89) in not transferring Mr. Al-Senussi to the ICC and instead in rendering him extra-judicially to Libya in September 2012.<sup>42</sup> Libya acted in violation of these same binding international obligations in participating in obtaining and taking custody of Mr. Al-Senussi from Mauritania when he should have been transferred directly to the ICC.
39. The circumstances of Mr. Al-Senussi's current detention in Libya are clearly distinguishable from those of Mr. Saif Gaddafi, whose surrender has been postponed during the admissibility proceedings in his case. Mr. Gaddafi was arrested in Libya, which led to Libya filing an admissibility challenge in respect of his case. Mr. Al-Senussi, on the other hand, should never have been transferred to Libya in the first place in violation of the ICC's orders and requests to transfer him directly to the ICC. On his arrest in Mauritania, he should have been transferred to the ICC. The only reason that Libya can now even seek to assert that the surrender request should be postponed is because it has custody of him as a result of the flagrant breaches of the ICC's orders and requests. As the Defence has demonstrated in its previous filings, the evidence discloses violations of Security Council resolution 1970 as well as the Court's orders to Libya to surrender Mr. Al-Senussi and the request to Mauritania to transfer Mr. Al-Senussi to the Court. It also reveals that Libya paid Mauritania \$200 million to secure Mr. Al-Senussi's illegal presence on Libyan territory.

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<sup>41</sup> Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi, ICC-01/11-01/11-72, 7 March 2013, para. 12; Decision requesting Libya to provide observations concerning the Court's request for arrest and surrender of Abdullah Al-Senussi, ICC-01/11-01/11-254, 18 January 2013, para. 10; 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, 6 February 2013, para. 21.

<sup>42</sup> 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-01/11-01/11-248, 9 January 2013, paras. 28-42.

40. Given the serious violations perpetrated by Mauritania and by Libya, it is the Defence's submission that Libya cannot be said to have lawful custody of Mr. Al-Senussi, and Libya is therefore not entitled to retain custody of him while the admissibility of the case before the ICC is being determined.
41. The Defence submits that in these circumstances, no provision of the ICC Statute, including Article 95, permits the Chamber to set aside or freeze the surrender obligation. The Defence's submission is borne out by the irrationality of the contrary position: Libya would benefit from, and be able to take advantage of, the clear breaches of international law committed by Mauritania and arising as a result of Libya's own unlawful conduct. The only appropriate remedy for these serious breaches is to require Mr. Al-Senussi to be transferred to the ICC where he should have been sent when captured in Mauritania. In this way, the ICC and all of the parties would be in the position that they should have been in but for the breaches that were committed. Libya should not be permitted to continue to benefit from the delay occasioned by its flouting of the Chamber's orders. Moreover, the position would be the same even if Libya had 'innocently' acquired custody of Mr. Al-Senussi (which is not the case): the fact that it has custody of him as a result of Mauritania's violation of the ICC's orders means that the surrender request should not now be suspended.
42. *Second*, as cited above, several key provisions of the Statute require States to comply with the orders and requests of the ICC (Articles 59, 86, 87 and 89). As the Assembly of States' Parties (ASP) has emphasised, State cooperation and compliance with the orders of the ICC are paramount to the ability of the Court to fulfil its mandate. The ASP has stated that the failure to provide cooperation "*affects the efficiency of the Court, and underlines the negative impact that non-execution of Court requests can have on the ability of the Court to execute its mandate, in particular when it concerns the arrest and surrender of individuals subject to arrest warrants*".<sup>43</sup> For this reason the Chambers of the ICC have stressed the critical importance of States implementing the orders of the ICC, recognising that a lack of cooperation could "lead to frustration of justice".<sup>44</sup>

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<sup>43</sup> ASP Resolution, ICC-ASP/11/Res.5 Cooperation, 21 November 2012.

<sup>44</sup> Decision on the defence request for a temporary stay of proceedings, Concurring Separate Opinion of Judge Eboe-Osui, ICC-02/05-03/09-410, 26 October 2012, para. 92.

43. The Defence accordingly submits that an interpretation of the cooperation provisions, including Article 95, that is consistent with the object and purpose of the cooperation regime should never result in a surrender request being suspended when it has been systematically ignored over a lengthy period from the very beginning of the case. Otherwise, Libya would be rewarded for taking custody of Mr. Al-Senussi and keeping custody of him in violation for the ICC's orders and the execution of the Court's mandate. Such an outcome inevitably has the practical consequence of inciting and encouraging States not to comply with the orders of the Court and would therefore have a resoundingly negative impact on the Court's ability in this case and in all other cases to secure the cooperation of States.
44. A logical and systematic interpretation of the cooperation provisions would, similarly, necessitate that Libya should not be permitted to retain custody of Mr. Al-Senussi merely because it has now filed an admissibility challenge. The Chamber should take into account as a decisive factor that Libya only has custody of Mr Al-Senussi as a result of a manifest disregard of the ICC's orders in breach of the cooperation provisions of the Statute.
45. *Third*, the complementarity provisions of Statute do not permit the surrender request to be postponed. Libya is, of course, entitled to file an admissibility challenge before the ICC and must do so at the earliest opportunity under Article 19. However, a State's ability to challenge the admissibility of a case before the ICC does not automatically relieve that State of its obligations to comply with the ICC's orders and requests made in accordance with the provisions of the Statute.
46. Even when such an application is filed, it does not automatically follow that the orders of the Chamber are suspended. Article 19(9) specifically provides that the filing of an admissibility challenge does not affect the validity of the orders of the Chamber. As noted above, the State does not have the right unilaterally to refuse to comply with a surrender request. Under the cooperation provisions of the Statute, when read as a whole, the Chamber is authorised to require States to comply with its orders and may report them to the ASP and/or the Security Council when a State fails to cooperate.
47. It is correct that the Prosecutor must suspend her investigations once an admissibility challenge is filed (Article 19(7)). There is however no equivalent provision for the

State concerned. The State can continue with its investigations, and there is no requirement under the Statute that the accused must be held in custody in the State concerned. There is no provision in Article 19 or in any other article which prevents the Chamber from requiring the surrender of the accused to the ICC during the admissibility proceedings; on the contrary, article 19(9) and other provisions assume that the surrender obligation is left untouched.

48. *Fourth*, the Defence submits that it is telling that Libya has given no assurance that it will not commence Mr. Al-Senussi's trial until the ICC has decided on its admissibility challenge. As explained in its admissibility application, Libya is proceeding with the trial of Mr. Al-Senussi<sup>45</sup>; the accusation stage of the proceedings is imminent.<sup>46</sup> This is the case despite the Chamber's order that Libya should not take any steps to hinder Mr. Al-Senussi's immediate transfer to the ICC. Libya conducts itself as though there is no possibility that Mr. Al-Senussi will ever be surrendered to the ICC. This sentiment is reflected in the recent statement of Libya's Foreign Minister:

*“Saif Al-Islam will be tried in Libya, so will Abdullah Al-Senussi, Gaddafi's family member and former intelligence chief, as well as other members of the former regime; there shall not be any surrender to any person.”*<sup>47</sup>

49. The statement is in similar terms to prior statements of Libyan officials that Libya is not bound to comply with ICC's orders to transfer Mr. Al-Senussi to the Court.<sup>48</sup> Although Libya has maintained that these statements were reported inaccurately<sup>49</sup>, the statements have never been corrected, and instead, their contents has been confirmed in the subsequent statement of the Foreign Minister.
50. For all of these reasons, the Chamber is requested to dismiss Libya's argument under Article 95 and to confirm its order for the immediate surrender of Mr. Al-Senussi to the ICC.

<sup>45</sup> Admissibility Challenge of 2 April 2013, paras. 136, 137, 155, 156, 175, 176.

<sup>46</sup> Admissibility Challenge of 2 April 2013, para. 156.

<sup>47</sup> <http://www.dw.de/سيف-الاسلام-بإبقاء-في-ليبيا-إجراءات-إثباته-تتواصل-على-اللاجوء-في-ناعم/a-16716499>; <http://aawsat.com/details.asp?section=1&issueno=12545&article=723195&feature=#.UV1eK6JHJqw>.

<sup>48</sup> ICC-01/11-01/11-248-Anx1.

<sup>49</sup> Response of the Libyan Government to 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-01/11-01/11-264, 1 February 2013, paras. 9, 22, 23.

**No privileged access to Mr. Al-Senussi in Libya**

51. The Defence submits that an additional reason for refusing to postpone the surrender request is that Libya has failed to comply with the Chamber's order to "make the necessary arrangements ... for a privileged visit to Mr Al-Senussi by his Defence."<sup>50</sup> In addition, all visits by ICC personnel or counsel are now banned until further notice due to the unstable and deteriorating security situation in the country (including the recent targeting of foreign nationals in Tripoli). According to an instruction promulgated by the ICC's Chief of the Security and Safety Section (CSS) on 22 April 2013, this means that "all missions to Libya remain suspended until further notice".
52. For both of these independent reasons, it is not possible for the Defence to have any contact with Mr Al-Senussi in Libya. Mr. Al-Senussi's presence in The Hague would guarantee that he would have access to his lawyers for the purposes of the admissibility proceedings and any other proceedings.
53. Libya stated in its recent filing that it has now sent proposed amendments to the draft MOU on immunities and privileges to the Registry and was ready to facilitate a visit for Defence Counsel.<sup>51</sup> However, Libya has stated previously on many occasions that it would cooperate with the Registry to arrange a visit, yet no visit has in fact ever been organised. Libya has also recently stated to the Registry that Defence Counsel would be bound by the domestic laws of Libya during any visit. Not only does this assertion directly undermine the very purpose of the MOU (which is to provide the Defence with international protections and immunity under Libyan law), it highlights that Libya now intends to insist on the presence of a local Libyan lawyer in any visit by Defence Counsel.<sup>52</sup> Such an imposition would mean that any visit could not be privileged and confidential, as ordered by the Chamber. Without the guarantee of a secure, confidential and privileged environment, which Libya has not provided, any visit (even if it were allowed) would be meaningless, and contrary to the Chamber's order to permit Mr. Al-Senussi to exercise his fundamental rights to have access to his lawyers on a confidential and privileged basis.

<sup>50</sup> Order of 6 February 2013, p. 15.

<sup>51</sup> Response to "Application on behalf of Abdullah Al-Senussi for leave to reply to the 'Response of the Libyan Government to the Renewed Application on behalf of Mr. Abdullah Al-Senussi to Refer Libya and Mauritania to the UN Security Council with Public Annex 1 and Confidential and Ex Parte (Registry only) Annexes 2 and 3'" of 10 April 2013", ICC-01/11-01/11-314, 23 April 2013, para. 6.

<sup>52</sup> Libya mentioned this to Registry previously.



54. Libya's recent statements on a legal visit have in effect changed nothing. Libya seeks to show that it is willing to cooperate with the Registry on this question, but in reality continues to delay making any concrete arrangements for a visit, as it has done all along. Instead, Libya raises new obstacles to organising a privileged visit by now stating that Defence Counsel would be subject to Libyan law and would have to be accompanied by a local Libyan lawyer. The Defence thus remain in the position of having no privileged contact at all with Mr. Al-Senussi while the admissibility proceedings are underway.

55. It has now been 7 months that Libya has held Mr. Al-Senussi, who has not any criminal charges confirmed against him, and who has been held in detention without access to a lawyer or appropriate supervision by a Judge. Libya has admitted that Mr. Al-Senussi has been interrogated both in Mauritania and Libya, and has been "confronted" with witness statements against him – all in the absence of legal representation.<sup>53</sup> It is untenable that a State apply to the Court for postponed surrender, claiming that it is capable of delivering a fair trial, while at the same time it denies the accused any meaningful and appropriate contact with counsel. This is a preliminary issue of cooperation with the Court that should be imposed by the Court before it even considers other submissions from Libya. It is also confirmation that Libya is unwilling and unable to deliver a fair trial to Mr. Al-Senussi.

56. Libya's argument on inadmissibility – to which the Defence will respond in due course as outlined above and in the request for a scheduling order filed in parallel with this response - is premised on the idea that Libya must be given a chance to prove that it can deliver justice. As it argues in its application, "[i]t is vital in ensuring justice for the Libyan people as well as in demonstrating that the Libyan justice system is capable of proper investigation and prosecution, that it can conduct fair trials which meet applicable international standards". This argument constitutes an admission that Libya is in fact not presently capable of 'proper investigation and prosecution' or capable of conducting 'fair trials which meet applicable international standards', not least in a

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<sup>53</sup> Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11-130-Red, 1 May 2012, para. 50; Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11-307-Conf-Anx3-Red, 2 April 2013; Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11-307-Conf-Red, 2 April 2013, para. 166. See also, Libya Denies Execution Plans for Abdullah al-Senussi, NY Times, 28 January 2013 ([http://www.nytimes.com/2013/01/29/world/africa/libya-denies-execution-plans-for-abdullah-al-senussi.html?\\_r=0](http://www.nytimes.com/2013/01/29/world/africa/libya-denies-execution-plans-for-abdullah-al-senussi.html?_r=0)).

case of this political magnitude. Libya also misunderstands the nature of its relationship with the Court when it invites “the Chamber ... to consider embracing a ‘positive’ approach to complementarity by declaring the case inadmissible subject to the implementation of monitoring and assistance initiatives and review by the Chamber of the investigation and prosecution carried out by the Applicant as they develop”. As the Defence will show in its response on admissibility, nowhere in the Rome Statute is there the suggestion that the Court in general, and the Pre-Trial Chamber in particular, engages in ‘monitoring and assistance’ initiatives. That this is even being suggested to the Chamber as a ‘way out’ also constitutes an admission that Libya is not at present in a position to meet the standards imposed by article 17.

57. It suffices to say at this juncture that in the present circumstances in which the Defence is unable to consult with Mr. Al-Senussi in a secure and privileged fashion – both as a result of Libya’s obstructions and the present security ban on ICC visits – the Defence submits that the Chamber would be justified in confirming the surrender order so that Mr. Al-Senussi would be able to prepare his case for the admissibility proceedings with his Counsel in The Hague.
58. Mr. Al-Senussi’s presence is, at this juncture, required at the seat of the Court 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. More specifically:
- a. The lack of any plausible privileged and secure access to Mr. Senussi in Libya means that Counsel is not able to seek instructions or discuss factual issues that are relevant to admissibility. Such issues include Mr. Al-Senussi’s treatment in detention, the conditions under which he and witnesses have been interrogated, and the precise circumstances of his transfer to Libya from Mauritania. Libya’s challenge to admissibility is based on the complementarity provisions in Article 17 of the Rome Statute, which provides that national proceedings must be “genuine”; that “[i]n order to determine unwillingness in a particular case, the Court shall consider ... the principles of due process recognized by international law...”, and that the Court should consider whether “proceedings were not or are not being conducted independently or impartially”. In addition, under article 21(3) of the ICC Statute, the Chamber must apply the law in line

with “internationally recognized human rights”. These factual issues are therefore key to an analysis of admissibility by the Chamber, but cannot be dealt with by the Defence so long as Mr. Al-Senussi’s transfer is blocked.

- b. The ICC Surrender Request directs Libya to respect the suspect's rights guaranteed by the Statute.<sup>54</sup> This includes the rights contained in Articles 55 and 59. Rule 117 of the Court’s Rules also provides that “the Court shall ensure that the person receives a copy of the arrest warrant issued by the Pre-Trial Chamber” and provides for other procedures that require contact with the suspect. Rule 58(3) contemplates that the suspect should receive a copy of the admissibility filings and allows the joining of admissibility proceedings with confirmation proceedings – which the suspect is entitled to attend. None of these rights have been respected and they plainly cannot be respected so long as Mr. Al-Senussi continues to be held in Libya and cannot even meet with his lawyer. The Court should not countenance further violations in this regard, when Libya is under an obligation to surrender him and has provided no grounds for further postponement of that obligation imposed by the Court and the UN Security Council.

**Article 95 does not provide a basis for postponing surrender because the admissibility challenge does not relate to the same “case”**

59. As an alternative to the arguments outlined above, the Defence submits that Article 95 should not be interpreted as providing a basis for postponing surrender requests, as opposed to other types of cooperation-requests. The Defence therefore reiterates the arguments made by the OPCD on this issue in its filing of 11 May 2012.<sup>55</sup> Although the Defence recognizes that the Chamber rejected this argument in its decision of 1 June 2012, this key question of first impression has yet to be addressed by the ICC Appeals Chamber.

60. Moreover, although this filing does not constitute a response to Libya’s admissibility challenge, the Defence notes that in its response to that challenge it will present

<sup>54</sup> 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, ICC-01/11-01/11-5, 4 July 2011.

<sup>55</sup> Public Redacted "Version of the "Response to the Request to Postpone the Surrender of Mr. Saif Al Islam Gaddafi Pursuant to Article 95 of the Statute", ICC-01/11-01/11-141-Red, 11 May 2012, paras. 7-28.

evidence that Libya's national proceedings do not relate to the same "case" as the one before the ICC. The Chamber has confirmed that, where national authorities are investigating a *different* case, Article 89(4) – and not Article 95 – is the provision that applies to a State's surrender obligations.<sup>56</sup> The Chamber has also confirmed that Article 89(4) does not provide a basis for postponing surrender. Rather, it contemplates a sequencing approach whereby the Court can deal with its own case first.<sup>57</sup>

61. Art 89(4) provides that "[i]f the person sought is being proceeded against ... in the requested State for a crime different from that for which surrender to the Court is sought, the requested State, after making its decision to grant the request, shall consult with the Court". It is complemented by Rule 183 which states that "[t]he requested State may temporarily surrender the person sought in accordance with conditions determined between the requested State and the Court. In such case the person ... shall be transferred to the requested State once his or her presence before the Court is no longer required, at the latest when the proceedings have been completed".

62. If the Chamber ultimately does not reject Libya's postponement request for the reasons developed above, it is requested that it 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 on that basis.

### **Conclusion**

63. The Chamber is respectfully requested for all of these reasons (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.

Counsel on behalf of Mr. Abdullah Al-Senussi,

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<sup>56</sup> This has also been expressed by the Office of the Prosecutor. Public Redacted Version March 2009 Prosecution Response to Motion Challenging the Admissibility of the 18 the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a), paras 79-80.

<sup>57</sup> Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi, ICC-01/11-01/11-72, 7 March 2012.



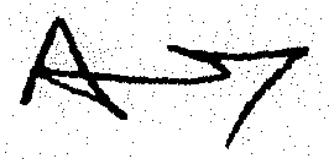
**Ben Emmerson QC**



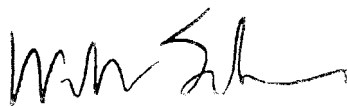
**Rodney Dixon**



**Amal Alamuddin**



**Anthony Kelly**



**Professor William Schabas**

Dated 24<sup>th</sup> April 2013  
London, United Kingdom