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Date: 24 June 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 Defence Application on behalf of Mr. Abdullah Al-Senussi for Leave to Appeal against the “Decision on Libya’s postponement of the execution of the request for arrest and surrender of Abdullah Al-Senussi pursuant to article 95 of the Rome Statute and related Defence request to refer Libya to the Security Council”**

**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 14 June 2013, Pre-Trial Chamber I found that Article 95 does not require a prior authorization on the part of the Chamber in order for a State to postpone the execution of a surrender request where there is an admissibility challenge under consideration by the Court and insofar as the necessary pre-requisites for its exercise are met. The Pre-Trial Chamber also found that in the circumstances of this case it is satisfied that Libya may legitimately postpone, pursuant to Article 95, the execution of the Surrender Request pending a final determination by the Chamber of the Admissibility Challenge of the case against Abdullah Al-Senussi.
2. On 20 June 2013, the Defence for Abdullah Al-Senussi (the “Defence”) sought leave to appeal this Decision and identified four issues:
  - a. “The finding that prior authorisation by the Chamber is not required to postpone the execution of a surrender order under Article 95” (“First Issue”);
  - b. “The postponement of the surrender order on the narrow basis that all the Chamber needed to consider was whether an admissibility challenge had been properly filed before the ICC” (“Second Issue”). In particular, the Defence argues that the Pre-Trial Chamber erred when it dismissed the following arguments: (i) that Libya had not filed the Challenge at the earliest opportunity; (ii) the relevance of Libya taking custody of Al-Senussi in violation of the ICC orders; (iii) evidence of Libya’s intention not to cooperate with the Court; (iv) guaranteeing Al-Senussi’s fair trial rights.
  - c. The Chamber’s failure to consider or make any decision on the Defence’s request to refer Mauritania to the Security Council for its violations of the ICC’s orders and requests (“Third Issue”); and

- d. The Chamber's refusal of the Defence's application to refer Libya to the Security Council for repeated violations of the ICC's orders without providing any reasons for its decision ("Fourth Issue").
2. The Prosecution submits that the Defence Application should be rejected. The First Issue arises from the Decision but does not meet the requirements under Article 82(1)(d); in particular, it does not affect the fair conduct of the proceedings. Although the Chamber found that no authorization was required to postpone the execution of the request for surrender, it did nevertheless review whether Libya's admissibility challenge had been properly made. The various sub-issues of the Second Issue either constitute disagreements with the Chamber's Decision or although they arise from the decision, they do not meet the requirements pursuant to Article 82(1)(d). The Third Issue does not arise because the Pre-Trial Chamber did not rule on the Defence request to refer Mauritania to the Security Council in the impugned Decision. Finally, the Fourth Issue is a mere disagreement with the Pre-Trial Chamber's exercise of its discretion not to refer Libya to the Security Council and therefore does not constitute an issue for the purpose of appeal.

### **Procedural Background**

3. On 27 June 2011, the Pre-Trial Chamber issued a warrant of arrest against Al-Senussi.<sup>1</sup>
4. On 4 July 2011, the Registrar transmitted the Surrender Request whereby it requested Libya to arrest and surrender to the Court, inter alia, Al-Senussi.<sup>2</sup>
5. On 19 March 2013, the Defence filed an application to refer Libya and Mauritania to the Security Council for their failure to comply with their obligations vis-à-vis the Court.<sup>3</sup>

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<sup>1</sup> ICC-01/11-01/11-4.

<sup>2</sup> ICC-01/11-01/11-5.

6. On 2 April 2013, Libya challenged the admissibility of the case against Al-Senussi before the Court and notified the Chamber of the exercise of its right to postpone the execution of the Surrender Request pursuant to Article 95 of the Statute.<sup>4</sup>
7. On 24 April 2013, the Defence responded and requested the Pre-Trial Chamber to reject Libya's argument that it is entitled to postpone the surrender request pursuant to Article 95, and to confirm its order for the immediate surrender of Al-Senussi to the ICC.<sup>5</sup>
8. On 20 May 2013, with the leave of the Chamber, Libya filed its reply and requested that the Chamber reject the Defence's response.<sup>6</sup>
9. On 14 June 2013, the Pre-Trial Chamber issued its "Decision on Libya's postponement of the execution of the request for arrest and surrender of Abdullah Al-Senussi pursuant to article 95 of the Rome Statute and related Defence request to refer Libya to the UN Security Council" ("Impugned Decision").<sup>7</sup>
10. On 20 June 2013, the Defence filed an application for leave to appeal the Impugned Decision ("Application").<sup>8</sup>

### **Submissions**

*First Issue: prior authorisation by the Chamber is not required to postpone the execution of a surrender order under Article 95*

11. The Prosecution recognizes that the question of whether "the finding that prior authorisation by the Chamber is not required to postpone the execution of a surrender order under Article 95" is an issue which arises from the Decision. The

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<sup>3</sup> ICC-01/11-01/11-304.

<sup>4</sup> ICC-01/11-01/11-307-Red2.

<sup>5</sup> ICC-01/11-01/11-319.

<sup>6</sup> ICC-01/11-01/11-339.

<sup>7</sup> ICC-01/11-01/11-354.

<sup>8</sup> ICC-01/11-01/11-365.

Chamber stated that “the postponement of the execution of a surrender request while an admissibility challenge is pending falls within the prerogatives of the requested State and does not require a Chamber’s prior authorization”.<sup>9</sup>

12. However, the issue does not meet the requirements pursuant to Article 82(1)(d). In particular, the issue does not affect the fairness of the proceedings. Although the Pre-Trial Chamber found that prior authorization from the Pre-Trial Chamber was not necessary to postpone the execution of a surrender request pending the determination of the admissibility challenge, the Pre-Trial Chamber stated that “when a dispute arises as to whether these pre-requisites for the application of article 95 of the Statute are met, such dispute cannot be unilaterally settled by the State” and the Chamber will intervene “to determine whether an admissibility challenge has been duly made within the statutory provisions”.<sup>10</sup> Having decided this, the Chamber then proceeded to assess whether the challenge to the admissibility of the case against Al-Senussi had been properly made and, therefore, whether Libya may legitimately decide to postpone the execution of the Surrender Request under Article 95.<sup>11</sup>
13. Thus, the request for postponement of Al-Senussi’s surrender was reviewed by the Chamber which sought to ensure that the challenge was properly made and the postponement caused no unfairness. The postponement of the surrender was therefore not reduced to a unilateral determination by the Libyan Government, without meaningful judicial involvement. The fact that such judicial intervention took place *ex post*, and not *ex ante*, does not, in and of itself, affect the fairness of the proceedings.
14. Moreover, the issue does not significantly affect the expeditious conduct of the proceedings, neither will an immediate resolution of the issue materially advance the proceedings. Appellate review of this issue will merely delay the proceedings. The assertions made by the Defence regarding the general

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<sup>9</sup> Decision, para.27.

<sup>10</sup> Decision, para.25.

<sup>11</sup> Decision, paras.28-40.

importance of making clear that States are obliged to seek the Chamber's authorisation before postponing the Court's surrender orders "to ensure that the correct legal position and procedure is adopted"<sup>12</sup> are irrelevant if the Issue does not meet the requirements under Article 82(1)(d). It is insufficient that an appeal may be legitimate or even necessary at some future stage, as opposed to requiring immediate resolution by the Appeals Chamber in order to materially advance the proceedings.<sup>13</sup> Therefore, the Defence has failed to provide arguments to support its submission.

*Second Issue: The postponement of the surrender order on the narrow basis that all the Chamber needed to consider was whether an admissibility challenge had been properly filed before the ICC*

15. The Defence divides this issue in four sub-issues; the Prosecution will address them in the same manner:

*Issue 2(i) That Libya had not filed the Admissibility Challenge at the earliest opportunity*

16. The Defence submits that on 1 May 2012, when it filed its challenge to the admissibility of the case against Saif Al-Islam, Libya already indicated that it was ready to challenge the case of Al-Senussi. However, and although Al-Senussi was transferred from Mauritania to Libya in September 2012, Libya only challenged the admissibility on 2 April 2013, nearly seven months after the transfer. Hence, and according to the Defence, the Chamber erred when it did

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<sup>12</sup> Defence Application, para.12.

<sup>13</sup> ICC-02/05-03/09-457, para.13.

not conclude that Libya had not challenged the admissibility “at the earliest opportunity” within the terms of Article 19(5).<sup>14</sup>

17. The Prosecution submits that this is not an appealable issue, but rather a mere disagreement with the Chamber’s conclusion that, in light of the facts of this case, the Challenge was not tardy in violation of Article 19(5).<sup>15</sup> The Pre-Trial Chamber took into consideration the arguments made by the Defence regarding the timing of the admissibility challenge<sup>16</sup> and concluded that the information before it did not appear to indicate that Libya, despite being in a position to properly and timely challenge the admissibility of the case against Al-Senussi, unduly failed to do so, in violation of Article 19(5)<sup>17</sup>. Therefore, the mere fact that the Chamber came to a different conclusion than the Defence does not create an appealable issue.<sup>18</sup>

18. However, and should the Chamber find that Issue 2(i) does arise from the Impugned Decision, the Prosecution submits that Senussi has failed to explain how this purported issue impacts on the prongs under Article 82(1)(d). Accordingly, the Prosecution does not make submissions on this point.

*Issue 2(ii) The relevance of Libya taking custody of Al-Senussi in violation of the ICC orders*

19. The Defence submitted that the Chamber erroneously adopted an overly restrictive interpretation, when it found that “Libya’s alleged violations of its international obligations” are “immaterial for the limited purposes of article 95” and when the Chamber decided that the “purpose of the Chamber’s evaluation of the applicability of article 95 [...] is not to determine whether or not the State

<sup>14</sup> Defence Application, paras.15-19.

<sup>15</sup> Decision, paras.31-33.

<sup>16</sup> Decision, para.30, 32.

<sup>17</sup> Decision, para.32.

<sup>18</sup> ICC-02/05-02/09-267, para.11-12



has previously fulfilled its obligation to cooperate with the Court.”<sup>19</sup> The Defence argues that there is no legal basis for excluding from its consideration of Article 95, the alleged breach of the ICC’s orders when transferring Al-Senussi from Mauritania to Libya.<sup>20</sup>

20. The Prosecution submits that this sub-issue, in particular whether the scope of the Chamber’s judicial review in the context of Article 95 should also consider Libya’s purported violations, arises from the Decision. However, this sub-issue does not satisfy the other requirements of Article 82(1)(d). In particular, the issue does not significantly affect the fair and expeditious conduct of the proceedings. The Defence argues that “in the absence of any clear findings” by the Court on issues including the taking custody of Al-Senussi from Mauritania, Libya will “continue to conduct itself as though it is not bound to comply with the ICC’s orders, which will occasion further delays”.<sup>21</sup> However, the Pre-Trial Chamber indicated that the postponement of the execution of the Surrender Request in no way affects Libya’s continuing obligation to cooperate with the Court. Moreover, Libya also remains under the duty to provide all assistance required by the Court in particular in order to ensure the full and effective exercise of Al-Senussi’s rights before the Court and to facilitate a timely determination of the Admissibility Challenge.<sup>22</sup> Therefore, the Chamber’s decision not to entertain Senussi’s arguments in the context of Article 95 does not cause unfairness nor it will expedite the proceedings as Libya remains under the obligation to comply and Senussi may litigate any purported violation in another context.
21. The Prosecution notes that Defence made no submissions on how Issue 2(ii) satisfies the other requirements set out in Article 82(1)(d). Accordingly, the Prosecution does not address the remaining requirements under Article 82(1)(d).

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<sup>19</sup> Defence Application, para.20-21

<sup>20</sup> Defence Application, para.22

<sup>21</sup> Defence Application, Paras.46-47

<sup>22</sup> Decision, paras.37,40.

*Issue 2(iii) Evidence of Libya's intention not to cooperate with the Court*

22. The Pre-Trial Chamber held that it was not persuaded by the Defence argument that Libya's submission under Article 95 should be dismissed on the grounds that a number of political statements demonstrate Libya's intent to carry out the trial against Al-Senussi at the national level. It added that these mere facts do not, per se, amount to a violation of Libya's obligation to cooperate with the Court, insofar as Libya must ensure that its ongoing criminal proceedings do not hinder or delay Al-Senussi's surrender to the Court should the case eventually be declared admissible.<sup>23</sup> The Defence argues that leave to appeal should be granted in order that the Appeals Chamber can consider whether Libya's conduct does amount to non-cooperation and that this fact should be taken into account when determining whether the surrender order should be postponed at this time.<sup>24</sup>
23. The Prosecution submits that sub-issue 2(iii) constitutes a mere disagreement with the Chamber's conclusion that Libya's evinced intention to carry out domestic proceedings does not amount, per se, to a violation of Libya's obligation to cooperate with the Court. The fact that the Chamber came to a different conclusion than the Defence does not create an appealable issue.<sup>25</sup>
24. Should the Chamber find that the above matter does constitute an issue the Prosecution submits that it still does not satisfy the other requirements set out in Article 82(1)(d). In particular, the Defence does not explain how this purported issue affects the fairness and expeditiousness of the proceedings. It merely states, in generic terms, that this issue affects the fair and expeditious conduct of the proceedings in that "any failure by Libya to surrender Mr. Al-Senussi" would "hamper and delay the ICC's exercise of jurisdiction over Mr. Al-Senussi's

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<sup>23</sup> Decision, para.36.

<sup>24</sup> Defence Application, para.26.

<sup>25</sup> ICC-02/05-02/09-267, para.11-12

case”.<sup>26</sup> The Defence adds that it is an issue that the Appeals Chamber should determine in order to “pre-empt the repercussions of any errors in the Decision on the proceedings before the ICC”.<sup>27</sup> The Defence did not, however, clarify what these repercussions were.

25. The above Defence submissions are unpersuasive. The Pre-Trial Chamber indicated that Libya must ensure that its ongoing criminal proceedings do not hinder or delay Al-Senussi's surrender to the Court should the case eventually be declared admissible.<sup>28</sup> Thus, there is no unfairness as a result of the Pre-Trial Chamber's ruling. Further, any delay on the ICC's exercise of its jurisdiction is not the result of domestic proceedings but a necessary consequence of the Chamber's determination of the admissibility of the case.
26. The Defence made no submissions on how an immediate resolution of the issue would materially advance the proceedings. Accordingly, the Prosecution does not make submissions on this point.

*Issue 2(iv) Guaranteeing Al-Senussi's fair trial rights*

27. The Defence claims that the Chamber erred in finding that the ability of Al-Senussi to exercise his rights under the Statute are immaterial when considering whether to postpone the surrender order.<sup>29</sup> The Defence also adds that the Pre-Trial Chamber has failed to address and consider Libya's failure to make the necessary arrangements for a privileged visit to Al-Senussi by his Defence being a justification to reject the postponement request.<sup>30</sup>
28. As with sub-issue 2(ii) above, this issue arises from the Decision as it refers to the scope of the Pre-Trial Chamber's review in the context of Article 95. However, as

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<sup>26</sup> Defence Application, para.26.

<sup>27</sup> Decision, para.28.

<sup>28</sup> Decision, para.36. See also para.40.

<sup>29</sup> Defence Application, para.30.

<sup>30</sup> Defence Application, para.31.

with sub-issue (2)(ii), this sub-issue does not significantly affect the fair conduct of the proceedings. As noted above, the Pre-Trial Chamber indicated that the postponement of the execution of the Surrender Request in no way affects Libya's continuing obligation to cooperate with the Court and Libya remains under the duty to provide all assistance required by the Court in particular to ensure the full and effective exercise of Al-Senussi's rights before the Court and to facilitate a timely determination of the Admissibility Challenge.<sup>31</sup> Moreover, the Pre-Trial Chamber also noted that should the circumstances ultimately evolve into indicating that Libya will fail to cooperate with the Court in the arrangement of the privileged legal visit to Al-Senussi, the Chamber will determine what measures would be necessary to ensure compliance on the part of Libya with the Chamber's order to that effect.<sup>32</sup> Therefore, the Chamber's ruling on this matter caused no unfairness.

29. Further, the Defence made no submissions on how this issue significantly affects the expeditious conduct of the proceedings, or how an immediate resolution of this issue would materially advance the proceedings. Hence, the Prosecution will not address these additional requirements under Article 82(1)(d).

*Third Issue: The Chamber's failure to consider or make any decision on the Defence's request to refer Mauritania to the Security Council for its violations of the ICC's orders and requests*

30. The Defence claims that the Pre-Trial Chamber has failed to address the Defence's arguments with respect to Mauritania's purported violations. The Defence added that the Chamber provided no indication that the matter would be considered separately or at a later stage.<sup>33</sup> The Prosecution submits that this issue does not arise from the Impugned Decision. It is settled law that the party seeking leave to appeal should identify "...a specific "issue" *which has been dealt with in the relevant*

<sup>31</sup> Decision, para.37. See also para.40.

<sup>32</sup> Decision, para.45.

<sup>33</sup> Defence Application, para 35.

*decision* and which constitutes the appealable subject.”<sup>34</sup> The referral of Mauritania to the Security Council for its alleged violations is not a matter that has been “dealt with in the relevant decision”. Further, any assumption that the Chamber has decided definitively not to address the Defence’s arguments and requests concerning Mauritania is entirely speculative and cannot constitute an issue for the purposes of Article 82(1)(d).

31. Moreover, the Defence does not explain how this issue satisfies the other requirements of Article 82(1)(d).

*The Chamber’s refusal of the Defence’s application to refer Libya to the Security Council for repeated violations of the ICC’s orders without providing any reasons for its decision*

32. As the Fourth Issue, the Defence refers to the Chamber’s refusal of the Defence’s application to refer Libya to the Security Council for “repeated violations” of the ICC’s orders “without providing any reasons” for its decision.<sup>35</sup> The Defence claims that the Pre-Trial Chamber did not provide any reasons for its conclusion that it is “unwarranted and of no benefit to exercise its discretion to refer Libya” to the Security Council. The Defence also alleges that the Chamber did not address whether Libya had violated the ICC’s orders as requested by the Defence.<sup>36</sup>

33. The Prosecution submits that this is a mere disagreement with the findings of the Chamber. The Impugned Decision contains a detailed analysis of whether Libya should be referred to the Security Council for: (i) its involvement in Al-Senussi’s extradition to Libya by Mauritania in September 2012; (ii) its non-compliance with the request for surrender of Al-Senussi between September 2012 and the

<sup>34</sup> ICC-02/05-03/09-428, Para.7. Emphasis added.

<sup>35</sup> Defence Application, para.8.

<sup>36</sup> Defence Application, para.38.

filing of the Admissibility Challenge (i.e. 2 April 2013) in which Libya invoked its right under article 95 of the Statute; and (iii) its failure to date to arrange a privileged visit to Al-Senussi by his Defence, as requested by the Chamber.<sup>37</sup> The Pre-Trial Chamber decided not to exercise its discretion and refer Libya to the Security Council at this stage and on these grounds.<sup>38</sup> The fact that the Chamber, in the exercise of its discretionary powers, assessed the same information and arguments regarding the necessity for referral as those analysed by the Defence but came to a different conclusion does not create an appealable issue.<sup>39</sup>

34. Should the Chamber find that the above matter does constitute an issue, the Prosecution submits that it still does not satisfy the other requirements set out under Article 82(1)(d). In particular, the issue does not significantly affect the fair conduct of the proceedings. As already noted by the Pre-Trial Chamber, and with respect to (iii) above, on 19 April 2013 Libya transmitted to the Court the draft Memorandum of Understanding between the Court and Libya with a number of comments before finalisation, and indicated, *inter alia*, that "the Libyan Government invite[s] the defense team for Mr. Al-Senussi to visit Libya forthwith at any time convenient for them".<sup>40</sup> Moreover, the Pre-Trial Chamber indicated that should the circumstances ultimately evolve into indicating that Libya will fail to cooperate with the Court in the arrangement of the privileged legal visit to Al-Senussi, the Chamber will determine what measures would be necessary to ensure compliance on the part of Libya with the Chamber's order to that effect.<sup>41</sup> In this context, it is premature for the Defence to state that this issue significantly affects the fair conduct of the proceedings.

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<sup>37</sup> Decision, para.43.

<sup>38</sup> Decision, paras.44-45.

<sup>39</sup> ICC-02/05-02/09-267, para.11-12

<sup>40</sup> Decision, para.45.

<sup>41</sup> Decision, para.45.

35. The Defence made no submissions on how this issue significantly affects the expeditious conduct of the proceedings, or how an immediate resolution of this issue would materially advance the proceedings. Accordingly, the Prosecution does not make submissions on this point.

### **Relief sought**

36. For the reasons set out above, the Prosecution requests that Pre-Trial Chamber I reject the Defence's Application.



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Fatou Bensouda, Prosecutor

Dated this 24<sup>th</sup> day of June 2013  
At The Hague, The Netherlands