

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/11-01/11
Date: 28 August 2013

PRE-TRIAL CHAMBER I

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

SITUATION IN LIBYA

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

Public

**Decision on an application for leave to appeal submitted by the Defence of
Abdullah Al-Senussi**

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

The Office of the Prosecutor
Fatou Bensouda, Prosecutor
James Stewart, Deputy Prosecutor

Counsel for Saif Al-Islam Gaddafi
John R.W.D. Jones

Counsel for Abdullah Al-Senussi
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Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**
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Ahmed El-Gehani
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Others
Appeals Chamber

REGISTRY

Registrar
Herman von Hebel

Deputy Registrar
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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Pre-Trial Chamber I (the “Chamber”) of the International Criminal Court (the “Court” or the “ICC”) issues the present decision on the “Defence Application on behalf of Mr. Abdullah Al-Senussi for Leave to Appeal against ‘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’” (the “Defence Application” or the “Application”).¹

I. Procedural history

1. On 26 February 2011, the United Nations Security Council adopted Resolution 1970, whereby it referred the situation in Libya since 15 February 2011 to the Prosecutor of the Court and required the Libyan authorities to cooperate fully with and provide any necessary assistance to the Court and the Prosecutor.²

2. On 27 June 2011, the Chamber issued a warrant of arrest against Abdullah Al-Senussi (“Mr Al-Senussi”).³

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

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

¹ ICC-01/11-01/11-365.

² S/RES/1970 (2011).

³ Pre-Trial Chamber I, Warrant of Arrest for Abdullah Al-Senussi, 27 June 2011, ICC-01/11-01/11-4.

⁴ ICC-01/11-01/11-5.

obligations *vis-à-vis* the Court.⁵ Libya filed a response on 10 April 2013,⁶ and, on 3 May 2013, the Defence, with the leave of the Chamber,⁷ submitted its reply to Libya's response.⁸

5. On 2 April 2013, Libya filed the "Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute" (the "Admissibility Challenge"), challenging the admissibility of the case against Mr Al-Senussi before the Court and notifying the Chamber of the exercise of its right to postpone the execution of the Surrender Request pursuant to article 95 of the Rome Statute (the "Statute").⁹

6. On 24 April 2013, the Defence of Mr Al-Senussi filed the "Response on behalf of Abdullah Al-Senussi to the Submission of the Government of Libya for Postponement of the Surrender Request for Mr Al-Senussi",¹⁰ requesting the Chamber to "(i) reject Libya's argument that it is entitled to postpone the surrender request pursuant to Article 95; and (ii) confirm its order for the immediate surrender of Mr. Al-Senussi to the ICC".¹¹

7. On 20 May 2013, with the leave of the Chamber,¹² Libya filed the "Libyan Government's reply to 'Response on behalf of Abdullah Al-Senussi to the Submission of the Government of Libya for Postponement of the Surrender Request for Mr. Al-Senussi'",¹³ requesting that the Chamber "reject Mr. Al-Senussi's response and interpret article 95 to allow Libya to postpone

⁵ ICC-01/11-01/11-304.

⁶ ICC-01/11-01/11-310.

⁷ Pre-Trial Chamber I, Decision on the request of Abdullah Al-Senussi for leave to reply, 26 April 2013, ICC-01/11-01/11-324.

⁸ ICC-01/11-01/11-329.

⁹ ICC-01/11-01/11-307-Conf-Exp. A confidential redacted version (ICC-01/11-01/11-307-Conf-Red) and a public redacted version (ICC-01/11-01/11-307-Red2) are also available.

¹⁰ ICC-01/11-01/11-319.

¹¹ *Ibid.*, para. 63.

¹² Pre-Trial Chamber I, Decision on Libya's application for leave to reply to the Defence of Abdullah Al-Senussi, 10 May 2013, ICC-01/11-01/11-335.

¹³ ICC-01/11-01/11-339.

execution of the surrender request pending determination of the admissibility challenge".¹⁴

8. On 14 June 2013, the Chamber issued 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 UN Security Council" (the "Decision"),¹⁵ whereby it: (i) "decide[d] that Libya, pursuant to article 95 of the Statute, may postpone the execution of the Surrender Request pending determination of the Admissibility Challenge"; and (ii) "reject[ed] the request of the Defence of Mr Al-Senussi to make a finding of non-cooperation by Libya and refer the matter to the Security Council".¹⁶

9. On 20 June 2013, the Defence of Mr Al-Senussi filed its Application, requesting that the Chamber grant leave to appeal the Decision in relation to the following issues: (i) "[t]he finding that prior authorisation by the Chamber is not required to postpone the execution of a surrender order under Article 95" (the "First Issue"); (ii) "[t]he 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" (the "Second Issue"); (iii) "[t]he 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" (the "Third Issue"); and (iv) "[t]he 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" (the "Fourth Issue").¹⁷

¹⁴ *Ibid.*, para. 44.

¹⁵ ICC-01/11-01/11-354.

¹⁶ Decision, operative part, p. 20.

¹⁷ Defence Application, para. 8.

10. On 24 June 2013, the Prosecutor submitted the “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’” (the “Prosecutor’s Response”), requesting that the Application be rejected in its entirety.¹⁸

II. The applicable law

11. The Chamber notes article 82(1)(d) of the Statute, rule 155 of the Rules of Procedure and Evidence and regulation 65 of the Regulations of the Court. Article 82(1)(d) of the Statute provides that any party may appeal:

A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

12. According to established jurisprudence, an “issue” is an identifiable subject or topic requiring a decision for its resolution, as opposed to a hypothetical concern or an abstract legal question or a question over which there is a mere disagreement or conflicting opinion. The “issue” must not only emanate from the relevant decision itself, it must also be constituted by a subject, the resolution of which is “essential for the determination of matters arising in the judicial cause under examination”.¹⁹

13. Furthermore, for leave to appeal to be granted, article 82(1)(d) of the Statute requires that the “issue” identified by the party would significantly affect either the fair and expeditious conduct of the proceedings or the

¹⁸ ICC-01/11-01/11-369.

¹⁹ Appeals Chamber, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 9.

outcome of the trial. Finally, it is necessary that, in the opinion of the Chamber, an immediate resolution of the issue by the Appeals Chamber may materially advance the proceedings. As held by the Appeals Chamber, “the issue must be such that its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial”.²⁰ Accordingly, “[p]ut in a nutshell, the object of paragraph (d) of article 82 (1) of the Statute is to pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial”.²¹

III. Analysis

A. *The First Issue*

14. The First Issue, as identified by the Defence, relates to “[t]he finding that prior authorisation by the Chamber is not required to postpone the execution of a surrender order under Article 95”.²²

The Defence Application

15. The Defence observes that the Chamber stated in the Decision that no prior authorization is required from the Chamber in order for a State to exercise its right under article 95 of the Statute.²³ According to the Defence, this position contradicts the finding, equally made in the Decision, that in any case, postponement of a surrender request cannot be unilaterally determined by the State as it is for the Chamber to settle any potential dispute on whether the requirements for the exercise of such right are met in the concrete

²⁰ *Ibid.*, para. 14.

²¹ *Ibid.*, para. 19.

²² Defence Application, para. 8(i).

²³ *Ibid.*, para. 9, making reference to Decision, paras 25 and 27.

circumstances of the case, namely that a proper admissibility challenge pursuant to article 19 of the Statute is under consideration by the Court.²⁴

16. The Defence argues that “the Court must have the final say over the implementation of its own orders and requests, including whether they can temporarily be postponed”.²⁵ With reference to the Chamber’s determination of whether an admissibility challenge was properly filed, the Defence observes that “in the present case the Chamber has exercised its discretion in considering each of the arguments advanced by the parties to conclude that the surrender order should be postponed in the circumstances of Mr Al-Senussi’s case”.²⁶

17. The Defence submits that “it is essential that the ICC’s jurisprudence makes it clear that States are obliged to seek the Chamber’s authorisation before postponing the Court’s surrender orders” and that “[t]his issue is thus one that should be considered by the Appeals Chamber to ensure that the correct legal position and procedure is adopted”.²⁷

18. Finally, according to the Defence, consideration of “whether the surrender order should be postponed at this stage of the proceedings [...] directly concerns the conduct of the ICC proceedings, and whether they are being conducted fairly and without unnecessary delays”.²⁸

The Prosecutor’s Response

19. The Prosecutor submits that the First Issue, while arising from the Decision,²⁹ does not meet the requirements of article 82(1)(d) of the Statute.³⁰ In

²⁴ Defence Application, para. 10, making reference to Decision, para. 27.

²⁵ Defence Application, para. 10.

²⁶ *Ibid.*, para. 11.

²⁷ *Ibid.*, para. 12.

²⁸ *Ibid.*, para. 45.

²⁹ Prosecutor’s Response, para. 11.

³⁰ *Ibid.*, para. 12.

particular, according to the Prosecutor, “[t]he postponement of the surrender was [...] 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”.³¹

20. Moreover, the Prosecutor argues that the issue does not significantly affect the expeditious conduct of the proceedings, and that an immediate resolution of the issue may not materially advance the proceedings, but, to the contrary, “[a]ppellate review of this issue will merely delay the proceedings” and that, as made clear by the jurisprudence of the Court, “[i]t is insufficient that an appeal may be legitimate or even necessary at some future stage”.³²

Conclusions of the Chamber

21. In the Decision, the Chamber stated:

[Article 95 of the Statute] does not require a prior authorization on the part of the Chamber in order for a State to avail itself of a statutory prerogative, insofar as the necessary pre-requisites for its exercise are met. Nevertheless, when a dispute arises as to whether these pre-requisites for the application of article 95 of the Statute are met, such dispute cannot be unilaterally settled by the State. It is for the Chamber to determine whether an admissibility challenge has been duly made within the terms of the applicable statutory provisions.³³

22. The Defence challenges the Chamber’s finding that no prior authorization is required in order for a State to exercise its right under article 95 of the Statute, should the necessary conditions be present (*i.e.* there is “an admissibility challenge under consideration by the Court”³⁴). The Chamber is satisfied that the First Issue arises from the Decision and constitutes an identifiable subject of significant relevance to the determination of the matters addressed in the Decision.

³¹ *Ibid.*, para. 13.

³² *Ibid.*, para. 14.

³³ Decision, para. 25.

³⁴ Article 95 of the Statute.

23. The Chamber is, however, of the view that the issue of whether a State's invocation of article 95 of the Statute requires prior authorization from the Chamber does not "significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial" within the meaning of article 82(1)(d) of the Statute.

24. At the outset, the Chamber observes that the Defence does not substantiate how the First Issue would affect the "fair and expeditious conduct of the proceedings or the outcome of the trial" as required under article 82(1)(d) of the Statute. It merely argues that the Appeals Chamber should consider "whether the surrender order should be postponed at this stage of the proceedings" as "[t]his issue directly concerns the conduct of the ICC proceedings, and whether they are being conducted fairly and without unnecessary delays". Yet, whether or not the surrender order should be postponed is not the content of the First Issue.

25. In order to assess whether the issue would indeed significantly affect one of the "elements of justice" mentioned in article 82(1)(d) of the Statute, the Chamber "must ponder the implications of a given issue being wrongly decided" on the fairness and expeditiousness of the proceedings or the outcome of the trial.³⁵ With regard to the issue at hand, if indeed the invocation of article 95 of the Statute on the part of Libya were subject to the Chamber's *prior* authorization, this would merely entail that the postponement of the Surrender Request would take effect as of the moment of the Chamber's intervention rather than at the moment of the filing of the Admissibility Challenge. In the Chamber's view, this result has no significant repercussions on either the fairness and expeditiousness of the proceedings against

³⁵ Appeals Chamber, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, paras 10 and 13.

Mr Al-Senussi or the outcome of the trial. Indeed, regardless of *when* it takes place, the judicial intervention under article 95 of the Statute, is preserved in any event, and its scope does not change according to its timing.

26. Rather, it appears from the substance of the arguments raised in the Application that, in essence, the Defence takes issue not with respect to the existence of the Chamber's judicial intervention, but with respect to the *scope* of such judicial intervention. This latter aspect is, however, the subject of the Second Issue proposed for appeal.

27. Leave to appeal the Decision with respect to the First issue is therefore rejected.

B. The Second Issue

28. The Second Issue, as identified by the Defence, relates to “[t]he 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”.³⁶

The Defence Application

29. Under the Second Issue, the Defence contests the Chamber's finding in the Decision that the determination of whether a State may postpone the execution of a request for surrender is limited to verifying that a proper admissibility challenge pursuant to article 19 of the Statute is under consideration by the Court.³⁷

30. According to the Defence, on the basis of this interpretation, the Chamber specifically rejected a number of arguments advanced by the Defence.³⁸ With a

³⁶ *Ibid.*, para. 8(ii).

³⁷ *Ibid.*, para. 8(ii).

³⁸ *Ibid.*, para. 13.

view to demonstrating that the Second Issue meets the requirements of article 82(1)(d) of the Statute, the Defence addresses individually the Chamber's disposal of some of the Defence arguments in the Decision.

31. First, the Defence refers³⁹ to the Chamber's determination that "the information before the Chamber does not appear to indicate that Libya, despite being in a position to properly and timely challenge the admissibility of the case against Mr Al-Senussi, unduly failed to do so, in violation of article 19(5) of the Statute".⁴⁰ The Defence argues that in the Decision "[t]he Chamber [...] considered [...] whether Libya had acted in violation of Article 19(5) [and] [b]y so doing, the Chamber accepted that if it were to find that an admissibility challenge could have been filed at an earlier stage, it could refuse to postpone the surrender order".⁴¹ In this regard, the Defence submits that "[t]he Chamber has stated that the Statute's provisions require a State to file any admissibility challenge as soon as there are grounds on the basis of which the case would be inadmissible before the Court. The Chamber has failed to explain how Libya has met this test".⁴²

32. Second, the Defence refers⁴³ to the Chamber's finding that "a determination of whether the State obtained and/or maintained custody of the suspect in non-compliance with the Court's request for his arrest and surrender" is "immaterial, for the limited purposes of article 95 of the Statute".⁴⁴ According to the Defence, "the Chamber erred in adopting this overly restrictive interpretation, which appears to be contrary to its own reasoning", namely the Chamber's reasoning that it must determine whether

³⁹ *Ibid.*, paras 15 to 19.

⁴⁰ Decision, para. 32.

⁴¹ Defence Application, para. 21.

⁴² *Ibid.*, para. 19.

⁴³ *Ibid.*, paras 20 to 23.

⁴⁴ Decision, para. 35.

the Admissibility Challenge has been properly made.⁴⁵ The Defence further submits that this matter must be dealt with by the Appeals Chamber as “it is vital for the legitimacy and integrity of the Court that it considers and decides on the serious violations of the ICC’s orders that have been perpetrated by both Libya and Mauritania”.⁴⁶

33. Third, the Defence challenges⁴⁷ the Chamber’s treatment of the Defence arguments that domestic criminal proceedings against Mr Al-Senussi have not been terminated and that a number of political statements demonstrate Libya’s intention to carry out the trial against Mr Al-Senussi at the national level. The Defence takes issue with the Chamber’s finding that these arguments are immaterial for its determination under article 95 of the Statute and that, in any case, the mere facts alleged by the Defence “do not, *per se*, amount to a violation of Libya’s obligation to cooperate with the Court, insofar as Libya must ensure that its ongoing criminal proceedings do not hinder or delay Mr Al-Senussi’s surrender to the Court should the case eventually be declared admissible”.⁴⁸ 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 that should be taken into account when determining whether the surrender order should be postponed at this time”.⁴⁹

34. Fourth, the Defence contests⁵⁰ the Chamber’s determination that even if the transfer of Mr Al-Senussi to the Court was necessary in order for him to exercise his statutory rights, this would not negate Libya’s entitlement to postpone the execution of the Surrender Request.⁵¹ In the view of the Defence,

⁴⁵ Defence Application, para. 21.

⁴⁶ *Ibid.*, para. 23.

⁴⁷ *Ibid.*, paras 24 to 28.

⁴⁸ Decision, para. 36.

⁴⁹ Defence Application, para. 26.

⁵⁰ *Ibid.*, paras 29 to 33.

⁵¹ Decision, para. 37.

the Chamber failed in the Decision “to consider or address” the Defence arguments demonstrating “that Libya’s failure to provide Mr. Al-Senussi with legal representation and access to his appointed counsel justified rejecting the postponement request”.⁵²

35. In terms of how the Second Issue meets the requirements under article 82(1)(d) of the Statute, the Defence submits:

[T]he Appeals Chamber should consider whether the surrender order should be postponed at this stage of the proceedings. This issue directly concerns the conduct of the ICC’s proceedings, and whether they are being conducted fairly and without unnecessary delays. In the present circumstances, Mr. Al-Senussi is unable to have access to his Counsel and to be afforded his rights as an accused without being transferred to the ICC. The ICC’s proceedings would have to be halted and at the very least severely delayed in the event that Libya fails to surrender Mr. Al-Senussi to the ICC.⁵³

The Prosecutor’s Response

36. The Prosecutor addresses the four arguments advanced by the Defence following the same structure of the Application.

37. With regard to the first Defence argument, the Prosecutor argues that the Defence submissions in relation to the timing of the Admissibility Challenge are not sufficient to constitute an appealable issue, “but rather a mere disagreement with the Chamber’s conclusion that, in light of the fact of the case, the Challenge was not tardy in violation of Article 19(5)”.⁵⁴ Indeed, the Prosecutor observes that “the [...] Chamber took into consideration the arguments made by the Defence regarding the timing of the admissibility challenge 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

⁵² Defence Application, para. 31.

⁵³ *Ibid.*, para. 45. See also para. 33.

⁵⁴ Prosecutor’s Response, para. 17.

so, in violation of Article 19(5)".⁵⁵ In these circumstances, according to the Prosecutor, "the mere fact that the Chamber came to a different conclusion than the Defence does not create an appealable issue".⁵⁶ Additionally, the Prosecutor notes that the Defence fails "to explain how this purported issue impacts on the prongs under Article 82(1)(d)".⁵⁷

38. Regarding the second Defence argument, the Prosecutor submits that the issue of "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, but does not significantly affect the fair and expeditious conduct of the proceedings.⁵⁸ According to the Prosecutor "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".⁵⁹

39. In relation to the third Defence argument, the Prosecutor submits that the Defence is merely raising a disagreement with the Chamber when it contests the Chamber's conclusion that Libya's intention to carry out domestic proceedings does not amount, *per se*, to a violation of Libya's obligation to cooperate with the Court,⁶⁰ and that in any case "the Defence does not explain how this purported issue affects the fairness and expeditiousness of the proceedings".⁶¹

40. Finally, in relation to the fourth Defence claim that the Chamber erred in finding that the ability of Mr Al-Senussi to exercise his statutory rights is

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*, para. 18.

⁵⁸ *Ibid.*, para. 20.

⁵⁹ *Id.*

⁶⁰ *Ibid.*, para. 23.

⁶¹ *Ibid.*, para. 24.

immaterial to the consideration of whether to postpone the Surrender Request, the Prosecutor argues that this issue does not significantly affect the fair conduct of the proceedings. This is particularly so given that “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”.⁶² Furthermore, the Prosecutor observes that “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”.⁶³

Conclusions of the Chamber

41. The Second Issue proposed for appeal by the Defence relates to “[t]he 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”.⁶⁴ What the Defence challenges is the Chamber’s determination that the scope of its judicial intervention within the context of a State’s invocation of its right under article 95 of the Statute is limited to the determination of whether “there is an admissibility challenge under consideration by the Court pursuant to article [...] 19 of the Statute”.

42. In the Decision, the Chamber, on the basis of its understanding of the relationship between the Court and the States, within the context of article 95 of the Statute, indeed limited its analysis to matters which have the potential to affect the validity of the Admissibility Challenge, *i.e.* those suitable to ground

⁶² *Ibid.*, para. 28.

⁶³ *Ibid.*, para. 29.

⁶⁴ Defence Application, para. 8(ii).

its dismissal *in limine* without consideration of the merits.⁶⁵ Against this backdrop, the Chamber considered irrelevant, for the limited purposes of the Decision, the Defence submissions regarding the alleged violations on the part of Libya of its obligations *vis-à-vis* the Court,⁶⁶ and the need to ensure Mr Al-Senussi's presence at the seat of the Court in order to advance the admissibility proceedings and to give effect to his statutory rights.⁶⁷ The Chamber accordingly refused to address those discrete arguments in the context of its analysis related to article 95 of the Statute.⁶⁸ This is precisely what is contested by the Defence under the Second Issue proposed for appeal.

43. The Chamber is of the view that the Second Issue is satisfactorily identified, accurately reflects the Chamber's position as expressed in the Decision and constitutes "a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination".⁶⁹

44. The Chamber is also satisfied that the Second Issue affects the fairness and expeditiousness of the proceedings. In fact, while the Second Issue primarily relates to the relationship between the Court and the States in terms of their respective rights and obligations as established in the Statute, the Chamber notes that, once the Defence arguments were rejected, the Chamber confirmed Libya's entitlement to postpone the execution of the Surrender Request pursuant to article 95 of the Statute. This postponement, in turn, arguably involves the legitimisation of a considerable delay in the commencement of the criminal proceedings against Mr Al-Senussi leading to the confirmation of charges hearing, with significant repercussions on the fair

⁶⁵ Decision, paras 29 to 33.

⁶⁶ *Ibid.*, paras 35 and 36.

⁶⁷ *Ibid.*, para. 37.

⁶⁸ *Ibid.*, para. 34.

⁶⁹ Appeals Chamber, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 9.

and expeditious conduct of the proceedings. As recognised by the Appeals Chamber, “[t]he expeditious conduct of the proceedings in one form or another constitutes an attribute of fair trial”⁷⁰ and “expeditiousness is an important component of a fair trial”.⁷¹ While not every delay in the proceedings affects their fairness, the Chamber is nonetheless of the view that the delay resulting from the Decision is such that the Second Issue would have a significant impact on the fairness of the criminal proceedings against Mr Al-Senussi.⁷² In sum, the question of whether the Chamber’s rejection of the Defence arguments in light of its interpretation of article 95 of the Statute was correct significantly affects both the fairness and the expeditiousness of the proceedings.

45. The Chamber takes note of the Prosecutor’s submission that in the Decision, together with rejecting as irrelevant the Defence arguments, the Chamber also considered that the approach it adopted would not prejudice the rights of the Defence.⁷³ However, the Chamber is of the view that the argument that an issue affects the fairness of the proceedings within the meaning of article 82(1)(d) of the Statute cannot be refuted on the mere ground that the Chamber, in resolving the matter for which leave to appeal is requested, had concluded that the rights of the Defence were not prejudiced.

46. Finally, the Chamber is of the view that an immediate resolution of the Second Issue may materially advance the proceedings, in that a prompt remedy would be necessary to cure, at this stage, any possible error of the

⁷⁰ *Ibid.*, para. 11.

⁷¹ Appeals Chamber, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence”, 3 May 2011, ICC-01/05-01/08-1386, para. 55.

⁷² See for a similar approach Trial Chamber V(A), Decision on Prosecution’s Application for Leave to Appeal the “Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial”, 18 July 2013, ICC-01/09-01/11-817, para. 23.

⁷³ Prosecutor’s Response, paras 20 and 28, with reference to paras 37 and 40 of the Decision.

Decision which would affect the legitimacy of Libya's postponement of the execution of the Surrender Request.

47. On the basis of the above, the Chamber is persuaded that the Second Issue meets the requirement under article 82(1)(d) of the Statute. Leave to appeal the Decision with respect to the Second Issue is therefore granted.

C. The Third Issue

48. The Third Issue, as identified by the Defence, relates to "[t]he 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".⁷⁴

The Defence Application

49. The Defence asserts that on 9 January 2013 and 19 March 2013, it "specifically requested that Mauritania's violations of the ICC's orders be addressed by the Chamber and that Mauritania should be referred to the Security Council in light of its failure to comply with the ICC's orders".⁷⁵

50. According to the Defence, in rejecting the Defence applications, "the Chamber has failed to address and consider at all the Defence's arguments and requests concerning Mauritania's violations which were the subject of the Defence's Applications".⁷⁶ The Defence therefore submits that "the Chamber's failure to consider and decide on this matter should be considered by the Appeals Chamber",⁷⁷ otherwise "the Decision will remain defective and the issue will be unresolved".⁷⁸

⁷⁴ Defence Application, para. 8(iii).

⁷⁵ *Ibid.*, para. 34.

⁷⁶ *Ibid.*, para. 35.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*, para. 36.

The Prosecutor's Response

51. The Prosecutor submits that the Third Issue does not arise from the Decision, given that “[t]he referral of Mauritania to the Security Council for its alleged violations is not a matter that has been ‘dealt with in the relevant decision’”.⁷⁹ Furthermore, according to the Prosecutor, “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) of the Statute”.⁸⁰

52. Finally, the Prosecutor observes that “the Defence does not explain how this issue satisfies the other requirements of Article 82(1)(d)”.⁸¹

Conclusions of the Chamber

53. On 9 January 2013, the Defence requested, *inter alia*, that the Chamber order Mauritania to provide observations in respect of its failure to cooperate with the Court by extraditing Mr Al-Senussi to Libya in violation of its alleged binding international obligations.⁸² On 6 February 2013, the Chamber reserved its right to consider this matter “in due course”.⁸³ On 19 March 2013, the Defence of Mr Al-Senussi requested the Chamber to make a finding of non-cooperation by Mauritania and refer the matter to the Security Council.⁸⁴ In the Decision, the Chamber did not address the alleged conduct of Mauritania, and the Defence request for a finding of non-cooperation was not entertained. Every aspect of the Decision (its title,⁸⁵ the operative part,⁸⁶ the

⁷⁹ *Ibid.*, para. 30.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*, para. 31.

⁸² ICC-01/11-01/11-248.

⁸³ Pre-Trial Chamber I, Decision on the “Urgent Application on behalf of Abdullah Al-Senussi for Pre-Trial Chamber to order the Libyan Authorities to comply with their obligations and the orders of the ICC”, 6 February 2013, ICC-01/11-01/11-269, para. 23.

⁸⁴ ICC-01/11-01/11-304, paras 50, 51(v) and 51(vi).

⁸⁵ The full title of the Decision is indeed “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

summary of the Defence submissions⁸⁷ and the Chamber's analysis thereof⁸⁸) reveals plainly that the matter *sub judice* was exclusively the Defence request to make a finding of non-cooperation by Libya. As the Chamber announced in its decision of 6 February 2013, the matter was to be addressed "in due course". It is therefore unfounded for the Defence to aver that the matter would not be considered separately or at a later stage.⁸⁹

54. Therefore, the Third Issue does not refer to any matter which has been dealt with in the Decision and does not arise therefrom. Accordingly, leave to appeal the Decision in respect of the Third Issue must be rejected.

55. In any case, with a view to ultimately disposing of this matter that has been raised again by the Defence, the Chamber issues, simultaneously with the present decision, a decision addressing the Defence request to make a finding of non-cooperation by Mauritania and refer the matter to the Security Council.

D. The Fourth Issue

56. The Fourth Issue, as identified by the Defence, relates to "[t]he 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".⁹⁰

Statute and related Defence request to refer Libya to the UN Security Council" (emphasis added).

⁸⁶ In the operative part of the Decision, the Chamber "reject[ed] the request of the Defence to make a finding of non-cooperation by Libya and refer the matter to the Security Council" (emphasis added).

⁸⁷ Decision, para. 21 which contains a summary of the Defence arguments in support of its "submission that Libya's non-compliance with its obligation *vis-à-vis* the Court also warrants a referral of Libya's conduct to the Security Council" (emphasis added).

⁸⁸ Decision, paras 43 to 45. At paragraph 43, after recalling the relevant background, the Chamber explicitly stated: "[t]he present determination is therefore limited to whether Libya should be referred to the Security Council" (emphasis added).

⁸⁹ Defence Application, para. 35.

⁹⁰ Defence Application, para. 8(iv).

The Defence Application

57. In essence, the Defence asserts that, in the Decision, the 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”, and “did not even address whether Libya had violated the ICC’s orders and did not make any findings on this matter as requested by the Defence”.⁹¹

58. According to the Defence, “the Chamber’s failure to address the arguments relied on by the Defence and to give any reasons for refusing to refer Libya to [the] Security Council has deprived Mr. Al-Senussi of the benefit of fair proceedings”.⁹² The Defence therefore submits that “without the Appeals Chamber’s intervention, the resolution of this issue will not be advanced, further delays will result, and the integrity of the proceedings will remain in question”.⁹³

The Prosecutor’s Response

59. The Prosecutor submits that the Fourth Issue is “a mere disagreement with the findings of the Chamber”.⁹⁴ The Prosecutor indeed recalls that “the [...] Decision contains a detailed analysis of whether Libya should be referred to the Security Council” and observes that “[t]he 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”.⁹⁵

⁹¹ *Ibid.*, para. 38.

⁹² *Ibid.*, para. 40.

⁹³ *Ibid.*, para. 43.

⁹⁴ Prosecutor’s Response, para. 33.

⁹⁵ *Ibid.*

60. Furthermore, according to the Prosecutor, the Fourth Issue does not significantly affect the fair conduct of the proceedings, as the Chamber's analysis in the Decision makes the Fourth Issue "premature".⁹⁶ Finally, the Prosecutor notes that "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."⁹⁷

Conclusions of the Chamber

61. In the Decision, the Chamber addressed the Defence request to make a finding of non-cooperation by Libya on three grounds.⁹⁸ The Chamber considered the arguments advanced by the Defence and decided, in light of all the information before it, not to make a finding of non-cooperation by Libya,⁹⁹ since this was deemed to be "unwarranted"¹⁰⁰ and "of no benefit".¹⁰¹ The Defence takes issue with this determination by purporting that in the exercise of its discretion the Chamber did not give weight or make reference to the arguments provided by the Defence and, by extension, "did not provide any reasons"¹⁰² for its final conclusion.

62. The Chamber considers that, in principle, the issue of whether a decision involving an element of discretion provides insufficient reasons elucidating the Chamber's exercise of its discretion may qualify as an appealable issue. However, for the reasons set out below, the Chamber is not persuaded that the Fourth Issue, as presented by the Defence, arises from the Decision.

⁹⁶ *Ibid.*, para. 34.

⁹⁷ *Ibid.*, para. 35.

⁹⁸ Decision, para. 41.

⁹⁹ Decision, paras 41 to 45.

¹⁰⁰ *Ibid.*, paras 44 and 45.

¹⁰¹ *Ibid.*, para. 45.

¹⁰² Defence Application, para. 38.

63. The Fourth Issue is inherently predicated upon the assumption that the Chamber provided no reason for its decision not to make a finding of non-cooperation by Libya and refer the matter to the Security Council.

64. This assumption is however incorrect. It is clear from the relevant part of the Decision¹⁰³ that the decision to reject the request to make a finding of non-cooperation by Libya for not having surrendered Mr Al-Senussi to the Court was taken in light of Libya's entitlement to postpone the execution of the Surrender Request upon filing of the Admissibility Challenge which was addressed in the first part of the Decision.¹⁰⁴ In relation to Libya's outstanding failure to organise a legal visit to Mr Gaddafi, the decision not to make a finding of non-cooperation by Libya was instead predicated on considerations as to the status of the arrangements between Libya and the Court.¹⁰⁵ On this latter point, the Chamber additionally clarified that "[s]hould the circumstances ultimately evolve into indicating that Libya will fail to cooperate with the Court in the arrangement of the privileged visit to Mr 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".¹⁰⁶

65. In these circumstances, the issue as presented by the Defence, namely whether the Chamber's erred in rejecting the request to refer Libya to the Security Council "without providing any reasons for its decision",¹⁰⁷ merely constitutes an abstract legal question rather than a subject arising from the Decision. Accordingly, it is unnecessary for the Chamber to determine whether the Fourth Issue has the potential to significantly affect the fair and expeditious conduct of the proceedings against Mr Al-Senussi or the outcome of the trial.

¹⁰³ Decision, paras 42 to 44.

¹⁰⁴ *Ibid.*, paras 19 to 22.

¹⁰⁵ *Ibid.*, para. 45.

¹⁰⁶ *Ibid.*

¹⁰⁷ Defence Application, para 8(iv).

66. Leave to appeal the Decision with respect to the Fourth Issue is therefore rejected.

FOR THESE REASONS, THE CHAMBER

GRANTS the Defence of Mr Al-Senussi leave to appeal the Decision in relation to the Second Issue proposed for appeal, namely “[t]he 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”; and

REJECTS the remainder of the Defence Application.


Done in both English and French, the English version being authoritative.



Judge Silvia Fernández de Gurmendi
Presiding Judge



Judge Hans-Peter Kaul



Judge Christine Van den Wyngaert

Dated this Wednesday, 28 August 2013
At The Hague, The Netherlands