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**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***

**OPCV's observations on "Libyan Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi"**

**Source:** Office of Public Counsel for Victims

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

**The Office of the Prosecutor**

Ms. Fatou Bensouda

**Counsel for the Defence**

Mr. Xavier-Jean Keïta

Ms. Melinda Taylor

**Legal Representatives of Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for Participation/Reparation**

**The Office of Public Counsel for Victims**

Ms. Paolina Massidda

Ms. Sarah Pellet

Mr. Mohamed Abdou

**The Office of Public Counsel for the Defence**

**States Representative**

**Amicus Curiae**

Professor Ahmed El-Ghani

Professor Philippe Sands QC

Professor Payam Akhavan

Ms. Michelle Butler

**REGISTRY**

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**Registrar & Deputy Registrar**

**Defence Support Section**

Ms. Silvana Arbia & Mr. Didier Preira

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section**

**Other**

## I. PROCEDURAL HISTORY

1. On 1 May 2012, the Government of Libya filed an Application pursuant to article 19 of the Rome Statute, whereby it requested the Chamber to: (i) postpone execution of the Surrender Request pursuant to article 95 of the Rome Statute and (ii) declare the case inadmissible and quash the Surrender Request (the “Admissibility Challenge”).<sup>1</sup>

2. On 4 May 2012, the Pre-Trial Chamber (“Chamber”) issued the “Decision on the Conduct of the Proceedings Following the ‘Application on behalf of the Government of Libya pursuant to Article 19 of the Statute’” wherein it decided, *inter alia*, to appoint, for the purpose of the admissibility proceedings, Paolina Massidda from the Office of Public Counsel for Victims (the “OPCV”) as legal representative of victims who have already communicated with the Court in relation to the case.<sup>2</sup>

3. On 15 May 2012, the Chamber issued the “Decision on the OPCV ‘Request to access documents in relation to the Challenge to the Jurisdiction of the Court by the Government of Libya’”, granting access to the OPCV to the following confidential documents ICC-01/11-01/11-130-Conf, ICC-01/11-01/11-130-Conf-AnxC, ICC-01/11-01/11-130-Conf-AnxD, ICC-01/11-01/11-130-Conf-AnxE, ICC-01/11-01/11-130-Conf-AnxF and ICC-01/11-01/11-130-Conf-AnXI.<sup>3</sup>

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<sup>1</sup> See the “Application on behalf of the Government of Libya pursuant to Article 19 of the Statute”, No. ICC-01/11-01/11-130-Red, 1 May 2012, paras. 107 and 108 (the “Admissibility Challenge”).

<sup>2</sup> See the “Decision on the Conduct of the Proceedings Following the ‘Application on behalf of the Government of Libya pursuant to Article 19 of the Statute’” (Pre-Trial Chamber I), No. ICC-01/11-01/11-134, 4 May 2012, par. 13. See also the “Notification of appointment of the Office of Public Counsel for Victims as legal representative of victim applicants in relation to the Admissibility Challenge pursuant to Article 19 of the Rome Statute”, No. ICC-01/01-01/11-161, 30 May 2012.

<sup>3</sup> See the “Decision on the OPCV ‘Request to access documents in relation to the Challenge to the Jurisdiction of the Court by the Government of Libya’” (Pre-Trial Chamber I), No. ICC-01/11-01/11-147, 15 May 2012.

4. On 4 June 2012, the OPCV filed “Observations on behalf of victims on the Government of Libya’s Application pursuant to Article 19 of the Rome Statute”. The OPCV requested the Pre-Trial Chamber “to reject the Admissibility Challenge and to find that, for the time being, the case is admissible before the International Criminal Court.”<sup>4</sup>

5. On 7 December 2012, the Chamber issued the “Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi”,<sup>5</sup> in which it requested the Government of Libya to submit further information and evidence on several issues concerning the admissibility of the case by 23 January 2013, and authorized, *inter alia*, the OPCD and the OPCV to respond to these submissions by 11 February 2013.<sup>6</sup>

6. On 23 January 2013 the Libyan Government filed further submissions (the “Libya’s Submissions”) together with 23 annexes. These submissions and 7 of its annexes were filed confidential and *ex parte* (Pre-Trial Chamber and Prosecution only). A public redacted version of said submissions, together with 16 public annexes, was made available to the OPCV. A public redacted version was filed on the same day.<sup>7</sup>

7. On 29 January 2013, the OPCD filed the “Urgent Defence request to dismiss Libya’s Submissions”.<sup>8</sup> The OPCD requested the Chamber to: (i) dismiss the Government of Libya’s further submissions on issues related to the admissibility of

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<sup>4</sup> See the “Observations on behalf of victims on the Government of Libya’s Application pursuant to Article 19 of the Rome Statute”, No. ICC-01/11-01/11-166-Red, 4 June 2012, p. 24.

<sup>5</sup> See the “Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi”, No. ICC-01/11-01/11-239, 7 December 2012.

<sup>6</sup> *Idem*, p. 23.

<sup>7</sup> See the “Libyan Government’s further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi”, No. ICC-01/11-01/11-258-Red2, 23 January 2013 (the “Libya’s Submissions”).

<sup>8</sup> See the “Public Redacted Version of the “Urgent Defence Request to Dismiss ‘Libyan Government’s further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi’”, No. ICC-01/11-01/11-261-Red, 29 January 2013.

the case against Saif Al-Islam Gaddafi; and (ii) issue an immediate decision on the admissibility of the case.

8. On 30 January 2012, the Chamber issued the “Decision concerning Libya’s *ex parte* submission of evidence relevant to its challenge to admissibility of the case against Saif Al-Islam Gaddafi”.<sup>9</sup> The Chamber found it appropriate to notify the OPCD of the annexes currently classified as ‘*ex parte*’ in Libya’s Submissions. However it considered appropriate to give Libya the opportunity to apply “*discrete redactions, if any, to the concerned material, providing a justification for why each of those redactions is asserted to be necessary vis-à-vis the OPCD*”.<sup>10</sup> The Chamber added that “[u]pon receipt of the proposed redactions, if any, together with the explanations thereof, the Chamber will determine whether these redactions vis-à-vis the OPCD are warranted”.<sup>11</sup>

9. On 7 February 2013, the Chamber issued the “Decision on the ‘Libyan Government's proposed redactions to ICC-01/01-01/11-258-Conf-Exp and Annexes 4,5,6,7,15,16 and 17’”<sup>12</sup> deciding that “*in the absence of a proper reason justifying the contrary, the OPCV should in principle be given access to the relevant material [...] with the same redactions hereby authorised by the Chamber vis-à-vis the OPCD*”<sup>13</sup> and consequently extended the deadline originally set up to provide any response to Libya’s Submissions by 18 February 2013.<sup>14</sup>

10. On 8 February 2013, Libya filed a confidential version of its Submissions, filed as annex 1 and the confidential redacted version of annexes 4, 15 and 16.<sup>15</sup>

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<sup>9</sup> See the “Decision concerning Libya’s *ex parte* submission of evidence relevant to its challenge to admissibility of the case against Saif Al-Islam Gaddafi”, No. ICC-01/11-01/11-262, 30 January 2013.

<sup>10</sup> *Idem*, par. 14.

<sup>11</sup> *Ibid.*

<sup>12</sup> See the “Decision on the ‘Libyan Government's proposed redactions to ICC-01/01-01/11-258-Conf-Exp and Annexes 4, 5, 6, 7, 15, 16 and 17’”, No. ICC-01/11-01/11-271-Red, 7 February 2013.

<sup>13</sup> *Idem*, paras. 17 and 18.

<sup>14</sup> *Ibid.*, par. 19.

<sup>15</sup> See ICC-01/11-01/11-258-Conf-Red3, ICC-01/11-01/11-258-Conf-Anx4-Red2; ICC-01/11-01/11-258-Conf-Anx15-Red2; ICC-01/11-01/11-258-Conf-Anx16-Red2.

11. On 11 February 2013, the Government of Libya filed a compilation the relevant Libyan laws referred to in its Submissions of 23 January 2013.<sup>16</sup>

12. On 12 February 2013, the Prosecution filed the “Prosecution’s Response to ‘Libyan Government’s further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi’”<sup>17</sup> establishing that Libya “*has not provided sufficient supporting evidence to demonstrate that it is investigating the same case as before the ICC*”.<sup>18</sup>

13. The Principal Counsel of the OPCV hereby submits her observations on behalf of victim-applicants in this case and generally on behalf of victims who have communicated with the Court in relation to the case in accordance with the decision of the Pre-Trial Chamber dated 7 February 2013.<sup>19</sup>

## II. SUBMISSIONS ON BEHALF OF VICTIMS

14. First, concerning the assertions advanced by Libya concerning the applicable law on admissibility proceedings<sup>20</sup>, the Principal Counsel submits that the Government misconstrued the admissibility test as provided for in article 17(1)(a) of the Rome Statute by suggesting that the burden of proof lies with the applicant only with respect to establishing the existence of national proceedings.<sup>21</sup> This claim is legally incorrect and seeks to inappropriately shift the burden of proof from the applicant to other parties and participants. Therefore, the

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<sup>16</sup> See the “Libyan Government’s filing of additional provisions from Libyan Criminal Code and Libyan Criminal Procedure Code referred to in its 23 January 2013 Submission which were not referred to in its 1 May 2012 Admissibility Challenge”, No. ICC-01/11-01/11-273, 11 February 2013.

<sup>17</sup> See the “Prosecution’s Response to ‘Libyan Government’s further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi’”, No. ICC-01/11-01/11-276-Conf-Red, 12 February 2013.

<sup>18</sup> *Idem*, par. 45.

<sup>19</sup> See the “Decision on the ‘Libyan Government’s proposed redactions to ICC-01/01-01/11-258-Conf-Exp and Annexes 4, 5, 6, 7, 15, 16 and 17’”, *supra* note 12.

<sup>20</sup> See Libya’s Submissions, *supra* note 7, paras. 5 to 46.

<sup>21</sup> *Idem*, paras. 11-12 and 19-20.

Principal Counsel contends that Libya bears the burden to prove both elements of the admissibility test.

15. Furthermore, the Principal Counsel cannot agree with the proposed “*balance of probabilities standard*” urged by the Government.<sup>22</sup> Indeed, the adoption by the Chamber of any lower standard than that of “*clear and convincing evidence*” would frustrate the object and purpose of the Rome Statute, namely to “*put end to impunity*”.

16. Finally, the Government’s contention that it is not required to show that the exact “same conduct” is being investigated at the national level<sup>23</sup> is meritless. The Principal Counsel maintains that the term “conduct” must be interpreted as incident-specific. A State must therefore demonstrate that it is effectively investigating or prosecuting the same allegations as charged before the ICC in order to meet the inadmissibility threshold under article 17 of the Rome Statute.

#### **A. The Improper Timing of the Admissibility Challenge**

17. The Principal Counsel wishes to reiterate her position in relation to the untimely filing of the Admissibility Challenge by Libya.<sup>24</sup> The Principal Counsel submits that the Admissibility Challenge, as filed on 1 May 2012, was premature and that, on this basis alone, should be rejected.

18. Nowhere does the Statute suggest, or imply, that a State or other applicant should be permitted to incrementally file information as and when it deems fit. Notwithstanding, in the present case, the party who challenges the admissibility of the case is the State, which is assumed to have in its possession all the information

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<sup>22</sup> *Ibid.*, paras. 21 to 26.

<sup>23</sup> *Ibid.*, par. 27.

<sup>24</sup> This position was developed during the hearing held on 9-10 October 2012. See No. ICC-01/11-01/11-T-2-RED-ENG ET, 9 October 2012, p. 66, lines 17 *et seq.*

and evidence necessary to demonstrate whether or not a genuine investigation is ongoing at the national level. Hence, if an application pursuant to article 19 of the Rome Statute is premature or incomplete, it ought to be rejected.

19. This approach also accords with the procedural framework set out in rule 58(1) of the Rules of Procedure and Evidence which prescribes that admissibility challenges “*shall be in writing* and contain the basis for it”.<sup>25</sup> On this particular issue, Libya indicated that the Admissibility Challenge was lodged in order to avoid handing over Mr. Gaddafi to the Court, by postponing the execution of the surrender request.<sup>26</sup> Thus, Libya implicitly acknowledged that, at the time the Admissibility Challenge was filed, there were no – or very little – investigative activities ongoing in Libya as regards Mr. Gaddafi’s case, not to mention the relevance thereof.

20. Moreover, the Government cannot legitimately claim any compelling reason for having waited some seven months after the initial filing of the Admissibility Challenge to submit evidence that is critical to its correct determination by the Court. As the moving party, Libya determined the timing of its own Application and should have known whether or not grounds existed for the motion to be granted.

## **B. Burden and Standard of Proof**

21. The Rome Statute does not contemplate the standard or the burden of proof to be applied for the purpose of the determination of challenges pursuant to articles 17 and 19. In this regard, the Principal Counsel makes the following submissions.

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<sup>25</sup> We underline.

<sup>26</sup> See ICC-01/11-01/11-T-3-Red-ENG WT, 10 October 2012, p. 44 (line 12) to p.45 (line 2).

***1. Libya must establish both its ability and willingness to carry out genuine national proceedings***

22. Libya's position appear to be that, with respect to admissibility challenges, the burden of proof lies with the State only in so far as it relates to establishing the existence of a "case" at the national level.<sup>27</sup> As for the second limb of article 17(1)(a) of the Rome Statute (*i.e.* unwillingness and/or inability), Libya asserts that the burden of proof rests with the party alleging flaws in the national investigation or prosecution.<sup>28</sup>

23. In fact, this position is based upon the erroneous premise that the existence of a national investigation is *per se* sufficient to render a case inadmissible before the ICC. This statement directly contradicts the jurisprudence of the Appeals Chamber, which requires consideration of both elements of article 17(1)(a) of the Rome Statute (*i.e.* the existence of the investigation and the willingness/ability element) before declaring a case inadmissible.

24. In the two Kenyan cases, the Appeals Chamber emphasized that:

*"determining the existence of an investigation must be distinguished from assessing whether the State is unwilling or unable genuinely to carry out the investigation or prosecution, which is the second question to consider when determining the admissibility of a case".<sup>29</sup>*

25. Likewise, in the *Katanga and Ngudjolo Chui* case, the Appeals Chamber held that:

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<sup>27</sup> See Libya's Submissions, *supra* note 7, par. 12.

<sup>28</sup> *Idem*, paras. 19 and 20.

<sup>29</sup> See the "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'", No. ICC-01/09-01/11-307, 30 August 2011, par. 41 (the "Kenya 1 Admissibility Judgment") and the "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'" (Appeals Chamber), No. ICC-01/09-02/11-274, 30 August 2011, par. 40 (the "Kenya 2 Admissibility Judgment").

*“in considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability”.<sup>30</sup>*

26. The Principal Counsel therefore submits that the Appeals Chamber’s finding that *“a State that challenges the admissibility of a case bears the burden of proof to show that the case is inadmissible”*<sup>31</sup> must be read in light of the foregoing jurisprudence. Accordingly, the Court cannot declare a case inadmissible unless it is satisfied that the State is genuinely able and willing to carry out investigative proceedings. Whenever the ability and/or the willingness of a State is/are at issue (*i.e.* contested by a party or a participant), it is also for the State to establish the requisite elements of law and facts substantiating its claim that the case is inadmissible.

27. Moreover, the reference by the Libyan Government to Mr. Cheng’s academic commentary is largely taken out of its context.<sup>32</sup> The Government relies upon this commentary to assert that it *“is a general principle of international law that the sovereign acts of a State within its domestic jurisdiction are presumed to be valid unless otherwise established”*.<sup>33</sup> It should be noted that this thesis was formulated long before the establishment of the International Criminal Court, namely in 1953. At the time, the presumption of regularity and validity of acts of States was essentially based on the idea that international State responsibility is not to be presumed and that, accordingly, the burden of proof lies with the party or participant asserting

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<sup>30</sup> See the “Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case”, No. ICC-01/04-01/07-1497, 25 September 2009, par. 78.

<sup>31</sup> See the Kenya 1 Admissibility Judgment, *supra* note 29, par. 2 and the Kenya 2 Admissibility Judgment, *supra* note 29, par. 2.

<sup>32</sup> See Libya’s Submissions, *supra* note 7, par. 20.

<sup>33</sup> *Idem*, par. 20.

the violation giving rise to responsibility.<sup>34</sup> There is no logical or legal basis for extending this reasoning to admissibility proceedings before the Court. Indeed, the State is not party to the criminal litigation<sup>35</sup> and the Court's statutory provisions expressly preclude the possibility to engage the responsibility of a State.<sup>36</sup>

28. Moreover, the presumption in favor of the validity of acts of States, even if recognized and accepted in certain areas of international law, cannot be advanced in order to override the established rules governing the allocation of burden before the ICC. The Libyan situation was referred to the Court pursuant to a UN Security Council resolution<sup>37</sup> and, as a result, Libyan authorities *"shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to [said] resolution"*.<sup>38</sup> Moreover, the inapplicability of the general principles on State responsibility to matters regulated by special treaties is confirmed by the Articles on Responsibility of States for Internationally Wrongful Act, which provide that:

*"These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law"*.<sup>39</sup>

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<sup>34</sup> See FAIRLIE (M.) and POWDERLY (J.), "Complementarity and burden allocation", in STAHN (C.) and EL ZEIDY (M.) (Ed.), *The International Criminal Court and Complementarity: from theory to practice*, Cambridge University Press, 2011, p. 650.

<sup>35</sup> In particular, see article 25(2) of the Rome Statute which provides: *"The Court shall have jurisdiction over natural persons pursuant to this Statute"* (we underline).

<sup>36</sup> In particular, see article 25(4) of the Rome Statute which reads as follows: *"No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law."*

<sup>37</sup> See Resolution 1970, S/RES/1970, 26 February 2011, paras. 4 to 8. This resolution is available at the following address:

<http://www.icc-cpi.int/NR/rdonlyres/081A9013-B03D-4859-9D61-5D0B0F2F5EFA/0/1970Eng.pdf>.

<sup>38</sup> *Idem*, par. 5.

<sup>39</sup> See Article 55, "Responsibility of States for Internationally Wrongful Acts", Report of the International Law Commission on the work of its fifty-third session, *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 140. See also UN General Assembly Resolution 56/83 adopted on 12 December 2001, A/56/49(Vol. I)/Corr.4. This resolution is available at the following address: [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/56/83&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/56/83&Lang=E).

**2. *Libya must establish that the “case” is being investigated through “clear and convincing evidence”***

29. As pointed out *supra*, the Rome Statute does not articulate the standard of proof to be applied for the purposes of articles 17 and 19.<sup>40</sup> Contrary to Libya’s submissions, the Principal Counsel argues that the appropriate standard of proof to be applied is that of “*clear and convincing evidence*”.

30. The Government of Libya contends that, with respect to the first limb of article 17(1)(a) of the Rome Statute, the Chamber should apply the “balance of probabilities” standard.<sup>41</sup> The proposed standard requires merely that “*the evidence adduced by one party on the basis of reasonable probability weighs heavier than the evidence produced by the other side.*”<sup>42</sup> The Government further contends that the Appeals Chamber did not “*suggest a particularly onerous standard*”<sup>43</sup> and that the complementarity principle supports the proposition that a heightened standard of proof is not merited.<sup>44</sup>

31. The Principal Counsel submits that these assertions are unfounded and derive from a misleading interpretation of the jurisprudence of the Appeals Chamber. Indeed, the latter never had the opportunity to define the standard of proof to be applied when considering challenges made by States to the admissibility of a case before the Court. In both *Muthaura et al.* and *Ruto et al.* cases, the Appeals Chamber found that the applicant-State had “*provided no evidence*” to demonstrate the existence of a national investigation,<sup>45</sup> and concluded that “*there must be evidence with probative value*”.<sup>46</sup> The Appeals Chamber therefore did not consider the standard of proof to be applied as regard complementarity, for the

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<sup>40</sup> See *supra* par. 2121.

<sup>41</sup> See Libya’s Submissions, *supra* note 7, par. 17.

<sup>42</sup> *Idem*, par. 18.

<sup>43</sup> *Ibid.*, par. 16

<sup>44</sup> *Ibid.*, par. 18

<sup>45</sup> See the Kenya 1 Admissibility Judgment, *supra* note 29, par. 69 and the Kenya 2 Admissibility Judgment, *supra* note 29, par. 68.

<sup>46</sup> *Idem*, par. 63.

very reason that it found that there was no evidence presented at all and therefore did not even touch upon the issue of the standard to be applied for their evaluation.

32. Moreover, the Government of Libya's reliance on Trial Chamber III's "Decision on the Admissibility and Abuse of Process Challenges" is misleading.<sup>47</sup> A careful review of said decision shows that the Trial Chamber's analysis was limited to article 19(2)(a) of the Rome Statute, namely to challenges made by an accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58 of the Rome Statute. In reaching the conclusion that the appropriate standard of proof under article 19(2)(a) of the Rome Statute is that of "*balance of probabilities*", the Trial Chamber stated that:

*"the overwhelming preponderance of national and international legal systems apply what is frequently called the "civil standard" of proof (a balance of probabilities) when the burden lies upon the defence in criminal proceedings".<sup>48</sup>*

The Trial Chamber also clarified:

*"it is critical to bear in mind that these are criminal proceedings, and it would be unjust to impose a variable standard of proof on the accused, depending on the seriousness of the application that he is making".<sup>49</sup>*

33. Thus, it is clear that the Trial Chamber's determination in the *Bemba* case was primarily guided by the need to ensure that the accused's right to a fair trial was fully respected, and that his interests throughout the admissibility proceedings were preserved. These considerations are clearly irrelevant to the determination of

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<sup>47</sup> See the "Decision on the Admissibility and Abuse of Process Challenges" (Trial Chamber III), No. ICC-01/05-01/08-802, 24 June 2010, par. 203.

<sup>48</sup> *Idem* (we underline).

<sup>49</sup> *Ibid.*

an admissibility challenge brought by a State, pursuant to article 19(2)(b) of the Rome Statute.

34. Rather, the Principal Counsel contends that, for the purpose of the present case, the appropriate standard of proof is that of “*clear and convincing evidence*”. In this respect, she finds it useful to refer to the components of said standard as set out in the Prosecution’s submission in the *Bemba* case:

*“The clear and convincing standard requires that the party or participant making the assertions is capable of establishing the truth of the allegations in a convincing manner and that the Court satisfies itself that the claim is well founded in fact and law and that the facts on which it the claim is based are supported by convincing evidence. The evidence need not point to absolute certainty as such, but must be convincing. Therefore, this standard is lower than ‘proof beyond a reasonable doubt’ but higher than ‘proof on the preponderance of evidence’”.*<sup>50</sup>

35. The adoption of the “*clear and convincing*” standard in relation to admissibility challenges made by States is supported by both logical and legal reasons.

36. The legal reason relates to the object and purpose of the Statute, as well as to the different dimensions of the complementarity principle. As argued by Libya, complementarity may serve as basis for suggesting that “*States have the primary responsibility to exercise criminal jurisdiction*”.<sup>51</sup> However, this is only one of the several aspects of complementarity as enshrined in the Rome Statute. A more comprehensive definition of complementarity was provided by the Appeals Chamber in the *Katanga* case and reads as follows:

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<sup>50</sup> See the “Prosecution’s Response to Motion Challenging the Admissibility of the Case by the Defence for Jean-Pierre Bemba Gombo pursuant to Articles 17 and 19(2)(a) of the Rome Statute”, No. ICC-01/05-01/08-739, 29 March 2010, par. 43. (footnotes omitted)

<sup>51</sup> See Libya’s Submissions, *supra* note 7, par. 18.

*“[Complementarity] strikes a balance between safeguarding the primacy of domestic proceedings vis-à-vis the International Criminal Court on the one hand, and the goal of the Rome Statute to ‘put an end to impunity’”.*<sup>52</sup>

37. The Appeals Chamber therefore made it clear that any interpretation of article 17 of the Rome Statute must be consistent with the Statute’s overall purpose, namely to put an end to impunity.<sup>53</sup> If States were only required to prove on a preponderance of evidence the inadmissibility of a case (*i.e.* that the existence of an investigation is more probable than not), this would result in the Court finding that the case is inadmissible without being persuaded that the case is genuinely pursued at the national level. Such a result would clearly be contrary to the object and purpose of the Rome Statute. *A contrario*, the adoption of the “*clear and convincing standard*” enables the relevant Chamber to make a thorough assessment of the evidence presented by the parties and participants. The Chamber will also be in a better position to probe the nuances of each argument and submission put forward before reaching a decision.

38. The logical reason for requiring an “enhanced” evidential standard relates to the specific nature of States’ challenges. States challenging admissibility under article 19 of the Rome Statute must necessarily be conducting investigations or prosecutions at the national level. National judicial authorities responsible for investigation and prosecution of criminal offences have full control over the national proceedings. They also have unfettered access to the evidence gathered and as such, are best placed to assist the Court in its determination of the admissibility of a case. Thus, if a State is genuinely pursuing a case, it ought to have little difficulty to provide the Court with clear and convincing evidence showing that the case is inadmissible.

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<sup>52</sup> See the “Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case”, *supra* note 30, par. 85.

<sup>53</sup> *Idem*, par. 83.

### C. “Same Conduct” test

39. The Principal Counsel disputes Libya’s assertions that national investigations should not necessarily cover “*exactly the same conduct*”.<sup>54</sup> In this respect, she reiterates her position according to which the “*same conduct test*” requires States to investigate the same incidents as alleged in the proceedings before the ICC.<sup>55</sup> Incidentally she notes that said assertions seem, however, to be directly contradicted by the Government’s own submissions. The Government indeed confirms that “*its national investigation covers: (1) the same factual incidents charged as murder and persecution before the ICC; and (2) the same allegations of individual conduct by Mr. Gaddafi which have formed the basis for his alleged participation in crimes by the ICC*”.<sup>56</sup>

40. The “same conduct” approach is also consistent with the Appeals Chamber’s ruling in the *Muthaura et al.* and *Ruto et al.* cases. In those two cases, the Appeals Chamber was called to rule upon the correctness of the Pre-Trial Chamber’s finding that, for the purpose of article 19(2)(a) of the Rome Statute, the national jurisdiction must be investigating “*the same conduct as in the case already before the Court*”.<sup>57</sup> The Appeals Chamber held that the Pre-Trial Chamber committed no error of law in applying the “same conduct” test in the manner it did.<sup>58</sup> In doing so, the Appeals Chamber upheld the Pre-Trial Chamber’s strict approach of “exactly” the same conduct – the conduct as in the case before the ICC. Therefore, it is crystal clear that a State must establish that the same incidents and events are being investigated.

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<sup>54</sup> See Libya’s Submissions, *supra* note 7, par. 27.

<sup>55</sup> See the “Observations on behalf of victims on the Government of Libya’s Application pursuant to Article 19 of the Rome Statute”, *supra* note 4, par. 24-25.

<sup>56</sup> See Libya’s Submissions, *supra* note 7, par. 71 (we underline).

<sup>57</sup> See the Kenya 1 Admissibility Judgment, *supra* note 29, par. 27 and the Kenya 2 Admissibility Judgment, *supra* note 29, par. 26.

<sup>58</sup> *Idem*, par. 47.

41. It is also significant to note that the Appeals Chamber refused to accept, albeit in relation to the “same person”, any variation of the admissibility test on the basis that national authorities may not always have the same evidence available as the ICC Prosecutor.<sup>59</sup> The admissibility test is to be construed as a mean “*to resolve a conflict of jurisdictions between the Court on the one hand and a national jurisdiction on the other*”.<sup>60</sup> In this sense, Libya’s assertions that “*an onerous standard would unreasonably defeat national jurisdiction*” are unwarranted, since the Court may proceed forward with a case only in relation to a conduct not covered by an ongoing investigation at the national level.

42. The interpretation of the “same conduct” as incident-specific is also consistent with the drafting history of the Statute. Indeed, a commentator pointed out that the “*issues underlying the discussions on ne bis in idem were similar to those in the debate of the principle of the complementarity principle*”.<sup>61</sup> Article 20 of the Rome Statute, together with the articles of the Statute dealing with the complementarity principle, were negotiated and approved at the Rome Conference as part of the same “package”.<sup>62</sup> There is therefore a compelling reason to conclude that the intent of the drafters was to apply the same criteria for both articles 17 and 20 of the Rome Statute, which includes the definition of the term conduct. Pursuant to article 20(1) of the Rome Statute, the term conduct is defined as what “*formed the basis of the crimes for which the person has been convicted or acquitted by the Court*”. Moreover, it appears that the addition of the terms “*with respect to the same conduct*” in the *chapeau* of article 20(3) of the Rome Statute, was necessitate by the need to “*clarify that the Court could try someone even if the person had been tried in a national court provided that different conduct was the subject of the prosecution*”.<sup>63</sup>

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<sup>59</sup> *Ibid.*, par. 42.

<sup>60</sup> *Ibid.*, par. 36.

<sup>61</sup> Holmes (J.T.), “The Principle of Complementarity” in Lee (R.L.) (Ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer, 1999, p. 57.

<sup>62</sup> *Idem*, p. 58.

<sup>63</sup> *Ibid.*, p. 59.

43. Libya is therefore required to establish that the same incidents set out in the Pre-Trial Chamber's article 58 Decision<sup>64</sup> are investigated at the national level. In order to do so, Libya must first demonstrate that its domestic criminal legislation permits the prosecution of the criminal conduct punishable under the Rome Statute. In the absence of such domestic legal framework, the Court may decide that a case is admissible as a result of the "incapacity" of the national jurisdiction to provide adequate remedies in the case.

44. This issue has been previously highlighted in the OPCV's submissions dated 4 June 2012.<sup>65</sup> At the time, Libya indicated that it was likely to charge Mr. Gaddafi with ordinary crimes, as the draft law designed to incorporate international crimes into the Libyan law has not been approved.<sup>66</sup>

45. Libya indicated that it initially intended to charge Mr. Gaddafi with the following crimes: intentional murder; torture; incitement to civil war; indiscriminate killings; misuse of authority against individuals; arresting people without just cause; and the unjustified deprivation of personal liberty under articles 368, 435, 293, 296, 431, 433, 434 of the Libyan Criminal Code.<sup>67</sup> The Government now asserts that, since the Admissibility Challenge, the list of charges includes eleven new charges, as follows: articles 195 (insulting constitutional authorities), 202 (devastation, rapine and carnage), 203 (civil war), 211 (conspiracy), 217 (attacks upon the political rights of a Libyan subject), 297 (arson), 362 (spreading disease among plants and livestock), 294 (concealment of a corpse), 322 (aiding members of a criminal association), 429 (use of force to compel another) and 432 (search of persons) of the Criminal Code as well as included in the Sharia

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<sup>64</sup> See the "Decision on the 'Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi'", No. ICC-01/11-01/11-1, 27 June 2011.

<sup>65</sup> See the "Observations on behalf of victims on the Government of Libya's Application pursuant to Article 19 of the Rome Statute", *supra* note 4, par. 29 *et seq.*

<sup>66</sup> See Libya's Submissions, *supra* note 7, paras. 78 to 80.

<sup>67</sup> See the Admissibility Challenge, *supra* note 1, paras. 75 and 84.

law governing retaliation and Diya compensation for killings pursuant to Law No. 7 of 1988.<sup>68</sup>

46. The Principal Counsel recalls that Libya has continuously failed to provide documentary evidence specifying the details of the allegations and charges against Mr. Gaddafi. The Government's assertion as to the total number of charges does not accord with the information contained in the detention orders.<sup>69</sup> Indeed, the Government asserts that Mr. Gaddafi is charged with 18 charges, whereas the detention orders contain a total number of charges of 15. Notwithstanding, Libya does not clarify the reason for this discrepancy.

47. Moreover, Libya attaches a copy of the NTC General Prosecutor Resolution, which provides for the establishment of an investigating committee for the investigation of the members of the former regime.<sup>70</sup> Article 2 of said Resolution stipulates that the mandate of the Investigation Committee shall be limited to three months.<sup>71</sup> This clearly implies that as of 19 December 2012 there has been a situation of inactivity as regards Gaddafi's case, contrary to the Government's submissions.

48. Given this lack of certainty, the Principal Counsel is not in a position to conclude that the scope of the crimes alleged covers the same "conduct" forming the subject-matter of the proceedings before the ICC.

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<sup>68</sup> See Libya's Submissions, *supra* note 7, par. 82.

<sup>69</sup> See Libya's Submissions, *supra* note 7, Annex 9, Public – Extension of Detention Order 30 October 2012 and Annex 10, Public – Extension of Detention Order 13 December 2012.

<sup>70</sup> See Libya's Submissions, *supra* note 7, Annex 18, Public, NTC General Prosecutor Resolution, 19 July 2012.

<sup>71</sup> *Idem*.

### III. SCOPE AND SUBJECT-MATTER OF NATIONAL INVESTIGATIONS

#### A. Victims' participation under Libyan Law

49. Victims who have suffered harm as a result of any crime under Libyan law are entitled to participate in the criminal investigation pursuant to article 173 of the Libyan Code of Criminal Procedure. The victims concerned must apply to the Office of the Prosecutor which shall examine each application and decide, within three days, whether or not the applicant is entitled to participate.<sup>72</sup> In the event the application is rejected, the victim may appeal the Prosecution's decision within three days from the date of notification before the *Chambre d'Accusation*.<sup>73</sup>

50. Moreover, pursuant to article 61 of the Libyan Code of Criminal Procedure, victims, through their lawyer, have the right to participate at the investigation stage and to present evidence. The investigator may however carry out certain investigative steps in the absence of the victims, to the extent that these measures are necessary for the determination of the truth.<sup>74</sup> In the latter case, victims should be notified as soon as these grounds have ceased to exist.<sup>75</sup>

51. Throughout the admissibility proceedings, the Government has avoided addressing any issue related to the participation of victims at the national level. During the October 2012 hearing, Libya has nevertheless commended the role played by the OPCV stating that:

*"The delegation of Libya attaches very great importance to the interests of victims, and irrespective of the differences in relation to*

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<sup>72</sup> See article 173 of the Libyan Code of Criminal Procedure.

<sup>73</sup> *Idem*.

<sup>74</sup> See article 61 of the Libyan Code of Criminal Procedure.

<sup>75</sup> *Idem*.

*the fundamental issue that you are addressing, we recognise the vital importance of the role of victims in this process".<sup>76</sup>*

52. Despite this statement, the Government has failed to indicate the kind of mechanism – not to mention resources – which it intends to put in place in order to ensure a meaningful and effective participation of victims in national proceedings. These issues are arguably of vital importance in light of the Government's assertions that national ownership of trials would provide a unique opportunity *"for reconciliation, democracy, and rule of law"*.<sup>77</sup>

53. The question of victims' participation in Libya is directly relevant to the determination of the admissibility of the case against Mr. Gaddafi before the ICC. First, assessing the efficiency of the system for victims' participation in Libya will enable the Court to better evaluate the Government's ability to give effect to its domestic laws – as part of the overall assessment of the Government's ability. Second, information provided by the Government in relation to the number of participating victims, as well as their origins, gender, age, language, religion, political or other opinion, nationality, wealth and social background and other status, will assist the assessment of public confidence in the national criminal justice system. These indicators will also help understand the overall security situation, as well as the specific potential risks to the safety of victims and witnesses.

#### **B. Lack of specificity of the charges against Mr. Gaddafi**

54. Nowhere in the 23 annexes to Libya's Submissions, or in the 25 annexes to the Admissibility Challenge, is there any specific reference to the precise list of charges against Mr. Gaddafi. The Government simply indicated in a letter addressed to Mr. Gehani that:

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<sup>76</sup> See ICC-01/11-01/11-T-3-CONF-ENG ET, p. 44, lines 8 to 10.

<sup>77</sup> See the Admissibility Challenge, *supra* note 1, paras. 11 *et seq.*

*“The Attorney General Office ha[s] taken into consideration the incidents of murder and persecution outlined in paragraphs 36-65 of the International Criminal court’s ‘Decision on the Prosecutor’s Application pursuant to article 58 as to as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi’”.*<sup>78</sup>

It also asserted that:

*“The Ministry and the Attorney General Office have also taken into consideration the allegations relating to the individual criminal responsibility of Saif Al-Islam Gaddafi in the 27 June 2011 Decision”.*<sup>79</sup>

55. Similarly, the two orders for extension of detention do not provide even basic information about the nature of the charges or the allegations brought against the suspect<sup>80</sup>, but merely contain a reference to unspecified charges and incidents.<sup>81</sup>

56. In light of this repeated lack of specificity, and in the absence of a detailed list of charges and allegations, it is impossible for the Chamber, the parties and participants to determine whether the Libyan authorities are investigating the same conduct as in the case before the ICC.

57. The Principal Counsel notes that Libya has provided some samples of evidential material which it says demonstrate the existence of genuine investigations.<sup>82</sup> These “samples” consist mainly of witness testimonies, phone intercepts and flight documentation.<sup>83</sup> They refer to very particular – and limited – facts and events. This evidential material, notwithstanding its probative value, may therefore only be used to show that some kind of investigative measures are finally

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<sup>78</sup> See Libya’s Submissions, *supra* note 7, Annex 3, Ministry of Justice letter relating to contours of investigation.

<sup>79</sup> *Idem*.

<sup>80</sup> *Ibid.*, Annex 9, Public – Extension of Detention Order 30 October 2012 and Annex 10, Public – Extension of Detention Order 13 December 2012.

<sup>81</sup> *Idem*.

<sup>82</sup> See Libya’s Submissions, *supra* note 7, par. 29.

<sup>83</sup> *Idem*, Annexes 4 to 7 and 15 to 17.

taking place. However, it does not, in any way, demonstrate that the “same conduct” is being investigated. In these circumstances, it is impossible even to infer the contours of the national investigation from the evidentiary material adduced by Libya.

58. In light of the above, the Principal Counsel submits that Libya has failed, once again, to present sufficient evidence to establish that it is investigating the “same conduct”, let alone that the said investigation is genuine.

### C. The issue of public officer

59. The Government now confirms that the status of public officer is a requisite element for several crimes with which Mr. Gaddafi is likely to be charged.<sup>84</sup> This is particularly the case for the crimes of torture, misuse of authority against individuals, arrest of people without just cause and the unjustified deprivation of personal liberty. The Government indicates that:

*“Libyan law recognizes the concepts of de jure and de facto authority, and although it is a constituent element of articles 435, 431, 433 and 434 to establish that the accused was a public officer, this requirement can be satisfied in Mr. Gaddafi’s case if there is sufficient evidence presented at trial of his de facto authority”.*<sup>85</sup>

60. The Government seems to have revised its earlier position suggesting that the public officer status constitutes only an aggravating factor. Indeed, during the hearing held on 10 October 2012, Mr. El-Gehani stated that:

*“The offences or the charges that have been given to Mr Gaddafi can be charges against a public officer, or any other individual. The public officer is only a matter of aggravanti, as we say it in Italian, if he is a public officer, but what can be committed by a public officer is the same like any offences to be committed by any other person”.*<sup>86</sup>

<sup>84</sup> See Libya’s Submissions, *supra* note 7, par. 85.

<sup>85</sup> *Idem*.

<sup>86</sup> See ICC-01/11-01/11-T-3-CONF-ENG ET, 10 October 2012, p. 61, line 5-9.

61. The Principal Counsel opposes the Government's submissions, in particular with respect to the alleged recognition of the concept of *de facto* authority under Libyan Law. Libya's assertions are not clear as to whether these submissions reflect the applicable law, or whether the submissions represent the current state of jurisprudence. Libya does not cite any legal authority nor does it refer to any specific pronouncement by domestic courts on this issue. As the applicant's bears the burden of proof, and in light of these inconsistencies, it is submitted that the Libyan Government has failed to adduce sufficient supporting evidence to demonstrate its contentions.

#### IV. PROGRESS OF NATIONAL INVESTIGATIONS

##### A. Custody of Mr. Gaddafi

62. The Government confirms that Mr. Gaddafi remains in the custody of the Zintan brigades.<sup>87</sup> However, Libya has not been candid as to whether any agreement has been reached on the transfer of Mr. Gaddafi to Tripoli and, if so, when this transfer is expected to take place. One point that is at least clear from the Government's submissions is that the detention centre in which Mr. Gaddafi is being held is not under the Government's control.

63. This issue continues to raise serious doubts about Libya's ability to carry out concrete and effective investigative steps. More importantly, this lack of control significantly affects the credibility of the evidence presented by the Government in support of the Admissibility challenge. Indeed, most of the documents appended to Libya's Submissions suggest that Mr. Gaddafi has been interrogated by, or in

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<sup>87</sup> See Libya's Submissions, *supra* note 7, par. 102.

direct contact with the Libyan judicial authorities.<sup>88</sup> Libya does not however clarify how this was carried out.

64. Therefore the Principal Counsel maintains that the Chamber should not accord any probative value to these annexes as long as the issue relating to Mr. Gaddafi's custody is not resolved. The Principal Counsel also respectfully refers the Chamber to her earlier submissions on the issue.<sup>89</sup>

### **B. Witness protection and security**

65. Ensuring witnesses' and victims' protection is a necessary requirement for a genuine investigation and prosecution. This is particularly the case in the Libyan context given the overall precarious security situation in the country. The Libyan national law does not provide for any special protective measures for victims and witnesses who participate or appear at trial. There is no indication that a witness protection program has ever been put in place. It seems that one of the greatest challenges at the moment for Libya is to find victims and convince them to testify.<sup>90</sup>

66. The measures set out in the Government's Submissions are far from being adequate to address the security challenges faced by Libya. The measures envisioned by the Government are limited to the preservation of witnesses' anonymity during the investigation phase, in accordance with article 59 of the Libyan Code of Criminal Procedure.<sup>91</sup> There is no similar provision which applies to the trial phase. And more importantly, there is no clear procedure regulating access to document and disclosure. The lack of protective measures under Libyan law was further confirmed in the *amicus curiae* brief filed jointly by the Redress

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<sup>88</sup> *Idem*, annexes 3, 9, 10, 12 and 13.

<sup>89</sup> See the "Observations on behalf of victims on the Government of Libya's Application pursuant to Article 19 of the Rome Statute", *supra* note 5, paras. 47 *et seq.*

<sup>90</sup> See *supra* paras. 49 to 53.

<sup>91</sup> See Libya's Submissions, *supra* note 7, par. 95.

Trust and Lawyers for justice in Libya.<sup>92</sup> It also remains to be seen whether any potential witnesses' protection reform can yield concrete positive results.

**FOR THE FOREGOING REASONS** the Principal Counsel of the OPCV, acting as Legal Representative of victims for the purpose of Article 19 proceedings, respectfully requests the Pre-Trial Chamber to reject the Admissibility Challenge.

A handwritten signature in black ink, reading 'Paolina Massidda', with a horizontal line drawn underneath the name.

**Paolina Massidda**  
**Principal Counsel**

Dated this 18<sup>th</sup> day of February 2013

At The Hague, The Netherlands

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<sup>92</sup> See the "Lawyers for Justice in Libya and Redress Trust's observations pursuant to Rule 103 of the Rules of Procedure and Evidence", No. ICC-01/11-01/11-172, 8 June 2012, paras. 20 et seq.