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THE APPEALS CHAMBER

Before: Judge Anita Ušacka, Presiding Judge
Judge Sang-Hyun Song
Judge Sanji Mmasenono Monageng
Judge Akua Kuenyehia
Judge Erkki Kourula

SITUATION IN LIBYA

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

**Public Redacted Version
With Public Annexes**

**Defence Response to the “Document in Support of the Government of Libya’s
Appeal against the Decision on the admissibility of the case against Saif Al-
Islam Gaddafi”**

Source: Defence for Mr. Saif Al-Islam Gaddafi

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

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I. INTRODUCTION	6
II. OVERVIEW.....	6
III. GROUNDS FOR SUMMARY DISMISSAL	11
IV. FACTUAL AND PROCEDURAL BACKGROUND	16
V. STANDARD OF REVIEW ON APPEAL	19
VI. EX PARTE ANNEXES SUBMITTED BEFORE THE APPEALS CHAMBER.....	22
VII. GROUND ONE: “THE PRE-TRIAL CHAMBER ERRED IN LAW BY HOLDING THAT A NUMBER OF INVESTIGATIVE STEPS COVERING DISCRETE ASPECTS OF THE CASE FAILED TO SATISFY THE STANDARD OF ‘INVESTIGATION OF SAME CASE’”	23
A. LIBYA HAS MISCONSTRUED THE TEST APPLIED BY THE CHAMBER	23
B. LIBYA’S ARGUMENTS WITH REGARD TO THE “LEVEL OF SIMILARITY REQUIRED BY THE ‘SUBSTANTIALLY THE SAME CONDUCT’ TEST” ARE ENTIRELY MISPLACED	27
i. Libya’s arguments on the “Alleged errors as to requisite level of sameness as regards an ongoing investigation” distort the Chamber’s findings	32
C. LIBYA’S SUBMISSIONS AS TO “THE OBJECT AND PURPOSES OF STATUTE AND THE ROLE OF THE ICC IN DOMESTIC PROCEEDINGS” ARE IRRELEVANT TO DEMONSTRATING LEGAL ERROR	34
D. LIBYA’S ARGUMENTS REGARDING AN ALLEGED “FAILURE TO PROVIDE A REASONED OPINION” ARE UNSUBSTANTIATED AND FAIL TO MEET THE REQUISITE STANDARD FOR APPELLATE REVIEW	34
VIII. GROUND TWO: “THE PRE-TRIAL CHAMBER ERRED IN FACT AND LAW BY FINDING THAT LIBYA HAD NOT SUBSTANTIATED THAT ITS DOMESTIC INVESTIGATIONS COVERS THE SAME CASE AS THAT BEFORE THE ICC”	35
A. LIBYA’S ALLEGATION IS FLAWED, CONSTITUTES A REVERSAL OF ITS POSITION BEFORE THE CHAMBER AND IS MANIFESTLY UNFOUNDED	35
a) Documents.....	37
b) Annex E and F and Al-Senussi materials	38
c) Flight-related documents.....	40
d) Other documents	41
e) Summaries of witness statements	43
f) Witness statements	44
i. Annex 4.....	44
ii. Annex 15.....	45
iii. Annex 16	46
iv. Intercepts.....	47

B. LIBYA’S ARGUMENTS ON THE “ <i>ALLEGED FAILURE TO TAKE INTO ACCOUNT OTHER SPECIFIC AND PROBATIVE EVIDENCE PERTAINING TO THE SCOPE OF THE DOMESTIC INVESTIGATION</i> ” REMAIN UNSUBSTANTIATED	48
C. LIBYA’S SUBMISSION AS TO THE CHAMBER’S ALLEGED “ <i>UNREASONABLE APPROACH TO THE EVALUATION OF EVIDENCE</i> ” ARE MISCONCEIVED	57
IX. GROUND THREE: “UNFAIRNESS AND PROCEDURAL ERRORS OCCASIONING A FAILURE TO TAKE INTO CONSIDERATION RELEVANT AND PROBATIVE EVIDENCE”	58
A. ALLEGATION THAT THE CHAMBER FAILED TO “ <i>TAKE APPROPRIATE MEASURES FOR THE PROPER CONDUCT OF THE PROCEDURE</i> ” OCCASIONING A FAILURE TO TAKE INTO CONSIDERATION RELEVANT AND PROBATIVE EVIDENCE IS MISLEADING AND UNSUPPORTED BY EVIDENCE	58
B. LIBYA’S SUBMISSIONS ON “ <i>THE CHAMBER’S REJECTION OF RELEVANT AND AVAILABLE EVIDENCE ON THE ERRONEOUS BASIS THAT “THE SIGNIFICANCE OF... INFORMATION...[PROVIDED BY THE PARTIES IN FILINGS SUBSEQUENT TO LIBYA’S REPLY OF 4 MARCH 2013 HAD]...NOT BEEN SUFFICIENTLY DEMONSTRATED</i> ” ARE ENTIRELY UNREASONABLE.....	62
C. LIBYA’S ARGUMENTS THAT “ <i>THE CHAMBER FAILED TO ADAPT THE PROCEDURE TO THE SPECIFIC ISSUES</i> ” ARE MISLEADING AND SEEK TO REMOVE THE BURDEN OF PROOF FROM LIBYA	63
D. LIBYA’S SUBMISSIONS AS TO “ <i>LINKING THE PROPRIETY OF THE ADMISSION OF EVIDENCE ON THE FIRST LIMB (“THE CASE”) WITH THE MERITS OF THE ASSESSMENT OF THE SECOND LIMB (“INABILITY”)</i> ” FAIL TO IDENTIFY ANY ERROR ON THE PART OF THE CHAMBER.....	66
X. GROUND FOUR: “THE CHAMBER ERRED IN FACT AND IN LAW IN ITS DETERMINATION THAT, DUE TO THE UNAVAILABILITY OF ITS NATIONAL JUDICIAL SYSTEM, LIBYA IS UNABLE TO OBTAIN THE ACCUSED OR THE NECESSARY EVIDENCE AND TESTIMONY OR OTHERWISE CARRY OUT ITS PROCEEDINGS, PURSUANT TO ARTICLE 17(3) OF THE STATUTE”	66
A. LIBYA’S CLAIM AS TO THE “ <i>ERRONEOUS INTERPRETATION AND APPLICATION OF ‘UNAVAILABILITY’</i> ” MISSTATE PREVIOUS CONCESSIONS BEFORE THE CHAMBER.....	67
B. LIBYA’S SUBMISSIONS THAT “ <i>THE CHAMBER ERRED IN FACT AND IN LAW BY FINDING THAT THE LIBYAN JUDICIAL SYSTEM IS ‘UNABLE’ IN PARTICULAR MATERIAL REGARDS IN RELATION TO THE CASE AGAINST MR GADDAFI</i> ” ARE UNREALISTIC.....	70
i. “ <i>Inability to obtain the accused</i> ”	70
ii. “ <i>Inability to obtain testimony</i> ”	74
iii. “ <i>Otherwise unable to carry out its proceedings: appointment of defence counsel</i> ”	79
iv. “ <i>Misappreciation of the ongoing nature of the investigation when assessing ability</i> ”	80
v. “ <i>Failure to consider the “genuineness” of the investigative steps taken by Libya</i> ”	81
XI. SUSPENSIVE EFFECT	81
i. The criteria for suspensive effect are not fulfilled	82

- ii. Granting the Request would disproportionately prejudice the rights of Mr. Gaddafi before the ICC and the interests of justice 83

XII. CONCLUSION AND RELIEF SOUGHT..... 86

I. Introduction

1. On 24 June 2013, the Government of Libya (“Libya” or “the Government”) filed its *“Document in Support of Libya’s Appeal against the ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’”* (“Appeal”).¹
2. Counsel for the Defence of Mr. Saif Al-Islam Gaddafi (“the Defence”) herewith files its Response.
3. Libya has failed to discharge its burden of showing that the Pre-Trial Chamber (“the Chamber”) erred in law, in fact or in the exercise of its discretion, when it found the case against Saif Al-Islam Gaddafi to be admissible before the Court.
4. Accordingly, Libya’s Appeal should be dismissed in its entirety.
5. Moreover, Libya’s request for an oral hearing should be rejected. There is a presumption against oral hearings on appeal,² and Libya has advanced no cogent arguments as to why this presumption should be displaced in the current case. An oral hearing would serve no useful purpose, would not be in the interests of justice and would only serve to protract what have already been the most protracted admissibility proceedings in the history of the ICC.

II. Overview

6. Libya’s Appeal should be summarily dismissed because it either (a) merely repeats arguments which it raised before the Chamber and which were rejected, without showing how the Chamber erred; (b) raises new arguments on appeal and seeks to adduce new materials, which were not before the Chamber when it rendered its Decision; and (c) misstates the findings of the Chamber. These are all grounds for summary or *in limine* dismissal.³

¹ ICC-01/11-01/11-370-Conf-Red. This was notified to the Defence on 25 June 2013.

² “Rule 156(3) [...] establishes as a norm that proceedings on appeal [...] should be conducted by way of written submissions ...for the Appeals Chamber to exercise its discretion and depart from this norm it must be furnished with cogent reasons that demonstrate why an oral hearing in lieu of, or in addition to, written submissions is necessary.” ICC-01/09-01/11-271, paras.9-10.

³ See Part III of Response.

7. Libya attacks the Chamber's *Decision on the admissibility of the case against Saif Al-Islam Gaddafi* of 31 May 2013 ("the Decision") as "*a rush to judgment*".⁴ This is an extraordinary claim to make in the context of the lengthiest admissibility proceedings in the history of the Court, in which the Chamber gave Libya every opportunity to make good its admissibility challenge. At the admissibility hearings on 9 and 10 October 2012,⁵ Libya was permitted to address any facts that were of relevance to the determination of the admissibility of the case against Saif Al-Islam Gaddafi.⁶ Libya fully availed itself of the unprecedented opportunities accorded to it to make, and supplement, its challenge. For example, by the time it filed its reply dated 4 March 2013,⁷ the Government had submitted at least twenty-one prior filings, which advanced its factual or legal arguments concerning the admissibility of the case.⁸ No State or party has ever been furnished with as much time and as many opportunities as Libya to make good its challenge.
8. Yet not only does Libya complain that it should have been granted even more time, it wrongly accuses the Chamber of having created the appearance of giving "*short shrift*" to Libyan domestic proceedings.⁹ This is a serious accusation to level against the Chamber. Libya goes even further and charges that the Chamber was "*determined*" to render its Decision before Libya's proceedings against Mr. Gaddafi had reached the accusation stage, when – Libya alleges – its challenge would have been stronger.¹⁰ The suggestion that the Chamber timed its Decision so as to put Libya at a

⁴ Appeal, para.71.

⁵ ICC-01/11-01/11-T-1-CONF-ENG; ICC-01/11-01/11-T-2-CONF-ENG; ICC-01/11-01/11-T-3-CONF-ENG; ICC-01/11-01/11-T-4-CONF-ENG, (collectively "Admissibility Hearing").

⁶ ICC-01/11-01/11-212, para.10: In response to OPCR's request to confine the scope of the admissibility hearing to matters falling within the scope of the initial admissibility challenge, the Pre-Trial Chamber stated "*it would be unreasonable to disregard the circumstances currently prevailing, by preventing Libya to address, at this point in time, any changes or developments in the factual circumstances underlying its Admissibility Challenge*".

⁷ ICC-01/11-01/11-293-Conf.

⁸ ICC-01/11-01/11-44-Anx1-Red; ICC-01/11-01/11-82, para.2; ICC-01/11-01/11-102, para.5; ICC-01/11-01/11-102, paras.5-6 and 21-27; ICC-01/11-01/11-111-Red, paras.6 and 13-17; ICC-01/11-01/11-130-Red; ICC-01/11-01/11-132, paras.6-14; ICC-01/11-01/11-144; ICC-01/11-01/11-149; ICC-01/11-01/11-160; ICC-01/11-01/11-192; ICC-01/11-01/11-205, para.2, 10-16; ICC-01/11-01/11-213, paras.10-18; ICC-01/11-01/11-218-Conf; ICC-01/11-01/11-221-Conf; ICC-01/11-01/11-246; ICC-01/11-01/11-251; ICC-01/11-01/11-258-Conf-Red3; ICC-01/11-01/11-260, paras.3, 12-13 and 17; ICC-01/11-01/11-264, paras.22-24 and 27-28; ICC-01/11-01/11-274.

⁹ Appeal, para.70.

¹⁰ Appeal, para.62.

disadvantage is grave and entirely unfounded. Moreover, Libya claimed for over one year that its investigation would soon reach the accusation stage, and yet it did not.¹¹

9. In respect of its substantive grounds of appeal, Libya's Ground One relies on an entirely erroneous reading of the Decision and a misstatement of the legal test applied by the Chamber. Libya alleges – using the expression no less than *20 times* in its Appeal¹² – that the Chamber applied a “*precise scope*” test in relation to the same person/same conduct test. In fact, the Chamber applied no such test, and the phrase, “*precise scope*” appears only once in the Decision, and there in the context of a fact-specific discussion of witness summaries.¹³ The Chamber directed itself correctly in law and in fact. Libya has shown no error.
10. In its Ground Two, Libya either simply rehashes arguments which the Chamber rejected, without showing how the Chamber erred, or seeks to rely on new arguments and new evidence that was not before the Chamber, which is equally impermissible.
11. It is highly striking, and emblematic of Libya's shifting and opportunistic approach, that it now states that “*it was a patent error of fact for the Chamber to fail to take into account the evidential materials submitted as part of the Al-Senussi Admissibility Challenge (in so far as they pertained to Mr. Gaddafi) when deliberating on the Gaddafi Admissibility Challenge.*”¹⁴ Libya neglects to mention that its position throughout the admissibility proceedings was that the Chamber had to consider the Al-Senussi and Gaddafi admissibility challenges separately:

*“... the term, ‘case’ in Article 19(2) necessarily refers to the individual case against each individual suspect and must be considered separately in respect of every such individual. Consequently, where there are two or more suspects, the admissibility assessment must consider the case against each suspect as separate and distinct inquiries.”*¹⁵

¹¹ In its original challenge dated 1 May 2012, (“Admissibility Challenge”), Libya stated that Mr. Gaddafi's case would proceed to the accusation stage in a “*few weeks*” and “*three weeks*”. ICC-01/11-01/11-130-Conf, paras.41 and 91. *See also* footnote 67 and paragraph 291 below.

¹² Appeal, paras.45-46, 49, 53, 59, 60, 62-64, 68-69, 72, 75, 77, 80, 101, 132, 136, 150 and 158.

¹³ Decision, para.123, “*...In other words, the scant level of detail and the lack of specificity of the summaries do not allow the Chamber to draw conclusions as to the precise scope of the domestic investigation.*”

¹⁴ Appeal, para.92, emphasis added.

¹⁵ ICC-01/11-01/11-130, para.69, emphasis added. *See also* ICC-01/11-01/11-134, the Chamber confirmed that the challenge was “*understood to only concern the case against Mr. Gaddafi*”. Libya did not seek leave to appeal or reconsideration of this decision.

12. In respect of its Ground Three, Libya fails to substantiate any unfairness or procedural errors on the part of the Chamber.
13. Libya's Ground Four fails to identify any error of fact or law in relation to the Chamber's decision concerning the question of the inability or unavailability of Libya's national judicial system. The fact that Mr. Gaddafi is detained by the Zintan Brigade outside the control of the authorities in Tripoli is a notorious and incontrovertible fact. Libya seeks to disguise this fact with semantics, for example calling the Zintan Brigade "*a government-sanctioned local authority*."¹⁶ Not only is this approach unrealistic sophistry, it represents an entirely new position taken on appeal. This is impermissible; the ground must be summarily dismissed. Finally, Libya also seeks to put new evidence before the Appeals Chamber which was not before the Pre-Trial Chamber. Again, this is impermissible, as Libya knows, and a further warrant for summary dismissal of its challenge.
14. Finally, it is worth noting that in the entirety of Libya's Appeal, there is not the slightest mention or recognition of the fact that Mr. Gaddafi – a man who is presumed innocent in the eyes of the law – has been held *incommunicado* and in solitary confinement for months. Throughout this time he has been facing the gravest penalty of all: the death penalty. Libya's Appeal neglects to mention any right of Mr. Gaddafi to an expeditious trial and to be free of the appalling mental strain of solitary confinement and the stress of facing a capital charge. On the contrary, by arguing that Libya should be given months, if not years, to build a society based on the rule of law and the institutions necessary to try him, any such rights of Mr. Gaddafi appear to be entirely subordinated to the purported requirements of a state in "*transitional circumstances*".¹⁷ In this way, Libya appears to be indifferent to the predicament of Mr. Gaddafi, and of his right to be treated with dignity, as a human being.
15. As a result, Mr. Gaddafi's fundamental right to a fair and expeditious trial, as enshrined in both the Statute and the Rules,¹⁸ is currently undermined by the use of unwarranted and prolonged preliminary appeals. As the Pre-Trial Chamber noted in *Lubanga*:

¹⁶ Appeal, para.157.

¹⁷ Appeal, para.6.

¹⁸ Articles 64(2), 67(1) and 67(1)(c)

*“Greater emphasis should be placed on [the exceptional nature of interlocutory appeals] ...[m]oreover, particular attention should be paid to the status of detention of the accused. To authorize the parties to appeal the decision confirming charges when the suspect is under detention would cause avoidable delay in the procedure, which has to be carefully counterbalanced with the interests of the suspect to a fair and expeditious trial.”*¹⁹

16. The same considerations apply in the case of challenges to admissibility when the person is in custody. What is more, the particular circumstances of the person’s detention, as well as the prolonged nature of proceedings to date, further underscore the need to prevent further, unnecessary delay. Since confirmation of his arrest on 19 November 2011,²⁰ the conditions of Mr. Gaddafi’s continued detention are well known. Most recently, the African Court of Human and Peoples’ Rights found that *“there exists a situation of extreme gravity and urgency, as well as a risk of irreparable harm”* to Mr. Gaddafi, considering his *“alleged length of detention [...]without access to a lawyer, family or friends”* and *“the principles of justice that require every accused person to be accorded a fair and just trial”*.²¹
17. It is clear that Libya employs complementarity as a ‘silver bullet’ in a number of respects: as an interpretive presumption in favour of the State; as a basis for lowering the requirement for a successful complementarity-based admissibility challenge and for an informal, open-ended approach to such challenges.²² Without discounting the importance of this principle, it is important to stress that it is given effect to by the terms of the Statute and cannot be abused as a modifier whenever their application is unfavourable to the State.

¹⁹ ICC-01/04-01/06-915, paras.29-30.

²⁰ ICC-01/11-01/11-34-Anx.

²¹ *ACHPR v. Libya*, paras.16-17.

²² This is underscored by Libya’s multiple attempts to stave off its obligation to surrender Mr. Gaddafi by employing an overly broad interpretation of the admissibility regime. For example, in reaction to the Chamber’s decision of 7 March 2012, which rejected Libya’s attempt to postpone the surrender of Mr. Gaddafi pursuant to Article 94 and requested Libya to notify of its decision to fulfil its surrender obligation (ICC-01/11-01/11-72-Conf), Libya sought to once more defer the surrender of Mr. Gaddafi on the basis that it intended to challenge admissibility within forty-two days (ICC-01/11-01/11-82-Conf). Libya thereby failed to comply with the Chamber’s surrender request, notwithstanding the fact that the obligation to surrender Mr. Gaddafi dated from his arrest, and Libya had not received any authorisation from the ICC to delay or postpone his surrender in the interim (ICC-01/11-01/11-87-Conf). *See also* ICC-01/11-01/11-100.

III. Grounds for Summary Dismissal

18. The following grounds of appeal should be summarily dismissed for the following reasons:

- ***Ground One***

19. The Appeals Chamber has a discretion to dismiss appellate submissions that are evidently unfounded.²³ Ground One should be summarily dismissed because it is predicated on a blatantly erroneous interpretation of the Decision. Namely, Libya incorrectly asserts that the Pre-Trial Chamber found, as a matter of law, that the “*same conduct*” test under Article 17 requires “*proof of the ‘actual contours’ and ‘precise scope’ of its domestic investigations*”.²⁴

20. The Pre-Trial Chamber did not establish such a ‘legal test’; it merely employed the terms “*actual contours*” and “*precise scope*” as descriptors in its evidential analysis. Libya had itself purported to adduce evidence concerning the “*contours*” of the investigation.²⁵ The Chamber’s finding was an evidential conclusion that Libya’s evidence failed to substantiate what it had claimed.

21. Libya has also failed to set out any arguments as to how this alleged “*legal error*” materially affected the outcome of the decision.²⁶ This constitutes grounds for summary dismissal.²⁷ It is, moreover, difficult to see how this finding could have prejudiced Libya given that it had previously defended the Pre-Trial Chamber’s request for information concerning the contours of the investigation.²⁸ Libya argued that the Chamber’s request “*forms one of the building blocks by which the Chamber is fulfilling its role in ensuring the fairness of the overall admissibility proceedings*”.²⁹ A

²³ Sesay, para.36; Bangura, para.28; D. Milošević, para.16.

²⁴ Appeal, paras.45-46.

²⁵ See ICC-01/11-01/11-258-Conf-Red, paras.67-68.

²⁶ ICC-02/04-01/05-408, para.48: “[a]s part of the reasons in support of a ground of appeal, an appellant is obliged not only to set out the alleged error, but also to indicate, with sufficient precision, how this error would have materially affected the impugned decision.”

²⁷ ICC-02/04-01/05-408, para.51.

²⁸ ICC-01/11-01/11-246, para.2.

²⁹ ICC-01/11-01/11-246, para.16.

failure to show prejudice is grounds for summary dismissal,³⁰ as is a failure by the appealing party to contest the legal point at first instance.³¹

- ***Ground Two***

22. Ground Two should be summarily dismissed due to Libya's failure to clearly identify which errors are factual and which are legal. Libya has referred to the existence of a legal error in the chapeau to Ground Two, but it does not refer to nor identify the nature of this legal error in its submissions. A party is expected to set out the grounds of appeal clearly, logically and exhaustively.³² Failure to articulate the precise nature of the appealed error can thus constitute grounds for summary dismissal.³³
23. Throughout Ground Two, Libya also claims that the Chamber erred by failing to attribute "*weight*" or "*sufficient weight*" to particular items of evidence.³⁴ It has nonetheless failed to specify in what sense it is employing the term "*weight*", nor whether it considers this to have been a legal or factual error.
24. Libya has not contested the Pre-Trial Chamber's finding that the Appeals Chamber's reference to probative value refers to evidence that is probative of the existence of investigations rather than probative as to the criminal responsibility of a person.³⁵ It would therefore have been inapposite for the Chamber to have made any attributions of "*evidential weight*".
25. Moreover, the Chamber did in fact conclude, on the basis of those evidential items that Libya claims were given no or insufficient weight, that Libya was conducting investigations into the matters referred to therein.³⁶ Although weight is not a term that readily lends itself to an admissibility assessment, it would appear that the Chamber attributed "full" weight to these items in the sense that it found them to be probative of the existence of investigations into the matter set out therein. In other words, the Chamber took Libya's evidence "at its highest", and still found it wanting. The crux of

³⁰ *Sesay*, para. 41.

³¹ *Haradinaj* paras.111-112.

³² *Sesay*, para.36; *Brima*, para.34; *D. Milošević*, para.16.

³³ *Galić*, para.297; *Martić*, para.89; *Krajišnik*, paras.593 and 646; *Bangura*, para.29.

³⁴ Appeal, paras.96, 99, 100, 106, and 109.

³⁵ Decision, paras.54 and 122.

³⁶ Decision, para.134.

Libya's ground is, therefore, disagreement with the Chamber's assessment of the facts, rather than any legal or factual error.

26. Libya's arguments in Ground Two concerning "*weight*" should thus be dismissed summarily due to their inherent ambiguity, as well as Libya's failure to articulate an error, and failure to refer to relevant factual findings of the Pre-Trial Chamber.³⁷
27. Throughout Ground Two, Libya has also consistently misrepresented the contents of its evidence, which constitutes automatic grounds for summary dismissal.³⁸ It is also impermissible, and thus grounds for summary dismissal, to refer to material, which is not part of the record.³⁹ In light of the fact that the documents filed as annexes to the challenge to the admissibility of the case against Mr. Al-Senussi⁴⁰ do not comprise part of the record of the Gaddafi admissibility challenge, Libya's submissions at paragraphs 94-95 should be summarily dismissed.
28. In several instances throughout Ground Two, Libya asserts that the error in question impacted on the outcome of the Pre-Trial Chamber's Decision, without explaining how the error impacted on the Decision.
29. For example, in Ground Two (C), Libya merely asserts that the information that would have been adduced through further submissions or *via* a site visit to Tripoli "*would have been of sufficient specificity and probative value to satisfy the Chamber that the domestic investigation was in relation to the same case as that before the ICC.*"⁴¹ Libya has not, however, elucidated what the evidence would have been comprised of (i.e. statements, photographs, recordings) or to which conduct underlying the ICC case it pertained. As concerns the appointment of the new Prosecutor-General, although Libya refers to its "*significance*", it does not elaborate as to how this information would have materially affected the particular findings of the Pre-Trial Chamber that were dispositive of the challenge.

³⁷ D. Milošević, para.17.

³⁸ D. Milošević, para.17. In terms of examples of these misrepresentations [REDACTED].

³⁹ D. Milošević, para.17.

⁴⁰ ICC-01/11-01/11-307, ("Al-Senussi Challenge").

⁴¹ Appeal, para.115.

30. Similarly, in Ground Two (D), Libya claims that the Chamber fails to make linkages between individual items of evidence. Libya has nonetheless failed to provide any examples where such linkages should have been made, nor has it elaborated as to what conclusions these linkages would have supported.

• ***Ground Three***

31. Ground Three is essentially premised on Libya's assertion that the Chamber "*rushed to judgment*" in issuing its admissibility decision when it did, and thereby failed to accord procedural fairness to Libya. It beggars belief that Libya has the temerity to put forward such a claim, given that it was allocated three times the amount of time that any other party challenging admissibility before the ICC ever enjoyed,⁴² and abundant opportunities to submit evidence. Appellate arguments that are evidently unfounded or contrary to common sense are liable to be summarily dismissed.⁴³
32. Ground Three is also riddled with instances in which Libya failed to contest the point at first instance, or had acquiesced to the Chamber's position on the issue in question. In its decision of 7 December 2012, the Pre-Trial Chamber set out a time frame for the resolution of the admissibility proceedings, and clear indicia as to the type of evidence required and the standard of proof.⁴⁴ Libya not only failed to seek leave to appeal this decision, it explicitly argued that the terms of the decision were consistent with the fairness of the proceedings, and would ensure an expeditious resolution of the admissibility proceedings.⁴⁵
33. Libya has also failed to cite any information or evidence in the record concerning the apparent appointment of counsel for Mr. Gaddafi in connection with the national security proceedings in Zintan.⁴⁶ Similarly, although Libya avers that the appointment of the new Prosecutor-General had produced a "*positive impact on the development of the domestic proceedings and transitional justice generally*",⁴⁷ no information or

⁴² See para.135 *et seq* below.

⁴³ *Sesay*, para.36; *Bangura*, para.28; *D. Milošević*, para.16; *Krajišnik*, para.22.

⁴⁴ ICC-01/11-01/11-239, ("7 December 2012 Decision").

⁴⁵ ICC-01/11-01/11-246, paras.16-17.

⁴⁶ Appeal, para.122.

⁴⁷ Appeal, para.130.

evidence in the record is cited in support of this claim. As such, these allegations should be automatically disregarded.⁴⁸

34. Libya's arguments at paragraph 126 of the Appeal Brief concerning Article 59 of the Criminal Procedure Code are also premised on unsupported, unreferenced quotations, which do not correspond to the actual text of Article 59.⁴⁹ Libya's appellate arguments concerning the so-called secrecy of investigations should therefore be summarily dismissed due to its misrepresentation of the law.⁵⁰

- **Ground Four**

35. Libya's submissions in Ground Four should be dismissed as manifestly unfounded because they are predicated on the erroneous conclusion that the Chamber failed to set out a legal definition of "unavailability".⁵¹ In so doing, Libya has ignored the Chamber's finding that:

"Libya continues to face substantial difficulties in exercising its judicial powers fully across the entire territory [...] the Chamber is of the view that its national system cannot yet be applied in full in areas of aspects relevant to the case, being thus "unavailable" with the terms of article 17(3) of the Statute".⁵²

36. Properly cast, therefore, Libya's appeal on this point rests on a mere disagreement with the definition adopted by the Chamber, rather than an appealable error concerning the absence of a definition, and as such, should be summarily dismissed.
37. Moreover, while Libya has claimed that the standard for a determination of "inability" is a stringent one,⁵³ it has failed to demonstrate that the notion of unavailability applied by the Pre-Trial Chamber (including the reference to substantial difficulties in the exercise of judicial powers) is inconsistent with, or less stringent than, the test

⁴⁸ *D. Milošević*, para.17.

⁴⁹ Article 59: "Investigation procedures and their results shall be considered confidential. Investigators, prosecution members and their assistants or clerks and experts and others who are related to the investigation or attend it due to their profession or post shall undertake not to disclose them [procedures and results]. [...]" ICC-01/11-01/11-281-Conf, fn 27, emphasis added.

⁵⁰ *D. Milošević*, para.17.

⁵¹ Appeal, paras.150-151.

⁵² Decision, para.205, emphasis added.

⁵³ Appeal, paras.150-151.

advocated by the authorities upon which it relies.⁵⁴ It is not enough to simply assert that the alleged error would have impacted on the decision; the appealing party must demonstrate how the error affected the outcome of the decision.

38. Throughout Ground Four, Libya also asserts that the Chamber “erred in fact and law” without specifying the nature of the legal or factual error, or identifying which arguments pertain to which type of error.⁵⁵ Such ambiguous and equivocal pleadings also attract summary dismissal.⁵⁶
39. As with Ground Three, Libya asserts in Ground Four that Mr. Gaddafi is represented by counsel in the Zintan proceedings, notwithstanding the absence of any evidence submitted in support of this assertion. Libya has also raised arguments concerning the appointment of this counsel, the relationship of the Zintan brigade to the central government, and the possibility that Mr. Gaddafi could be tried in Zintan, for the first time on appeal. Such submissions should be dismissed summarily because they were not raised before the Pre-Trial Chamber.⁵⁷
40. Grounds Four (B.4) and (B.5)⁵⁸ should be summarily dismissed due to the absence of any coherent nexus between the arguments set out therein and the Chamber’s findings.

IV. Factual and Procedural Background

41. Libya’s presentation of what it claims to be the “*backdrop*” to the case is replete with tendentious political points. The following assertions of Libya are all highly controversial:

(1) That Libya is “*a stable and democratic state*”;

(2) That Libya “*has made its best efforts to cooperate and engage with the Court*”;

⁵⁴ Appeal, fn.220-223.

⁵⁵ See Appeal paras.154 and 156.

⁵⁶ *Sesay* para.36; *Brima*, para.34; *D. Milošević*, para.16.

⁵⁷ ICC-02/05-03/09-295-OA2, para.20

⁵⁸ Appeal, paras.173-177.

(3) That the Gaddafi regime was responsible for “*mass atrocities*” during the 2011 revolution.⁵⁹

42. These arguments and assertions have no place in an appeal against a Decision finding a case to be admissible before the Court.⁶⁰ The Appeals Chamber is not concerned with political slogans, with stating a preference for one political regime over another, or with the politics of what Libya calls “*difficult, transitional circumstances*”.⁶¹ The Appeals Chamber’s mandate is only to decide whether Libya has discharged its burden of showing that its appeal meets the tests set out in Articles 81 and 82 of the Statute.
43. Indeed, Libya’s persistent references to “*challenges*”, “*transitional circumstances*”, and other such vague phrases and euphemisms, are in fact an implicit admission that Libya does not yet have a functioning judicial system. The Court is not concerned with why this is so; it is enough that it is so.
44. As detailed throughout this Response, the Pre-Trial Chamber afforded ample, indeed extraordinary, opportunities to Libya to make good its challenge. Aside from the number of filings submitted to assert its factual or legal arguments,⁶² Libya was offered three distinct opportunities to adduce evidence in support of its challenge,⁶³ neither of which was confined or limited in scope as to its original challenge.⁶⁴ On at least six separate occasions Libya was either granted leave to reply, given an extension of time or allowed to postpone an obligation.⁶⁵
45. Such allowances were not limited to the Admissibility Challenge. Libya was able to evade its obligation to surrender Saif Al-Islam Gaddafi to the Court for over six months prior to its challenge despite the lack of authorisation from the ICC to delay or

⁵⁹ Appeal, para.6.

⁶⁰ Other supererogatory political slogans include: “*Muammar Gaddafi’s tyrannical rule*” (Appeal, para.8), and “*an oppressive regime has been overthrown; the country has emerged from a bloody civil war [...]*” (Appeal, para.112).

⁶¹ Appeal, para.6.

⁶² See paragraph 7 and footnote 8 above.

⁶³ The original Admissibility Challenge (May 2012); Admissibility Hearing (October 2012); and Further Submissions (January 2013).

⁶⁴ ICC-01/11-01/11-212.

⁶⁵ ICC-01/11-01/11-42; ICC-01/11-01/11-163; ICC-01/11-01/11-163; ICC-01/11-01/11-191; ICC-01/11-01/11-200; ICC-01/11-01/11-239; ICC-01/11-01/11-288.

postpone his surrender.⁶⁶ Libya's apparent will to evade meeting its obligations before the ICC were most notably demonstrated by its consistent assertions that it would adduce further evidence once the investigation into Mr. Gaddafi reached the Accusation Chamber stage⁶⁷ and would retain custody over Mr. Gaddafi, both in the coming weeks.⁶⁸ To date, Libya has achieved neither in nearly fifteen months of making its challenge.

46. Moreover, the Chamber provided Libya with ample guidance as to what it needed to show by way of evidence in the context of an admissibility challenge. Most notably, in its 7 December 2012 Decision, the Pre-Trial provided 55 specific points of clarification for Libya to address in its filing dated 23 January 2013, ("Further Submissions"),⁶⁹ with particular emphasis on a request for further information on "*the anticipated contours of the case at the national level...[being] mindful that a mere assurance that the national on-going investigation covers the same conduct as the case before the Court cannot be deemed sufficient [...].*"⁷⁰
47. Despite these advantages accorded to it by the Chamber, Libya consistently failed to adhere to the Chamber's stipulation that "*Libya will provide all required assistance in order to facilitate an expeditious determination of the Admissibility Challenge*".⁷¹ For example, the Chamber suspended Libya's deadline to submit its reply to the responses to the Admissibility Challenge, in recognition of the exceptional circumstances engendered by elections. Nonetheless, when the Chamber requested Libya to submit a report "*as soon as possible, and no later than 7 September 2012*" in order to update it on, *inter alia*, the appointment of the Minister of Justice and Prosecutor-General,⁷² Libya requested an extension of time on the day of the deadline itself, which thus

⁶⁶ See ICC-01/11-01/11-87-Conf.

⁶⁷ ICC-01/11-01/130-Conf ("in the next three weeks", 1 May 2012); ICC-01/11-01/11-251 ("that in the next month it is expected that the cases will be transferred to the Chamber d'Accusation for pre-trial proceedings", 15 January 2013); ICC-01/11-01/11-258-Conf ("the case will be transferred to the Chambre d'Accusation for pre-trial proceedings within the next four weeks", 23 January 2013). In October 2012, Libya asserted that "*the trial stage were currently scheduled to begin [...] in February, not any earlier*" (ICC-01/11-01/11-T-2-ENG-CONF, p.45, lines 11-12). In March 2013 it "*estimated commencement date of the trial in May 2013*" (ICC-01/11-01/11-293-Conf).

⁶⁸ For examples of Libya's assertion that it was undergoing negotiations to transfer Mr. Gaddafi to Zintan see ICC-01/11-01/11-44; ICC-01/11-01/11-102; ICC-01/11-01/11-160; ICC-01/11-01/11-T-2-ENG-CONF, p.29, lines 16-24); ICC-01/11-01/11-258-Conf; ICC-01/11-01/11-293-Conf.

⁶⁹ ICC-01/11-01/11-239; ICC-01/11-01/11-258-Conf-Red.

⁷⁰ ICC-01/11-01/11-239.

⁷¹ ICC-01/11-01/11-163, para. 41.

⁷² ICC-01/11-01/11-200.

impeded the ability of the Chamber to determine whether alternative measures or procedures would have been appropriate in the interim.⁷³ Furthermore, on certain occasions Libya conceded that it had failed to address each of the Chamber's requests for information that the Chamber considered necessary for its determination of the Challenge but failed to provide any reasons for such omissions.⁷⁴ Notwithstanding the considerable degree of leeway accorded to it throughout the proceedings, Libya remained unable to demonstrate that any concrete progress had been made on its part.

V. Standard of Review on Appeal

48. Generally, the Appeals Chamber construes its appellate function in a strict manner. In *Banda and Jerbo*, the Chamber annunciated the following:

*“The Appeals Chamber has repeatedly held that its review is corrective in nature and not de novo. [...], it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision”.*⁷⁵

49. In *Kony*, the Appeals Chamber indicated that its function “*in respect of appeals brought under article 82 (1) (a) of the Statute is to determine whether the determination on the admissibility of the case or the jurisdiction of the Court was in accord with the law*”.⁷⁶
50. While the Statute does not provide any standard of review for appeals brought pursuant to Article 82, the Appeals Chamber has adopted the grounds referred to in Article 81(1): procedural error, error of fact and error of law. In the case of *Bemba*, the Appeals Chamber considered the appeal of a decision granting interim release (thus governed by Article 82(1)(b)):

“62. [...] the Appeals Chamber will not review the findings of the Pre-Trial Chamber de novo, instead it will intervene in the findings of the Pre-Trial

⁷³ ICC-01/11-01/11-205.

⁷⁴ ICC-01/11-01/11-258-Conf, para.48.: “*Out of the approximately fifty witnesses interviewed in total for the investigation, eight have been interviewed by the prosecution team since 1 May 2012, with the final interview taking place on 16 December 2012 Libya has not provided the date of every single witness interview in this further submission as requested by the Pre-Trial Chamber in its Decision*”.

⁷⁵ ICC-02/05-03/09-295-OA2, para.20, emphasis added.

⁷⁶ ICC-02/04-01/05-408-OA3, para.80.

*Chamber only where clear errors of law, fact or procedure are shown to exist and vitiate the Impugned Decision.*⁷⁷

51. The Appeals Chamber has similarly imported the above standard of review into the context of admissibility challenges. Also in *Bemba*, the Appeals Chamber held:

“63. The Appeals Chamber has previously held that it may justifiably interfere with sub judice decision ‘if the findings of the [Chamber] are flawed on account of a misdirection on a question of law, a misappreciation of the facts founding its decision, a disregard of relevant facts, or taking into account facts extraneous to the sub judice issues’. The Appeals Chamber considers that this standard of review is equally applicable when reviewing a decision on the admissibility of a case.

[...]

102. The Appeals Chamber has also held that “an appellant is obliged not only to set out the alleged error, but also to indicate, with sufficient precision, how this error would have materially affected the impugned decision”.⁷⁸

52. The use of “vitate” at paragraph 62 of the abovementioned *Bemba* decision, suggests just how strong an influence any error needs to have on the impugned decision in order to succeed as a ground of appeal.
53. In the present Appeal, Grounds One, Two and Four include alleged errors of fact. In *Ruto*, the Appeals Chamber laid down the following stringent test for alleged errors of fact:

“As to the ‘misappreciation of facts’ the Appeals Chamber will not disturb a Pre-Trial or Trial Chamber’s evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case where it cannot discern how the Chamber’s conclusion could have reasonably been reached from the evidence before it.”⁷⁹

54. In its Ground Three, Libya relies on alleged unfairness in the manner in which the Chamber conducted the admissibility proceedings. It should be noted that Rule 58(2), which regulates how proceedings under Article 19 are to be conducted, leaves the

⁷⁷ ICC-01/05-01/08-631-Red, para.62, emphasis added.

⁷⁸ ICC-01/05-01/08-962, para.102.

⁷⁹ ICC-01/09-01/11-307-OA, para.56, emphasis added.

conduct of proceedings wholly in the hands of the Chamber hearing the challenge. The Chamber:

“...shall decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings. It may hold a hearing. It may join the challenge or question to a confirmation or a trial proceeding as long as this does not cause undue delay, and in this circumstance shall hear and decide on the challenge or question first” (emphasis added).

55. In such circumstances the Appeals Chamber ought to be, and has in the past proven to be, extremely reluctant to interfere with the procedures adopted by the Chamber below. Matters of the proper conduct of proceedings and procedure are pre-eminently matters of discretion for that Chamber. As set out in its decision in *Ruto* referred to at paragraph 53 above, the Appeals Chamber applied the same high standard to the review of alleged procedural errors as it applies to the review of discretionary decisions:

“89. Thus, rule 58 of the Rules of Procedure and Evidence stipulates the procedure to be followed when filing a request or application under article 19 of the Statute. It requires that this request be transmitted to the Prosecutor and the person concerned, who shall be given an opportunity to make written submissions. Save for these express stipulations, the Pre-Trial Chamber enjoys broad discretion in determining how to conduct the proceedings relating to challenges to the admissibility of a case.”⁸⁰

56. In *Kony*, the Appeals Chamber explained its standard of review in respect of discretionary decisions as follows:

“[T]he Appeals Chamber will not interfere with the Pre-Trial Chamber's exercise of discretion under article 19 (1) of the Statute to determine admissibility, save where it is shown that that determination was vitiated by an error of law, an error of fact, or a procedural error, and then, only if the error materially affected the determination. This means in effect that the Appeals Chamber will interfere with a discretionary decision only under limited conditions. The jurisprudence of other international tribunals as well as that of domestic courts endorses this position. They identify the conditions justifying appellate interference to be: (i) where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is exercised on patently

⁸⁰ ICC-01/09-01/11-307-OA, para.89, emphasis added.

*incorrect conclusion of fact; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion.*⁸¹

57. This standard of review applies, therefore, to the alleged procedural errors relied upon by Libya.

VI. Ex Parte Annexes Submitted Before the Appeals Chamber

58. Finally, the Appeals Chamber's consideration of the admissibility materials should be confined to the redacted versions transmitted to the Defence and the OPCV, rather than the *ex parte* versions that have been filed directly before the Appeals Chamber.
59. In its decision of 18 July 2012, the Pre-Trial Chamber concluded "*it may base its decision on the admissibility of the case exclusively on information which is accessible to the other parties to the admissibility proceedings*".⁸² Notably, this finding is not confined to *ex parte* materials submitted by the Defence, but on its terms, extends to all information underpinning the admissibility decision.
60. While the Pre-Trial Chamber subsequently authorised Libya to request redactions in relation to discrete information concerning the identity of witnesses and prosecuting authorities,⁸³ the Pre-Trial Chamber did not reconsider any of its earlier legal findings nor did it indicate that it would rely upon the withheld information in its final decision.
61. Thus there is a clear distinction between authorising Libya to withhold material from the Defence, on the one hand, and authorising Libya (or any other participant) to rely on *ex parte* information as part of its submissions. For example, the Rules permit the Prosecution to withhold information from the Defence, which could identify witnesses or prejudice ongoing investigations. Even though the Pre-Trial Chamber may receive the information in question in connection with the Prosecution's application for an arrest warrant, or requests for redactions, the Chamber is precluded from basing its decision on the withheld information, as it has itself ruled.

⁸¹ ICC-02/04-01/05-408-OA3, para.80, emphasis added.

⁸² ICC-01/11-01/11-187-Red, para.10.

⁸³ ICC-01/11-01/11-262, paras.13-14.

62. The Chamber's Decision was issued on an entirely *inter partes* basis. The Decision is not predicated, in any way, on any *ex parte* materials. Libya has not appealed against the Chamber's *inter partes* mode of proceeding, which indeed is the only fair and reasonable way to proceed in this case. There is, therefore, no lawful basis for introducing any *ex parte* material on appeal.

VII. GROUND ONE: “The Pre-Trial Chamber erred in law by holding that a number of investigative steps covering discrete aspects of the case failed to satisfy the standard of ‘investigation of same case’”⁸⁴

A. Libya has misconstrued the test applied by the Chamber

63. Libya argues that the Chamber erred in law by requiring the “*additional proof*” of the “*actual contours*” and “*precise scope*” of its domestic investigation, beyond that of proving that a “*case is being investigated*”.⁸⁵ Libya argues that the Chamber's use of these terms constitutes a “*legal standard*” inconsistent with the plain meaning of “*being investigated*” under Article 17(1)(a) of the Statute.

64. Libya makes this argument repeatedly:

*“[b]y requiring proof of the ‘actual contours’ and ‘precise scope’ of its domestic investigation, the Chamber clearly applied a legal standard which required more than substantially the same conduct, and which necessarily and erroneously requires the domestic criminal process to encompass nearly all aspects...of the ICC case.”*⁸⁶

65. The argument is, however, flawed at inception. The Chamber never applied any such standard.
66. Libya's argument is based on a complete misreading of the Decision. On both occasions where Libya alleges that the Chamber applied a “*precise scope*” test, it cites

⁸⁴ Appeal, paras 42-81.

⁸⁵ Appeal, para.45.

⁸⁶ Appeal, para.53.

to paragraph 135 of the Decision in support.⁸⁷ Yet nowhere in that paragraph does the phrase, “*precise scope*” appear. Paragraph 135 of the Decision reads as follows:

*“Nevertheless, the evidence, taken as a whole, does not allow the Chamber to discern the actual contours of the national case against Mr Gaddafi such that the scope of the domestic investigation could be said to cover the same case as that set out in the Warrant of Arrest issued by the Court. Libya has fallen short of substantiating, by means of evidence of a sufficient degree of specificity and probative value, the submission that the domestic investigation covers the same case that is before the Court.”*⁸⁸

67. It is, therefore, fallacious for Libya to maintain that the Chamber ever applied a “*precise scope*” test. Notwithstanding that, Libya uses the phrase, “*precise scope*” no less than 20 times in its Appeal, each time in speech marks to suggest that it is a direct quotation from the Decision. It is clear from this that the alleged use of a “*precise scope*” test is the centrepiece of Libya’s appeal.
68. In paragraph 135 of the Decision, the Chamber referred to ‘scope’ and not ‘precise scope’. There the term ‘scope’ was not employed as a legal term of art, but as a factual description of the failure of Libya to demonstrate – as an evidentiary matter – precisely who and what the investigation was about. Having failed to do that the Chamber was unable to apply the legal standard, correctly pointed out at paragraph 66 of its Decision, to that investigation. Put differently, the failure of Libya to identify the scope of its alleged investigation as a matter of evidence, meant that the Chamber was unable to proceed to the next step, which was to apply the legal test to that investigation. This is what the Chamber was referring to when it found:

*“Libya has fallen short of substantiating, by means of evidence of a sufficient degree of specificity and probative value, the submission that the domestic investigation covers the same case that is before the Court.”*⁸⁹

69. The dearth of information regarding the scope and contours of Libya’s investigation was, therefore, a finding of fact, not of law. This lacuna prevented the Chamber from having the relevant factual information, which was necessary to verify whether there was any, let alone a substantial, nexus between Libya’s investigation and the ICC case.

⁸⁷ Appeal, para.45, fn.77 and Appeal, para.53, fn.82.

⁸⁸ Decision, para.135.

⁸⁹ Decision, para.135, emphasis added.

For example, the witness summaries contained in Annex C were not dated and impermissibly vague. It was therefore impossible for the Chamber to assess whether these summaries were even relevant to the ICC case against Mr. Gaddafi.

70. Similarly, the detention orders included in Annex D failed to state a case number or the charges laid against the Mr. Gaddafi or the factual basis for his detention. The absence of such information would have prevented the Chamber from determining whether these orders could be taken into consideration as evidence that the Libyan authorities were actively taking steps in connection with allegations related to the ICC case.
71. In light of the fact that the Libyan authorities had previously informed the Chamber that they had opened investigations against Mr. Gaddafi for serious crimes, such as “*Murder, Mass Murder, Torture, Rape, and Financial Corruption and stealing a very large sums of public funds in Libya and abroad*”, and that these investigations were not connected to the ICC case,⁹⁰ the Chamber could not presume that any evidence of investigations was necessarily directed to the allegations underlying the ICC case.⁹¹
72. Libya has not contested the legal requirement that it was required to adduce concrete evidence of sufficient specificity. It is clear that without information concerning the actual contours and scope of the domestic investigations, the information submitted by Libya would fail to satisfy the requirement of sufficient specificity.
73. As far as the other phrase repeatedly cited by Libya as evidence of an error of law and/or approach by the Chamber, namely “*actual contours*” of the investigation, the phrase means nothing more than that the *outlines* of the investigation need to be

⁹⁰ ICC-01/11-01/11-44-Anx1-Red, p.3.

⁹¹ This is underscored by the fact that Libya’s alleged investigations into Mr. Gaddafi for the same conduct as the ICC do not bear any case-file number, as would be expected in any national jurisdiction. Indeed, Libya’s position on this point has not been consistent. Despite denying that investigations bear a case number in the investigative phase (ICC-01/11-01/11-T-3-CONF-ENG, p.54, lines 11-13), immediately after this issue was put to Libya, a case number appears to have been assigned to Mr. Gaddafi (ICC-01/11-01/11-258-Anx9). The absence of a case number at the time of the admissibility challenge, when considered in conjunction with Libya’s express admission that Mr. Gaddafi was only detained on the basis of financial crimes until 2 April 2012 (ICC-01/11-01/11-130, para.43) would have heightened the need for the Chamber to receive further particulars concerning Libya’s investigative steps taken prior to this date in order ensure the existence of a nexus with the ICC case. It would not have been open to any reasonable Chamber to conclude on the basis of such a miasma of vagueness and contradictory information that Libya had met its burden of demonstrating that it was actively investigating the ICC related case against Mr. Gaddafi at the time of the admissibility challenge.

adduced by way of evidence. “*Outline*” is a synonym of “*contour*”,⁹² and the word “*actual*” does not add anything meaningful to the word “*contours*”.⁹³

74. Again, by stating that it needed to “*discern the actual contours of the national case against Mr. Gaddafi*”,⁹⁴ the Chamber was saying no more than that it needed to know the outline of the case against Mr. Gaddafi, “*such that the scope of the domestic investigation could be said to cover the same case as that set out in the Warrant of Arrest*”.⁹⁵ Far from this being a stringent test, or a test that departed from the Court’s established case law, this was clearly just an observation regarding the deficiencies of the evidence presented.
75. Libya compounds its misreading of the Decision when it states, “[p]atently, ‘*investigative steps*’ at an earlier stage will necessarily have not have concluded or defined the “*actual contours*” and “*precise scope*” of the case”.⁹⁶ Thus Libya wrongly considered that the Chamber required proof that “*the case*” being investigated had “*actual contours*” or a “*precise scope*”.
76. The Chamber’s use of the terms “*actual contours*” and “*scope*” thus refers to an epistemological question, not to the substance of the investigation. The Chamber was not setting a standard to which the investigations should have progressed – Libya simply did not provide enough evidence to even establish the investigation that it was alleging to exist. The Chamber had correctly identified the requisite standard of proof, namely that the State “*must provide the Court with evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case*”.⁹⁷
77. The fact that Libya makes this argument without prejudice to its Ground Two cannot disguise the fact that in the latter Ground, Libya relies on an interpretation which is inconsistent with its argument on Ground One, and one consistent with a correct interpretation of the Chamber’s use of “*actual contours*” and “*scope*”. Libya asserts

⁹² According to the Oxford English Dictionary, 2013, “Contour” is defined as “The outline of any figure”, <http://www.oed.com/view/Entry/40304?rskey=DYREhk&result=1#eid> (5 July 2013).

⁹³ A fact that is obvious when one considers the nonsensicality of the opposite: “*non-actual contours*.”

⁹⁴ Decision, para.135.

⁹⁵ Decision, para.135.

⁹⁶ Appeal, para.62.

⁹⁷ ICC-01/09-02/11-274, para.61.

that the Chamber should have found that it was investigating the “‘*same case*’ as that before the ICC” on the basis that “[v]arious pieces of evidence referred to above were of direct relevance to the question of the scope and contours of the domestic case against Mr. Gaddafi[...]”.⁹⁸ In doing so, Libya demonstrates its awareness of the fact that the Chamber’s use of the terms “*scope*” and “*contours*” concerned its application of the correct the standard of proof, and did not constitute an “*additional standard*”, as it argues in its Ground One.⁹⁹ Requiring information concerning the scope and contours of the investigation no more modified the legal standard or created a new legal test than if the Chamber were to have requested information from Libya as to the identity of the person being investigated, in order to assess whether Libya had fulfilled the ‘same person’ aspect of the ‘same case’ test.

B. Libya’s arguments with regard to the “Level of similarity required by the ‘substantially the same conduct’ test” are entirely misplaced¹⁰⁰

78. Libya makes a number of arguments in support of a ‘low’ level of similarity in respect of the ‘*substantially the same conduct test*’. First, Libya argues that “[a] contextual reading of the relevant provision supports a broad and permissive interpretation of what constitutes the ‘case being investigated’”.¹⁰¹ More specifically, Libya argues that Article 19(5) – which requires a State to make an admissibility challenge “at the earliest possibility” – implies a lower threshold as “[a] challenge at the ‘earliest opportunity’ clearly requires only minimal evidence of an ongoing investigation relating broadly to the “*same conduct*”[...]”¹⁰². This is not the only possible interpretation of Article 19(5).
79. This argument has already been expressly considered and dismissed by the Appeals Chamber: “Article 19(5) of the Statute requires a State to challenge admissibility as soon as possible once it is in a position to actually assert a conflict of jurisdictions.

⁹⁸ Appeal, para.95.

⁹⁹ See also the Al-Senussi Challenge, ICC-01/11-01/11-307, para.125, in which Libya recognised the evidential and practical necessity of setting out the contours of its investigation: “the following section sets out [...] the key features of Libya’s substantive and procedural law with a view to contextualising and explaining the concrete and specific investigative steps taken as well as the contours of the case against Abdullah Al-Senussi.”

¹⁰⁰ Appeal, paras.50-70.

¹⁰¹ Appeal, para.63.

¹⁰² Appeal, para.63.

*The provision does not require a State to challenge admissibility just because the Court has issued a summons to appear.”*¹⁰³

80. The language used by the Chamber is consistent with the statutory scheme in Article 17, and the Appeals Chamber’s jurisprudence in the *Kenya* cases, to the effect that a challenging State must substantiate the existence of an investigation into the same person/same conduct as the ICC case, through the production of “*evidence with a sufficient degree of specificity and probative value*”.¹⁰⁴ Libya’s arguments in paragraphs 65-70 of the Appeal are thus entirely misplaced.
81. As Libya correctly points out, the purpose of Article 19(5) has been identified by the Appeals Chamber as “*in the interest of the Court and the proper administration of justice because it will avoid potentially lengthy and expensive proceedings before the Court that may have to be stopped at a later stage because the case has become inadmissible*”.¹⁰⁵ However, it does not follow that the threshold should be lowered to require “*only minimal evidence of an ongoing investigation relating broadly to the ‘same conduct’*”.¹⁰⁶ Libya’s arguments on this point have falsely conflated the stage of the investigations, with the level of proof required to demonstrate that the authorities had reached that stage of the investigations. The policy objective of requiring States to challenge admissibility as soon as there is a ‘conflict of jurisdictions’, is independent of the evidential requirement that States must substantiate that there is in fact a ‘conflict of jurisdictions’.
82. Moreover, contrary to Libya’s arguments, lowering the evidential threshold concerning the existence of an ongoing investigation would in fact increase the risk that the proper administration of justice will be frustrated. There is a much greater possibility that cases that have been found to be inadmissible will later be declared admissible if there has not been a proper evidential verification that the State in question is in fact investigating the case, and is not shielding the defendant whilst promulgating empty promises and unsubstantiated assurances that it intends to investigate the case. The risk can only be avoided by applying the test strictly.

¹⁰³ ICC-01/09-01/11-307, para.46.

¹⁰⁴ ICC-01/09-01/11-307, para.2.

¹⁰⁵ ICC-01/09-01/11-336, para.21; ICC-01/09-02/11-342, para.21, emphasis added.

¹⁰⁶ Appeal, para.63.

83. In any event, the Chamber's approach is consistent with the evidential standard advocated by Libya. This was precisely at issue when the Chamber found that Libya had not established the scope or "*actual contours*" of the investigation – that it could not even meet this relatively low threshold.
84. Second, Libya argues for a low level of similarity in respect of the "*substantially the same conduct test*" based on the principle of complementarity. This is yet another example of the abuse of this principle, which creates a presumption in favour of domestic prosecution broadly speaking, but does not mean that each and every dispute must be resolved in favour of domestic prosecutions. While Libya may be correct that complementarity is "*widely regarded as the 'cornerstone' of the Statute 'without which there would have been no agreement' at the Rome Conference*",¹⁰⁷ this cannot be used as a basis to undermine or circumvent the manifestation of that agreement: the Rome Statute. Therefore, this 'presumption' cannot override the clear language of the Rome Statute which its drafters crafted in order to give effect to this principle, as well as other important considerations such as the administration of justice and the rights of the accused.
85. What is more, the so-called "*presumption in favour of national jurisdictions*" is at its strongest in Article 18(2) of the Statute which requires the Prosecution to defer to national jurisdictions, upon notification by the Prosecutor and within a limited time-frame, where a State informs the Court that it is investigating or has investigated its nationals or others within its jurisdiction. However, the drafters of the Rome Statute elected to exclude Security Council referrals (such as this) from the scope of Article 18(2). This leaves significant doubt as to the application of this presumption in cases triggered by a Security Council referral.
86. Libya's misreading of the Decision is not assisted by its submissions on the presumption in favour of national jurisdictions.¹⁰⁸ Even if such a presumption can be considered to exist in the context of a Security Council referral – which is arguable – any such presumption would not alter the fact that the burden of proof is on Libya.

¹⁰⁷ Appeal, para.56.

¹⁰⁸ Appeal, paras.55-56.

Libya must therefore meet the requisite standard of proof.¹⁰⁹ In this case the Chamber correctly held that it had not.¹¹⁰

87. In addition to lowering the threshold for “*sameness*”, Libya also employs the principle of complementarity as a basis for proposing an alternative process to that envisaged by the Rome Statute in respect of complementarity: namely a “*flexible and continuous review procedure*” which, it alleges, is “*exactly what the drafters of the Statute contemplated in adopting the complementarity principle*”.¹¹¹ This is a clear and flagrant departure from the scheme set out in the Rome Statute in terms of which “[t]he admissibility of a case ... may be challenged only once by any person or State”, unless exceptional circumstances exist that warrant further challenges with the leave of the Court.¹¹²
88. Third, Libya argues (albeit implicitly) for a low level of similarity in respect of the “*substantially the same conduct test*” on the basis that – under the current process – “*a finding of inadmissibility concerning an ongoing investigation does not preclude the Court from a subsequent finding of admissibility, depending on the progress of the domestic investigations*”.¹¹³ It argues, “[i]n pointed contrast, a State may submit a new challenge to admissibility under article 19(4) only in “*exceptional*” circumstances”, a standard that does not apply to subsequent “*challenges*” by the Prosecutor”. However, the alleged prejudice suffered by the challenging State of having to meet the additional requirement of “*exceptional circumstances*” is clearly outweighed by the prejudice in respect of the administration of justice and, more importantly, the rights of the accused to a fair and expeditious trial caused by any reversal of a decision of

¹⁰⁹ Decision, paras. 52-53.

¹¹⁰ At paragraph 55 of its Appeal, Libya, in a somewhat tortuous passage, accuses the Chamber of showing only a “*theoretical deference to sovereign rights* (sic)” which is belied by “*rulings that in substance defeat domestic proceedings*”. This comes close to an allegation of bad faith against the Chamber, i.e. that it paid lip-service to considerations of state sovereignty which it had no intention of honouring. This is, clearly, an inappropriate charge to lay against any Chamber of the Court. The submission also approaches incoherence in that it appears to suggest that any ruling that a case is admissible is, *ipso facto*, flawed because it was the intention of the drafters of the Statute that “*domestic proceedings*” should never be “*defeat[ed]*”. Obviously, if that were so, there would be no need for admissibility proceedings at all. The submission also bears no resemblance to reality, as the Chamber did everything it could to accommodate Libya during the proceedings, as illustrated in paragraphs 44-47 above. In the same vein, at paragraph 67 of its Appeal, Libya accuses the Chamber of having “*disregard[ed] the ‘best efforts’ of the Government*”; again, an unwarranted charge.

¹¹¹ Appeal, para. 74.

¹¹² Article 18(4).

¹¹³ Appeal, para. 72.

admissibility or inadmissibility because a Pre-Trial Chamber adopts an unexacting or overly deferential approach.

89. Finally, Libya at various points refers to the “*challenging transitional situation*” in the country, implying that this is a basis for applying a lower level of similarity than that applied to more ‘stable’ situations. However, nowhere in the Rome Statute does it suggest that the requirements of Article 17 should be more leniently applied to States going through transitions or emerging from conflict. If anything, the Statute suggests the opposite. The presumption in favour of national jurisdictions is – for reasons discussed above – of less relevance when the Security Council refers a situation to the Court. Such referrals can only take place after the Council determines that a particular situation constitutes a threat to international peace and security, which more often than not will take place in relation to States undergoing transitions or emerging from armed conflict.
90. Libya’s arguments concerning State sovereignty are thus entirely irrelevant to the objective assessment as to whether Libya discharged its burden of establishing that it was – at the time of the admissibility proceedings – actively investigating the same case as the ICC. As the Appeals Chamber has made clear, any presumption in favour of domestic jurisdictions does not obviate the duty of challenging states to substantiate their challenge to admissibility:

*“Although article 17 (1)(a) to (c) of the Statute does indeed favour national jurisdictions, it does so only to the extent that there actually are, or have been, investigations and/or prosecutions at the national level. If the suspect or conduct have not been investigated by the national jurisdiction, there is no legal basis for the Court to find the case inadmissible.”*¹¹⁴

91. Libya errs in its argument that the Chamber’s finding that there was evidence that a number of progressive steps had been taken.¹¹⁵ It is patently wrong that a State only has to establish that it is conducting investigations. Article 17 requires the State to establish that it is conducting active investigations and that these investigations encompass the same case as the ICC. Whilst the Chamber’s finding concerning the existence of progressive steps might have sufficed to establish the first element, that

¹¹⁴ ICC-01/09-01/11-307, para.44.

¹¹⁵ Appeal, para.54.

did not and could not in itself establish that these steps were directed to the allegations underlying the ICC case.

92. In terms of the latter aspect, the Chamber found that these progressive steps “*have been taken by Libya with respect to certain discrete aspects that arguably relate to the conduct of Mr. Gaddafi as alleged in the proceedings before the Court*”.¹¹⁶ Discrete aspects “*that arguably relate*” to the ICC case cannot equate to “*substantially the same conduct*” as the ICC case.

93. In this connection, in its 4 March 2013 reply, Libya confirmed its understanding that:

*“Libya is required to establish that its proceedings focus on substantially the same conduct and series of events as the ICC case such that criminal responsibility of Saif Al-Islam Gaddafi is to be examined in the context of substantially the same incidents and underlying facts and allegations of criminal responsibility”*¹¹⁷

94. Libya further argued that “*providing samples of a substantial number of the factual allegations underpinning the Court’s arrest warrant should be considered sufficient*” to satisfy the test.¹¹⁸ The existence of progressive steps concerning “*discrete aspects*” would thus fail even to satisfy the standard previously advocated by Libya – namely, evidence that Libya was investigating “*substantially the same incidents and underlying facts and allegations of criminal responsibility*”.

95. Libya has thus failed to establish any error on the part of the Chamber when it concluded that Libya’s investigation of “*discrete aspects*” of the ICC case failed to satisfy the requirements of Article 17(1).

i. Libya’s arguments on the “*Alleged errors as to requisite level of sameness as regards an ongoing investigation*” distort the Chamber’s findings¹¹⁹

96. Libya’s arguments on this point¹²⁰ again misconstrue the Decision. At paragraph 59, Libya distorts the Chamber’s findings by arguing that the Chamber’s reference to “*precise scope*” required Libya to have completed its investigations or finalised its

¹¹⁶ Decision, para.134; Appeal, para.45, emphasis added.

¹¹⁷ ICC-01/11-01/11-293-Conf, para.34.

¹¹⁸ ICC-01/11-01/11-293-Conf, para.41.

¹¹⁹ Appeal, paras.57- 70.

¹²⁰ Appeal, paras.57-64.

parameters.¹²¹ The Chamber found nothing of the sort – it simply concluded that there was insufficient information to identify the scope of the existing investigations. Contrary to the arguments of Libya, this language would not have precluded Libya from satisfying the Article 17(1) test with even preliminary investigative steps, as long as Libya had provided sufficient information to determine whether those preliminary steps were directed at the ICC case. The issue concerns the specificity of the evidence – it is not a legal issue or a legal error.

97. In adumbrating its arguments at paragraph 60 *et seq.*, Libya confuses specificity of outcome (which the Chamber was not requiring) with specificity of procedures. Although it is not possible to predict the outcome of an investigation at the outset, the persons conducting the investigation should at least be aware of what they are actually investigating. Any credible interview of a witness should record the dates and geographic locations to which the testimony relates. Such specificity can and should exist from the outset of the investigative process.
98. Libya incorrectly argues at paragraph 62 that the Chamber required it to demonstrate the specific contours of the “*case*”. The Chamber did not – it only required them to demonstrate the contours of the investigation. This did not impose a requirement on Libya to confirm all aspects of the ICC investigation, only to establish that it had directed investigative steps to the substantial aspects of the ICC case. Indeed, if the Libyan authorities had investigated the ICC case but determined that there was insufficient probative evidence to warrant a prosecution, then they could have invoked Article 17(b) of the Statute.
99. Libya further errs where it alleges that the Chamber found the case inadmissible because the domestic case was “*merely ‘proceeding more slowly’ or ‘less efficiently’ than the ICC case*”.¹²² The Chamber made no such finding. Libya does not even cite any paragraph of the Decision to support this allegation. Accordingly, it should be summarily dismissed.¹²³ Moreover, Libya entirely overlooks the fact that the

¹²¹ As noted at paragraphs 63-77 above, Libya errs when it asserts that the Chamber applied a ‘*precise scope*’ test.

¹²² Appeal, para.68.

¹²³ “*Appellant is expected to provide the Appeals Chamber with an exact reference to the parts of the trial record invoked in support of its arguments. As a general rule, in instances where this is not done, the Appeals Chamber*

Prosecutor's investigations in this case were suspended once the admissibility challenge was made, so there could not even be a theoretical issue of the Libyan case proceeding "*more slowly*" or "*less efficiently*" than the ICC case. The argument is simply incoherent.

C. Libya's submissions as to "*the object and purposes of Statute and the role of the ICC in domestic proceedings*" are irrelevant to demonstrating legal error¹²⁴

100. Libya has failed to explain how its arguments on this point are related to any alleged legal or factual error. It simply repeats arguments that it made at first instance, and which were rejected, without demonstrating any error by the Chamber. This is not the objective of appellate review and is a ground for summary dismissal.

D. Libya's arguments regarding an alleged "*failure to provide a reasoned opinion*" are unsubstantiated and fail to meet the requisite standard for appellate review¹²⁵

101. This appellate ground is also entirely misplaced due to the fact that Libya's argument that the Chamber adopted an additional legal criterion ("*precise scope*") constitutes a wholly incorrect interpretation of the Decision.¹²⁶ This Ground should therefore be dismissed summarily. The Chamber's reference to "*actual contours*" and "*scope*"¹²⁷ was completely consistent with appellate jurisprudence requiring sufficiently specific evidence. This jurisprudence had been set out in the Pre-Trial Chamber's 7 December 2012 Decision, and there was no need for the Chamber to further explain its application in its final decision.
102. Moreover, contrary to Libya's submissions,¹²⁸ the Chamber was not obliged to address "*the broader context of the Libyan criminal justice system*" (whatever that means) nor explicitly to explain "*why it chose not to draw reasonable inferences*" from that

will summarily dismiss the alleged error or argument." (Martić, para.20; Strugar, para.22. See also Halilović, para.13; Blagojević and Jokić, para.11.)

¹²⁴ Appeal, paras.71-74.

¹²⁵ Appeal, paras.75-78.

¹²⁶ See paragraphs 63-77 above.

¹²⁷ Decision, para.135.

¹²⁸ Appeal, para.77.

“broader context”, and on that basis to find the case inadmissible. Indeed, it is well established in international criminal law that a Chamber is not obliged to give reasons for rejecting every argument raised by the Parties.¹²⁹

VIII. GROUND TWO: “The Pre-Trial Chamber erred in fact and law by finding that Libya had not substantiated that its domestic investigations covers the same case as that before the ICC”¹³⁰

A. Libya’s allegation is flawed, constitutes a reversal of its position before the Chamber and is manifestly unfounded

103. Libya has completely failed to satisfy the relatively onerous burden of establishing that the Chamber committed a factual error in its assessment of the evidence submitted by Libya in support of its admissibility challenge.
104. Indeed the reasonableness of the Chamber’s ultimate assessment that Libya had failed to establish that it was investigating substantially the same conduct as the ICC case, is corroborated by the fact that the Prosecutor also concluded that Libya had failed to establish that it was investigating substantially the same conduct as the ICC case.¹³¹
105. Finally, it is worth noting that Libya benefitted from a definition of a ‘case’ which was much broader than that employed previously before the ICC. Accordingly, if the Chamber committed any error, it was that the legal test employed was too broad rather than too narrow.
106. As Libya has explicitly recognised:

“the [ICC] Prosecutor is in a unique position to be able to compare the evidence in the possession of her office with that gathered by the Libyan authorities in the national investigation. Libya has not had any access to the investigative materials of the ICC Prosecutor, and does not anticipate reciprocal disclosure. For this reason, Libya’s assessment of the “same conduct” test is necessarily limited to the Article 58 Decision of 27 June 2011

¹²⁹ See ICC-01/04-01/06-773, para.20, where the Appeals Chamber stated that it was not necessary for “each and every factor that was before the Pre-Trial Chamber to be individually set out”.

¹³⁰ Appeal, paras.82-119.

¹³¹ ICC-01/11-01/11-276-Conf-Red, para.38.

whereas the ICC Prosecutor's assessment of this issue will be a more informed one".¹³²

107. According to the Appeals Chamber, the purpose of an admissibility challenge is to *"resolve a conflict of jurisdictions between the Court on the one hand and a national jurisdiction on the other"*.¹³³ If it *"cannot be said that the same case is (currently) under investigation by the Court and by a national jurisdiction, [...] there is therefore no conflict of jurisdictions."*¹³⁴
108. The power of the Pre-Trial Chamber to adjudicate the admissibility challenge is therefore circumscribed by its own jurisdiction. In order to render a decision on whether Libya is actively investigating the same case as the ICC, the Chamber should have only take into consideration acts and conduct which fall within its own jurisdiction (i.e. those which were expressly set out in the decision on the arrest warrant).
109. The possibility that Libya might be investigating acts or conduct falling outside of the scope of the ICC arrest warrant – albeit of a similar character- should therefore have been entirely irrelevant to the Chamber's determination as to whether the Government has adduced sufficiently concrete evidence that it is actively investigating the same case as the ICC.
110. In this regard, the ICC Appeals Chamber found that the Court has no jurisdictional competence to render determinations on factual incidents or matters falling outside of the scope of the ICC charges. Thus, although the definition of a 'victim' for the purposes of Rule 85 was not expressly limited to persons who suffered harm as a result of the facts and circumstances set out in the charges, the Chamber's authority was restricted to the parameters of the charges.¹³⁵ Similarly, the current test adopted by the Pre-Trial Chamber errs only to the extent that it permits and potentially requires the Chamber to engage in an evidential adjudication of incidents which fall outside the scope of the ICC investigations and proceedings.

¹³² ICC-01/11-01/11-258-Conf-Red, para.34, emphasis added.

¹³³ ICC-01/09-01/11-307, para.37.

¹³⁴ ICC-01/09-01/11-307, para.41.

¹³⁵ ICC-01/04-01/06-1432, paras.62-63.

111. The Chamber has no competence to determine whether considering other charges or incidents would eliminate impunity – it is only seized of the incidents that form the basis of the arrest warrant. As noted by the Appeals Chamber in the *Kenya* case – to adopt a broader definition of a ‘case’ would be to confuse the admissibility test under Article 18 with that which applies to specific cases under Article 19.¹³⁶
112. Similarly, the Court’s complementarity regime does not militate in favour of according States with greater discretion to deviate from the parameters of the ICC case: “[i]f the suspect or conduct have not been investigated by the national jurisdiction, there is no legal basis for the Court to find the case inadmissible”.¹³⁷
113. Accordingly, if the Appeals Chamber were to disturb the Pre-Trial Chamber’s definition of a ‘case’, it should be to find that the definition employed by the Pre-Trial Chamber was too broad rather than too narrow. This would not, however, warrant the remittance of the decision to the Pre-Trial Chamber as the adoption of an overly broad definition operated to the advantage of Libya, rather than to its detriment. The error thus had no impact on the outcome of the Decision.

a) Documents¹³⁸

114. As a preliminary matter, Libya has not explained whether its Ground Two is a legal, factual or procedural error, merely repeating the stock phrase, “*erred in fact and in law*”, leaving both options open, or “*fell into error*”, without specifying the type of error.¹³⁹ Obviously it is essential for the Appeals Chamber to know whether the alleged error is one of fact or of law, since different appellate tests apply. An appellant has a duty to set out appellate grounds clearly. Libya’s grounds of appeal are patently too vague and for that reason should be summarily dismissed.
115. In the event that the Appeals Chamber does consider this ground of appeal, notwithstanding its lack of specificity, what follows is a comprehensive analysis of the evidence adduced by Libya in support of its challenge.

¹³⁶ ICC-01/09-01/11-307, para.39.

¹³⁷ ICC-01/09-01/11-307, para.44, emphasis added.

¹³⁸ Appeal, paras.86-100.

¹³⁹ Appeal, paras.82-95.

b) Annex E and F and Al-Senussi materials¹⁴⁰

116. Annex E undermines rather than supports Libya's claim that it was actively investigating Mr. Gaddafi for ICC-related conduct. [REDACTED]. Under Libyan law, a detainee must be questioned in relation to the factual basis for their detention.¹⁴¹ It therefore follows that if Mr. Gaddafi was only interrogated in relation to [REDACTED] as of May 2012, then he was only being detained for these matters, and not for ICC-related conduct.
117. In terms of the documents pertaining to Mr. Al-Senussi (Annex F and the Al-Senussi Challenge), as a general matter, Libya never disputed that Article 17 imposed a requirement to demonstrate that it was investigating the same person as the ICC (the same person/same conduct test).
118. In the *Kenya* cases, the Appeals Chamber held that, while general investigations into either contextual crimes and/or lower-level or same-level perpetrators might suffice for an Article 18 admissibility challenge, Article 19 requires the challenging State to demonstrate that the investigative steps are directed against the particular person who is the subject of the admissibility challenge.¹⁴²
119. Libya's domestic investigations against Mr. Al-Senussi are therefore irrelevant to its challenge concerning Mr. Gaddafi, particularly in the absence of any information that the evidence collected against Mr. Al-Senussi formed part of the domestic case-file against Mr. Gaddafi.
120. Moreover, as the party bringing the challenge, the burden fell on Libya to demonstrate the relevance of these documents to the Chamber's assessment of its admissibility challenge. Libya did not do so.
121. Libya made no submissions to the Pre-Trial Chamber as to the relevance of the evidence set out in the Al-Senussi Challenge to Mr. Gaddafi's individual responsibility, or to the domestic investigation against Mr. Gaddafi. It is patently

¹⁴⁰ Appeal, paras.87-93.

¹⁴¹ Articles 105 and 112 of the Criminal Procedure Code and Annex 2 to the Response.

¹⁴² ICC-01/09-01/11-307, paras.39-42.

insufficient to assert the existence of such relevance without actually elucidating how each item of evidence demonstrated that Libya's domestic investigation against Mr. Gaddafi (as opposed to Mr. Al-Senussi) encompassed the same conduct underlying the ICC case. If a party fails to highlight the relevance of a particular item of evidence for the Chamber's decision, then it invites the risk that the Chamber will not take it into consideration. The Chamber cannot be expected to embark on "*judicial guesswork*".¹⁴³

122. Accordingly, this ground of appeal should be rejected in its entirety.
123. The contents of Annex F concern the [REDACTED] and as such, have absolutely no relevance to either Mr. Gaddafi or the ICC case.
124. With respect to the annexes submitted on 1 April 2013 in the Al-Senussi challenge, Libya never submitted a request for the Chamber to take these materials into consideration in its Gaddafi challenge. Libya only obliquely intimated that it wished to address the general "*relevance*" and "*status*" of these materials, in a request for leave to reply, which was filed in connection with the Al-Senussi challenge and not the Gaddafi challenge.¹⁴⁴
125. As a matter of procedure, it is in any case impermissible to shroud a request within the cloak of a response or a reply.¹⁴⁵ It was, therefore, entirely appropriate for the Chamber, and well within its discretion, to disregard this aspect of Libya's request for leave to reply.
126. As the Appeals Chamber will be aware, in its original Admissibility Challenge, Libya expressly requested the Chamber to separate its consideration of the admissibility of the Al-Senussi and Gaddafi cases. Libya confirmed that:

¹⁴³ ICC-01/04-01/06-2842, para.95

¹⁴⁴ In the context of the Al-Senussi Challenge, Libya requested authorisation to file a reply in relation to "*the relevance and status of the information and evidence served in the challenge concerning Mr. Al-Senussi, which was not included in the initial challenge concerning Mr. Gaddafi*" (ICC-01/11-01/11-327, para.6). The ambiguity of Libya's stance on this matter was compounded by the fact that immediately before requesting to address the issue of the relevance of these documents, Libya had also requested to address the allegation that the Government "*contrived to benefit from additional time to mount its admissibility challenge against Mr. Al-Senussi*" and the suggestion that Libya now "*seek[s] to rely upon the one filed latest in time to supplement its earlier challenge against Mr. Gaddafi*". It would have been reasonable for the Chamber to infer from Libya's wish to reply to the suggestion that Libya "*seek[s] to rely upon the one filed latest in time to supplement its earlier challenge*" that Libya disputed this suggestion, and was not in fact seeking to supplement its challenge against Mr. Gaddafi *via* the Al-Senussi Challenge.

¹⁴⁵ ICC-01/05-01/08-962, para.30.

*“where there are two or more suspects, the admissibility assessment must consider the case against each suspect as separate and distinct inquiries.”*¹⁴⁶

127. Libya did not resile from this position when it filed the Al-Senussi Challenge. To the contrary, Libya asserted that a Defence claim that Libya might try to utilise the Al-Senussi challenge to reopen or delay the Gaddafi challenge was “*baseless and inapposite*”.¹⁴⁷
128. Given that Libya never requested the Chamber to take the Al-Senussi documents into consideration in its assessment of the Gaddafi challenge, the Chamber committed no error by excluding them from its consideration. Parties are “*required to raise formally any issue of contention before the Trial Chamber either during trial or pre-trial;*¹⁴⁸ *failure to do so may result in the complainant having waived his right to raise the issue on appeal*”.¹⁴⁹ Having made its election, Libya has, therefore, waived its right to raise any issue on appeal to the effect that the Chamber should have considered the Al-Senussi documents in relation to the Gaddafi challenge.
129. By filing these annexes directly before the Appeals Chamber, and submitting arguments as to their merits, Libya has tried to introduce new evidence on appeal without first seeking leave to do so; indeed without even alerting the Appeals Chamber to what it was doing. It has also done so on an *ex parte* basis, again, without seeking authorisation or providing any justification for withholding the information in question from the Gaddafi Defence (as opposed to the Al-Senussi Defence), in the context of the Gaddafi admissibility challenge.
130. Litigating the merits of these annexes on appeal for the first time would also be contrary to the Appeals Chamber’s finding in the *Kenya* case that appellate proceedings are corrective, and cannot be considered to be a continuation of the pre-trial proceedings.¹⁵⁰

c) Flight-related documents¹⁵¹

¹⁴⁶ ICC-01/11-01/11-130, para.69, emphasis added.

¹⁴⁷ ICC-01/11-01/11-318-Red, para.14.

¹⁴⁸ *Krajišnik*, para.654; *Blaškić*, para.222; *Čelebići*, para.640, emphasis added.

¹⁴⁹ *Boškoski & Tarčulovski*, para.244; *Haradinaj*, paras.111-112, emphasis added.

¹⁵⁰ ICC-01/09-01/11-234, paras.12-13.

¹⁵¹ Appeal, paras.96-98

131. Libya has provided absolutely no explanation as to how the Chamber erred in its assessment of these documents. To the contrary, Libya has completely failed to refer to the specific findings of the Chamber, namely, that Annex 5 failed to specify the destination of the flight, and Annexes 6 and 7 established at most, that there were flights between 17 and 19 February 2011. Libya's assertion that these annexes related to proof of financing and mobilisation of mercenaries is completely false.¹⁵² No such evidence was placed before the Chamber, and Libya's claim that these annexes could establish such matters simply underscores its inability to assess the evidence in this case in an impartial and objective manner.

d) Other documents¹⁵³

132. Libya has failed to establish that the Chamber erred by finding that Annexes I (of 1 May 2012), and 3, 9, 10 and 11 (of January 2013) do not contain "*specific information as to the criminal conduct under investigation in Libya*".¹⁵⁴ At most, these annexes establish that the Libyan authorities were conducting criminal investigations against Mr. Gaddafi. They do not, however, include sufficient information to establish that the conduct under investigation was related to the ICC case.
133. For example, Annex I consists of a mere assertion regarding the existence of investigations, and contains no information concerning the temporal or geographic scope of the investigations. As noted above, in light of the fact that the Libyan authorities had explicitly informed the ICC in January 2012 that they were investigating Mr. Gaddafi for serious crimes, such as murder, which were unrelated to the ICC case, the Chamber could not deduce from the mere fact that some investigative steps had been taken that these were directed to the ICC case. Annex I, therefore, lacks both probative value and specificity.
134. Annex 3 contains a blanket assertion from the Libyan Ministry of Justice that the domestic investigation encompasses the ICC case; it contains insufficient information to enable the Chamber to verify the accuracy and veracity of the statement. Both Annexes I and 3 were prepared expressly for the Admissibility Challenge, rather than in the normal course of domestic investigations.

¹⁵² [REDACTED]

¹⁵³ Appeal, paras. 99-100.

¹⁵⁴ Appeal, para. 99.

135. Annexes 9 and 10 are extensions of detention orders, and not evidence.¹⁵⁵ The probative value of the detention orders is also highly dubious given that Libya conceded that Mr. Gaddafi had never been brought before a Court in “South Tripoli” and that the reference to a public hearing in the orders is incorrect.¹⁵⁶ The alleged ‘confessions’ from Mr. Gaddafi were also extracted in coercive circumstances, and are nonsensical in their content: Mr. Gaddafi allegedly confessed to killing someone who is alive,¹⁵⁷ and directly contradicts himself between the two hearings, confessing to the eleventh charge in one hearing and denying the charge in another.¹⁵⁸
136. Annex 11 contains no details whatsoever of the temporal or geographic scope of investigations, and although it refers to the existence of a “*systemic general policy*”, there is no information concerning the objective of this policy, its temporal or geographic scope, or the manner in which it was implemented. In particular, there is no information concerning the alleged contribution of Mr. Gaddafi to the realisation of the policy. Since it is based on a mere assertion, it also lacks probative value.
137. The Chamber’s findings in relation to these annexes are entirely consistent with the Appeal Chamber’s jurisprudence concerning the limited evidential value of mere assertions concerning the existence of investigations, or documents, which lack concrete details concerning the scope of investigations.¹⁵⁹
138. Bearing in mind that the burden fell on Libya to demonstrate that the evidence pertained to the ICC case, the Chamber rightly took into account the absence of specific information concerning dates, locations and offences. The Chamber properly considered that the vague and deficient documents submitted by Libya were insufficient as concrete evidence of investigations of substantially the same case as the ICC.

¹⁵⁵ Pursuant to Article 177 of the Libyan Criminal Procedure Code, the questioning of the suspect by a three-judge panel is done for the purposes of renewal of detention orders; it is merely a procedural and investigative step under Chapter 3 of the Code of Criminal Procedure, as opposed to Chapter 2, which covers the collection of factual evidence and the bringing of a case and to Volume 2 of the said Code, which covers the trial stage. ICC-01/11-01/11-190-Anx1, p.7.

¹⁵⁶ ICC-01/11-01/11-293-Conf, para.49.

¹⁵⁷ ICC-01/11-01/11-281-Conf, para.112.

¹⁵⁸ ICC-01/11-01/11-281-Conf-Red, paras.112-116.

¹⁵⁹ ICC-01/09-01/11-307, para.62.

139. Libya's submissions on this ground reveal no error in the manner in which the Chamber reached its conclusions and should be dismissed.

*e) Summaries of witness statements*¹⁶⁰

140. Libya's arguments on this point misconstrue the Decision. Libya argues that the Chamber erred by finding that witness summaries, as a generic category, could not meet the standard of proof set by the Appeals Chamber.¹⁶¹ The Chamber made no such finding. Indeed, it rejected Defence arguments seeking to exclude the summaries *en masse*. The Chamber considered the summaries on a case by case basis. It found that the summaries had some probative value and did reflect discrete aspects of the conduct underlying the ICC case.¹⁶²

141. Reasonably, however, the Chamber concluded that the summaries themselves did not reach the evidential standard. The summaries were brief and had been prepared specifically for the admissibility proceedings; they lacked information concerning dates, locations and other key details. Very few, if any, of the summaries pertain to the allegations underlying the ICC case.¹⁶³ The fact that the Chamber found that some summaries reflected discrete aspects of the ICC case indicates that where there was sufficient information to assess the relevance to the ICC case, the Chamber did take the summaries into consideration.

142. Libya contends that the Chamber's conclusion that the summaries lacked detail and specificity "*is manifestly wrong*".¹⁶⁴ It is telling that Libya does not cite any examples to illustrate its point. The summaries are drafted in the broadest terms imaginable. Some are only one or two sentences long, and lack specific information as to who, how, why, when, and where.

143. The summaries also contain no information concerning the date on which the initial statement was taken, by whom it was taken, and the circumstances under which it was taken. The lack of such information was particularly problematic in light of evidence concerning the use of coercive and illegal interrogation practices by volunteers and

¹⁶⁰ Appeal, paras.101-104.

¹⁶¹ Appeal, para.102.

¹⁶² Decision, para.121.

¹⁶³ See ICC-01/11-01/11-190-Conf-Corr, paras.77-78.

¹⁶⁴ Appeal, para.104.

militias conducting interviews,¹⁶⁵ and Libya's concession that the initial investigations against Mr. Gaddafi were conducted by 'local magistrates' from Zintan.¹⁶⁶

144. According a lower probative value to such summaries would have been well within the scope of the Chamber's previous rulings that information of sufficient specificity and probative value must be provided in relation to both the content and date of witness statements.¹⁶⁷
145. Libya has also misstated the Chamber's observations concerning the desirability of seeing the underlying witness statement.¹⁶⁸ Although the Chamber agreed with the Defence that it would have been useful to do so, the Chamber did not predicate its decision on this observation. Rather, it concluded that the absence of sufficient detail in the summaries sufficed to dispose of the matter:

*"the reality is that, even if such verification were carried out, the crucial question as to the scope of the domestic investigations would remain unanswered."*¹⁶⁹

146. Consequently, even if – which is denied – there had been any error in the Chamber's observation that verification of the accuracy of the summaries had not been possible, it would, in any event, have had no impact on its Decision. Accordingly, the threshold for the appeal to be allowed would not have been reached in any event.

f) Witness statements¹⁷⁰

147. Libya errs when it argues that Annexes 4, 15 and 16 should have, in themselves, established that Libya was investigating the same person/same conduct.¹⁷¹

i. Annex 4¹⁷²

¹⁶⁵ ICC-01/11-01/11-281-Conf, paras.71 and 78-87; ICC-01/11-01/11-190-Conf-Corr, paras.89-115.

¹⁶⁶ ICC-01/11-01/11-44.

¹⁶⁷ ICC-01/09-01/11-101, para.68.

¹⁶⁸ Appeal, para.102.

¹⁶⁹ Decision, para.123

¹⁷⁰ Appeal, paras.105-108

¹⁷¹ Appeal, para.105.

¹⁷² Appeal, para.106a.

148. Libya has argued that the Chamber erred by finding that although Annex 4 had relevance, it was not clear that it was directed to the investigation against Mr. Gaddafi. In fact, the Chamber's finding is unimpeachable.
149. Libya's Appeal studiously fails to mention the fact that the Chamber carefully considered Annex 4. As part of its duty of candour Libya should have set out the Chamber's finding in full, which was that Libya had demonstrated that it was investigating "*instances of mobilisation of militias and equipment by air, the assembly and the mobilisation of military forces at the Abraq airport*".¹⁷³
150. The Chamber thus gave full weight to the contents of the statement, but even taken at its highest, the statement contained no information imputing responsibility to Mr. Gaddafi, nor did it evidence the existence of a criminal plan directed against civilians, or any contributions to this plan by Mr. Gaddafi.¹⁷⁴
151. As noted above, Libya has accepted the applicability of the same person/same conduct test. In itself, this document could, at best, establish contextual elements, which did not establish the involvement of Mr. Gaddafi in any events pertaining to the ICC case. Given that the burden fell on Libya to demonstrate the relevance of Annex 4 to both the responsibility of Mr. Gaddafi and the conduct underlying the ICC case, it was not unreasonable for the Chamber to conclude that Libya had failed to discharge its burden of relating this evidence to the role and alleged responsibility of Mr. Gaddafi.

ii. Annex 15¹⁷⁵

152. Libya's arguments concerning Annex 15 fail to address its key deficiency, namely that it concerns conduct from August 2011, and as such, fell outside the temporal scope of the incidents underlying the ICC case. In August 2011, Libya was riven by an internal armed conflict, which was comprised of a completely different factual matrix than the February 2011 events. Whereas the ICC case concerns a policy directed against civilians, the August 2011 events concerns actions directed against the opposing armed group.

¹⁷³ Decision, para.134.

¹⁷⁴ [REDACTED]

¹⁷⁵ Appeal, para.106.

153. The Chamber nonetheless rejected the Defence request to exclude the statement on the basis that it fell outside the arrest warrant events, and held that it could still be corroborative of arrest warrant events. Accordingly, if the Chamber committed any error it was that it gave the statement any weight, rather than that it gave it too little weight, particularly as the statement does not satisfy the same conduct/same person test and falls outside the jurisdiction of the ICC case.
154. As noted above, Libya expressly accepted that the same person/same conduct test required it to adduce evidence concerning the “*factual allegations underpinning the Court’s arrest warrant*”, or in other words, “*substantially the same incidents and underlying facts and allegations of criminal responsibility*”.¹⁷⁶ The allegations and incidents underpinning the ICC case do not concern events in August 2011, nor do they concern acts taking place in the context of an armed conflict between the Government and the rebels. As such, this evidence does not trigger the ‘conflict in jurisdictions’ requirement necessary to found a successful admissibility challenge.
155. Taken at its highest, a document that is corroborative of incidents underlying the ICC case, cannot in itself satisfy the admissibility test because it does not evidence actual investigations into events set out in the arrest warrant. Evidence of a Libyan investigation into events falling outside the temporal scope of the ICC case could only be corroborative of the existence of a Libyan investigation covering the same temporal scope if there were already evidence of the latter. In the absence of sufficient evidence of a Libyan investigation into February 2011 events, there is nothing to corroborate. Corroboration cannot occur in a vacuum.
156. The Chamber therefore did not err by finding that this statement was not, in itself, decisive as to the existence of investigations into the ICC case. Libya’s appeal on this ground should be dismissed.

iii. Annex 16¹⁷⁷

157. Libya argues that the Chamber erred by “*not making any express findings as to the proper weight to be attributed to*” this statement.¹⁷⁸ The Chamber was not obliged to

¹⁷⁶ ICC-01/11-01/11-293-Conf, para.34.

¹⁷⁷ Appeal, para.106.

make any such express finding. Libya does not clarify what it means by “*proper weight*”, nor whether it considers this to have been a legal or factual error. As set out in paragraphs 20 *et seq.* Libya’s references to “*weight*” are inherently vague, and flawed.

158. The Chamber found this statement to be probative of the existence of investigations into one day of the events in Benghazi (“*certain events in Benghazi on 17 February 2011, and the arrest of journalists and activists against the Gaddafi regime*”).¹⁷⁹ There is no indication that the Chamber erred in making such a finding. Contrary to Libya’s assertions,¹⁸⁰ the statement does not provide *any* evidence concerning mercenaries.¹⁸¹
159. Libya’s complaint is essentially directed against the Chamber’s finding that the evidence, while it may have established the existence of discrete steps, did not equate to substantial steps. This is simply a repetition of Libya’s earlier, flawed argument.¹⁸²

iv. Intercepts¹⁸³

160. Libya’s arguments concerning the weight that should have been attributed to these intercepts fail to address the fact that the intercepts concerned a time period which fell outside the temporal scope of the arrest warrant, and were of only peripheral relevance to the incidents underlying the ICC case.¹⁸⁴
161. [REDACTED].¹⁸⁵¹⁸⁶
162. Libya failed to demonstrate that the intercepts had been authenticated in accordance with standard Libyan procedures, and as such, the participants in the conversations had not been verified in a reliable manner.¹⁸⁷ Libya had therefore failed to take steps at the time of the admissibility proceedings to ascertain that the intercepts actually imputed responsibility to Mr. Gaddafi.

¹⁷⁸ Appeal, para.106(c).

¹⁷⁹ Decision, para.134.

¹⁸⁰ Appeal, para.106.

¹⁸¹ ICC-01/11-01/11-281-Conf, paras.90-94 and para.157.

¹⁸² ICC-01/11-01/11-370-Conf-Red, paras.44 and 54.

¹⁸³ Appeal, para.109.

¹⁸⁴ ICC-01/11-01/11-281-Conf, para.158.

¹⁸⁵ [REDACTED].

¹⁸⁶ [REDACTED]. *See* ICC-01/11-01/11-281-Conf, para.99.

¹⁸⁷ Decision, para.131; ICC-01/11-01/11-281-Conf, paras.90-106.

163. In the absence of any evidence that Libya had taken steps to link such peripheral events to the conduct of Mr. Gaddafi, the Chamber acted reasonably when it found that the intercepts failed to establish that Libya was actively investigating the same case as the ICC.

B. Libya's arguments on the "Alleged failure to take into account other specific and probative evidence pertaining to the scope of the domestic investigation" remain unsubstantiated¹⁸⁸

164. Libya has failed to substantiate any error in the manner in which the Chamber exercised its direction in refusing to grant Libya's requests to both adduce further evidential materials and to undertake a site visit to Tripoli.

165. Rule 58 vests the Pre-Trial Chamber with broad discretionary powers in organising the admissibility proceedings.¹⁸⁹ These powers are subject to the Chamber's overriding duty to respect the rights of the defendant,¹⁹⁰ and ensure an expeditious resolution to the admissibility proceedings.¹⁹¹

166. It would have been well within the Chamber's discretion to dismiss Libya's challenge without providing any further opportunities for it to supplement its initial challenge. As the Appeals Chamber has firmly held, a State challenging admissibility cannot expect to be allowed to present additional evidence; it has a duty to ensure that its initial challenge is substantiated.¹⁹²

167. In the current case, it would appear that Libya filed its challenge prematurely in order to avoid a possible finding of non-compliance as concerns its obligation to surrender Mr. Gaddafi to the ICC.¹⁹³ However, a "*State cannot expect to be allowed to amend an admissibility challenge or to submit additional supporting evidence just because the*

¹⁸⁸ Appeal, para.110.

¹⁸⁹ ICC-01/09-01/11-307, para.89.

¹⁹⁰ ICC-01/04-169, paras.2 and 20. ICC-01/04-01/06-1444-Anx, para.6: In a separate opinion, Judge Pikis opined that discretionary powers must in general take into consideration the interests of justice and the efficacy of the proceedings. The ICTY Appeals Chamber has also found that discretionary powers must comport with the rights of the accused. In *Haradinaj*, the Appeals Chamber found that the Trial Chamber's discretion to evaluate the credibility of witnesses must be reconciled with the accused's right to a reasoned opinion.

¹⁹¹ ICC-01/04-01/07-2259, para.43, ICC-01/05-01/08-962, para.30.

¹⁹² ICC-01/09-01/11-307, para.98.

¹⁹³ ICC-01/11-01/11-T-3-CONF-ENG p. 44, lines 17-18.

State made the challenge prematurely”.¹⁹⁴ Libya’s possible motive of avoiding its obligation to surrender Mr. Gaddafi to the ICC is clearly not a legitimate excuse for failing to meet its evidential burden, particularly in light of the significant amount of time and number of opportunities which were in fact accorded to it.

168. If the Appeals Chamber found that the Pre-Trial Chamber committed no error in the *Kenya* cases by resolving the admissibility challenge in the space of two months and accepting limited additional annexes,¹⁹⁵ then this Pre-Trial Chamber was clearly acting well within the bounds of its discretion in the current case.
169. The Pre-Trial Chamber, on multiple occasions, underscored that the burden fell squarely on Libya to establish that the case was inadmissible before the ICC.¹⁹⁶ Libya was accorded three separate opportunities to adduce evidence in relation to the admissibility of the case.¹⁹⁷ Libya was also invited to submit reports on issues touching on the admissibility of the case in January and September 2012.¹⁹⁸
170. Libya also benefited from a considerable amount of time to improve its challenge through the collection of further evidence and internal capacity-building. The Chamber issued its decision thirteen months after the challenge was filed, and approximately eighteen and a half months after Mr. Gaddafi was first apprehended. This time period greatly exceeds that enjoyed by other States and parties in other ICC admissibility challenges.¹⁹⁹
171. In assessing the appropriate time frame for admissibility proceedings, the Chamber was also obliged to take into consideration the impact on the rights of the defendant before the ICC, and the overall expeditiousness of the proceedings.

¹⁹⁴ ICC-01/09-01/11-307, para.100.

¹⁹⁵ ICC-01/09-01/11-307, para.98.

¹⁹⁶ ICC-01/11-01/11-159, para.9; ICC-01/11-01/11-239, para.8.

¹⁹⁷ See paragraphs 44-47 above.

¹⁹⁸ ICC-01/11-01/11-44-Anx1-Red and ICC-01/11-01/11-205.

¹⁹⁹ In the *Bemba* case, a corrected version of the Defence challenge was filed on 1 March 2010 (ICC-01/05-01/08-704-Conf-Corr) with original filed 25 February 2010 (ICC-01/05-01/08-704-Red3-tENG) March 2010. Decision was issued on 24 June 2010 (ICC-01/05-01/08-802). In the *Katanga* case, the Defence initially filed an *ex parte* challenge on 10 February 2009, which was reclassified on 25 February 2009. The Chamber issued its oral decision on 12 June 2009 (ICC-01/04-01/07-T-67-ENG), and written decision on 16 June 2009 (ICC-01/04-01/07-1213-tENG). In the *Kenya* cases, the Government filed its challenge on 31 March 2011 (ICC-01/09-01/11-19), and the Chamber issued its decision on 30 May 2011 (ICC-01/09-01/11-101). In *Gbagbo*, the admissibility challenge was filed on 15 February 2013 (ICC-02/11-01/11-404-Red) and Pre-Trial Chamber I issued its decision on 11 June 2013 (ICC-02/11-01/11-436-Red).

172. In terms of Mr. Gaddafi's rights, as a Court which is obliged to apply its Statute in a manner which is consistent with internationally recognised human rights, the Chamber was required to give due weight to the following conclusions of the African Court on Human and Peoples' Rights:

"In view of the alleged length of detention of the Detainee [Mr. Gaddafi] without access to a lawyer, family or friends; and with due regard to the Respondent's alleged failure to respond to the Provisional Measures requested by the Applicant, and the requirements of the principles of justice that require every accused person to be accorded a fair and just trial, the Court decided to order provisional measures suo motu;

*In the opinion of the Court, there exists a situation of extreme gravity and urgency, as well as a risk of irreparable harm to the Detainee."*²⁰⁰

173. The Defence had brought this decision to the attention of the Chamber in connection with Libya's Notification concerning the appointment of the new Prosecutor-General, in order to underscore the imperative of bringing the admissibility proceedings to a close.²⁰¹ Although it would have been excluded from the Chamber's consideration of the merits of the challenge, it nonetheless supports the reasonableness of the Chamber's procedural decision not to incur a 'risk of irreparable harm' through a further prolongation of the proceedings.
174. Libyan officials have acknowledged publicly that Mr. Gaddafi has been detained in isolation since his arrest, that is, for twenty months,²⁰² in a secret location.²⁰³ Although the Government averred that Mr. Gaddafi may receive visits, various persons and NGOs that have sought to visit Mr. Gaddafi have been unable to obtain access.²⁰⁴ Mr. Gaddafi also has no means to communicate with a lawyer. He is therefore held in *incommunicado* detention.
175. Prolonged *incommunicado* detention can constitute cruel and inhumane treatment, and a violation of Article 10(1) of the ICCPR.²⁰⁵ This is particularly the case if the

²⁰⁰ *ACHPR v. Libya*, paras.16-17, ICC-01/11-01/11-308-AnxA.

²⁰¹ ICC-01/11-01/11-308, para. 15.

²⁰² ICC-01/11-01/11-332, para. 62.

²⁰³ ICC-01/11-01/11-130-Red, para.35.

²⁰⁴ ICC-01/11-01/11-190-Corr-Conf, paras.277-286 (and Confidential Annex 9).

²⁰⁵ *Polay Campos v. Peru*, para.8.4; *Velasquez Rodriguez case*, para.187. The Human Rights Committee has also found violations of Article 10 in cases of *incommunicado* detention of two weeks, and fifteen days in the respective cases of *Amtyunyan v. Uzbekistan* and *Arzuaga Gilboa v. Uruguay*.

detainee is held in isolation,²⁰⁶ as Mr. Gaddafi is.

176. The ICTR Appeals Chamber has found that prolonged solitary confinement could constitute a serious violation of internationally recognised standards, and as such, the Appeals Chamber had a duty not to transfer a defendant to the jurisdiction of domestic authorities if the defendant faced the prospect of prolonged solitary confinement.²⁰⁷
177. The requirement that the Court must apply the Statute in a manner which is consistent with internationally recognised human rights therefore acted as an injunction against prolonging the Chamber's determination of the admissibility proceedings, at the expense of maintaining Mr. Gaddafi in conditions of prolonged solitary confinement.
178. The cumulative physical and mental consequences of being detained in isolation could also irreversibly damage Mr. Gaddafi's ability to participate in ICC proceedings, if Libya's appeal is rejected.
179. The United Nations Special Rapporteur on Torture and other Cruel and Inhumane Treatment has observed in connection with solitary confinement that:

*“medical studies and anecdotal evidence has additionally shown that this form of social isolation and sensory deprivation can cause serious harm to the physical and mental state of a detainee, even after a short period of time”.*²⁰⁸
180. A representative of an international organisation that visited Mr. Gaddafi two and half months after his arrest observed that his mental state appeared to have altered since his arrest.²⁰⁹ It was, therefore, reasonable to expect that Mr. Gaddafi's mental state and stability would further decline, perhaps grievously, during the course of the admissibility proceedings.
181. The Chamber also had no effective mechanism for monitoring the domestic detention conditions of Mr. Gaddafi. Although the Chamber ordered Libya to submit a report

²⁰⁶ *Polay Campus v. Peru*, para.8.7.

²⁰⁷ *Kanyarukiga*, and authorities cited therein, para.15.

²⁰⁸ Submission by Juan E. Méndez, United Nations Special Rapporteur On Torture And Other Cruel, Inhuman, Or Degrading Treatment Or Punishment', *Ahmad et al. v. UK*, p. 2.

²⁰⁹ ICC-01/11-01/11-216-Conf-Anx8.3, p. 7.

concerning the conditions of Mr. Gaddafi's detention in September 2012,²¹⁰ it not only failed to submit the report but provided absolutely no explanation or justification for its failure to do so. Indeed, Libya's filing to the Court completely omitted to refer to the Chamber's order to provide specific information regarding Mr. Gaddafi's detention.²¹¹ Libya's abdication of its duties to the Court make it plain that its engagement with the Court is opportunistically one-sided – it demands that its rights be respected, but concomitantly fails to treat the Chamber with respect by complying with its orders. That is symptomatic of a broader failure by Libya to respect the rules of this Court regarding appeals – a failure highlighted throughout these submissions.

182. Articles 19(4) and (5), when read together, strongly militate in favour of an imposition of due diligence on the party challenging admissibility, and an expeditious resolution of admissibility proceedings.
183. In such circumstances, a further prolongation of the admissibility proceedings would have been disproportionately prejudicial to the rights of Mr. Gaddafi. It would also have contravened the Chamber's duty to ensure an expeditious resolution of the challenge. In this regard, the Appeals Chamber has adumbrated the principle that:

*“expeditiousness is a recurrent theme in the Court's legal instruments. The Statute and the Rules of Procedure and Evidence place an onus on all those involved in the trial to act in a diligent and expeditious manner in the performance of their obligations. The duty applies to the Chambers of the Court, the parties and participants.”*²¹²

184. In reaching this conclusion, the Appeals Chamber explicitly referred to the statutory requirement in Article 19(5) that States “*shall make a challenge [to the admissibility of the case] at the earliest opportunity*”.²¹³
185. In the case of an admissibility challenge, which has the effect of suspending the investigations by the Prosecution (i.e. one which is filed by a State), the Chamber “*should rule as rapidly as possible*”.²¹⁴ Holmes has observed that the “*procedures at the jurisdiction and admissibility stage are intended to be expedited ones, and this*

²¹⁰ ICC-01/11-01/11-200,p. 9.

²¹¹ ICC-01/11-01/11-205.

²¹² ICC-01/04-01/07-2259, para.43.

²¹³ ICC-01/04-01/07-2259, fn.89.

²¹⁴ Hall, p. 655.

objective is reflected in the Rules”.²¹⁵ The ICC Appeals Chamber has also explicitly referred to the imperative of resolving admissibility challenges in an expeditious manner.²¹⁶

186. The further prolongation of the admissibility proceedings would have delayed the resolution of the appropriate forum for Mr. Gaddafi’s trial. Also, if the challenge is ultimately rejected, the delay would have negatively impacted on the putative ability of the ICC to step in to ensure an effective prosecution. For this reason, Trial Chamber II underscored that undue delay in the resolution of admissibility proceedings would be:

*“inimical to the proper administration of justice. For instance, witnesses to the alleged crime may become unavailable, or may, with the passage of time, forget what transpired. Material evidence, both incriminating and exculpatory, may disappear or may be rendered useless by exposure to the elements. In this case, both the prosecution and the accused may be prejudiced.”*²¹⁷

187. Turning to Libya’s proposal that the Chamber send a judicial representative to view materials in Tripoli,²¹⁸ far from it being unreasonable of the Chamber not to have taken up the proposal, it would have been a wholly unreasonable exercise of the Chamber’s discretion to accept it.
188. As the Court found in *Lubanga*, a Chamber cannot base decisions on evidence that the Chamber has merely viewed, but which does not form part of the court record.²¹⁹ It is wildly unrealistic to suggest that Judges should have travelled to Tripoli to review materials that are presumably for the most part in Arabic. The Judges or judicial representative(s) would have had to take their own handwritten notes of anything available in English (since copying the file would presumably not be permissible, that being the point of the visit), with all the vagaries of inaccurate transcription which that entails. This is further compounded by the fact that no invitation was extended to the Defence, meaning that the inspection would have occurred on an *ex parte* basis.

189. The *bona fides* of Libya’s proposal must further be questioned in light of the well-

²¹⁵ Holmes, p. 348.

²¹⁶ ICC-01/05-01/08-962, para.30.

²¹⁷ ICC-01/04-01/07-2259, para.45.

²¹⁸ Appeal, paras.110-115.

²¹⁹ ICC-01/04-01/06-T-91-ENG, p.29.

known security situation in Tripoli, and the fact that the Government had failed, at the time of the proposal, to recognise the privileges and immunities of ICC officials in Libya.²²⁰

190. Moreover, it would have been entirely reasonable for the Chamber to have in mind the fact that any ICC delegation would run the risk of being detained by the Libyan authorities, perhaps for weeks, should any ‘misunderstandings’ arise. Four members of the ICC delegation were detained in June 2012. While the ICC delegation was detained, the Libyan Prosecutor-General visited the ICC and made unwarranted “requests” which the ICC had to meet in order for its officials to be released.²²¹ To this day, members of the ICC delegation face serious criminal charges in Libya arising from the visit, notwithstanding that the Court has ordered the destruction of the legally privileged documents that are the subject of the prosecution.²²²
191. These factors, taken together, mean that the proposal that an ICC delegation view the case files in Tripoli was never realistic. The Chamber was entirely within its discretion not to accept the proposal.
192. Libya’s request to be permitted to adduce further materials “*within a modest timeframe of six weeks*”²²³ was little more than a disguised request for additional time, albeit one which failed to comply with the requirements of Regulation 35. The Chamber gave the parties six and a half weeks notice of the 23 January 2013 deadline. Libya had abundant time to request an extension of time in advance of the deadline, pursuant to Regulation 35 of the Regulations of the Court. It did not do so and failed to explain why. Libya failed to provide a cogent justification as to why it was not able to submit this evidence contemporaneously with its Further Submissions, nor did it explain what the material in question was. As such, there was no information before the Chamber that would have allowed it to appreciate the significance of the material to the admissibility challenge.
193. It clearly fell within the discretion of the Chamber to dismiss this request on the

²²⁰ ICC-01/11-01/11-274.

²²¹ ICC-01/11-01/11-323-Conf-Exp-Annex D, p.7.

²²² ICC-01/11-01/11-291.

²²³ Appeal, para.114.

grounds that it was submitted in a dilatory manner,²²⁴ and failed to disclose good cause for the extension of time to submit further documentation.

194. With respect to Libya's notification concerning the appointment of the new Prosecutor-General, Libya both fails to show that the Chamber's refusal to take this information into consideration constituted an improper exercise of discretion or that any such error would have had a material impact on the outcome of the Decision. Libya failed to demonstrate how the replacement of the Prosecutor-General had any impact on the paucity of evidence collected by the authorities. The new appointment did not alleviate the endemic security problems besetting law enforcement agencies in Libya, nor did it resolve issues concerning the custody of Mr. Gaddafi.
195. Libya had also repeatedly asserted that a new Prosecutor-General and Minister of Justice would be appointed by a certain date in order to postpone any decision on the admissibility of the case *sine die*.²²⁵ Given that these appointments had repeatedly failed to occur, it was well within the discretion of the Chamber to issue its decision over eight months from the date on which Libya had initially indicated that the appointments would be finalised.
196. In attempting to establish the relevance of the appointment of the new Prosecutor-General, Libya also misinformed the Appeals Chamber by averring that there was a time period during which there was no Prosecutor-General who could appear on behalf of Libya or give instructions.²²⁶ At all material times of the admissibility proceedings,

²²⁴ The jurisprudence of the Court emphasises that requests for extension of time should where possible be submitted sufficiently in advance of the deadline, in order to enable the Chamber to receive observations from the opposing parties, and issue a ruling in advance of the expiration of the deadline. *See* ICC-01/05-01/08-2192, para.4; ICC-01/09-01/11-493, paras.5 -7.

²²⁵ For example, despite seeking a blanket right to reply to any responses to its admissibility challenge (ICC-01/11-01/11-150), on 30 July 2012, Libya sought an extension of time to file its reply until 18 days after the appointment of the new Libyan Ministry of Justice team which it submitted would occur "*by 7 September 2012*" (ICC-01/11-01/11-192), this was granted by the Pre-Trial Chamber who suspended Libya's deadline to file the reply and requested Libya to submit a comprehensive report on, *inter alia*, the status of the appointment of the Minister of Justice, General and Prosecutor-General in Libya and counsel's ability to take instructions from them, no later than 7 September 2012 (ICC-01/11-01/11-200). Libya failed dismally to meet this deadline, and on 7 September 2012 i.e. the day of the deadline, sought a further extension of time to submit the report on the basis that the formation of the new Government was to be completed by 20 September 2012 and "*the appointment of a new Prosecutor-General will be made imminently after*" (ICC-01/11-01/11-205). For further examples of Libya asserting the alleged imminent appointment of the Prosecutor-General *see* ICC-01/11-01/11-192; ICC-01/11-01/11-205; ICC-01/11-01/11-213; ICC-01/11-01/11-T-2-CONF-ENG, p.45, lines 10-12; ICC-01/11-01/11-293-Conf.

²²⁶ ICC-01/11-01/11-370-Conf-Red, para.25.

there was a Prosecutor-General who had full constitutional authority to exercise his functions, and in fact, did so.²²⁷

197. The mere possibility that the Prosecutor-General might be replaced also had no bearing on Libya's ability to effectively participate in the admissibility proceedings.
198. During the Admissibility Hearing, Counsel for Libya informed the Chamber that Dr. Gehani had been appointed by the President of the GNC as the focal point for the ICC, and thus had full authority to present the position of the Libyan Government to the ICC.²²⁸ Counsel for Libya also made it abundantly clear during the hearings that throughout the proceedings, they received their instructions from Dr. Gehani.²²⁹ Libya has not referred to any impediments relating to Dr. Gehani's ability to obtain information from the former Prosecutor-General, his Deputy (who apparently signed Mr. Gaddafi's detention orders),²³⁰ or the persons acting under their supervision.
199. The current Prosecutor-General has no greater legitimacy than the previous Prosecutor-General. Like the National Transitional Council (NTC), the General National Congress (GNC) is an interim custodial political body. It is governed by an interim constitutional declaration, which has not been ratified by democratic processes. The objective of the GNC is to adopt a process for the drafting of a permanent constitution, and the establishment of electoral rules, which will govern the first democratic elections in Libya.²³¹ The GNC will then be dissolved, in the same manner that the NTC was dissolved upon completion of its mandate. The interim constitutional declaration did not vest the GNC with any greater powers than those that were vested in the NTC.
200. Indeed, in its initial Admissibility Challenge, Libya urged the Chamber to grant audience to the former Prosecutor-General, on the grounds that he had "*investigated the case of Saif Al-Islam Gaddafi personally*", "*play[s] a central role in the development of the Libyan justice system in the immediate future (as well as in the*

²²⁷ ICC-01/11-01/11-201, paras.6 and 14; ICC-01/11-01/11-243-Red, para.62

²²⁸ ICC-01/11-01/11-T-3-CONF-ENG, p.48, lines 15-18: "*The new General National Congress adopted decree number 12 which provides him with full authority and powers in this matter*", emphasis added.

²²⁹ ICC-01/11-01/11-T-3-CONF-ENG, p.32, lines 9-13; p.46, lines 21-22; p.48, lines 15-17; p.52, lines 14-16; p.55, lines 10-17.

²³⁰ ICC-01/11-01/11-145-Conf-AnxD, p.3-4.

²³¹ Article 30 of the Interim Constitutional Declaration, ICC-01/11-01/11-144-AnxG.

middle and long-term)”, and was a “*source[...] upon which the Pre-Trial Chamber may comfortably rely in assessing the capacity of the Libyan criminal justice system.*”²³²

201. Finally, Libya’s explanation of the relevance of the appointment of the new Prosecutor-General was filed in a redacted version for the Defence. Given that the Chamber had previously ruled that admissibility proceedings should be *inter partes*²³³ - a ruling which Libya had not contested nor requested leave to appeal - Libya had no legitimate expectation that the Chamber would take into account these observations, particularly in light of the fact that first, Libya did not request prior authorisation to file the Notification (which was essentially, a request to file additional information) and second, Libya had not requested authorisation to file evidence *ex parte*.

C. Libya’s submission as to the Chamber’s alleged “Unreasonable approach to the evaluation of evidence” are misconceived²³⁴

202. This ground should be dismissed summarily because it is essentially a duplication of Ground 2(B), which is in itself, inherently flawed.²³⁵
203. In the alternative, Libya’s argument that the Chamber erred by failing to make linkages between evidence²³⁶ is completely misconceived. The burden fell on Libya, and not the Pre-Trial Chamber to make such linkages. It is not the Chamber’s role to make Libya’s case for it. In any case, Libya has failed to refer to any pertinent examples of such linkages. If Libya itself cannot specify such linkages, it cannot reasonably have expected the Pre-Trial Chamber to do so.
204. The Chamber correctly directed itself to examine “*the evidence taken as a whole*”²³⁷, which Libya admits is the correct approach. Libya fails to show any error in the Chamber’s approach.

²³² ICC-01/11-01/11-132, para.14, emphasis added.

²³³ ICC-01/11-01/11-187-Red.

²³⁴ Appeal, paras.116-118

²³⁵ The Appeals Chamber has addressed similar appellate grounds together: in such circumstances, the dismissal of one, automatically leads to the dismissal of the related/repetitious ground: ICC-02/04-01/05-408, para.69.

²³⁶ Appeal, para.118.

²³⁷ Decision, para.135.

IX. GROUND THREE: “Unfairness and procedural errors occasioning a failure to take into consideration relevant and probative evidence”²³⁸

A. Allegation that the Chamber failed to “take appropriate measures for the proper conduct of the procedure” occasioning a failure to take into consideration relevant and probative evidence is misleading and unsupported by evidence²³⁹

205. This ground repeats arguments subsumed within other grounds (for example, the Chamber’s refusal to take into consideration the appointment of a new Prosecutor-General and to send judicial representatives to view materials in Libya), and should be dismissed summarily for that reason. The Defence therefore repeats its arguments under those headings.
206. Libya misunderstands the Decision when it complains that “*relevant information or evidence*” was not “*fairly considered*”.²⁴⁰ In fact, it is clear from the careful wording employed in its Decision that the Chamber did consider the information, but decided that Libya had failed to demonstrate its importance or relevance to the admissibility proceedings and for that reason, declined to admit it into the admissibility record.²⁴¹
207. In terms of the appointment of a lawyer in the Zintan national security trial, Libya never placed any evidence concerning the appointment of a lawyer to Mr. Gaddafi before the Pre-Trial Chamber (and in fact, still has not done so), nor did it request the Pre-Trial Chamber to consider this development. To the contrary, Libya strenuously argued that the Chamber should disregard the Zintan proceedings for the purposes of the admissibility challenge, due to Libya’s claim that these proceedings had absolutely no connection with the ICC case.²⁴² As submitted above, a party cannot raise arguments or points of contention for the first time on appeal.
208. In submitting this appellate ground, Libya commits the same error of which it - wrongly - accuses the Chamber, namely that of adopting a piecemeal approach to

²³⁸ Appeal, paras.120-141.

²³⁹ Appeals, paras.120-128.

²⁴⁰ Appeal, para.122.

²⁴¹ Decision, para.23.

²⁴² ICC-01/11-01/11-274, para.4.

proceedings. Libya seeks to put before the Appeals Chamber snippets of procedural developments which it considers support its challenge, whilst failing to refer to the more damaging aspects of these developments.

209. Thus, even if the Chamber were to have taken into consideration the appointment of a lawyer in the unrelated Zintan proceedings, its significance would be minimal at best, given that there was no evidence that the lawyer had consented to represent Mr. Gaddafi in other proceedings or that she had even had a privileged meeting with Mr. Gaddafi.

210. The possibility that this development would advance Libya's challenge would also have been completely outweighed by other aspects of the Zintan trial which had been put before the Pre-Trial Chamber, such as:

- The Government's blatant contravention of legal professional privilege, as enshrined under the Rome Statute and domestic law;²⁴³
- Retaliatory actions and intimidation of the Defence and Defence witnesses;²⁴⁴
- Retaliatory actions against Mr. Gaddafi for attempting to express his wishes as concerns the admissibility proceedings and defend himself before the ICC;²⁴⁵ and
- The authorities' failure to apply the December 2012 Supreme Court decision to the proceedings against Mr. Gaddafi *et al.*²⁴⁶

211. Libya's assertion that the Pre-Trial Chamber failed to accord it due process by taking into consideration its arguments regarding the confidentiality of investigations are also

²⁴³ ICC-01/11-01/11-255, paras.22-23, 54 and 56; ICC-01/11-01/11-332, paras.14 and 24.

²⁴⁴ ICC-01/11-01/11-332, paras.59- 61 and 72; ICC-01/11-01/11-228-Conf-Red, para.6; ICC-01/11-01/11-152-Conf, paras.41 and 63; ICC-01/11-01/11-323-Conf-Exp, paras.6-32.

²⁴⁵ ICC-01/11-01/11-255, paras.57-58; ICC-01/11-01/11-281-Conf, paras.115-116.

²⁴⁶ ICC-01/11-01/11-332, para.75; ICC-01/11-01/11-281-Conf, para.169.

entirely unsupported by either domestic law, or the proceedings before the ICC.²⁴⁷

212. Libya's arguments on Article 59 have been consistently riddled with inaccuracies and inconsistencies. For example, Libya cites to text concerning Article 59 of the Criminal Procedure Code,²⁴⁸ but fails to footnote or reference any provision of domestic law in support of this interpretation of Article 59. Indeed, footnote 189 is missing from Libya's Appeal.
213. This oversight must be considered in light of the fact that Libya submitted and relied upon an incorrect translation of Article 59 in its past submissions, and omitted to draw the Chamber's attention to other legal provisions of the Code. The correct translation of Article 59 clarifies that the principle of confidentiality of investigations only applies *vis-à-vis* the public.²⁴⁹
214. Article 59 does not, therefore, act as an impediment to the confidential disclosure of evidential materials for purposes directly concerning judicial proceedings. This is evidenced by the fact that in its bilateral extradition treaty with the United Kingdom, Libya agreed to provide "*such evidence as would justify committal for trial under the laws of the requested State*", thereby demonstrating that the principle of 'confidentiality of investigations' is not a legal impediment to the provision of such evidence to a foreign judicial entity.²⁵⁰ Furthermore, Libya has repeatedly referred to investigative materials in public filings before the Court, further undermining its stance on the confidentiality of investigations.²⁵¹
215. Moreover, if Libya truly felt compelled by the terms of Article 59 to preserve the

²⁴⁷ Appeal, paras.126-128.

²⁴⁸ Appeal, para.126.

²⁴⁹ ICC-01/11-01/11-281-Conf-Red, fn. 27: "*The translation of Article 59 of the Criminal Procedure Code, which has been submitted by the Government, is not correct. The full version is as follows: Article 59: Investigation procedures and their results shall be considered confidential. Investigators, prosecution members and their assistants or clerks and experts and others who are related to the investigation or attend it due to their profession or post shall undertake not to disclose them [procedures and results]. Any of them who breach this provision shall be punished in accordance with Article 236 of the Penal Code. The term 'others' in Article 59 is further clarified by Article 61, which provides that the "Public Prosecution, the accused, the victim, the civil rights party and their counsel and representatives can attend all the investigation procedures". ICC-01/11-01/11-190-Anx1, p. 3*", emphasis added.

²⁵⁰ Article 6(2)(b) of the UK-Libya Extradition Treaty, 17 November 2008, <http://www.fco.gov.uk/resources/en/pdf/3706546/3892733/10149409/TrLibya3.2009Extrad>; cited at ICC-01/11-01/11-190-Conf-Corr, para.75.

²⁵¹ ICC-01/11-01/11-130-Red, paras.45 and 47; ICC-01/11-01/11-258-Red2, paras.49 and 64; ICC-01/11-01/11-258-Anx3, p.3.

confidentiality of its investigative case files, then it is illogical that it would have been willing to disclose evidence to the ICC Judges and ICC Prosecution, but not to the Defence or the Victims. The former would be, according to their arguments, external parties who have no right to view the materials, whereas the Defence and victims are entitled to view the case-file under domestic law.²⁵²

216. Similarly, if Article 59 precluded Libya from disclosing the evidence to any person outside of the investigations team, then it has not explained why it would be in a position to disclose items to the Judges or their representatives if they were to travel to Tripoli, but not if they were in The Hague. Article 59 would appear to have no relevance to this proposal.
217. The existence of a legal impediment to disclosing the evidence in the case-file would also appear to be contradicted by the apparent fact that the Libyan authorities have disclosed examples of intercepts to Al Jazeera and the ICC Prosecutor for discussion in a public documentary,²⁵³ and have referred to evidential items in public interviews on numerous occasions.²⁵⁴
218. The primary purpose of the principle of confidentiality of the investigation is to preserve the presumption of innocence of the defendant. Libya has completely, routinely and systematically flouted this rationale by publicly disclosing information that is significantly prejudicial to the defendant, including alleged confessions to crimes.²⁵⁵ The public disclosure of this information had much greater potential to taint the integrity of the investigative process than the disclosure of evidence on a strictly confidential basis to the Defence.
219. In such circumstances, Libya has patently failed to discharge its burden of demonstrating that it has suffered any real prejudice from the operation of Article 59 in these admissibility proceedings.
220. Finally, and significantly, it is well established that domestic law impediments are never an excuse for failing to cooperate with an international criminal court or

²⁵² ICC-01/11-01/11-281-Conf, para.38. ICC-01/11-01/11-261-Red, para.28.

²⁵³ ICC-01/11-01/11-281-Conf, para.104.

²⁵⁴ ICC-01/11-01/11-261-Red, paras.32 and 35; ICC-01/11-01/11-202, para.6.

²⁵⁵ ICC-01/11-01/11-258-Anx9, p.3; ICC-01/11-01/11-258-Anx10, p.3.

tribunal, especially in the context of a Security Council referral.²⁵⁶ The ICC Statute is also clear: the particularities of a State's domestic system do not constitute grounds for failing to implement a decision of the Chamber. The Statute imposes a positive obligation on States to ensure that it has procedures available under national law, in order to enable it to implement cooperation requests from the Court.²⁵⁷

B. Libya's submissions on "*The Chamber's rejection of relevant and available evidence on the erroneous basis that "the significance of... information...[provided by the parties in filings subsequent to Libya's Reply of 4 March 2013 had]...not been sufficiently demonstrated" are entirely unreasonable*"²⁵⁸

221. In its earlier appellate grounds, Libya sought to advance its submissions by relying upon appellate case law that the Chamber is required to base its decision on facts in existence at the time of the proceedings.²⁵⁹ In so doing, Libya implicitly conceded that the Chamber cannot take into consideration hypothetical scenarios or potential developments. This is consistent with the findings of Pre-Trial Chamber II in the *Kony et al.* case.²⁶⁰ There is accordingly absolutely no basis for Libya's contention that the Chamber erred by failing to consider the impact that the appointment of the Prosecutor-General "*would have*" on the progress of Mr. Gaddafi's case.²⁶¹ Any assessment would have been wholly speculative.
222. Libya failed to show a connection between the appointment of the new Prosecutor-General and any concrete positive developments in the Gaddafi case or the Libyan justice sector at large. The Chamber was entitled to disregard this information because Libya had failed to demonstrate its significance to the factual matrix in existence at that point in time.

²⁵⁶ The Libyan situation was referred to the Court pursuant to a UN Security Council resolution 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" (U.N Security Council Resolution 1970, S/RES/1970, 26 February 2011, paras.4-8. *See also* Article 27 Vienna Convention on the Law of Treaties: "*A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.*"

²⁵⁷ Article 88 of the Statute.

²⁵⁸ Appeal, paras.129-131.

²⁵⁹ Appeal, paras.121-122 and 166.

²⁶⁰ ICC-02/04-01/05-377, paras.49-52.

²⁶¹ Appeal, paras.129-130.

223. Libya's contention that if it was in doubt,²⁶² the Chamber should have requested further information concerning the significance of this information has no foundation in law. Such a submission subverts the burden of proof in admissibility proceedings and seeks to transform the role of the Chamber from that of an impartial adjudicator to a direct proponent for Libya's challenge. A Chamber adjudicating upon an admissibility challenge should not, and indeed must not, "*descend into the arena*" and seek to assist one party to make out its case.

C. Libya's arguments that "*The Chamber failed to adapt the procedure to the specific issues*" are misleading and seek to remove the burden of proof from Libya

224. This ground of appeal appears to be a variation of an appeal based on ineffective representation. Libya has been represented throughout the proceedings by three expert international counsel and one Libyan lawyer. Yet it claims that the Chamber erred by failing to clarify the law for it.²⁶³ In so doing, Libya seeks to shift any deficiencies in its appreciation of the law from the responsibility of Counsel to the Chamber.
225. The Appeals Chamber has ruled unequivocally that the Chamber has no jurisdiction to clarify the legal obligations or entitlements of parties or participants; if the Chamber were to provide such clarification, it would be acting as an advisory body and not a Chamber, which would fall outwith the scope of its authority.²⁶⁴
226. If there is no legal basis in the Statute for providing clarification or advisory opinions, the Pre-Trial Chamber cannot be found to have committed an appellate error because – according to Libya – it did not "*clarify their position relating to the burden and standard of proof*", or provide a definition in advance of a 'case'.²⁶⁵ Indeed, to impose such a duty on the Chamber would be to put the cart before the horse – it is for the parties to advance their position on the proper constructions of such matters, and the Chamber to reach a determination on the basis of their submissions. If the Chamber were to have ruled on such matters in advance, it would have violated the principle of

²⁶² Appeal, para.131.

²⁶³ Appeal, para.132.

²⁶⁴ ICC-01/04-01/06-503, para.30.

²⁶⁵ Appeal, paras.133-134.

adversarial proceedings by predetermining key issues, without the benefit of the parties' submissions on these matters.

227. Libya is, moreover, seeking to create ambiguities where none can reasonably be said to have existed. In its decision of 28 May 2012, the Pre-Trial Chamber observed that:

*“The language of article 19(2) of the Statute and rule 58 of the Rules makes clear that in admissibility proceedings, [...] the triggering force and the main actor in such proceedings is the entity challenging the admissibility of the case, in the present case Libya. The same transpires from the jurisprudence of the Appeals Chamber, which has held that “a State that challenges the admissibility of a case bears the burden of proof to show that the case is inadmissible”.”*²⁶⁶

228. In its 7 December 2012 Decision— that is, in advance of Libya's Further Submissions - the Chamber further referred to the Appeals Chamber's pronouncement that an admissibility determination is comprised of a two-step test: first, an assessment of the existence of ongoing investigations or prosecutions, and second, an assessment of the willingness and ability of the State in question.²⁶⁷ The Chamber further confirmed that as concerns the “*related burden of proof*”, the challenging State bears the burden of proof.²⁶⁸

229. The Chamber's conjunction of the two-step test with the “*related burden of proof*” should have been more than sufficient notice to any reasonably diligent and professional counsel that they should have been prepared to substantiate all aspects of Libya's challenge.²⁶⁹ The possibility that the burden would extend to both steps of the admissibility test was further underscored by the Chamber's request that Libya submit further information as concerns both aspects of the two-step test.²⁷⁰

230. In terms of the actual standard of proof, the Chamber consistently put Libya on notice that it would be required to adduce “*evidence with a sufficient degree of specificity and probative value*” in order to discharge the standard of proof.²⁷¹ Libya's assertion that the Chamber failed to define the standard of proof is, therefore, completely

²⁶⁶ ICC-01/11-01/11-159, para.9.

²⁶⁷ ICC-01/11-01/11-239, para.6.

²⁶⁸ Decision, paras. 5 and 8.

²⁶⁹ ICC-01.04-01/07-2259, para.54.

²⁷⁰ See Decision, paras.41-45.

²⁷¹ ICC-01/11-01/11-239, para.8, citing to ICC-01/09-02/11-274, paras.2 and 61.

unfounded.²⁷²

231. Indeed, during the Admissibility Hearing in October 2012, Judge Kaul specifically asked Counsel for Libya as to whether the:

*“Libyan authorities - are all concerned in Tripoli - really aware that your side, the Libyan side, in these proceedings is under an obligation to provide concrete, tangible and pertinent evidence that ~ to demonstrate to this Chamber that proper investigations are currently ongoing and proper and concrete preparations for the trial are ongoing?”*²⁷³

232. In response, Counsel confirmed that:

*“Counsel are acutely aware of this need. That acute awareness has been communicated, is being communicated and will continue to be communicated. [...] in short the authorities are acutely aware, we are acutely aware and we remain absolutely committed to meeting Libya's full responsibilities in reaching the appropriate standard as determined by the Pre-Trial Chamber.”*²⁷⁴

233. The fact that other participants may have cited different standards during the proceedings is irrelevant. Having expressly confirmed that they were “acutely” aware of and were working towards meeting “*the appropriate standard as determined by the Pre-Trial Chamber*”, it is impossible to comprehend how Libya can maintain that it was prejudiced as concerns the adoption of a standard of proof, which was clearly set out in the 7 December 2012 Decision. Moreover, given that the Pre-Trial Chamber expressly described this standard as pertaining to the “*burden of proof*”,²⁷⁵ Libya’s assertion that the Chamber described the type of evidence required but not the standard of proof, is plainly incorrect.

234. The Pre-Trial Chamber greatly exceeded the level of guidance that any participant could generally expect in the proceedings, by providing very clear instructions as to the type of information that could be considered to meet this standard. As concerns the definition of a ‘case’, Libya cannot claim to be prejudiced in any way by the definition adopted by the Chamber, given that it hewed very closely to the definition advocated

²⁷² Appeal, para.136.

²⁷³ ICC-01/11-01/11-T-3-CONF-ENG, p.64, lines 18- 22, emphasis added.

²⁷⁴ ICC-01/11-01/11-T-3-CONF-ENG, p.65, lines 2-10, emphasis added.

²⁷⁵ ICC-01/11-01/11-239, para.8.

by Libya,²⁷⁶ which was far broader than the definition advocated by any of the other parties and participants.

235. Finally, Libya's assertion that the Chamber's refusal to view the case-file in Tripoli prevented it from taking into consideration evidence which "*may*" have met this standard²⁷⁷ is entirely speculative, and thus irrelevant for the purposes of appellate review. The absence of this material from the Chamber's assessment is also solely attributable to Libya's failure to file it as part of its Further Submission, and not any error on the part of the Pre-Trial Chamber.

D. Libya's submissions as to "*Linking the propriety of the admission of evidence on the first limb ("the case") with the merits of the assessment of the second limb ("inability")*" fail to identify any error on the part of the Chamber²⁷⁸

236. Under this ground of appeal, Libya has failed to set out the nature of the Chamber's alleged error in clear and comprehensible terms. Libya has not disputed the two-step test for admissibility (which was established by the Appeals Chamber). Given that the two steps are cumulative, Libya has not explained how it was an error for the Chamber to determine that Libya's failure to satisfy the second step would be dispositive of the challenge. At best, this ground constitutes a disagreement with the Chamber's decision, rather than a valid ground of appeal.
237. Moreover, Libya again misconstrues the Decision. The Chamber made clear that it rejected Libya's request to make additional submissions because "*Libya has had sufficient opportunities to submit evidence in support of its admissibility challenge*".²⁷⁹ That was the reason for the rejection, not, as Libya asserts, solely because of "*serious concerns remain[ing] with respect to the second limb of the admissibility test*".²⁸⁰

X. GROUND FOUR: "*The Chamber erred in fact and in law in its determination that, due to the unavailability of its national judicial system, Libya is unable to obtain the*

²⁷⁶ ICC-01/11-01/11-293-Conf, paras.34 and 41.

²⁷⁷ Appeal, para.138.

²⁷⁸ Appeal, para.140.

²⁷⁹ Appeal, para.137.

²⁸⁰ Appeal, para.140.

*accused or the necessary evidence and testimony or otherwise carry out its proceedings, pursuant to article 17(3) of the Statute*²⁸¹

238. Again, Libya failed to show any error on the part of the Chamber and this ground of appeal should be rejected.

A. Libya's claim as to the "Erroneous interpretation and application of 'unavailability'" misstate previous concessions before the Chamber²⁸²

239. Although Libya claims that the Chamber committed an error of law as concerns its definition of "*unavailability*", its description of this "*legal error*" reveals no more than a disagreement with the Chamber's application of this definition to the information placed before it.

240. For example, Libya asserts that the Chamber "*failed to address in any meaningful way the extent or degree to which [these legal and factual issues] constituted 'unavailability' within the terms of the Statute*".²⁸³ This complaint clearly relates to the manner in which the Chamber applied the definition of "*unavailability*" and not the definition itself.

241. Similarly, although Libya avers that the term "*unavailability*" should be construed in a stringent manner,²⁸⁴ it fails to demonstrate that the definition applied by the Chamber was overly broad or in any way inconsistent with the drafting history of Article 17(3) or the object and purposes of the Statute.

242. In reaching its conclusion that the Libyan national judicial system was 'unavailable' within the terms of Article 17(3), the Chamber had found that there were "*multiple challenges*" and that "*Libya continues to face substantial difficulties in exercising its judicial powers fully across the entire territory*".²⁸⁵ Such findings are entirely consistent with the commentary cited by Libya²⁸⁶ concerning the requirement of substantial rather than partial collapse of a country's judicial system.

²⁸¹ Appeal, paras.142-177.

²⁸² Appeal, paras.144-153.

²⁸³ Appeal, para.148.

²⁸⁴ Appeal, para.150.

²⁸⁵ Decision, para.205, emphasis added.

²⁸⁶ Appeal, para.150.

243. The Chamber also further developed its understanding of the term “*unavailability*” in its elaboration of the substantial difficulties faced by Libya in the subsequent sections of the Decision.²⁸⁷
244. As concerns Libya’s inability to obtain the accused, the Chamber referred to the fact that Libya had indicated that it planned to prosecute Mr. Gaddafi in Tripoli (or South Tripoli) but at the same time, had expressly conceded that it had been unable to effect his transfer to Tripoli at the time of the admissibility proceedings. Libya had also acknowledged that *in absentia* trials are not permitted under Libyan law, where the location of the accused is known.²⁸⁸
245. Accordingly, Libya has failed to show any legal error in the Chamber’s finding that the prohibition on *in absentia* trials rendered the Libyan judicial system unavailable to prosecute Mr. Gaddafi in circumstances in which the authorities were unable to secure his transfer to the location of the trial. This was an entirely reasonable – indeed the only reasonable – conclusion for the Chamber to reach.
246. Further, it is notable that in its filings before this Court, Libya has endorsed commentary to the effect that domestic legislation, which hinders or prevents effective domestic prosecutions, may exemplify the type of ‘unavailability’ which the drafters of the Statute envisaged as falling within the ambit of Article 17(3).²⁸⁹
247. Libya’s arguments concerning whether there is a distinction between central and local authorities obscures the real issue: can the Government obtain the presence of the defendant for the purposes of trial? The objective of pre-trial detention is to ensure the defendant’s presence at trial. The possibility that the defendant might be formally detained pursuant to detention orders issued by the Government has no relevance when the Government has conceded that it cannot secure his presence in the specific location that the Government has designated for his trial.²⁹⁰

248. Since Article 17(3) is concerned with objective impediments to the ability of the State

²⁸⁷ Decision, para.205.

²⁸⁸ ICC-01/11-01/11-T-3-Red-ENG, p.62, lines 10-14.

²⁸⁹ ICC-01/11-01/11-160, para.9, citing ICC Informal Expert Paper, para.50, arguing that “*lack of substantive or procedural penal legislation*” might render a system “*unavailable*”.

²⁹⁰ ICC-01/11-01/11-281-Conf, para.272.

to “*carry out its proceedings*”, there is no distinction between the inability of a State to obtain the presence at trial of a suspect, who is at large on their territory, and one who is being detained on its territory. The key question in each case is: can the State obtain the presence of the suspect for the purpose of carrying out its proceedings?

249. Libya has expressly conceded in these proceedings that a trial in Zintan would not satisfy the admissibility criteria before the ICC.²⁹¹ It has not mentioned this fact in its Appeal, although it had a duty to do so in order to ensure that the Appeals Chamber does not reach a conclusion on an erroneous basis. Moreover, in light of the fact that Libya stated that the trial would either occur in South Tripoli or Tripoli,²⁹² it is clear that Libya would lack the capacity to bring Mr. Gaddafi to trial if they were unable to secure his transfer to either of these two locations.
250. Contrary to Libya’s assertions, the Chamber’s decision on this point cannot be considered as “*setting too high a standard*”.²⁹³ It is the standard which Libya set for itself.
251. With respect to the Chamber’s findings concerning Libya’s inability to obtain testimony, the Chamber found that the unavailability of the national judicial system was predicated on “*the inability of judicial and governmental authorities to ascertain control and provide adequate witness protection*”.²⁹⁴ The Chamber further referred to reports that “*conflict-related detainees including senior former regime members have not been protected from torture and mistreatment in detention facilities.*”²⁹⁵
252. Both expert commentary and ICC jurisprudence have cited inability to implement effective witness protection as an example of “*unavailability*” in the context of Article 17(3).²⁹⁶ International Tribunals and domestic courts have also referred to it as a direct impediment to the transfer of a case to domestic jurisdiction, which in that sense

²⁹¹ ICC-01/11-01/11-T-2-Red-ENG, p.19-20.

²⁹² ICC-01/11-01/11-258-Conf-Red, para.102.

²⁹³ Appeal, para 153.

²⁹⁴ Decision, para.209.

²⁹⁵ Decision, para.209

²⁹⁶ ICC-01/05-01/08- 802, 24/06/2010, para.246. Policy Paper on Preliminary Examinations 4 October 2010, para.59, http://www.icc-cpi.int/NR/rdonlyres/E278F5A2-A4F9-43D7-83D2-6A2C9CF5D7D7/282515/OTP_Draftpolicypaperonpreliminaryexaminations04101.pdf

renders the national judicial system “*unavailable*” for the purposes of prosecution.²⁹⁷

253. Through its explicit reference to incidents of torture, mistreatment and death,²⁹⁸ which were attributed to the Government’s lack of control over these facilities, it is also clear that the Pre-Trial Chamber was employing a consistent standard of unavailability, rather than one which would apply to every country emerging from conflict. Libya refers to the need to show “*actual, systemic difficulties that have a direct and quantifiable ... impact*”.²⁹⁹ Even applying that standard proposed by Libya, the reports cited by the Chamber do, in fact, set out “*actual, systemic*” instances of torture, mistreatment and lack of control, which had a “*direct and quantifiable [...] impact on the ongoing investigation*” by virtue of the elimination and tainting of the available testimony of persons detained and interrogated under such circumstances.³⁰⁰

254. Libya has therefore failed to identify any legal error in the Chamber’s findings.

255. Similarly, the Chamber’s findings concerning the impact of the absence of an appointment of defence counsel were predicated on Libya’s own concession. It accepted that it would be unable to prosecute Mr Gaddafi in accordance with domestic law in the absence of a defence counsel.³⁰¹ Libya conceded that the absence of a defence counsel was related to systemic difficulties concerning the risk faced by defence lawyers, which rendered their assistance otherwise unavailable as concerns the trials of associates of the former regime.³⁰²

B. Libya’s submissions that “*The Chamber erred in fact and in law by finding that the Libyan judicial system is ‘unable’ in particular material regards in relation to the case against Mr Gaddafi*” are unrealistic³⁰³

i. “*Inability to obtain the accused*”³⁰⁴

²⁹⁷ *Brown and others v. Government of Rwanda and Secretary of State*, para.64; *Kanyarukiga*, paras.26-27.

²⁹⁸ Decision, para.209.

²⁹⁹ Appeal, para.153.

³⁰⁰ ICC-01/11-01/11-281-Conf, paras.67-70, 76-77 and 224-227.

³⁰¹ ICC-01/11-01/11-258-Conf-Red, para.60.

³⁰² ICC-01/11-01/11-258-Conf-Red, para.97; ICC-01/11-01/11-281-Conf, paras.258-268.

³⁰³ Appeal, paras.154-177.

³⁰⁴ Appeal, paras 155-161.

256. Libya has failed to demonstrate any legal or factual errors in the Chamber's conclusion that Libya was unable to investigate or prosecute Mr. Gaddafi within the meaning of Article 17(3) due to its inability to obtain the custody of Mr. Gaddafi.
257. As noted above, Libya conceded that a trial in Zintan would not satisfy the requirements for a case to be declared inadmissible before the ICC, and that Libyan law would not permit Mr. Gaddafi to be prosecuted in Tripoli or South Tripoli unless he was physically present in these locations.³⁰⁵ Libya therefore did not dispute the fact that it would be unable to prosecute Mr. Gaddafi in those courts which had the capacity to do so, due to a systemic feature of its judicial system (the prohibition on *in absentia* trials). The Chamber thus committed no error by inferring from these concessions that Libya would be unable to prosecute Mr. Gaddafi unless he was transferred to South Tripoli or Tripoli, and that this was related to domestic legislation, which rendered the judicial system otherwise unavailable.
258. Libya had also repeatedly claimed before the ICC that it had been unable to implement ICC decisions pertaining to Mr. Gaddafi due to the fact that the power to do so rested with the Zintan authorities and not the central Government.³⁰⁶ In a signed affidavit submitted in April 2012, Dr. Gehani conceded that:

*“Mr. Saif Al-Islam Gaddafi is not yet being detained by the Libyan authorities”.*³⁰⁷

259. It is crystal-clear from this that Libya accepted before the Chamber that detention by the Zintan militia or “*Brigade*” did not equate to detention “*by the Libyan authorities.*”
260. In filing dated 30 May 2012, Libya sought to excuse delays in implementing the Chamber's order to effectuate a privileged visit between the OPCD and Mr. Gaddafi on the basis that:

“[i]n this transitional period, it is still the case that despite best efforts, Mr. Gaddafi is not yet in the custody of the interim Libyan Government[...]. Mr.

³⁰⁵ ICC-01/11-01/11-T-3-Red-ENG, p.62, lines 10-14.

³⁰⁶ In April 2012, Libya asserted that it had been engaged for some time in the process of negotiations with the local authorities in Zintan to try to make arrangements for the transfer of Mr. Gaddafi to Tripoli but “[g]iven the situation in Libya, this has not been a straightforward task[...].” ICC-01/11-01/11-102, para.6.

³⁰⁷ ICC-01/11-01/11-146-Conf-AnxA, para.10.

*Gaddafi is still being held by the Zintan brigade [...]*³⁰⁸

261. Nothing has changed on the ground since then.³⁰⁹

262. During the October 2012 Admissibility Hearing, Libya informed the Chamber as follows:

*“So it's very quick what I have to say about the question of control over Mr Gaddafi's detention. It is correct that he presently remains in the custody of the Zintan Brigade”.*³¹⁰

263. Libya further referred to its efforts to secure Mr. Gaddafi from Zintan as comprising *“part of the new government's commitment to demobilising the various militia groups which remain active across Libya”*.³¹¹ Libya's deliberate use of the terms ‘militia’ and ‘demobilising’ clearly meant that the “Zintan Brigade” (a) was “a militia” and (b) one that did not fall under the effective control of the Government.

264. In a February 2013 interview,³¹² Prime Minister Zeidan even went so far as to expressly acknowledge that the Government had been unable to secure the transfer of Mr. Gaddafi to Tripoli because it lacked control over parts of Libya.

265. In the absence of any information or evidence that the Government had succeeded in exerting effective control over Zintan, the Chamber did not err in concluding that Mr. Gaddafi was not detained under the Government's effective control.

266. Contrary to Libya's submission,³¹³ it was also entirely reasonable for the Chamber to disregard or attribute little weight to the alleged extension of Mr. Gaddafi's detention by Tripoli-based judges, given that as set out in paragraph 135 above, Libya gave inconsistent and ambiguous submissions as to the manner in which these extensions took place, and the detention orders contained incorrect information.

267. Moreover it would have been reasonable for the Chamber to assume that the alleged

³⁰⁸ ICC-01/11-01/11-160, para.20, emphasis added.

³⁰⁹ As recently as 4 March 2013, conceded that it was “not possible to say with any certainty the exact date of Mr Gaddafi's transfer to Tripoli”. ICC-01/11-01/11-293-Conf.

³¹⁰ ICC-01/11-01/11-T-2-CONF-ENG, p. 29 lines 14-17.

³¹¹ ICC-01/11-01/11-T-2-CONF-ENG, p. 29 lines 22-23.

³¹² ICC-01/11-01/11-281-Conf, para.272.

³¹³ Appeal, para.158.

extensions merely ratified a *fait accompli* on the ground in Zintan.

268. Notably, Libya conceded that the South Tripoli Judges had been compelled to travel to Zintan to conduct the hearings, and that the hearings were – contrary to the *pro forma* requirement on the detention orders – convened in a confidential manner. No information was provided as to where in Zintan the hearings were conducted, and whether they were held in a formal courtroom, or at the place of Mr. Gaddafi's detention. It is self-evident that Mr. Gaddafi's trial cannot take place in a secret location in Zintan.
269. Rather than evidencing the Government's control over Mr. Gaddafi's detention, these irregular detention hearings simply underscored the Government's current inability to conduct proceedings against Mr. Gaddafi in a manner which comports with domestic procedures and capabilities.
270. Similarly, it was not unreasonable for the Chamber to consider the national security hearings in Zintan to be irrelevant to this issue since, as noted above, Libya expressly requested the Chamber to exclude these proceedings from its consideration of the admissibility proceedings. Moreover, in its March 2013 reply, the Government indicated that the instigation of the Zintan proceedings had no bearing on the forum of the main trial against Mr. Gaddafi as the national security proceedings would also be transferred to Tripoli.³¹⁴
271. Moreover, even assuming – which is vehemently denied – that it had been in any way factually or legally incorrect for the Chamber to conclude that Mr. Gaddafi was not being held under the custody of the Government, this error would not have affected its ultimate finding concerning Libya's inability to otherwise bring Mr. Gaddafi to trial. The Chamber can and must only rule on the basis of the information placed before it. Not only had Libya failed to introduce any submissions concerning its capacity to prosecute and detain Mr. Gaddafi in Zintan (indeed, it has never divulged the location of Mr. Gaddafi's detention in Zintan or the specific conditions of his detention),³¹⁵ it

³¹⁴ ICC-01/11-01/11-293-Conf, para.51.

³¹⁵ ICC-01/11-01/11-130-Conf, para.35: In its Admissibility Challenge, the Government indicated that he was being detained in a secret location. Moreover, as set out at paragraph 181 *supra*, the Government completely failed to respond to the Chamber's August 2012 order to respond to questions concerning the conditions of Mr. Gaddafi's detention.

had at all times strenuously denied reports that the trial would take place there.³¹⁶

272. The Government has also consistently emphasised that Mr. Gaddafi would be transferred to a detention facility to Tripoli,³¹⁷ particularly since it is illegal under Libyan law to be detained in a facility which is not purpose-built.³¹⁸
273. Appeals are corrective in nature, and not *de novo*.³¹⁹ An appellant cannot raise arguments or proposals for the first time on appeal, or utilise the appellate process to explore alternative admissibility theories which were never placed before the Chamber.³²⁰ Libya has itself argued that “[t]he purpose of interlocutory appeals is therefore not to allow the participants to have a ‘second bite at the cherry’ or to correct any deficiencies in previous pleadings”.³²¹
274. In circumstances in which Libya itself had stated that “*there was no prospect of a trial taking place in Zintan*”,³²² the Chamber cannot be found to have erred in ruling that Libya would be unable to commence trial proceedings as long as Mr. Gaddafi continued to be detained in Zintan.

ii. “Inability to obtain testimony”³²³

275. The Chamber’s conclusions on inability to obtain testimony were premised on a combination of the following factors:

³¹⁶ ICC-01/11-01/11-205, para.3 (the reports in question, which the Government asserted were false, alleged that the trial would take place in Zintan). ICC-01/11-01/11-T-2-CONF-ENG, p.19-20, line 25: During the Admissibility Hearing, Libya submitted “*although there’s been some recent contention in the press as to the planned location of any future trial, President el-Magariaf confirmed to the press on 22 September 2012 that there is no prospect of a trial taking place in Zintan due to inadequate courtroom facilities and the other infrastructure that will be needed for a trial.*” This is comparable to submissions made by Libya on 15 January 2013 stating that media reports announcing that the Libyan Minister of Justice and Prosecutor-General had confirmed that trial proceedings against Mr. Gaddafi’s trial were scheduled to commence in Zintan by the beginning of February 2013 were false, and “*unfortunate examples of the widespread misreporting of information associated with this case due to mistranslation or misunderstanding*”, (ICC-01/11-01/11-251). Three days later, Mr. Gaddafi was put on trial in Zintan for allegations related to the 7 June 2012 ICC visit (see ICC-01/11-01/11-255).

³¹⁷ See ICC-01/11-01/11-44-Anx1-Red, p.2; ICC-01/11-01/11-130-Conf, para.35; ICC-01/11-01/11-T-2-CONF-ENG, p.29, lines 16-23. See also footnote 306 above.

³¹⁸ ICC-01/11-01/11-130-Conf, para.59.

³¹⁹ ICC-02/05-03/09-295-OA2, para.20.

³²⁰ *Haradinaj*, para.112; *Tadić*, para.55; *Kambanda*, para.41; *Simić*, para.28.

³²¹ ICC-01/11-01/11-246, para.5.

³²² ICC-01/11-01/11-T-2-CONF-ENG, p.19-20

³²³ Appeal, paras.162-166.

- the absence of any information provided by the Government concerning the existence of specific witness protection programmes (including whether witnesses benefit from testimonial immunity);³²⁴
- the absence of any information as to whether Defence witnesses could benefit from witness protection programmes either in principle or in practice;³²⁵
- reports concerning deaths, torture and serious mistreatment of former Gaddafi officials and associates in detention;³²⁶ and
- the fact that the Government had not succeeded in exercising control over several detention centres where former Gaddafi officials were being detained.³²⁷

276. In its appeal against this finding, Libya has erroneously focused on discrete aspects of the Chamber's findings rather than the cumulative effect of the above factors.

277. For example, Libya has postulated that the Chamber's reference to the authorities' inability to interview two potential witnesses, who are detained in detention centres that do not fall under Government control, fails to reach the necessary threshold of Article 17(3).³²⁸ It is, however, abundantly clear that the Chamber's finding concerning Libya's inability to secure witness testimony was not predicated only on these two examples. Rather, the Chamber referred to these two examples in order to underscore the nexus between the Government's lack of control over detention centres and the impact that this had on witness availability.

278. The Chamber's finding as concerns these particular witnesses must also be considered in conjunction with Defence evidence that:

- key exculpatory witnesses would be unavailable to testify in Libya due to

³²⁴ Decision, para.211.

³²⁵ Decision, para.211.

³²⁶ Decision, para.209.

³²⁷ Decision, para.209.

³²⁸ Appeal, para.163.

the absence of effective protection programmes;³²⁹

- Libyan witnesses had been subjected to intimidation, mistreatment and torture whilst detained in centres that fell outside the control of the Government;³³⁰
- the names of key insider witnesses, some of whom were detained in Libya, had been publicly revealed by Libyan authorities;³³¹ and
- key witnesses had been subjected to death threats and vexatious prosecutions and arrest warrants, due to their assistance to the Defence.³³²

279. In light of the fact that Libya never disputed the above evidence, it clearly fell within the ambit of the Chamber's discretion to determine that the absence of concrete information concerning witness protection programmes (including testimonial immunity) and secure detention conditions would have a direct impact on the availability of key testimony for the proceedings.

280. In further arguing that the Chamber's assessment concerning the availability of protective measures "*constitutes an unwarranted intrusion upon the right of a sovereign state to determine its own domestic procedures*",³³³ Libya has failed to appreciate the objective nature of the Article 17(3) assessment.

281. If, due to a substantial collapse or unavailability of its national judicial system, the State is unable to obtain necessary evidence or testimony, the Chamber is required to find that the case is admissible before the ICC. The Chamber did not interpret Article 17(3) to require a specific standard of witness protection. Rather, it considered whether, in the prevailing circumstances which Libya conceded to exist at present, Libya would have the capacity to obtain key witness testimony and evidence.

³²⁹ ICC-01/11-01/11-190-Conf-Corr, paras.394-399; ICC-01/11-01/11-185-Conf-Exp-Anx27-Corr.

³³⁰ ICC-01/11-01/11-190-Conf-Corr, paras.101-115; ICC-01/11-01/11-281-Conf, paras.67-72 and 76-77; ICC-01/11-01/11-276-Conf-Exp-AnxC.

³³¹ ICC-01/11-01/11-281-Conf, paras.224-225; ICC-01/11-01/11-261-Conf, paras.32-33; ICC-01/11-01/11-228-Conf-Exp-Anx1, p.4; ICC-01/11-01/11-340-Conf-AnxE, p.2.

³³² ICC-01/11-01/11-332, paras.59-61 and 72; ICC-01/11-01/11-228-Conf-Red, para.6; ICC-01/11-01/11-323-Conf-Exp, paras.6-32; ICC-01/11-01/11-259-Conf-Exp, paras.3-17 and 23.

³³³ Appeal, para.165.

282. The Chamber was not requiring Libya to conform to an “*international ideal of witness protection*”.³³⁴ It was simply concluding that, in the absence of any concrete information as to how Libya would mitigate the impact of these prevailing circumstances on the judicial proceedings, such as through effective witness protection programmes, Libya had failed to discharge its burden as concerns Article 17(3).
283. Libya also incorrectly claims that the Chamber’s concerns regarding the availability of witness testimony were “*a matter of pure speculation*”.³³⁵ The Chamber cited two concrete examples, in which the Government’s lack of control over detention centres had created an actual rather than speculative impediment to their ability to obtain witness testimony.³³⁶
284. The Chamber’s finding concerning the lack of information relating to effective protection programmes for Defence witnesses should be read in light of Defence evidence concerning four concrete examples of witnesses, who had indicated that they would be unavailable to testify in the absence of effective witness protection programmes.³³⁷
285. It is entirely misconceived for Libya to propose that the Court should allow Libya to commence its proceedings, and only intervene if and when it becomes apparent that the absence of witness protection has had an impact on the proceedings.³³⁸ This proposal is as wrong in principle as it is in practice. Under Libyan law, the Defence is required to disclose the names of its witnesses at the beginning of the trial.³³⁹ Since Mr. Gaddafi’s Defence would be required to act in the best interests of the client, the Defence would be obliged to name witnesses in a domestic setting in which they cannot guarantee their security. However, the identification of Defence witnesses in those circumstances would create severe security repercussions for them, rendering them unavailable for the purposes of ICC proceedings.³⁴⁰ The admissibility regime should not be interpreted in such a manner as to jeopardise the ability of the ICC to

³³⁴ Appeal, para 165.

³³⁵ Appeal, para.165.

³³⁶ Decision, para.210.

³³⁷ ICC-01/11-01/11-190-Conf-Corr, paras.394-399; ICC-01/11-01/11-185-Conf-Exp-Anx27-Corr

³³⁸ Appeal, paras.153 and 165.

³³⁹ Article 159 of the Criminal Procedure Code: When the case is referred to a Trial Court by the Accusation Chamber, the Chamber requests the parties to file a list of their witnesses and their relevance to the case.

³⁴⁰ ICC-01/11-01/11-323-Conf-Exp and ICC-01/11-01/11-323-Conf-Exp-Anx1.

step in to ensure effective proceedings, should Libya prove unable to do so.

286. Libya argues that the Chamber “*must*” adopt a wait-and-see approach on the issue of witness protection:

*“The Court must allow the Libyan authorities the opportunity to apply their own domestic processes and address any issues relating to witness protection as and when they arise ...”*³⁴¹

287. Like so many of Libya’s arguments, this assertion is highly ambiguous. On the one hand, it might be taken to mean that the Chamber should have effectively adjourned the admissibility proceedings *sine die* until such time – perhaps many years hence - when Libya’s witness protection scheme fulfilled the ‘ability’ requirements for a case to be declared inadmissible. This is plainly untenable, not least because Libya never made such a request. Admissibility challenges have to be determined expeditiously; to adjourn them indefinitely would represent an unprecedented violation of the Defendant’s right to be fairly tried without undue delay and set a dangerous precedent for other admissibility challenges by opening the door for states to rely on complementarity challenges as a means to delay indefinitely the work of the Court.
288. The other way to interpret Libya’s submission is to understand it to mean that the Chamber should have found in favour of Libya’s admissibility challenge, notwithstanding that the facts were squarely against Libya on the witness protection issue. This, on the face of it absurd, argument is premised on the notion that “*the ICC Prosecutor may seek a redetermination of admissibility if concerns arise regarding the conduct of the future trial.*”³⁴² But the ICC Prosecutor may only request review of a decision of inadmissibility pursuant to Article 19(10) based on “*new facts*” which arose after the admissibility decision. Since the absence of an adequate witness protection programme in Libya would not, in this scenario, be a “*new fact*”, the ICC Prosecutor would not be able to raise it. Libya would be left with an inadmissibility finding in its favour to which, *ex hypothesi*, it was never entitled.
289. For example, in the present case, it was patently clear at the time that the Chamber issued its decision that Libya lacked the capacity to ensure the protection and security

³⁴¹ Appeal, para.166.

³⁴² Appeal, para.166.

of Court participants, such as judges, counsel and witnesses. Since this is a fact, which was known at the time of the admissibility proceedings, the Prosecutor would have been barred from raising this aspect in a future request for review.

290. It is for this reason that the Appeals Chamber has categorically stated that there was no merit to the argument that the ICC should accord States leeway in order to allow their domestic investigations to progress to the point where they would trigger the inadmissibility of the case.³⁴³ The obligation falls on the State to bring a challenge which triggers the inadmissibility of the case - not to build one during the admissibility proceedings themselves.

iii. “Otherwise unable to carry out its proceedings: appointment of defence counsel”³⁴⁴

291. In its Admissibility Challenge, Libya submitted that the investigations against Mr. Gaddafi were largely complete,³⁴⁵ and that the case was ready to proceed to the next phase (which was estimated to be approximately three weeks from then) as soon as a counsel had been appointed to Mr. Gaddafi.³⁴⁶

292. Libya also repeatedly underscored the fact that under Libyan law, the case would not be permitted to proceed to the next phase unless counsel were to be appointed to Mr. Gaddafi, even if he did not wish to be represented.³⁴⁷

293. Libya failed to address this issue after a further twelve months had elapsed, and further conceded that it lacked the capacity to remedy this issue at the time of the admissibility proceedings.³⁴⁸ Therefore, there is no basis for concluding that the Chamber erred in its assessment that Libya lacked the capacity to advance the proceedings to the next phase due to its failure to secure legal representation for Mr. Gaddafi.

294. Contrary to Libya’s submissions, the Chamber did not base its conclusion on the

³⁴³ ICC-01/09-02/11-274, para.44.

³⁴⁴ Appeal, paras.167-171.

³⁴⁵ ICC-01/11-01/11-130-Conf, paras.41and 91

³⁴⁶ ICC-01/11-01/11-130-Conf, para.61.

³⁴⁷ ICC-01/11-01/11-130-Conf, para.61; ICC-01/11-01/11-T-2-Red-ENG, p.20, lines 10-12.

³⁴⁸ Decision, para.213, Further submissions, paras.53-54.

question of whether Mr. Gaddafi had been able to exercise his right to legal representation in an effective manner during the investigations phase. Nor did it base its conclusion on the issue of whether the Libyan authorities violated Libyan law by interrogating him in the absence of counsel, or whether Mr. Gaddafi had previously refused legal representation.³⁴⁹

295. As noted at paragraphs 207-209 above, Libya also failed to introduce any information or evidence to the Pre-Trial Chamber concerning the appointment of Counsel in the Zintan proceedings. Libya had expressly requested the Chamber to disregard the Zintan proceedings for the purposes of its admissibility assessment. The Chamber therefore committed no error by basing its findings on Libya's submissions that Mr. Gaddafi was unrepresented as concerns the proceedings which purportedly relate to the ICC case.
296. Finally, Libya's argument that "*absent a finding that the Libyan authorities cannot ensure that Mr. Gaddafi will be represented at his trial, the Chamber erred in finding that the difficulties experienced by the Libyan authorities amount to 'unavailability'*",³⁵⁰ reverses the burden of proof. The burden did not fall on the Chamber to demonstrate that Libya could not ensure Mr. Gaddafi's representation. Rather the burden fell on Libya to prove, at the time of the admissibility proceedings, that it could. Since the Chamber is precluded from basing its assessment on aspirational statements of intent,³⁵¹ the Chamber committed no error by finding that Libya had failed to discharge its burden that it currently possesses the capacity to bring Mr. Gaddafi to trial.

iv. **"Misappreciation of the ongoing nature of the investigation when assessing ability"**³⁵²

297. Libya's appeal on this point fails to state the nature of the alleged appellate error, or to demonstrate its alleged impact on the outcome of the decision, and therefore falls for summary dismissal.

³⁴⁹ Cf Appeal, para.170.

³⁵⁰ Appeal, para.171.

³⁵¹ ICC-02/04-01/05-377, paras.49-52.

³⁵² Appeal, para.172.

298. The Chamber accorded Libya multiple opportunities to substantiate its challenge in spite of the opposition by the OPCD and OPCV highlighting, *inter alia*, the significant delays by Libya in taking crucial investigative steps in the case against Mr. Gaddafi, which were unjustified and inconsistent with the intent to bring Mr. Gaddafi to justice.³⁵³ The Chamber also took into consideration the specific circumstances in existence after the first election, and granted Libya several opportunities to obtain the necessary instructions to formulate its reply.³⁵⁴ There is thus absolutely no indication that the Chamber failed to appreciate the transitional context in Libya – even assuming that it was obliged to - or that it committed any reversible error.

v. **“Failure to consider the “genuineness” of the investigative steps taken by Libya”**³⁵⁵

299. Again, Libya has failed to clearly identify the nature of the appellate error, to cite any specific instances from the Decision which concern this alleged appellate error, or to demonstrate any impact on the outcome of the Chamber’s decision.

XI. Suspensive Effect

300. Article 82(3) sets out a presumption *against* suspensive effect, such that “*an appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence*”.

301. The burden therefore falls on the party requesting suspensive effect to satisfy the Appeals Chamber that implementation of the Chamber’s decision would result in an irreversible situation that could not be corrected.³⁵⁶ Failure to demonstrate “*strong*” or “*compelling*” reasons, which would justify the suspension, will result in the Appeals

³⁵³ For the extent of submissions made by OPCD and OPCV in opposition to the delay in admissibility proceedings, see ICC-01/11-01/11-43; ICC-01/11-01/11-51-Conf; ICC-01/11-01/11-72-Conf; ICC-01/11-01/11-85-Conf; ICC-01/11-01/11-187-Conf; ICC-01/11-01/11-106; ICC-01/11-01/11-154; ICC-01/11-01/11-155; ICC-01/11-01/11-190-Conf; ICC-01/11-01/11-192; ICC-01/11-01/11-196; ICC-01/11-01/11-201; ICC-01/11-01/11-209; ICC-01/11-01/11-215; ICC-01/11-01/11-T-2-CONF-ENG; ICC-01/11-01/11-T-3-CONF-ENG; ICC-01/11-01/11-228-Conf-Red; ICC-01/11-01/11-243-Conf; ICC-01/11-01/11-255; ICC-01/11-01/11-261-Conf; ICC-01/11-01/11-262; ICC-01/11-01/11-279; ICC-01/11-01/11-281-Conf-Red; ICC-01/11-01/11-285; ICC-01/11-01/11-286; ICC-01/11-01/11-308.

³⁵⁴ On occasion, the Chamber granted Libya’s request to reply, even when prematurely submitted prior to any responses, on the basis that “*the triggering force and main actor in [admissibility] proceedings is the entity challenging the admissibility of the case*” (ICC-01/11-01/11-191 para. 8 citing to ICC-01/11-01/11-159, para. 9).

³⁵⁵ Appeal, paras.173-177.

³⁵⁶ ICC-01/09-02/11-401, para.10.

Chamber dismissing the request.³⁵⁷ The Chamber's power to grant suspensive effect is also a discretionary power,³⁵⁸ which must be exercised in a manner consistent with the rights of the defendant, and the interests of justice.³⁵⁹

302. There is no objective basis for concluding that there are strong or compelling reasons to believe that the immediate implementation of the obligation to surrender Mr. Gaddafi to the ICC would create an irreversible situation that could not be corrected.
303. In the alternative, even if the criteria were to be fulfilled, the Appeals Chamber should nonetheless reject the Request on the basis that it would result in disproportionate prejudice to the rights of Mr. Gaddafi before the ICC and against the interests of justice.

i. The criteria for suspensive effect are not fulfilled

304. The Appeals Chamber has found repeatedly that decisions concerning the admissibility or jurisdiction of the case do not warrant automatic suspensive effect. If the challenge is successful, the Appeals Chamber possesses the power to order the implementation of the appellate decision, and the discontinuance of the proceedings before the ICC.³⁶⁰ A first instance decision on admissibility thus does not create an irreversible situation for the appellant which could not be corrected on appeal.
305. The surrender of Mr. Gaddafi to the custody of the ICC would also not create irreversible prejudice as concerns the Government of Libya's appellate rights concerning the admissibility of the case. Article 19 of the Statute expressly envisages that States may challenge the admissibility of the case *after* the defendant has been surrendered to the custody of the ICC. Moreover, Rule 185(2) sets out the procedure which applies in relation to the release of a defendant if a State is successful in its challenge to the admissibility of the case. The drafters therefore clearly envisaged that the transfer of a defendant to the custody of the ICC pending the resolution of an

³⁵⁷ ICC-01/04-02/12-12, paras.23-24; ICC-01/09-02/11-401, para.10.

³⁵⁸ ICC-01/04-01/06-1290 OA11, para.7.

³⁵⁹ ICC-01/04-169, para.2; ICC-01/04-01/06-1444-Anx, para.6.

³⁶⁰ ICC-01/09-02/11-401, para.10. *See also* ICC-01/09-01/11-391, para.10, and ICC-01/05-01/08-962, para.11.

admissibility challenge would not create an irreversible situation or undermine the objective of the appeal.

306. To the contrary, since Libya has not requested suspensive effect of any aspects of the admissibility decision other than the surrender request, it has no right to continue domestic proceedings pending the outcome of the appeal. The transfer of Mr. Gaddafi to the custody of the ICC therefore has no impact on the progress of domestic proceedings.
307. The possibility that immediate implementation of the decision could engage additional time or resources of Libya or the ICC is also entirely irrelevant to the criteria for suspensive effect.³⁶¹

ii. Granting the Request would disproportionately prejudice the rights of Mr. Gaddafi before the ICC and the interests of justice

308. The Appeals Chamber has found that all aspects of the Rome Statute must be interpreted and applied in a manner consistent with Article 21(3) of the Statute, which encompasses the overarching requirements of the defendant's right to a fair trial.³⁶²
309. The Appeals Chamber has also indicated recently that if an ICC defendant is detained under the authority of a third party, the ICC has jurisdiction to assess whether the conditions of detention infringe upon the defendant's fair trial rights before the ICC.³⁶³
310. The Appeals Chamber therefore has jurisdiction in the current case to assess whether Mr. Gaddafi's continued detention in Libya would infringe upon his rights before the ICC, or the internationally recognised human rights of Mr. Gaddafi. In this regard, the prolongation of Mr. Gaddafi's detention in Libya would prevent him from participating in ICC proceedings in an effective manner.
311. As Libya has not requested the Appeals Chamber to suspend the Pre-Trial Chamber's finding that the case is admissible before the ICC, the significant length of Mr.

³⁶¹ ICC-01/05-01/08-962, para.11.

³⁶² ICC-01/04-01/06-772, paras.36 and 37.

³⁶³ ICC-01/04-02/12-67, para.8.

Gaddafi's pre-trial detention triggers a corollary obligation on the ICC to advance Mr. Gaddafi's case at the ICC in an expeditious manner.³⁶⁴ It will be impossible to do so in circumstances where Mr. Gaddafi cannot participate in the proceedings, receive filings or evidence, or instruct counsel.

312. Mr. Gaddafi has been detained for approximately twenty-one months. During this time, his case before the ICC has been completely stalled. Further delays in the commencement of the pre-confirmation proceedings would be "*inimical to the proper administration of justice*".³⁶⁵
313. The suspension of Libya's obligation to surrender Mr. Gaddafi immediately to the ICC would therefore be fundamentally incompatible with the stringent statutory duty of the Court to ensure expeditious proceedings.³⁶⁶ The impact of a suspension of the surrender request on the rights of Mr. Gaddafi must also be viewed in light of the particular conditions of Mr. Gaddafi's detention, as addressed in paragraphs 172-180 *supra*, and the real likelihood that a prolongation of his detention under such conditions would violate Mr. Gaddafi's rights under Article 55 of the Statute.
314. If the Appeals Chamber were to take the positive step of approving Mr. Gaddafi's continued detention in Libya, the ICC would also be forced to renounce any effective control over Mr. Gaddafi, which would be incompatible with the Chamber's positive duty to ensure Mr. Gaddafi's rights under the Statute.³⁶⁷
315. As Libya's request for suspensive effect was strictly confined to the obligation to surrender, Mr. Gaddafi, the Government was required to hold any domestic proceedings against Mr. Gaddafi in abeyance until the Appeals Chamber has issued its judgment. Since the Appeals Chamber has yet to rule on the Government's request to

³⁶⁴ *Assenov and others v. Bulgaria*, para 154.

³⁶⁵ ICC-01/04-01/07-2259, para.45.

³⁶⁶ ICC-01/04-01/07-2559, para.43.

³⁶⁷ See Article 57(3)(b); Article 68(1). The ICC Appeals Chamber has also found that the ICC has a duty to provide a remedy as concerns any violations of the rights of the defendant, which have occurred in the process of bringing the defendant to justice before the ICC, even if these violations have been committed by a State and not organs of the ICC (ICC-01/04-01/06-772, paras.36-39). It follows from this that the ICC would have a corresponding duty to take such measures as are within its Statutory powers to ensure that such violations do not arise in the process of bring the defendant to justice before the ICC.

suspend its obligation to surrender Mr. Gaddafi to the ICC, the Government is also obliged to take steps to implement the surrender request.

316. When the Pre-Trial Chamber authorised Libya to postpone the surrender of Mr. Gaddafi, the Chamber also emphasised that in exercising physical custody over Mr. Gaddafi, Libya was obliged to refrain from any actions which could impede its ability to comply with its obligations to the Court, including implementation of the surrender request.³⁶⁸
317. Despite this, on 17 June 2013, an official from the Prosecutor-General's office announced that they intend to commence hearings against Mr. Gaddafi in the first part of August for the ICC related charges,³⁶⁹ prior to any final judgement from the Appeals Chamber. Moreover, notwithstanding the Pre-Trial Chamber's clear instruction that the postponement of Mr. Gaddafi's surrender was conditional on the Government's corresponding obligation to implement it should the challenge to admissibility being rejected,³⁷⁰ throughout the admissibility proceedings, the Libyan authorities have consistently emphasised that they intend to prosecute Mr. Gaddafi on Libyan soil and have no intention to comply with an actual or possible surrender request issued by the ICC.³⁷¹
318. In establishing the above-delineated criteria for suspensive effect, the Appeals Chamber was clearly guided by the imperative that the Court must be in a position to implement the Appeals Chamber's judgement, should the appeal be successful. Conversely, the power of the Appeals Chamber to grant suspensive effect must also presuppose that the Appeals Chamber has verified that the party requesting suspensive effect will implement its obligations should the appeal be rejected. Otherwise, an appealing party could exploit the avenue of requesting suspensive effect in order to make the outcome of the appeal a *fait accompli*.
319. In the present case, granting suspensive effect as concerns Libya's obligation to surrender Mr. Gaddafi to the ICC will facilitate the ability of the Libyan authorities to

³⁶⁸ ICC-01/11-01/11-163, para.40.

³⁶⁹ ICC-01/11-01/11-359.

³⁷⁰ ICC-01/11-01/11-163, para.40.

³⁷¹ Annex 3 to Response. *See also* ICC-01/11-01/11-359, fn.5.

commence domestic proceedings against Mr. Gaddafi. Given that firstly, Mr. Gaddafi faces the death penalty in connection with the domestic charges, and secondly, the Appeals Chamber will not be in a position to render its judgment on the appeal before the commencement of hearings, there is a possibility that the Libyan authorities could execute this penalty prior to the issuance of the judgement. This would create a grievous and irremediable consequence for Mr. Gaddafi, and completely undermine the ability of the Appeals Chamber to render a determination on the appeal.

320. Finally, given the deteriorating security and political situation in Libya, which has particularly impacted on the rule of law sector,³⁷² the ability of the Government to implement the surrender request is likely to be significantly diminished at the time when the Appeals Chamber renders its judgement. Granting suspensive effect would therefore be contrary to the interests of justice, and would not further “*the efficiency of the judicial process*”.³⁷³

XII. Conclusion and Relief Sought

321. Granting Libya’s Appeal would set an alarming precedent that incentivises States to submit premature challenges. Libya has protracted proceedings at the expense of Mr. Gaddafi’s fundamental right to a fair and expeditious trial. It was accorded every

³⁷² In his briefing to the Security Council on 18 June 2012, Special Representative of the Secretary-General and Head of UNMSIL decried the use of military force to extract political concessions (para.6), the adoption of the Political Isolation Law and the likelihood that it will violate civil and political rights and further weaken judicial institutions (paras.10-11), the persistent practice of deaths and torture in prisons (paras.19-20), and the growth in number and scale of security incidents (para.28).

http://unsmil.unmissions.org/Portals/unsmil/Documents/SC%20Briefing%20June%202013%20_12%20June%2013_%20check%20against%20delivery.pdf

Moreover, in June, a senior judge was murdered outside of a courtroom in Derna, a detainee was murdered by militia after his guards allowed them to enter his prison cell to attack him, 32 persons were killed during protests in Benghazi, and the Chief of the Army resigned due to the deterioration in security:

‘Lawyers for Justice in Libya concerned by attacks on judges and lawyers in Libya’ Lawyers for Justice in Libya 18 June 2013, <http://www.libyanjustice.org/news/news/post/92-lawyers-for-justice-in-libya-concerned-of-attacks-on-judges-and-lawyers-in-libya>

‘Derna judge murdered outside courthouse’, Libya Herald, 16 June 2013, <http://www.libyaherald.com/2013/06/16/35028/>

‘Prisoner gunned down inside his Sebha cell’ Libya Herald, 16 June 2013, <http://www.libyaherald.com/2013/06/16/prisoner-gunned-down-inside-his-sebha-cell/>

‘Libya: No Impunity for ‘Black Saturday’ Benghazi Deaths’, Human Rights Watch 14 June 2013, www.hrw.org/news/2013/13/libya-no-impunity-black-saturday-benghazi-deaths

A. Elumami, and N. Zaroug, ‘Mangoush Resigns’ Libya Herald, 9 June 2013 www.libyaherald.com/2013/06/09/mangoush-resigns/

See also the security incidents set out in ICC-01/11-01/11-356-AnxA.

³⁷³ ICC-01/04-01/06-1444-Anx, para.9.

opportunity to submit extensive arguments and repeat assertions and despite this, within thirteen months, it demonstrably failed to support its challenge.

322. In its Appeal, Libya seeks to reassert arguments properly dismissed by the Chamber; misstates previous arguments put before the Chamber; misconstrues the test applied by the Pre-Trial Chamber and impermissably submits new arguments before the Appeals Chamber. Libya continues to tread water; and it is no closer now to investigating Saif Al-Islam Gaddafi's case than it was in May 2012.
323. For the foregoing reasons, Libya's Appeal should be dismissed in its entirety, including its request for an oral hearing and request for suspensive effect.

A handwritten signature in black ink, appearing to read 'John Jones', is centered on the page.

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

Dated this, 18th Day of July 2013

At London, United Kingdom