Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

No.: **ICC-01/11-01/11**
Date: **22 July 2013**

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

Prosecution 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: **Office of the Prosecutor**

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

The Office of the Prosecutor
Fatou Bensouda
James Stewart
Fabricio Guariglia

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

Counsel for Abdullah Al-Senussi
Ben Emmerson QC
Rodney Dixon
William Schabas

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims
Paolina Massidda
Sarah Pellet
Mohamed Abdou

The Office of Public Counsel for the Defence

States Representatives
Philippe Sands
Payam Akhavan
Michelle Butler

Amicus Curiae

REGISTRY

Registrar
Herman von Hebel

Counsel Support Section

Deputy Registrar
Didier Preira

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Table of Contents

Introduction

1. On 31 May 2013, Pre-Trial Chamber I found the case against Saif Al-Islam Gaddafi ("Gaddafi") admissible before the Court (the "Decision"). The Chamber found that while some items of evidence showed that certain investigative steps had been taken with respect to certain aspects that related to the conduct of Gaddafi, Libya had fallen short of substantiating, by means of evidence of a sufficient degree of specificity and probative value, the submission that its domestic investigation covers the same case as before the Court. The Chamber further added that even if sufficient evidence had been presented, the case would still remain admissible because Libya was unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings within the terms of Article 17(3). The Pre-Trial Chamber also adopted a broad interpretation of the same conduct test and did not require full identity between the domestic and ICC case, but that the domestic investigation addresses the same conduct underlying the Warrant of Arrest and Article 58 Decision.

2. The Government of Libya ("the Appellant") is appealing the Decision and advances four grounds of appeal (the "Appeal"). First, it argues that the Chamber erred in law by holding that "a number of investigative steps" by the Appellant, covering "discrete aspects" of the case before the ICC, failed to satisfy the "same conduct" test under Article 17(1)(a). Second, it argues that the Pre-Trial Chamber erred in fact and in law in finding that the Appellant has not substantiated that its domestic investigation covers the same case as that before the ICC. Third, it submits that the Chamber erred procedurally, or acted unfairly, by failing

to "take appropriate measures for the proper conduct of the procedure" under Rule 58(2), thereby depriving the Appellant of the ability to rely upon highly relevant evidence in support of its admissibility challenge. Fourth, it argues that the Chamber erred in fact and in law in finding that, due to the unavailability of its national judicial system, the Appellant is unable to obtain the accused or the necessary evidence and testimony or is otherwise unable to carry out its proceedings, pursuant to Article 17(3) of the Statute.

3. The Prosecution submits that the Appeal should be dismissed. This is a case where the Pre-Trial Chamber gave ample scope for the Appellant to present evidence of sufficient degree of specificity and probative value to substantiate its admissibility challenge over an extended time period. During this time, the Appellant, while providing some information demonstrating that national proceedings exist against the same suspect, failed to demonstrate the precise scope and contours of the national case. This meant that the Pre-Trial Chamber was unable to verify whether national investigations indeed encompassed the same case as the proceedings before the ICC - the primary consideration under the first limb of the admissibility test. Hence, the crux of the decision rested on the insufficiency of the evidence presented to substantiate the challenge. In addition to finding that the first limb of the admissibility test had not been satisfied, the Pre-Trial Chamber went on to offer a number of observations on the Appellant's ability within the terms of Article 17(3) – the second limb of the admissibility determination. In view of the potentially ambulatory nature of the factual situation underlying an admissibility determination, the Chamber further emphasised that it was prepared to consider a renewed challenge based on any change of the

facts underlying domestic activity pursuant to the conditions set out in Article 19(4).

4. Hence, and contrary to the Appellant's submissions, there is no error in the Chamber's decision. First, the Chamber did not apply a higher standard than the same person/ substantially the same conduct test endorsed by the Appeals Chamber's jurisprudence. The Chamber required that the Appellant present evidence of a sufficient degree of specificity and probative value to substantiate its submissions and never indicated that the domestic investigation needed be completed at the time of the challenge. The Prosecution submits that a case will be "substantially the same" if any difference in the underlying facts and circumstances are minor, such that the facts and circumstances may be described as essentially the same because they are inextricably linked together in time, space and by their subject-matter.

5. Second, the Chamber correctly assessed the evidence presented before it therefore reaching reasonable conclusions. Third, the Chamber was not unfair when it set out the procedure under Rule 58(2) and took into account the particularities of the domestic case. Fourth, and although the Chamber's findings with respect to Article 17(3) may be characterised as obiter, the conclusions reached therein were not unreasonable and thus do not meet the required standard of appellate review with respect to findings of fact. Finally, the Prosecution also submits that the Appellant's request for an oral hearing and for suspensive effect of its obligation to surrender Gaddafi be rejected.

Procedural Background

6. On 1 May 2012, the Appellant challenged the admissibility of the case against Gaddafi before the Court pursuant to Article 19(2)(b) of the Rome Statute ("Admissibility Challenge").[1]

7. On 4 May 2012, Pre-Trial Chamber I issued a decision on the conduct of the proceedings for the purpose of the Admissibility Challenge.[2]

8. On 17 May 2012, the Appellant requested leave to reply to the responses to be filed to its Admissibility Challenge within 18 days of notification of the responses.[3]

9. On 1 June 2012, the Pre-Trial Chamber I decided to postpone the request for surrender of Gaddafi pursuant to Article 95 of the Statute until such time that the Chamber has ruled on the Admissibility Challenge.[4]

10. On 4 June 2012, the Prosecution filed its response to the Application.[5] The response of OPCV was filed the same day.[6] On 24 July 2012, the OPCD filed its confidential response to the Application.[7]

11. On 26 July 2012, the Pre-Trial Chamber I granted the Appellant's application for leave to reply to any response to the Admissibility

[1] ICC-01/11-01/11-130.
[2] ICC-01/11-01/11-134.
[3] ICC-01/11-01/11-150.
[4] ICC-01/11-01/11-163.
[5] ICC-01/11-01/11-167-Red.
[6] ICC-01/11-01/11-166-Red-Corr.
[7] ICC-01/11-01/11-190-Conf. The public redaction version of the corrigendum to OPCD response was filed on 31 July 2012 (ICC-01/11-01/11-190-Corr-Red).

Challenge, and extended the time limit for the reply until 13 August 2012.[8]

12. On 30 July 2012, the Appellant informed the Pre-Trial Chamber I that it would not be possible to receive instructions from the Libyan Government until after the appointment of the new Libyan Minister of Justice, Attorney-General and Prosecutor-General, and requested that the Chamber convene a status conference to discuss certain procedural matters related to the Admissibility Challenge and grant an extension of time for the filing of Libya's reply to the responses.[9]

13. On 9 August 2012, the Pre-Trial Chamber I suspended the time limit of 13 August 2012 set for Libya's reply to the Responses and requested the Appellant to file as soon as possible, and no later than 7 September 2012, a report providing an update as to: (i) the status of the appointment of the Minister of Justice, Attorney-General and Prosecutor-General in Libya, as well as counsel's ability to obtain instructions from them; (ii) the status of domestic proceedings against Gaddafi, including whether he had been appointed a lawyer for this purpose; and (iii) the conditions of detention of Gaddafi. Upon receipt of this report, the Chamber would decide on the request for extension of time for the filing of the Appellant's reply to the responses.[10]

14. On 7 September 2012, the Appellant filed the requested provisional report and requested leave to file a further report by 28 September 20l2".[11]

[8] ICC-01/11-01/11-191.
[9] ICC-01/11-01/11-192.
[10] ICC-01/11-01/11-200.
[11] ICC-01/11-01/11-205.

15. On 17 September 2012, the Pre-Trial Chamber I considered the information provided in the Appellant provisional report and decided that no additional written report was necessary on the issues identified on its 9 August 2012 Decision and instead decided to convene a hearing where the Appellant would be given a further opportunity to provide its reply to the Responses orally together with submissions of the other parties and participants to the admissibility proceedings ("Admissibility Hearing"). The Chamber further ordered the parties and participants to submit any additional evidence upon which they intend to rely at the hearing by 3 October 2012.[12]

16. On 3 October 2012, the Defence filed additional evidence for use at the Admissibility Hearing. [13]

17. On 9 and 10 October 2012, the Pre-Trial Chamber I held the Admissibility Hearing of the case against Gaddafi.[14]

18. On 7 December 2012, the Pre-Trial Chamber I requested the Applicant to provide by 23 January 2013 additional evidence and submissions on specified topics.[15]

19. On 23 January 2013, the Appellant filed its further submissions on issues related to the admissibility of the case against Gaddafi ("Further Submissions").[16]

[12] ICC-01/11-01/11-207.
[13] ICC-01/11-01/11-216.
[14] ICC-01/11-01/11-T-2-Red-ENG and ICC-01/11-01/11-T-3-Red-ENG.
[15] ICC-01/11-01/11-239.
[16] ICC-01/11-01/11-258-Red2.

20. On 11 February 2013, the Prosecution filed its response to the Further Submissions.[17] On 18 February 2013, the OPCV[18] and the Defence[19] filed their observations on the Further Submissions.

21. On 20 February 2013, the Appellant sought leave from the Pre-Trial Chamber I to reply to the responses of the Prosecution, the OPCV and the Defence to its Further Submissions.[20]

22. On 26 February 2013, the Pre-Trial Chamber I granted the Appellant request to reply to the responses to its Further Submissions by 4 March 2013.[21]

23. On 4 March 2013, the Appellant submitted its consolidated reply[22] to the responses of the Prosecution[23], the OPCD[24] and the OPCV[25] to its Further Submissions.[26]

24. On 31 May 2013, Pre-Trial Chamber I found the case against Gaddafi admissible before the Court and reminded the Applicant of its obligation to surrender Gaddafi (hereinafter "Admissibility Decision").[27]

25. On 7 June 2013, the Applicant filed its notice of appeal whereby it requested suspensive effect of the Pre-Trial Chamber's order to surrender Gaddafi.[28]

---

[17] ICC-01/11-01/11-276-Red2.
[18] ICC-01/11-01/11-279.
[19] ICC-01/11-01/11-281-Red2.
[20] ICC-01/11-01/11-283.
[21] ICC-01/11-01/11-288.
[22] ICC-01/11-01/11-293-Red .
[23] ICC-01/11-01/11-276-Red2.
[24] ICC-01/11-01/11-281-Red2.
[25] ICC-01/11-01/11-279.
[26] ICC-01/11-01/11-258-Red2.
[27] ICC-01/11-01/11-344-Red.

26. On 17 June 2013 the Defence filed the Response to Government of Libya's Request for Suspensive Effect.[29]

27. On 24 June 2013, the Prosecution responded to the Applicant's request for suspensive effect.[30]

28. On 24 June 2013, the Applicant filed its document in support of the appeal against the Admissibility Decision of the case against Gaddafi (hereinafter "Appeal").[31]

Standard of Review

29. Libya alleges factual, procedural and legal errors in the Decision. With respect to the applicable standards for *legal errors,* the Appeals Chamber has stated that it "will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law."[32] The Appeals Chamber will therefore articulate the correct legal standard and review the relevant factual findings of the Trial Chamber accordingly.[33]

30. With respect to *errors of fact,* the Appeals Chamber has stated that there is an error of fact when the Trial Chamber misappreciated facts, disregarded relevant facts or took into account facts extraneous to the *sub*

[28] ICC-01/11-01/11-350.
[29] ICC-01/11-01/11-357
[30] ICC-01/11-01/11-368
[31] ICC-01/11-01/11-370-Conf-Exp. The public redacted version was filed on 25 June 2013 (ICC-01/11-01/11-370-Red2.
[32] ICC-02/05-03/09-295OA,para.20.
[33] The ICTY Appeals Chamber has held that in cases of an incorrect legal standard, the Appeals Chamber, after identifying the correct standard, will apply it to the evidence contained in the trial record and determine whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the appellant. *Prosecutor v. Dragomir Milosevic*, IT-98-29/1-A, Appeals Judgment 12 November 2009, paras.13-14 and authorities cited therein.

judice issues.[34] The Appeals Chamber has set out a standard of reasonableness in the review of appeals judgments on interim release that equally applies to purported errors in the Trial Chamber's appreciation of evidence in the determination of the admissibility of the case:

> "The Appeals Chamber will not interfere with a Pre-Trial or Trial Chamber's evaluation of the evidence just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case of a clear error, namely where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it. In the absence of any clear error on the part of the Pre-Trial Chamber, the Appeals Chamber defers to the Pre-Trial Chamber."[35]

31. If a *procedural error* relates to the Chamber's alleged defective exercise of its discretion, then the Appeals Chamber will review that error "with some deference"; it will "not conduct[…] a *de novo* review […]. Rather, the Appeals Chamber will intervene only if the exercise of discretion amounts to an abuse of discretion".[36] If an error entails a defective interpretation and/or application of a non-discretionary procedural provision,[37] this closely relates to an error of law and the appropriate standard of review should accordingly be applied.

32. 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".[38] This does not require an appellant to

---

[34] ICC-01/05-01/08-631-RedOA2,para.66; ICC-01/09-01/11-307OA,para.56.
[35] ICC-01/04-01/10-283OA,para.17. A standard of reasonableness is also applied by the ICTY Appeals Chamber in the review of purported errors of fact in a final appeal. *Prosecutor v. Ante Gotovina and Mladen Markac*, IT-06-90-A, Appeal Judgment, 16 November 2012,para.13 and authorities cited therein.
[36] ICC-01/09-01/11-336 OA, para.15; ICC-01/09-02/11-342 OA, para.15.
[37] *C.Staker*, commentary to Article 81 in O. Triffterer (ed.): Commentary to the Rome Statute of the International Criminal Court, Baden-Baden, 1999,p.1019.
[38] Article 83(2); ICC-02/04-01/05-408OA3,para.80; ICC-01/05-01/08-962OA3,paras.102.

demonstrate with a degree of certainty that the appealed decision would have come to a different conclusion. Rather, the appellant must demonstrate that the error was "critical" to the decision reached by the Chamber[39] or that the error has "the potential to cause the impugned decision to be reversed or revised".[40]

Confidentiality

33. The Prosecution files its response Confidential because it refers to documents with this level of confidentiality.

Submissions

34. The Prosecution will address in turn each of the four grounds of appeal. As it is further described below, the Appellant has failed to meet the required standards of appellate review and the four grounds should be accordingly dismissed.

<u>First Ground of Appeal: 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 requirement of an "investigation" of the same case as that before the Court</u>

35. The Appellant argues that the Pre-Trial Chamber erred in law by holding that, although the "evidence presented satisfactorily demonstrates that a number of progressive steps directed at ascertaining Mr Gaddafi's criminal responsibility have been undertaken" and that these steps covered "discrete aspects" of the same case before the ICC, the Appellant has nevertheless "fallen short" of establishing that the same case that is

[39] *Prosecutor v.Rutaganda*, ICTR-69-3-A, Judgment, 26 May 2003,para.23.
[40] *Prosecutor v.Rutaganda*, ICTR-69-3-A, Judgment, 26 May 2003,para.20.

before the court "is being investigated" within the meaning of Article 17(1)(a).[41]

36. The Appellant argues that the Chamber applied a higher test than that endorsed by the Kenya Appeals Judgements[42] when it erroneously required that the domestic investigation had "actual contours" or "precise scope". According to the Appellant, an ongoing investigation is incomplete and does not have "actual contours" or "precise scope" until the accusation phase.[43] Moreover, it argues that a contextual reading of Article 17(1)(a) and Article 19(5) permits a challenging State to present only "minimal evidence" of an ongoing investigation relating broadly to "discrete aspects" of the same conduct to render the case inadmissible.[44]

37. Finally, the Appellant argues that the Chamber failed to provide a reasoned opinion and did not explain why the same conduct test requires proof of the actual contours or precise scope of the domestic investigation and ignored factors such as the concrete stage of the proceedings.[45]

38. As it is described below, the Appellant's submissions lack merit. First, the Chamber did not require the Appellant to have completed its domestic investigation nor it asked for an exact match between its case and the ICC proceedings. On the contrary, the Pre-Trial Chamber endorsed a broad interpretation of the same person/ same conduct test. In that respect, the Prosecution notes that while the Chamber's conclusion was correct, this appeal still raises the issue of the correct interpretation of the same person/ same conduct test (or "substantially the same conduct", as

[41] Appeal, para.44 referring to Decision, paras.132-135.
[42] ICC-01/09-01/11-307OA and ICC-01/09-02/11-274OA.
[43] Appeal, paras.59-62.
[44] Appeal, para.63.
[45] Appeal, paras.75,77,79,80.

phrased in the Kenya Appeals Judgements).[46] The Prosecution submits that the Chambers should find guidance on the relation between Article 17(1)(c) and Article 20(3) and how the sameness between two cases for the purposes of applying the *ne bis in idem* principle has been interpreted in numerous jurisdictions and by different organs.

39. Second, there is no lower standard of proof if the domestic investigation is ongoing, and the State must still provide the Court with evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the same case. Finally and contrary to the Appellant's submissions, the Chamber provided a reasoned decision.

(a) The Appellant has the obligation to prove the same case as the ICC - and not some aspects of the same case

40. The Appellant argues that by requiring proof of the "actual contours" and "precise scope" of its domestic investigation, the Chamber applied a legal standard that was higher than the "substantially the same conduct" test and required that the domestic investigation encompass nearly all aspects (or at least more than certain aspects) of the ICC case.[47] According to the Appellant, for a case to be inadmissible it suffices that the domestic investigation covers some – not all - aspects of the case before the Court.[48] It argues that a contextual reading of Article 17(1)(a) supports a broad and permissive interpretation of what constitutes the "case being investigated" and that Article 19(5) permits domestic authorities to present only minimal evidence of an ongoing investigation relating

[46] ICC-01/09-01/11-307OA, paras.1,40 and ICC-01/09-02/11-274OA, paras.1,42.
[47] Appeal,para.53. Note that the terms « precise scope » are only referred in the Decision, para.123 when the Chamber assessed the witness summaries.
[48] Appeal,paras.72,74,81.

broadly to "discrete aspects" of the same conduct to render the case inadmissible.[49] It further suggests that an approach should be adopted that gives deference to States to permit the Court to initially declare the case inadmissible if "progressive investigative steps" are taken towards "aspects" of the same case and to subsequently declare the case admissible if it has not sufficiently progressed over time to demonstrate its "actual contours" and "precise scope".[50] Although the Chamber's application of the "substantially the same conduct" test is central to its appeal, the Appellant does not develop further the degree of sameness that a domestic case needs to have to render the ICC case inadmissible.

41. The Appellant misapprehends the Chamber's reference to "actual contours" and "precise scope" on two levels: on the one hand, when it disputes the Chamber's finding that it had not fully substantiated its challenge by claiming that the level of precision required is not tenable; and on the other, by arguing that legal test against which the Chamber assessed its challenge was too burdensome.

(i) Sufficiency of evidence

42. The Prosecution notes that the Appellant appears to misconstrue the nature of the evidentiary standard applicable during admissibility hearings and incorrectly treats issues related to the sufficiency of the evidence to support a claim that the legal test has been altered. The Chamber's requirement for clarity as to the "actual contours" and "precise scope" of the national case is a pre-requisite for an assessment under the first limb of the admissibility test. The Court cannot identify whether there is an ongoing national investigation in relation to the same

[49] Appeal,para.63.
[50] Appeal,paras.71-74.

case if it is unclear what the national case encompasses. The obligation on the challenging State to provide clarity as to the contours and scope of its case is an inevitable consequence of its burden to substantiate its challenge in relation to both limbs of the admissibility test.[51] Since the assessment under Article 17 is case-specific, unless the Court can first apprehend the actual contours and precise scope of the national case it will not be able to proceed with its inquiry. The use of the terms "actual contours" and "precise scope", thus, were correctly applied within the context the Appellant's duty to provide the Court with "evidence of a sufficient degree of specificity and probative value" to show that the domestic investigation relates to the same case as that which is before the Court.

43. The Appellant further submits that the Pre-Trial Chamber effectively required an excessively specific description, since it is unlikely that the investigation has "actual contours" or "precise scope" until the accusation phase.[52] It asserts that since the investigation is ongoing and it is by definition incomplete, the term "case" will therefore lack specificity.[53] It argues thus that the Pre-Trial Chamber erroneously set out a higher standard by requiring an element of finality when establishing the "precise scope" and "actual contours" of the domestic investigation.[54] The Prosecution observes that these submissions are premised on the erroneous understanding that the Pre-Trial Chamber required that the domestic investigation be final – and all the relevant

[51] As the Pre-Trial Chamber observed "the inadmissibility of the case is premised on both limbs of Article 17(l)(a) and the challenging State is required to substantiate all aspects of its allegations to the extent required by the concrete circumstances of the case"; Decision,para.52.
[52] Appeal,paras.59,62.
[53] Appeal,paras.59,60-62,69.
[54] Appeal,paras.59-62.

conduct identified. Contrary to the Appellant's submissions,[55] any investigation, either at the early stages or when it approaches its completion, will have certain defining parameters. The vagueness or exactitude of its parameters, as well as its final and static or moving character will depend on the stage of the proceedings. If the parameters of the Libyan case are so unclear that it is not possible to discern which conduct is actually being investigated, then, simply, there is no concrete case at the national level that will permit comparison to the ICC case: i.e. there is no conflict of jurisdictions and the case is admissible before the Court.[56] As the Appeals Chamber has stated, "under article 17(1)(a) first alternative, the question is not merely a question of 'investigation' in the abstract, but is whether the same case is being investigated by both the Court and a national jurisdiction".[57] Thus, any investigation – either at domestic or ICC level – must necessarily have certain contours or defining parameters. These parameters need not be final or unmovable, nor did the Chamber require any such finality; but they must be of sufficient clarity to enable an assessment under Article 17.[58]

44. In this regard, the Prosecution notes that in its Admissibility Challenge on 1 May 2013 the Appellant had indicated that "[i]t is anticipated that the investigative phase of proceedings with respect to Mr Gaddafi will be

---

[55] Appeal,paras.60-62,69.
[56] ICC-01/09-01/11-307OA,para.43.
[57] ICC-01/09-01/11-307OA,para.37. The Pre-Trial Chamber's analysis is also consistent with the judgments of the Appeals Chamber which have contrasted the contours of potential cases for the purposes of preliminary admissibility determinations under Articles 15 and 53(1) with that of concrete cases at the Article 19 stage, the defining elements of which are the person and the alleged conduct; ICC-01/09-01/11-307OA,para.39.
[58] As explained below, the Appellant's submissions as to the lack of a reasoned opinion are similarly grounded on the erroneous premise that the Chamber imposed "an additional element of proof" which departed from Kenya Appeals Judgments by requiring that the investigation be complete;Appeal,paras.75-77.

completed within the next few weeks".[59] On 23 January 2013, it also indicated that "the investigative stage of proceedings in the Saif Al-Islam Gaddafi case is now nearing its completion."[60] Hence, as the domestic investigation had reached that stage should, it should have clear or identifiable parameters.

(ii) The 'substantially the same conduct' test

45. The Appellant raises a further argument based on its interpretation of the "substantially the same conduct" test, asserting that the term "substantially" means that the State need not in fact investigate all of the same case, but only parts thereof. The Appellant submits that to render a case inadmissible, it suffices to prove that "progressive investigative steps" are taken in relation to some but not all aspects of the ICC case.[61] It thus claims that the Pre-Trial Chamber made a legal error by requiring that the Appellant to demonstrate that its case encompasses nearly all aspects – or at least more than certain aspects – of the ICC case, as illustrated by the Chamber's requirement that the Appellant identify the "actual contours" and "precise scope" of the national case.[62]

46. The aspect of the appeal raises fundamental considerations as to what the "same case" means and how "same conduct" should be interpreted. In particular, it goes to the heart of what precisely the Appeals Chamber meant by "substantially the same conduct" – a set of terms whose indeterminacy clouds much of the Appellant's submissions.

[59] Admissibility Challenge,para.41.
[60] Further Submissions,para.60. See also ICC-01/11-01/11-251,para.4.
[61] Appeal,paras.72,74,81.
[62] Appeal,para.53.

47. In the view of the Appellant, a correct reading of the "substantially the same conduct" test would require proof that "Libya is undertaking several progressive 'investigative steps' covering 'aspects' of the 'same conduct'".[63] The Appellant's submissions in this respect appear to equate "substantially the same conduct" with "partially the same conduct". The Prosecution recalls that the Appellant needs to investigate the same case as that which is before the Court, defined by the Appeals Chamber as comprising the same person for substantially the same conduct.[64] As the Pre-Trial Chamber held, it does not suffice that the Appellant's domestic investigation, although covering certain discrete aspects of the conduct alleged before the Court, does not represent an investigation of conduct that could be verified as being *substantially* the same.[65] The Prosecution thus submits that the Chamber made no legal error when it held that the Appellant had not discharged its burden under the first limb of the admissibility test.[66]

48. In this case, the Pre-Trial Chamber actually adopted a very broad interpretation of the "substantially the same conduct" test. Specifically, the Chamber held that because the Warrant of Arrest and Article 58 Decision were both of an open-ended formulation, the Appellant need not investigate the same underlying incidents or exactly the same the same acts of murder and persecution as those described in the Article 58 Decision.[67] Instead, the Chamber held that it was sufficient for the Appellant to substantiate that its investigation covers "the same conduct

[63] Appeal,para. 81.
[64] ICC-01/09-01/11-307OA,paras.1,40-43,62.
[65] Decision,para.134.
[66] ICC-01/04-01/07-1497OA8,para.78.
[67] Specially, the Chamber noted that the Warrant of Arrest does not refer to specific instances of killings and acts of persecution and that the incidents listed in the Article 58 Decision are mere samples of a course of conduct and therefore constitute a non-exhaustive list; Decision,paras.80-82.

underlying the Warrant of Arrest and the Article 58 Decision, namely that: Mr Gaddafi used his control over relevant parts of the Libyan State apparatus and Security Forces to deter and quell, by any means, including by the use of lethal force, the demonstrations of civilians, which started in February 2011 against Muammar Gaddafi's regime; in particular, that Mr Gaddafi activated the Security Forces under his control to kill and persecute hundreds of civilian demonstrators or alleged dissidents to Muammar Gaddafi's regime, across Libya, in particular in Benghazi, Misrata, Tripoli and other neighbouring cities, from 15 February 2011 to at least 28 February 2011."[68]

49. In coming to this formulation, the Pre-Trial Chamber noted that Chambers of the Court have routinely adopted an interpretation of "case" consistent with the so-called "same conduct" test, namely that a case constitutes "specific incidents during which one of more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects".[69] This position was first expressed by Pre-Trial Chamber I in the *Lubanga* case, where it stated "it is a *condition sine qua non* for a case arising from the investigation of a situation to be inadmissible that national proceedings encompass both the person and the conduct which is the subject of the case before the Court".[70] While this definition was relied on by other Chambers, it found its most detailed elaboration in the decisions of Pre-Trial Chamber II in the *Kenya* cases,

[68] Decision,paras.83,133.
[69] ICC-01/04-01/06-8-Corr,para.21;ICC-02/05-01/07-1-Corr,paras.14,24; ICC-01/05-01/08-14-tENG,paras.16,21; ICC-02/04-01/05-377,para.14.
[70] ICC-01/04-01/06-8-Corr,para.31.

wherein the Chamber held that admissibility must be determined in relation to the same person for the same conduct.[71]

50. The Prosecution notes that while the Pre-Trial Chamber was correct in its conclusion, several issues remain unresolved from its interpretation and application of the "substantially the same conduct" test. The Chamber held that the determination of what is "substantially the same conduct" will vary according to the *concrete facts and circumstances* of the case and therefore requires a case-by-case analysis.[72] However, it also held that in the case at hand the Appellant need not investigate the same *incidents* as those which form the basis of the crime for which the Court seeks the persons surrender.[73] As such, it remains unclear which facts and circumstances are relevant to an assessment of "substantially the same conduct": i.e. whether it relates to the specific factual incidents which form the basis of the acts alleged as well as the forms of participation of the suspect and his or her alleged role, or only the latter. Moreover, the degree of sameness is encompassed by the term "substantially the same" is unclear: specifically, whether the word "substantially" actually alters the "same conduct" stipulation that is expressly contained within the Statute, or whether it serves rather to clarify how "same conduct" should be interpreted. Clarification of these questions by the Appeals Chamber is necessary in order to resolve the Appellant's dispute as to the proper scope and correct interpretation of the "substantially the same conduct" test.

[71] ICC-01/09-01/11-101;ICC-01/09-02/11-96.
[72] Decision,para.77(emphasis added).
[73] Decision,para.83.

(iii) The Prosecution's interpretation of the same person/ same conduct test

51. At the outset, the Prosecution recalls that the Appeals Chamber in the *Kenya* cases actually upheld the "same conduct" test. Specifically, it stated that "the 'same person/same conduct' test applied by the Pre-Trial Chamber was the correct test. The Pre-Trial Chamber thus made no error of law."[74] The Appeals Chamber grounded this finding in provisions of the Statute that utilize the term "same conduct", including Articles 20(3) and 90(1).[75] The Appeals Chamber nonetheless went on without further elaboration to refer to the test as requiring an assessment of the same person for "substantially the same conduct".[76]

52. The Prosecution submits that by adding the word "substantially", the Appeals Chamber sought to describe the nature of the test, rather than departing from it or proposing a different test where "sameness" is not required. Any other interpretation would render the decision internally inconsistent and manifestly unreasonable. Thus, the addition of the word "substantially" cannot be applied in a manner that it undermines the purpose of the test altogether.

[74] ICC-01/09-01/11-307OA,para.47. The phrase "the specific stage that the proceedings have reached" refers to the facts that, as the Appeals Chamber explains, in contrast to the earlier preliminary examination stage, after the issuance of summonses to appear the proceedings have progressed to the stage where specific suspects and conduct have been identified by the Court; *ibid*, paras.42-45.

[75] ICC-01/09-01/11-307OA,para.40,fn.81. As the Appeals Chamber held, the same person/same conduct test is deeply rooted in the Statute itself. Articles 17(1)(c) and 20(3) refer to "the same conduct" in relation to the same person. The express link between Article 17(1)(c) and the principle of *ne bis in idem* shows that the case must relate to the same person and the same conduct (*Ibid*.,para.40). Further, Article 90 (1), which deals with the choice of forum allocation with respect to competing requests for extradition and surrender, explicitly sets out the same person/same conduct test, relating it back to the tests for admissibility (*Ibid*.,fn.81). See also Rastan, R. "Situations and cases: defining the parameters", in *The International Criminal Court and Complementarity*, edited by Stahn, C. and El Zeidy, M. (CUP, 2011),421-458. The specificity of 'person' and 'conduct' in a case before the Court is further emphasized by the rule of speciality in Article 101.

[76] ICC-01/09-01/11-307OA, paras.1,40-43,62.

53. Sameness means identity, symmetry or equivalence - as opposed to something that is different or merely similar, but not the same. The starting point for any discussion should therefore focus on the required degree of sameness as it attaches to the term "conduct".

54. The Prosecution notes that the question of sameness and degrees of variation permitted between two cases has frequently arisen in national cases related to the application of *ne bis in idem, e.g.* the fundamental principle of law which restricts the possibility of an accused being prosecuted repeatedly on the basis of either the same offence/crime or conduct.[77] The Prosecution considers that the jurisprudence related to this principle may be of assistance, given the close interlink between *ne bis in idem* and complementarity provisions, their common function in determining forum allocation and, most notably, the similarity in the inquiry regarding whether the two cases are indeed "the same", and what "same" means in this context.[78]

55. Consistent with the Vienna Convention on the Law of Treaties, the ordinary meaning given to the terms in Article 17 must also be interpreted in light of the Statute as a whole.[79] In that regard, and as noted by the Appeals Chamber, consideration must be given to the

[77] This will depend on how the *idem* is characterized in domestic law. Stigen, J, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (Martinus Nijhoff Publishers, 2008),p.207 ("Stigen"); "Article 20" in Triffterer, O, *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article, Second Edition* (Hart Publishing, 2008),[11]-[15] ('Triffterer'). Schabas, W, *The International Criminal Court: A Commentary on the Rome Statute* (OUP,2010),p.373.
[78] While most national criminal justice systems know this general principle, there is no agreement on the definition or even on the name, as it is also known as *res judicata*, *autrefois acquit/ autrefois convict* and double jeopardy. Van den Wyngaert, C and Ongena, T, "Ne bis in idem : Principle, including the Issue of Amnesty" ("Ne bis in idem") in Cassese, A, et al (ed.), *The Rome Statute of the International Criminal Court:A Commentary* (Oxford University Press, 2002),p.706 ("Cassese"); "Article 20" in Triffterer,[1]-[17].
[79] See in that regard the more detailed submissions of the Prosecution in response to Libya's challenge to the admissibility of the case of Al-Senussi: ICC-01/11-01/11-321, paras.33-37 (ordinary meaning) and paras.38-43 (contextual interpretation).

manner in which Articles 17 and 20(3) operate together to implement the system of complementarity.[80] Articles 17 and 20 were recognised as related throughout the drafting history.[81] Commentators have noted the "clear interplay" between these provisions[82] and the principle of *ne bis in idem* was "seen as a 'corollary' of the principle of complementarity [...]. While Article 17 covers investigations and prosecutions, Article 20 covers cases that have already been tried." [83] As early as 1995, the Ad Hoc Committee for the establishment of the International Criminal Court referred to the paramount importance of the concepts of admissibility and *ne bis in idem* which together serve to implement the principle of complementarity.[84]

56. This is consistent with the object and purpose of Article 20 which serves not only as an important guarantee of individual rights in criminal proceedings, but has also to be seen in a jurisdictional context, distributing and balancing the competences of the ICC and those of national courts according to the principle of complementarity:[85] whether under Article 17(1)(a), (b) or (c), the underlying rationale is the same, that

[80] The fact that leading commentators, such as John Holmes, former coordinator of the Preparatory Committee refers to both provisions when addressing the principle of complementarity in the Rome Statute illustrates the close link between Articles 17 and 20. Holmes describes the principle of *ne bis in idem* enshrined in Article 20 as "a special aspect of Complementarity". See Holmes, JT, "The Principle of Complementarity" ("The Principle of Complementarity"), in Lee, RS (ed.), *The International Criminal Court: The Making of the Rome Statute: issues, negotiations, results* (Kluwer Law International,1999),pp.42, 44 ("Lee").
[81] Williams, S and Schabas W, "Article 17: Issues of Admissibility" in Triffterer,[9]and[10] ("Article 17").
[82] El Zeidy, M, The Principle of Complementarity in International Criminal Law: Origin, Development and Practice (Martinus Nijhoff, 2008) ("El Zeidy"),p.306,721; "Ne bis in idem" in Cassese,p.721;"Article 20" in Triffterer,[18].
[83] El Zeidy,p.285.
[84] *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, UN Doc.A/50/22(1995),para.92. See also *Report of the Preparatory Committee on the Establishment of an International Criminal Court Volume I* UN.Doc.A/51/22(1996) which records the observation that "the principle of non bis in idem was closely linked with the issue of complementarity",para.170. See generally,"Article 20" in Triffterer,[18].
[85] "Article 20" in Triffterer,[49].

the same case should only be heard once: before either the ICC or at the national level, subject to an assessment of genuineness.

57. Typically, the *idem* serves to identify the unique "object of the trial" and can be described in factual terms as the same historical event or the same conduct that has been submitted to the trial court for judgment on the merits (*idem factum*)[86] or, in legal terms (*idem crimen*), as the same set of facts plus the identical legal qualification (same offence) or a similar legal qualification (by norms that protect a similar legal interest, e.g. charging the offences of murder and subsequently manslaughter for the same killing).[87] The "same offence", "same crime" or "same elements" (which emphasize the legal qualification) appear to protect the *idem* more narrowly than the "same conduct", "facts" or "acts".[88]

58. German jurisprudence on *ne bis in idem* has defined the "same conduct" as a set of complex, inseparably interconnected facts which is

[86] The factual approaches have encountered problems in determining the precise limit of the object of a trial (e.g.,the "sameness" of two incidents); for example, a single historical event may constitute several offences under the law (*concursus*) or several events may be forged into an artificial legal unity.
[87] "Ne bis in idem" in Cassese,p.714; "Article 20" in Triffterer,[7]; Sluiter, G et al (ed.), *International Criminal Procedure:Principles and Rules* (OUP, 2012),p.437 ("Sluiter"); Van den Wyngaert, C and Stessens, G "The international *non bis in idem* principle: resolving some of the unanswered questions," 4 *Int'l & Comp L Quarterly*,Vol.48,779(1999),p.789.
[88] Carter LE, "The Principle of Complementarity and the International Criminal Court: the Role of Ne bis in idem", 8 *Santa Clara J Int'l L* 165 (2010),p.170. Regarding the scope of the *idem*, see review of national application in Sluiter,p.475-6, which shows that most national laws adopt a factual approach. Similarly, the *idem* in international instruments also differs: Article 14(7) of the ICCPR prohibits the retrial of "offences" for which a person has been finally convicted or acquitted. Article 4 of Protocol 7 to ECHR uses a similar language and also refers to the prohibition of retrial for the same "offences". However, Article 54 of the Convention Implementing the Schengen Agreement ("CISA") prohibits a retrial for the same "acts". Articles 9 and 10 of the ICTR and ICTY Statutes, respectively, prohibit retrial for "acts" already tried by the tribunal or by domestic courts with certain exceptions and Article 8(4) of the American Convention on Human rights prohibits retrial "for the same cause". "Ne bis in idem" in Cassese,pp.722-6; Erdei, I, "Cumulative Convictions in International Criminal Law: Reconsideration of a seemingly settled issue" 34 *Suffolk Transnat'l L Rev* 317 (2011),p.321-322. See generally: Cuesta, JL, "Concurrent National and International Criminal Jurisdiction and the Principle of 'Ne bis in idem, General Report" 73 *Int'l Revue of Penal Law* (2002),707-736.

independent of the legal qualification or the legally protected interest,[89] or the historic and therefore temporarily and circumstantially limited event to which the indictment and confirmation of charges refer.[90] Further, German Courts have provided some useful parameters to determine the sameness of conduct. For example: the "same conduct" would include not only the conduct explicitly described in the indictment but also all behavior that forms a unity with this conduct and which, if tried separately, would unnaturally divide up an event actually belonging together.[91] A temporal connection is neither necessary nor sufficient[92] and a fact can be part of the same conduct if, from an economic perspective, it can be traced back to the original event.[93] Further, it was also noted that a close factual relationship is decisive and has to be considered for every individual case.[94]

59. Maier, an Argentinean commentator, has indicated that there will be "sameness" (or basic identity) of conduct regardless of the existence of temporal differences or differences on space, method/ manner or in the object of the imputed fact as long as these divergences do not undermine the existence of a single historical event. As an example, there will be sameness if there is a minor difference on the amount of money stolen (10 or 20 USD), if the victim was A instead of B, if the injuries were caused with a knife or with another object, or if the fact was perpetrated in a near location or on an approximate time. In sum, these differences do not

[89] BGH 5 StR, 342/04, 9 June 2008 (receiving smuggled substances and their possession during a transfer that the smuggle was intended for in the first place is one single conduct).
[90] BGH 3 StR 566/08, 5 March 2009 (drunk driving was considered part of the conduct of the transport of illegal substances if this transport was the purpose of the trip).
[91] BGH 2 StR 520/96, 1 October 1997 (a violent re-acquisition of illegal substances is a separate offence from the preceding trade with it); BGH 1 StR 542/11, 7 February 2012.
[92] BGH 1 StR 542/11, 7 February 2012.
[93] BGH 1 StR 4/09, 18 February 2009 (for example, money laundering and the illegal acquisition of that money that made the laundering necessary, or bribery and the acquisition of the money used).
[94] BGH 1 StR 542/11, 7 February 2012.

indicate that the relevant facts form a different historical event.[95] In other words, they are not substantial.[96]

60. U.S. courts have applied a fact-intensive *ne bis in idem* inquiry in certain extradition cases where the *ne bis in idem* provision in question barred extradition for charges based on the "same facts" or "same acts" (rather than barring extradition for the "same offence").[97] For example, in *United States v Jurado-Rodriguez*, the court applied a fact-intensive approach when analyzing whether the *ne bis in idem* provision in a U.S.-Luxembourg extradition decree barred a money laundering and conspiracy prosecution in the United States. The court found that the money laundering prosecution was barred because the U.S. charges relied on "almost identical"[98] material propositions of facts as those previously used to convict the defendants of money laundering in Luxembourg, and the material elements of the two money laundering crimes were "substantially the same".[99] Conversely, the court found that the conspiracy charge could go ahead because the conspiracy charged in

[95] Maier, JBJ, *Derecho Procesal Penal, T.1, Fundamentos* (Editores del Puerto, 1996), p.610.
[96] Lord Morris' detailed review of English authorities over 400 years in *Connelly v DPP* further illustrates the historic use of terms such as "substantially" to describe the "sameness" of offences which are based on the same facts. Notwithstanding that the doctrine of *autrefois acquit/autrefois convict* in English and Wales protects a person from being put in peril twice for the "same offence" as opposed to the "same conduct", and although Lord Morris' position was ultimately in the minority, his analysis is apposite insofar as it indicates the origin and use in English cases of the term "substantially" and its synonyms. Thus, reference is made to prior cases that examined whether two offences based on the same facts were, *inter alia*, "substantially or practically the same", "in effect the same", whether "there was in substance one offence", or "another in substance different". Lord Morris' view, that the doctrine *autrefois acquit/autrefois convict* applies where the offences are substantially the same, was opposed by the majority view which concurred with Lord Devlin that for the doctrine to apply it must be the same offence in fact and in law; *Connelly v DPP* (1964) 48 Cr App R 183, 203, 229, 215-6.
[97] Note that in general, U.S. doctrine of double jeopardy protects against individuals being placed in jeopardy twice for the same "offence", thus providing narrower protection against multiple prosecutions. See U.S. Constitution, 5th amendment; *United States v Jurado-Rodriguez*, 907 F.Supp. 568, 580(E.D.N.Y.1995) ("Jurado-Rodriguez"); *Blockburger v. United States* 284 U.S. 299 (1932); *Grady v. Corbin* 495 U.S. 508 (1990).
[98] The underlying material propositions of fact were not entirely identical since, as the court recognized, the U.S. money laundering charge involved a more extended time period: *Jurado-Rodriguez*,580.
[99] *Ibid*.

the U.S. was "much broader as well as longer in time than that prosecuted in Luxembourg", and the material propositions of fact were "substantially different" since the U.S. allegations involved "more extensive independent drug trafficking".[100]

61. The ECJ and the ECtHR have also examined the required "sameness" to bar a second prosecution pursuant to the *ne bis idem* principle. For example, the ECJ in *Van Esbroeck*[101] held that "the same acts" for the purposes of Article 54 CISA is to be understood as the "identity of the material acts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together in time, in space and by their subject-matter".[102] This was confirmed in another case, *Van Straaten,* concerning the smuggling of narcotics between Schengen-states.[103] The ECJ recalled *Van Esbroeck* and held that the quantities of narcotic drugs and the accomplices do not need to be identical for there to be identity of *facts*.[104] In *Kraaijenbrink,* the Court was asked to provide guidance on the question of what extent the intentions of the subject are relevant for a finding of "idem".[105] The ECJ, after recalling once more *Van*

[100] *Ibid*,580-81(E.D.N.Y.1995).
[101] Case C-436/04 *Van Esbroeck* [2006] ECR I-2333 "Judgment". The case concerned the smuggling a shipment of various narcotics from Belgium into Norway; the Belgian Court of Cassation stayed the proceedings, and asked the ECJ (amongst other things) whether the export and import of illicit substances should be considered as "the same acts" for the purposes of Article 54 CISA.
[102] *Ibid*,paras.36-38. The ECJ held that "import" and "export" of illegal substances should be seen as a set of facts which are inextricably linked together in an area without internal borders such as the EU.
[103] Case C-105/05 *Van Straaten* [2006]ECR I-9327 "Judgment". By verdict on 23 June 1983, Mr Van Straaten was acquitted by a Dutch criminal court from charges of importing into the Netherlands the amount of approximately 5500 grams of heroin from Italy on or around 26 March 1983. He was however found guilty of possession of 1000 grams of heroin on or around 27 March until around 30 March 1983 together with Mr Yilmaz. On 22 November 1999, he was sentenced *in absentia* by the district court at Milan (Italy) to 10 years imprisonment for exporting on several occasions an amount of approximately 5 kilograms of heroin from Italy into The Netherlands on or around 27 March 1983 together with Mr Karakus Coskun.
[104] *Ibid*,paras.41-44.
[105] Case C-367/05 *Kraaijenbrink* [2007] ECR I-6619 "Judgment". In 1998, Mrs.Kraaijenbrink was sentenced by the local district court at Middelburg (Netherlands) for "several offences under Article 416 of the Netherlands Penal Code of receiving and handling the proceeds of drug trafficking between October 1994 and May 1995 in the Netherlands" as well as for acting in breach of the Opiumwet (the

Esbroeck, held that the same criminal intention or subjective link between a set of concrete circumstances is insufficient for a finding of idem or the same acts.[106]

62. A similar approach has been adopted in the most recent ECtHR jurisprudence.[107] In *Zolotukhin v Russia*,[108] the Court held that the use of the term "offence" in Article 4 of Protocol 7 cannot justify a more restrictive approach which looks only to the question of legal characterization because the Convention must be interpreted and applied in a manner which renders its rights practical and effective.[109] Hence, the Court held that this provision must be understood "as prohibiting the prosecution or trial of a second 'offence' in so far as it arises from identical facts or facts which are substantially the same".[110] This test has been subsequently upheld in the recent *Tsonyo Tsonev v Bulgaria*, where

---

Dutch Opium law). Three years later, she was sentenced by the criminal court at Ghent (Belgium) for the offence of "exchanging in Belgium sums received from trading narcotics in the Netherlands between November 1994 and February 1996", which sentence was upheld in appeal. Mrs. Kraaijenbrink appealed before the Belgian Court of Cassation, which stayed proceedings in order to ask the ECJ whether the conduct on the basis of which Mrs. Kraaijenbrink was convicted in Belgium and The Netherlands should be regarded as "the same acts" within the meaning of Article 54 CISA in view of the fact that the underlying intentions were the same.

[106] *Ibid*,para.29.

[107] Previously the ECtHR has interpreted *idem* broadly as conduct in one case (*Gradinger v Austria*, Appl.no. 15963/90, "Judgment", 23 October 1995, para.55), and gave it the narrower interpretation (covering only the previous conduct under law, and allowing a second prosecution for different charges) in another (*Oliveira v Switzerland*, Appl.no. 25711/94, "Judgement" 30 July 1998,para.26).

[108] *Sergei Zolotukhin v Russia*, Appl.no.1493/03 "Grand Chamber Judgment" 10 February 2009. The case concerned a Russian national who had displayed disorderly behaviour towards several public officials. He was placed in detention for three days for the administrative offence of "minor disorderly acts". Shortly afterwards, he was prosecuted for the criminal offences of "disorderly acts", "use of violence against a public official", and "insulting a public official" on the basis of the same facts. On 7 June 2007, the Chamber held unanimously that there had been a violation of Article 4 of Protocol No.7. At the request of the Russian government, the case was referred to the Grand Chamber for review.

[109] *Ibid*,para.81.

[110] *Ibid*,para.83.

the Court found a violation of Article 4 of Protocol 7 as the facts of the two offences were substantially the same.[111]

63. Notably, the ECtHR has adopted a similar approach in determining the inadmissibility of cases before it when the same matter was submitted simultaneously to another international institution: Article 35.2(b) seeks to avoid a plurality of international proceedings relating to the same cases[112] and applications are considered as being "substantially the same" when they concern the same persons, facts and complaints.[113]

64. In sum, and in light of the above case law, the Prosecution observes that use of the term "substantially" should not be understood to qualify "sameness" to mean that the *idem* in question (conduct) need *not* be the same. Rather, "substantially" serves to explain in relation to what "sameness" attaches, namely, to the substance of the criminal behavior. Thus, a case will be "substantially the same" if any difference in the underlying facts and circumstances are minor, such that the facts and circumstances may be described as essentially the same because they are inextricably linked together in time, space and by their subject-matter.

---

[111] *Tsonyo Tsonev v Bulgaria*, Appl. no.2376/03, "Judgment" 14 January 2012,para.52.

[112] Article 35.2 indicates that: "The Court shall not deal with any application submitted under Article 34 that (a) is anonymous; or (b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information."

[113] *Pauger v Austria* Appl.no. 24872/94, "Decision" 9 January 1995, DR 80 Ap.170. The ECtHR found that the applicant's communication to the Human Rights Committee, regarding his claim to a widower's pension, and the present application before the Court, regarding the application of transitory provisions to his pension rights, concerned essentially the same issue, namely, discrimination. See also Stigen,p.198: "In order to determine whether the national proceeding pertains to the same case as the ICC Prosecutor considers dealing with, the national description of the actus reus should be compared with that on which the ICC Prosecutor bases his involvement. […] The issue is whether the conducts described at the two levels are *essentially* the same with regard to time, place and alleged behaviour" (emphasis added).

65. If there is no inextricable linkage, but merely a re-occurrence of a similar act elsewhere, the two sets of facts cannot be described as the same in substance. Thus, if the focus of the national investigation or prosecution differs in any respect from the ICC case, the Chamber will need to scrutinize the national efforts closely, including reasons for such divergence, in order to determine whether the national authorities and the ICC are focused on substantially the same conduct.

66. This interpretation of relevant comparative and international jurisprudence is further consistent with the Statute, which does not require States to incorporate the crimes listed into their domestic legislation.[114] Accordingly, as the domestic legal characterization of the crimes in Articles 6 to 8 might vary, the Court must determine whether the underlying conduct is the same in substance.

67. The Prosecution notes that in the Decision, the Chamber endorsed the "settled jurisprudence of the Pre-Trial Chambers" and indicated that for a case to be inadmissible, national proceedings must "encompass both the person and the conduct which is the subject of the case before the Court".[115] It further noted the specific nature of the admissibility test, recalling the Appeals Chamber's finding that "article 19 of the Statute

[114] Decision,paras.85-88. Implementing legislation under the Rome Statute is only required in three areas: Part 9, Articles 70 and 109. This is due in part to the view during the drafting process that the Statute creates a code of crimes for the Court, not for States, whose obligations are already contained in other international instruments and/or customary international law. Thus, the Preamble of the Statute does not establish a new duty for States to investigate and prosecute such crimes, but recalls a pre-existing duty to do so: "Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes". This is reflected in Part 9 which refers to the choice of national law in implementing ICC requests for cooperation (Articles 88 and 99), and in Article 80 with respect to the national application of penalties. It is also apparent from the drafting of Article 20(3) in the rejection of the "ordinary crimes" exception contained in the original 1994 ILC Draft Statute, due to concern that it would restrict the right of States to apply national law: "Article 20" in Triffterer,[17],[26]-[27],[31]-[32].
[115] Decision,para.74 referring to ICC-01/04-01/06-8-Corr,para.31.

relates to the admissibility of concrete cases".[116] It also referred to the Appeals Chamber's jurisprudence in the *Kenya* cases, which required domestic proceedings to cover "substantially the same conduct as alleged in the proceedings before the Court" for a case to be deemed inadmissible[117]. It further noted that the determination of "substantially the same conduct" depends on the concrete facts and circumstances of the case and requires a case-by-case analysis.[118] Notably, the Chamber observed that although earlier Pre-Trial Chamber jurisprudence indicated that "the concept of case [includes] specific incidents during which one or more crimes within the jurisdiction of the court seem to have been committed by one or more identified suspects",[119] it stated that such jurisprudence did not clarify the notion of "incident", nor was this notion referenced by the Appeals Chamber when it confirmed the correctness of the same person/ same conduct test in the *Kenya* cases.[120]

68. The Chamber went on to indicate that for the purposes of the specific admissibility proceedings before the Chamber, the ICC case was to be defined in light of the Warrant of Arrest and the Article 58 Decision.[121] It noted that the Warrant of Arrest does not refer to specific instances of killings and acts of persecution,[122] and that the incidents listed in the Article 58 Decision are mere samples of a course of conduct and therefore constitute a non-exhaustive list.[123] Accordingly, the Chamber concluded

[116] Decision,para.76 referring to ICC-01/09-02/11-274OA,para.39.
[117] Decision,para.76 referring to ICC-01/09-02/11-274OA,para.39.
[118] Decision,para.77.
[119] ICC-01/04-01/06-8-Corr,para.31.
[120] Decision,paras.75-76.
[121] Decision,paras.78,83.
[122] Decision,para.80.
[123] Decision,paras.81-82.

that Libya cannot be required to investigate exactly the same acts of murder and persecution as those described in the Article 58 Decision.[124]

69. From the foregoing, the Chamber appears to have departed from prior and consistent jurisprudence of other Pre-Trial Chambers which have defined a case as being incident-specific.[125] However, the Chamber's notion of "conduct" is nonetheless capable of being reconciled with this earlier case-law since the Prosecution understands the notion of "incidents" as referring to criminal acts that occur in a particular location and at a specific time and in the framework of a course of conduct and series of events.[126] The Prosecution notes that an Article 15 Application, an Article 58 Application, and the Document Containing the Charges under Article 61 require that the Prosecution provide a "statement of facts" which are alleged to constitute the crimes, which appears to necessitate, with as much precision as is possible, the location and time of each alleged crime.[127] In this sense, the "statement of facts" will ordinarily include the "incidents". This notion assists in the presentation of the narrative of the relevant facts.[128]

[124] Decision,para.83.
[125] See authorities cited in Decision,fn.126.
[126] "Incidents" are composed of "facts and circumstances" within the meaning of Article 74.
[127] Regulation 49 of the Regulations of the Court specifies that the "statement of facts" in the Article 15 Application shall indicate, as a minimum, *inter alia*, "[t]he places of the alleged commission of the crimes, e.g. country, town, as precisely as possible" and "[t]he time or time period of the alleged commission of the crimes". Regulation 52 similarly requires that the Document Containing the Charges shall include "[a] statement of facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person to trial…". Although Article 58(2)(c) does not elaborate on the requirements of the "concise statement of facts", the Prosecution submits that it must be at least as specific as those required at the earlier and later stages of the proceedings, namely to include reference to time and place.
[128] A distinction should be drawn here from the notion of 'incident' as a legal requirement in the context of the term "attack" under Article 7(2)(a) in the Majority's "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute" ICC-02/11-01/11-432,para.23. In that case, the 41 incidents that according to the Majority constituted an attack are, in the Prosecution's submission, neither contextual elements, nor are they facts underlying the elements of crimes against humanity.

70. Moreover, the fact that the term "incident" is not referenced by the Appeals Chamber in the *Kenya* cases is not determinative of whether the term finds or not application within the context of Article 17, since the Appeals Chamber was not seized of the issue. Accordingly, the Prosecution submits that the Appeals Chamber has not yet ruled on the correctness of the inclusion of the notion of "incident" within the concept of a case.

71. Thus, the Prosecution agrees that the determination of what constitutes "substantially the same conduct" will vary according to the concrete facts and circumstances of the case at hand, and therefore requires a case-by-case analysis.[129] Nonetheless, the case which forms the subject of an admissibility determination must be denoted by a set of clearly defined parameters that will permit ready comparison. If the given parameters are overly broad, effective comparison is rendered meaningless.

72. In the context of the proceedings at hand, even under the Chamber's broad interpretation whereby the Appellant was not required to prove exactly the same criminal acts than those described in the ICC's Warrant of Arrest and Article 58 Decision,[130] the Pre-Trial Chamber correctly held that the Appellant had not established that its investigation covered the same person for substantially the same conduct.[131]

---

[129] Decision,para.77.
[130] Decision,para.83. Note that the Appellant does not deny that the sample pieces of evidence submitted to the court thus far do not deal with the factual allegations contained in paras.36(i),(iii)-(vi), 37-40,45-48 or 54-63 of the Article 58 Decision. *See* ICC-01/11-01/11-293,para.40.
[131] Decision,para.76.

(b) The Appellant bears the burden of proof to substantiate its admissibility challenge

73. The Appellant appears to ask for some leniency and discretion in order to prove that it is investigating the same case due to the fact that Article 19(5) requires states to challenge the admissibility "at the earliest opportunity". In particular, it submits that "a broad and permissive interpretation" should be given to what constitutes the "case being investigated" under Article 17(1)(a) and that domestic authorities need to provide "only minimal evidence of an ongoing investigation relating broadly to the 'same conduct'".[132] Moreover, it argues that provided that States are making "best efforts" to investigate the same case, they must be granted "wide discretion" as to the decisions adopted and procedures followed in their domestic investigations.[133]

74. First, there is no lower standard of proof because States are "obliged" to challenge the admissibility of the case once an arrest warrant has been issued.[134] As the Appeals Chamber has noted, Article 19(5) requires a State to challenge the admissibility as soon as possible once it is in a position to actually assert a conflict of jurisdictions.[135] Hence, once a challenge has been filed, domestic authorities need to provide the Court with "evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case".[136] As the Appeals Chamber also noted, albeit in a different context "[p]roviding evidence to substantiate an allegation is a hallmark of judicial proceedings".[137] This requirement does not curtail the discretion of the

[132] Appeal,para.63.
[133] Appeal,para.66.
[134] ICC-01/09-01/11-307OA,para.46.
[135] ICC-01/09-01/11-307OA,para.46.
[136] ICC-01/09-01/11-307OA,para.61, quoted in Decision,para.54.
[137] ICC-02/04-01/05-371OA2, para.36 quoted in ICC-01/09-01/11-307OA,para.62.

domestic authorities with respect to the decisions adopted and the procedure followed in the course of their domestic investigations.[138] It only entails that if a challenge is filed on the grounds of Article 17(1)(a), the applicant State needs to substantiate it with concrete, tangible and pertinent evidence that proper investigations are currently ongoing.[139] The State's assertions that "best efforts" are taken is not determinative if such statement is not supported with evidence.[140]

75. Second, there is no presumption in the Statute in favour of national proceedings that would alter the evidentiary standard to grant leniency to States in the fulfilment of the burden of proof and/or standard.[141] As the Pre-Trial Chamber held, "the principle of complementarity expresses a preference for national investigations and prosecutions but does not relieve a State, in general, from substantiating all requirements set forth by the law when seeking to successfully challenge the admissibility of a case".[142] While the Statute establishes a preference for genuine national proceedings, it does not establish their primacy *stricto sensu* in the sense

[138] Appeal,para.66.
[139] Decision,para.55.
[140] ICC-01/09-01/11-307OA,paras.62-63 where the Appeals Chamber confirmed the Pre-Trial Chamber's approach that assertions not substantiated with evidence are insufficient. A contrario, Appeal,para.66. The Prosecution further notes that the two ECtHR cases cited in footnote 98 do not support the Appellant's submission. In both cases, the ECtHR acknowledged the states' discretion on ensuring the compliance with article 6-1, but it also noted its obligation to ensure that this is the case and that the Court's task is only to determine whether they have respected the Convention. In *Colozza v. Italy*, the ECtHR acknowledged the States' discretion as regards to the choice of the means to ensure that their legal systems are in compliance with article 6-1 of the ECHR, but it nevertheless emphasized that domestic authorities have to ensure that its legal system has effective and available resources to ensure the respect for the relevant rights (para.30). Moreover, in *De Cubber v. Belgium*, the ECtHR emphasized that their domestic legal systems need to ensure the compliance with the requirements of Article 6-1 and that "the Court's task is to determine whether the Contracting States have achieved the result called for by the Convention, not to indicate the particular means to be utilised" (para.35).
[141] Appeal,paras.55-56,74.
[142] Decision,para.52. Commentators have also indicated that the drafting of the Article 17 in a negative form "does not per se create a presumption, in the technical sense of the word, in favour of inadmissibility"; El Zeidy, p.159, quoting M Benzing,"The Complementarity Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and the Fight Against Impunity" Max Planck Yearbook of UN Law 591 (2003),p.600-601.

that national courts can make determinative decisions on matters of forum selection. Once a case is brought before the ICC it is the Court and not national courts that will decide where the case will be heard.[143] The Statute also does not seek to guarantee a right of national prosecution at all cost. Rather, it recognizes only a preference for genuine national proceedings where they relate to the specific case before the Court. The preservation of State sovereignty in the exercise of a State's own criminal jurisdiction cannot be claimed as the overriding and unique object and purpose of the Statute or the Court's complementarity regime. As the Appeals Chamber has held, the core rationale of the principle of complementarity is to strike a balance between safeguarding the primacy of domestic proceedings and the Rome Statute's goal to put an end to impunity so that the Court steps in if States do not investigate.[144]

76. The Appellant also argues that the "strong presumption in favour of national jurisdictions" and the ongoing role of the ICC militates towards this flexible approach that would permit the Court to initially declare the case inadmissible if "progressive investigative steps" are taken towards "aspects" of the same case and to subsequently declare the case admissible if it has not sufficiently progressed over time to demonstrate its "actual contours" and "precise scope".[145]

77. This argument turns the requirements of Articles 17 and 19 on their head. Instead of the Court first determining whether the national authorities are investigating the same case (Article 17(1)(a)), and recalling the case if there is a change in facts which negate the basis on which the case was

[143] ICC-02/04-01/05-377,paras.45-46,51.
[144] ICC-01/04-01/07-1497OA8,para.85.
[145] Appeal,paras.71-74.

previously declared inadmissible (Article 19(10)), the Appellant proposes the reverse: it suggests that the Chamber make only a partial or provisional finding of inadmissibility under Article 17, and recall the case back should the national proceedings not eventually progress to encompass the same case. As such, the Court would be able to declare a case inadmissible even if it is not proven that the same case is being investigated.[146] This would render Article 19(10) a mechanism to enter rolling determinations on the basis of sequential and supplemental submissions as to whether the challenging State has satisfied the first limb of the admissibility assessment, as opposed to a review of the facts that formed the basis of a previous admissibility determination. It would defeat the burden that rests with the challenging State to substantiate its challenge.[147]

78. The Prosecution submits that this proposed test has no support in the provisions of the Rome Statute. As described above, an ordinary and contextual reading of the relevant provisions indicates that a domestic investigation that covers discrete "aspects" of the case before the ICC does not cover the "same case".[148] There is simply not sufficient degree of sameness between the two cases to render the case inadmissible before the Court.[149] Further, an interpretation of the Statute as a whole, in particular the reference to "the same conduct" in other provisions of the Rome Statute supports this position.[150]

[146] Appeal,para.72.
[147] ICC-01/09-01/11-307OA,para.62.
[148] See above paras.55-56.
[149] Although Kenya was disputing the "same person" limb, the same principle would apply to the "conduct": i.e. "unless investigative steps are actually taken in relation to [substantially the same conduct that are the object] of the proceedings before the court, it cannot be said that the same case is currently under investigation by the Court and by a national jurisdiction, and there is therefore no conflict of jurisdictions". ICC-01/09-02/11-274OA,para.40.
[150] See above paras.56-57.

79. The Appellant's proposal would also turn on its head the approach endorsed by the Appeals Chamber when it observed that "the admissibility of a case must be determined on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge",[151] that national activities "may change over time" and that "a case that was originally admissible may be rendered inadmissible by a change of circumstances in the concerned States and vice versa".[152] The Appeals Chamber has also observed that "the Statute assumes that the factual situation on the basis of which the admissibility of a case is established is not necessarily static, but ambulatory".[153] If a State is not in a position to fully satisfy the requirements of Article 17 at the time of its challenge, the correct approach is to either not lodge a challenge prematurely or, if a challenge has already been dismissed, to seek leave to challenge the case a second time pursuant to Article 19(4) based on a change in circumstances. [154]

80. Hence, and for all the reasons outlined above, the Appellant has failed to show an error of law in the Chamber's conclusion that the Appellant did not provide sufficient evidence to demonstrate that it is investigating the same case as the ICC.

[151] ICC-01/04-01/07-1497OA8,para.56– see also Decision,para.220.
[152] ICC-01/04-01/07-1497OA8,para.56 referred to in Appeal,para.72.
[153] ICC-01/04-01/07-1497OA8,para.56.
[154] In this regard, the Appellant's argument that the procedure under Article 19(4) prejudices States due to the constraints that a new challenge can only be considered in "exceptional" circumstances is speculative and without merit; Appeal, para.73. The Chamber made it abundantly clear that it was prepared to consider a renewed challenge based on any change to the facts underlying domestic activity pursuant to the conditions set out in Article 19(4); Decision,para.220.

(c) The Pre-Trial Chamber did not fail to reason the Decision

81. Finally, the Appellant argues that the Pre-Trial Chamber failed to provide a reasoned opinion and did not explain why the same conduct test requires proof of the actual contours or precise scope of the domestic investigation and ignored factors such as the concrete stage of the proceedings.[155]

82. The Appellant argues in the alternative that the Pre-Trial Chamber failed to provide a reasoned opinion as to why a number of investigative steps did not satisfy the requirements of Article 17(1)(a) and why an additional element of proof of the "actual contours" and "precise scope" of the case was required.[156] According to the Appellant, the Chamber failed to consider the particular stage of the domestic investigation within the broader context of the Libyan criminal justice system[157] and limited its reasoning to the need of a case-by-case analysis to determine what constitutes "substantially the same conduct".[158]

83. The Appellant's submissions lack merit. In paragraphs 115-131 of its Decision, the Chamber provided detailed analysis regarding each of the categories of evidence provided by the Appellant, and giving reasons as to why the evidence was not sufficiently specific or probative in each case.[159] Notably, although the Chamber found that some items of evidence indicated that a number of investigative steps had been taken

[155] Appeal,paras.75,77,80. The Appellant challenges the PTC's statement that what constitutes "substantially the same conduct" will depend on the facts and circumstances of the case and requires a case-by-case analysis. *See* Appeal,para.79.
[156] Appeal,para.75.
[157] Appeal,para.77.
[158] Appeal,para.79, referring to Decision,para.77.
[159] Decision,paras.115-131.

with respect to certain aspects of the ICC case,[160] the evidence, taken as a whole, did not allow to discern the actual contours of the national case against 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.[161]

84. In compliance with the relevant jurisprudence, the Chamber "set out which of the relevant facts and legal arguments that were before the Pre-Trial Chamber were found to be persuasive [or in this case, not persuasive] for the determination it reached".[162] The Pre-Trial Chamber also indicated "how it applied the [relevant legal] provisions to the facts of the case",[163] and identified with detail the relevant conduct for the purposes of this case after clarifying that "it does not expect the national investigation to cover the exact events that are mentioned in the Article 58 Decision".[164]

85. Finally, the Chamber set out both the burden and standard of proof,[165] and applied to the facts of the case when it concluded that "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."[166] Nothing in this sequence demonstrates any error.

[160] Decision,para.134.
[161] Decision, para.135.
[162] ICC-01/04-01/06-774OA6,para.33.
[163] ICC-01/04-01/06-774OA6,para.33.
[164] Decision,para.133.
[165] Decision,paras.52-55.
[166] Decision,para.135.

<u>Second Ground of Appeal: the Pre-Trial Chamber erred in fact and in law in finding that Libya has not substantiated that its domestic investigation covers the same case as that before the ICC</u>

86. The Appellant argues that the Pre-Trial Chamber: (a) failed to consider all the evidence before it, including Al-Senussi's material; (b) failed to consider the appointment of the new Prosecutor-General, the evidence the Appellant would have provided if the Court granted the request for six weeks extension, or if the Chamber accepted the offer of an on-site visit and; (c) assessed the evidence in isolation and not as a whole.

87. Contrary to the Appellant's characterization of the alleged error in this ground (that it is an error in fact and in law), the error claimed does not contain any erroneous interpretation of the law. The alleged error, as claimed by the Appellant, pertains to the Chamber's misappreciation of the evidence. It is therefore an error of fact and not of law.[167]

88. The Appellant has failed to meet the threshold necessitating the Appeals Chamber's interference on the basis of a factual error, based upon demonstration of that the Chamber's conclusion were unreasonable based on the evidence before it.[168]

[167] The Prosecution submits that a distinction should be drawn with the Prosecution's Second Ground of Appeal in its appeal against the Ngudjolo acquittal (ICC-01/04-02/12-39-Red2), where it argued that the Chamber had erred in law regarding the application of Article 74(2), since the Trial Chamber adopted a wrong approach at each of the three different stages of the decision- making process, when it (a) assessed the credibility of the evidence; (b) made factual findings; and (c) reached its final decision on the guilt of Ngudjolo.

[168] ICC-01/04-01/10-283OA, paras.1,17.

(a) The Pre-Trial Chamber conducted a reasonable assessment of the evidence presented to it

89. The Prosecution will address below the different items of evidence which the Appellant claims that the Chamber misappreciated.

(i) Annex E and F of the Admissibility Challenge

90. The Appellant claims that the Chamber disregarded Annex E and F which, according to the Appellant, contain opinions by the Libyan Prosecution authorities relating to, *inter alia*, murders allegedly committed by Al-Senussi and, in respect of Annex E murders, rapes and international crimes committed by Gaddafi.[169]

91. Annex E,[170] [REDACTED].

92. [REDACTED].[171] [REDACTED]. As such, the above observation does not in itself offer any verification as to the actual scope or the subject matter of the domestic investigation.

93. The same annex additionally provides information about the investigations in relation to Al-Senussi. No reference, however, is made in this context to Gaddafi. Accordingly, this too fails to provide clarifying information about the scope of the domestic investigations concerning Gaddafi's conduct.

94. Annex F is [REDACTED].[172] [REDACTED], with no reference or apparent relevance to Gaddafi or the scope of the domestic investigations into his alleged conduct.

---

[169] Appeal,para.87.
[170] ICC-01/11-01/11-130-Conf-AnxE.
[171] ICC-01/11-01/11-130-Conf-AnxE,p.3.

95. In the light of the above, the Prosecution submits that the Chamber did not err in its assessment when it held that although Annex E pertained to the case against Gaddafi, the information did not provide any clarification as to the scope or subject matter of the domestic investigation. Similarly, there was no error in the Chamber's finding in relation to Annex F that the link between the domestic investigations concerning Al-Senussi and those against Gaddafi had not been shown and was not apparent from the evidence before the Chamber.[173]

(ii) Material presented in the context of the admissibility proceedings in relation to Al-Senussi

96. The Appellant argues that materials pertaining to Al-Senussi were relevant to determine the scope and contours of the Libyan investigation because the two cases are joined at the ICC,[174] and intended to be joined in Libya.[175] According to the Appellant, the Chamber erred in fact by not considering the materials submitted in the Al-Senussi Challenge, in particular since Libya had indicated that Gaddafi's material was to be considered for the Al-Senussi Challenge.[176]

97. The Appellant does not claim that specific items of evidence submitted in the Al-Senussi challenge also relate to the criminal responsibility of Gaddafi. Rather, the Appellant states that because in its submissions the two cases can and should be considered joined, any evidence tendered in

---

[172] ICC-01/11-01/11-130-Conf-AnxF.
[173] Decision,para 115.
[174] Appeal,para.88.
[175] Appeal,para.89.
[176] Appeal,para.92.

one admissibility proceeding should *ipso facto* be considered as relevant also in the other admissibility proceeding.[177]

98. The Prosecution recalls that the Pre-Trial Chamber clearly indicated at the outset of Gaddafi's admissibility proceedings that these proceedings are distinct from those pertaining to the admissibility of the case against Al-Senussi. It indicated that, "[a]s a preliminary matter, the Chamber has considered Libya's submissions as to the scope of the Article 19 Application and considers that *it must be understood to only concern the case against Mr Gaddafi. Accordingly, the Chamber will not consider the admissibility of the case against Mr Al-Senussi in resolving the Article 19 Application.*"[178] In its Admissibility Challenge, the Appellant itself had explicitly requested the Chamber to consider the two challenges separately, arguing that "where there are two or more suspects, the admissibility assessment must consider the case against each suspect as separate and distinct inquiries."[179]

99. The Appeals Chamber has similarly stated that the words "is being investigated […] signify the taking of steps directed at ascertaining whether those suspects are responsible for that conduct."[180] The suspect that forms the focus of the present admissibility proceedings is Gaddafi, and thus, the focus is on whether investigative steps have been taken to ascertain whether he - and not Al-Senussi – is responsible for criminal

---

[177] Appeal,paras.88,89.
[178] ICC-01/11-01/11-134,para.8 (Emphasis added). The severance between the two sets of proceedings was also emphasized by the Chamber in the Al-Senussi case when it indicated that: "[w]hile recognizing, as asserted by the Defence, "the very close relationship between [Mr Gaddafi's] case and Mr Al-Senussi's case", the Chamber is of the view that the unfolding of the proceedings following the Admissibility Challenge cannot be made dependent upon procedural steps in, or conclusion of, proceedings that, although related, are distinct" [ICC-01/11-01/11-325,para.10].
[179] Admissibility Challenge, para.69.
[180] ICC-01/09-01/11-307OA,para.41.

acts. Thus, regardless of the purported joint commission of crimes, the investigative steps, which the applicant must demonstrate in these proceedings, concern Gaddafi's criminal responsibility, not Al-Senussi's.[181] This distinction is also a necessary consequence of the fact that the Chamber must consider separately whether the cases against each suspect should be deferred to the national level, based on the evidence before it in relation to national proceedings concerned. A finding of inadmissibility in relation to one suspect would not automatically impact on a Chamber's finding in relation to another co-perpetrator suspect, and *visa versa*.

100. The Prosecution notes in this regard that the Appellant asked the Chamber to consider the evidence against Gaddafi as also relevant for Al-Senussi in the context of its submissions in Al-Senussi Challenge, rather than in the present proceedings.[182] Moreover, even if the Appellant considered that the materials presented in the Al-Senussi challenge did directly relate to the criminal responsibility of Gaddafi, it still bears the burden of proof to make a showing of such direct relevance to the Chamber. Such relevance should not be automatically assumed absent demonstration of the linkage of each individual item of evidence tendered.

(iii) Flight-related documents

[181] The Prosecution also notes that not all investigative steps taken in relation to Al-Senussi case are necessarily relevant to Gaddafi's since, as submitted by the Appellant, "[t]he temporal scope of the Libyan investigation of Abdullah Al-Senussi is significantly broader than the ICC investigation", and "[t]he scope of the investigation into the alleged criminality of Mr Al-Senussi […] extends from the 1980s". ICC-01/11-01/11-307-Red2, para.160.
[182] ICC-01/11-01/11-307-Conf-Exp,para.173.

101. The Appellant asserts that the Chamber erred in fact in its evaluation of Annexes 5, 6 and 7 to its Further Submissions, by seemingly reaching no conclusions as to the weight to be attributed to these documents.[183]

102. The Chamber need not refer to every piece of evidence on the […] record "as long as there is no indication that the […] Chamber completely disregarded any particular piece of evidence."[184] In particular, since these documents do not contain any specific reference to Gaddafi, and only contain flight data. The Chamber, nonetheless, considered this information. It noted that Annex 5 is a letter signed by [REDACTED]. The destination and the time of departure of the aircraft were stated to be unknown. Annexes 6 and 7 include the schedule of flights operated between 17 and 19 February 2011 and a number of flight documents.[185] Notwithstanding the above, the information contained in these documents supports a finding the Chamber had already reached in its conclusion. Namely, that some items of evidence show that a number of investigative steps have been taken by Libya with respect to certain discrete aspects that arguably relate to the conduct of Gaddafi as alleged in the proceedings before the Court including, *inter alia*, mobilisation of militias and equipment by air.[186] Therefore, the Chamber did not err in its assessment of these documents.

[183] Appeal,paras.96-98.
[184] This is consistent with the jurisprudence of the *ad hoc* tribunals Appeals Chamber. See *Prosecutor v. Limaj et al.*, IT-03-66, Appeal Judgement, 27 September 2007,para.86 and *Prosecutor v.Kvocka et al.* IT-98-30/1 Appeal Judgement,para.23. "The Appeals Chamber recalls that a Trial Chamber need not refer to the testimony of every witness or every piece of evidence on the trial record, "as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence."" Also see *Prosecutor v.Kordić and Čerkez*, IT-95-14/2-A, Appeal Judgement,para.382 "Furthermore, a Trial Chamber only has to deal with evidence which is *necessary* for the purposes of the Trial Judgement" (emphasis added).
[185] Decision,para.118.
[186] Decision,para.134.

(iv) Other documents – annex I to the Admissibility Challenge and annexes 3, 9, 10 and 11 to the Further Submissions

103. In turn, Annex I is a statement from a Libyan prosecutor indicating that witnesses, documents, telephone and video recordings suggest that Gaddafi has committed a number of crimes.[187]

104. Annex 3 is a report prepared by the Ministry of Justice confirming that the incidents of murder and persecution outlined in paragraphs 36-65 of the Article 58 Decision are included within the scope of criminal investigation against Gaddafi.[188]

105. The Chamber made an assessment and concluded that Annexes I and 3, among other documents, which were prepared by the Libyan authorities for the purpose of the Admissibility Challenge, do not contain specific information as to the alleged criminal conduct of Gaddafi that is under investigation, and as such, fall short of substantiating, by means of evidence with a sufficient degree of specificity and probative value, the conduct which is the subject of domestic investigations.[189] This assessment is in conformity with the Appeals Chamber's finding that: "[A] statement by a Government that it is actively investigating is not […] determinative. In such a case the government must support its statement with tangible proof to demonstrate that it is actually carrying out relevant investigation". In other words, there must be evidence with probative value." [190] Accordingly, the Chamber did not exercise its discretion unreasonably given that mere statements of Government officials unsupported by further evidence are not 'sufficient' or 'determinative'.

---

[187] Decision,para.116 and [REDACTED].
[188] Decision,para.116 and ICC-01/11-01/11-258-Anx3.
[189] Decision,para.116
[190] ICC-01/09-01/11-307OA,para.63 and ICC-01/09-02/11-274OA,para.62.

106. Annexes 9 and 10 attach documents that appear to deal with the periodical reviews of Gaddafi's interim detention. The information contained therein about the charges is minimal and unclear and offers little to no explanation as to the crimes charged,[191] or otherwise lacks basic information as to the temporal or geographical scope and/or the circumstances of the crimes. Accordingly, the Chamber did not err in finding that they do not contain specific information as to the criminal conduct under investigation in Libya.[192]

107. Annex 11 is an opinion of a member of the Libyan Office of the Prosecutor suggesting to the Attorney General the joinder of case 229/2012 against Gaddafi and case 630/2013 against Al-Senussi and others. Similarly, the annex makes cursory reference to the crimes under investigation without providing details such as to the time, location of the crimes and the circumstances in which each crime was committed. Moreover, the crimes mentioned in this annex pertain to the investigation of case No. 630/2013 that relates to Al-Senussi and others, but not Gaddafi. Therefore, a recommendation to consider a joinder of cases does not in and of itself render the evidence in one case relevant to findings of criminal responsibility in another case. As indicated by Libya, although this is the recommendation of the Attorney-General's Investigative Committee, it will be a matter for the *Chambre D'Accusation* to make the

[191] In many instances, crimes are referred to in a numerical order e.g. first, second or third charge, without offering any further description on the nature of these crimes; Annex 9 indicates that Gaddafi was asked about the charges against him and records whether he confessed or denied them. The documents lack sufficient information about the charges. By way of illustration, it is stated that "he denied the twelfth, thirteenth, fourteenth, and fifteenth charges" (ICC-01/11-01/11-258-Anx9,p.3) without explaining the nature and scope of those charges. The same applies to Annex 10. It is stated that: "By calling the defendant he appeared while being in custody and by asking him about the first, second, third, fourth, and fifth charges, he confessed them […]" *see* ICC-01/11-01/11-258-Anx10,p.3. The document does not indicate what those charges are.
[192] Decision,para.117.

final determination as to whether the two cases are to be joined, and the conditions that may apply.[193]

108. Accordingly, the Chamber's finding that Annexes 9, 10 and 11 do not contain specific information as to the criminal conduct under investigation in Libya against Gaddafi was not an unreasonable exercise of its discretion.[194]

(v) Summaries of witness statements - annex C to Admissibility Challenge

109. The Chamber concluded that the information contained in the summaries does reflect discrete aspects of the conduct as alleged in the proceedings before the Court and that the summaries have some probative value in particular, inferential value as to the existence of the certain evidence,[195] but that 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.[196]

110. The Appellant argues that while the Appeals Chamber requires that submissions pertaining to the issue of 'same case' are supported by evidence of sufficient specificity and probative value, it did not indicate that witness summaries (as opposed to witness statements) are insufficient to meet this standard. According to the Appellant, the Chamber was therefore wrong to allocate to the summaries merely "some inferential value about the existence and content of the evidence".[197]

---

[193] Further Submissions,para.59.
[194] Decision,para.117.
[195] Decision,para.121.
[196] Decision,para.123.
[197] Appeal,para.102.

111. The Chamber reached its conclusion – that the summaries provided scant level of detail and specificity – based on the information provided and not on the form in which the information was provided (i.e. in its summary form).[198] The Chamber did not disregard the summaries on their face, but rather engaged in a detailed and full assessment of the information provided and adhered to them certain probative value in arriving at its conclusion regarding the existence of relevant national proceedings in relation to certain discrete aspects of the case before the Court. As the Chamber indicated "the information contained in these summaries does reflect discrete aspects of the conduct as alleged in the proceedings before the Court. In addition, the summaries do have some probative value. They are not to be equated to plain assertions from the Libyan prosecuting authorities that the witness statements "exist". The summaries provide some detail of the alleged evidence given by the witnesses and hence they have some inferential value about the existence and content of the evidence."[199]

112. Additionally, the Chamber addressed and disregarded the Defence's submission that it is impossible to ascertain from the summaries whether the witnesses are providing first-hand evidence or simply recounting versions of events that they have heard on television, or second hand or third hand anonymous hearsay. The Chamber concluded that this argument misapprehends the purpose of the admissibility determination and that the Chamber is not called to determine whether the evidence presented is strong enough to establish the criminal responsibility of

[198] Decision,para.123.
[199] Decision,para.121.

Gaddafi but, instead, whether Libya is taking steps to investigate Gaddafi's responsibility in relation to the same case.[200]

113. Following this assessment, the Chamber reasonably found that the lack of detail and specificity of the summaries provided limited assistance in answering the central question as to the scope of the domestic investigation.[201]

(vi) Witness-statements - Annexes 4, 15 and 16 to the Further Submissions

114. The Appellant alleges that the Chamber erred in its assessment of the statements of three witnesses contained in annexes 4, 15 and 16 of its Further Submissions by failing to give them the decisive weight they deserved.[202] In particular, it argues that although some weight was attached to two of the statements, the Chamber failed to accord them substantial weight and to make a concrete finding as to the weight attributed to them.[203]

115. Contrary to the Appellant's submissions, the Chamber allocated the proper weight to all three statements. First, the Chamber considered each of the statements individually.[204] In particular, in relation to Annex 4, it concluded that it is not apparent from the statement that it was taken in relation to an investigation of the role of Gaddafi, if any, in the events described by the witness.[205] With respect to Annex 15, it found that the taking of the statement may still indicate that steps directed at ascertaining Gaddafi's responsibility in relation to the same case are

---

[200] Decision,para.122.
[201] Decision,para.123.
[202] Appeal,para105.
[203] Appeal,para106.
[204] Decision,paras.124-127.
[205] Decision,para.124.

being taken.[206] As to Annex 16, it concluded that despite the Defence arguments, the relevance of this witness statement for the determination of the matter under consideration is not put into question.[207] Ultimately, the Chamber concluded on the basis of the totality of the evidence presented, including the witness statements, that a number of investigative steps had been taken by Libya with respect to certain discrete aspects that arguably relate to the conduct of Gaddafi as alleged in the proceedings before the Court. These aspects,[208] included instances of mobilisation of militias and equipment by air, the assembly and the mobilization of military forces at the Abraq Airport (which appears to be supported by statement contained in annex 4),[209] certain events in Benghazi on 17 February 2011 (which appears to be supported by statement contained in annex 16),[210] and the arrest of journalists and activists against the Gaddafi regime (which appears to be supported by statement contained in annex 16).[211]

116. Annex 4: The Appellant argues that the Chamber erred in finding that "it is not apparent from this statement [which relates to the assembly and mobilization of military forces at Abraq airport] that it was taken in relation to the investigation of the role of Mr Gaddafi".[212] Notwithstanding this finding, the Prosecution notes that the Chamber nonetheless appears to have attributed certain probative value to the statement as part of its overall assessment in paragraph 134 when it

[206] Decision,para 125.
[207] Decision,para.127.
[208] Decision,para.134.
[209] The Appellant seems to concede that this conclusion is supported by this statement, *see* Appeal,para.105, and fn.155.
[210] The Appellant seems to concede that this conclusion is supported by this statement, *see* Appeal,para.105, and fn.156.
[211] The Appellant seems to concede that this conclusion is supported by this statement, *see* Appeal,para.105, and fn.157.
[212] Appeal,para.106(a) referring to Decision,para.124.

concluded that the evidence presented appears to refer to "the assembly and the mobilization of military forces at the Abraq Airport".[213]

117. Annex 15: The Appellant also claims that the Chamber erred in its assessment by not attributing a decisive weight to the statement contained in annex 15, which refers to, *inter alia,* Gaddafi's alleged role in the distribution of weapons and the execution of three young persons in August 2011.[214]

118. In relation to the event concerning the execution of three young persons in August 2011, the Chamber recounted the contents of the witness' statement that Gaddafi ordered guards to kill them and his order was executed.[215] While the Chamber does not expressly refer to this event in its overall conclusions in paragraph 134 of the Decision, there is no material error that could have affected the outcome of the Decision. The Prosecution observes that, even taken at its highest, this information appears to relate to certain discrete aspects of conduct attributed to Gaddafi, namely the killing of civilians or alleged dissidents. However, this single item cannot in and of itself establish that the Applicant is investigating substantially the same conduct, described by the Chamber as encompassing, *inter alia*, Gaddafi's activation of the Security Forces under his control "to kill and persecute *hundreds of civilian demonstrators or alleged dissidents* to Muammar Gaddafi's regime, across Libya".[216]

119. Moreover, the Appellant takes issue with the Chamber's reference to the fact that the statement "may" indicate that "steps directed at ascertaining

[213] Decision,para.134
[214] Appeal, para.106(b).
[215] Decision,para.125.
[216] Decision,para.83 (emphasis added).

the criminal responsibility were taken".[217] The use of the word "may" in this context, however, was in response to the assertion of the Defence that the Chamber could not rely on this piece of evidence. It did not express any value judgment as to the manner of the Chamber's assignment of weight.

120. With respect to the distribution of weapons, the Appellant argues that the Chamber erred in finding that the statement attests to Gaddafi "promising to distribute weapons (Kalashnikovs) among the population without however, doing so".[218] [REDACTED].[219] The Appellant contention appears to focus on the reference elsewhere in annex 15 where witness refers to hearing from his neighbours that Gaddafi distributed Kalashnikovs.

121. The Prosecution submits that the fact that Chamber appears not to have given decisive weight to this hearsay information nor refers to it explicitly, does not constitute an unreasonable exercise of its discretion such as to warrant a finding of an error of fact.

122. As noted above, the Chamber need not refer to every piece of evidence on the […] record "as long as there is no indication that the […] Chamber completely disregarded any particular piece of evidence."[220] In this particular case, the Chamber expressly referred to and assessed this statement.[221] Moreover, the Chamber addressed and rejected the Defence's contentions that the statement bears hallmarks of witness coercion as wholly speculative. It also rejected the Defence argument that

---

[217] Appeal,para.106(b), referring to Decision,para.125.
[218] Appeal,para106(b).
[219] [REDACTED].
[220] See above para.102.
[221] Decision,para.125.

the statement dealt with events falling outside the temporal scope of the case before the Court and concluded that the temporal parameters of the case have been set as 15 February 2011 until *at least* 28 February 2011. Additionally, events which may have occurred outside the parameters of the case may still be indicative or corroborative of other facts or events that took place within that timeframe. Finally, the Chamber found that the taking of this statement may still indicate that steps directed at ascertaining Gaddafi's responsibility in relation to the same case are being taken. [222]

123. Annex 16: the Appellant argues that the Chamber erred in fact by not making any express findings as to the proper weight to be attributed to this piece of evidence which should have been decisive.[223]

124. This statement relates, *inter alia,* to the use of armed violence against demonstrators and the role and responsibility of Gaddafi before, during and after the outbreak of violence, including his order to kill a local journalist who had earlier spoken to the international media. The statement, further, addresses the issues of provision of money and arms by Gaddafi to his supporters and the role of Gaddafi in bringing mercenaries or military troops to Libya from elsewhere in order to kill demonstrators in Benghazi and other areas.

125. The Pre-Trial Chamber properly exercised its discretion in assessing the evidence: first, it considered the statement and second, it appears to have attributed appropriate weight by finding that there was support for certain discrete aspects of the case, namely: "certain events in Benghazi

[222] Decision,para.125.
[223] Appeal,para.106(c).

on 17 February 2011", and "the arrest of journalists and activists against the Gaddafi regime".[224]

(vii) Intercepts

126. The Appellant argues that the Chamber erred in fact by failing to give the intercepts (contained in annex 17 to the Further Submissions) decisive weight, in particular, given that the intercepts record Gaddafi ordering the killing of rebels, planning for the use of guns against unarmed protestors, and stating that there will be no retreat.[225]

127. The Pre-Trial Chamber addressed and discarded the Defence arguments as to the lack of reliability of the recordings.[226] The Chamber noted that in those intercepts, reference is made to the planning and coordination of the use of force to repress civilians and a follow up as to the military situation in the Eastern Zone (Tobruk and Benghazi). Reference is also made to the need to secure the oil fields, the support of the rebels by the United States of America and France, the possibility that Misrata, Benghazi, Ras Lanuf and Tripoli would be taken by the rebels and the fact that there would be no retreat.[227] The Chamber thereafter exercised an appropriate and reasonable assessment of the evidence before it and concluded that "[i]t is clear from the discussions between Mr Gaddafi and [REDACTED] and those between Mr Gaddafi and [REDACTED] that the intercept communications relate to the repression of demonstrations against the Gaddafi regime from 15 February 2011 until at least 28 February 2011",[228] which was relevant to its overall conclusion that

---

[224] Decision,para.134.
[225] Appeal,para.109.
[226] Decision,para.131.
[227] Decision,para128.
[228] Decision,para.131.

certain discrete aspects that arguably relate to the conduct before the Court were being investigated.[229]

(b) The Chamber did not err when it did not consider certain information

128. The Appellant argues that the Chamber erred when it failed to consider the appointment of the new Prosecutor-General and when it failed to consider the evidence Libya would have provided to the Court if it had granted Libya's requests to both adduce further evidential materials and undertake a site visit to Tripoli.[230]

129. The Appeals Chamber has stated that an applicant must substantiate its challenge when it files it and cannot expect to be permitted to present additional evidence.[231] It falls within the remit of the Chamber's discretion to allow for the submission of additional evidence. The Appellant does not seem to dispute this fact.[232] Thus, absent a showing of improper exercise of the Chamber's discretion that amounts to an abuse of discretion, the Appellant cannot invoke the appellate review in this respect. In the present proceedings, as explained in more detail in response to the third ground of appeal,[233] the Pre-Trial Chamber correctly exercised its discretion. In particular, it allowed three opportunities for the submission of supporting evidence over an extended period of time and only entered its findings a year after the challenge was lodged.

[229] Decision, para.134.
[230] Appeal,para.110.
[231] ICC-01/09-02/11-274 OA, paras.96, 98; ICC-01/11-01/11-307 OA, paras.98,100.
[232] The Appellant stated, *albeit* in relation to another ground that "[…] it is accepted that the Chamber was not obliged to consider additional evidence, ("nor could the State expect to be allowed to present additional evidence")".*See* Appeal,para.121.
[233] See below paras. 137- 144.

130. With respect to the requested extension of a period of six weeks, it is worth noting that the Appellant initially requested this extra time period on 23 January 2013.[234] After the expiry of the requested period, the Appellant notably failed to provide the additional evidence or seek leave from the Chamber to provide it. Instead, it sought an additional period of six weeks on 4 March 2013.

131. With respect to its proposal for an on-site visit, the Appellant observes that this would have circumvented the restrictions imposed by Article 59 of Libya's Code of Criminal Procedure and thus enabled the Chamber to review additional evidence.[235] Nonetheless, it remains unclear how the confidentiality restriction under Article 59 would have been overcome by virtue of this visit. It also remains unclear on what basis the Appellant was able to make certain items of evidentiary value from the case-file available to the Chamber but not others. If the Appellant accepts that the Chamber could inspect the entirety of the case-file in Libya, it is unclear why it could not have transmitted copies or detailed summaries of the same to the Chamber in the same manner it previously did when it submitted evidence on a confidential ex parte basis in January 2013.

132. Moreover, the appointment of the new Prosecutor-General was disregarded by the Chamber on the basis that, as with other information submitted after 4 March 2013, its significance had not been sufficiently demonstrated.[236] The Appellant, in its notification of this appointment, did not state, for example, that the new Prosecutor-General would submit additional investigative material. The mere assertion that the new

[234] Further Submissions,para.70.
[235] Appeal,para.126.
[236] Decision,para.23.

Prosecutor was likely to be more cooperative was not in and of itself sufficient to merit a different consideration from the Chamber.

(c) The Chamber evaluated the evidence as a whole and not in isolation

133. The Appellant argues that the Chamber erred when it found that Libya had not substantiated with evidence of a sufficient degree of specificity and probative value that it is investigating the same case.[237] According to the Appellant, the Pre-Trial Chamber carried out an unreasonable approach to the evaluation of evidence as it isolated particular categories of material and conducted a reasoned evaluation of only part of the evidence presented.[238] It contends that the Chamber failed to consider whether there were linkages between individual pieces of evidence and then failed to take those linkages into account.[239]

134. Nonetheless, the Chamber expressly indicated that it based its conclusion on the evidence taken as a whole.[240] The Pre-Trial Chamber assessed the individual pieces of evidence,[241] and then considered their significance as a whole.[242] Moreover and as noted above, the Chamber need not refer to every piece of evidence on the […] record, "as long as there is no indication that the […] Chamber completely disregarded any particular piece of evidence."[243] The Appellant has failed to demonstrate that the Chamber committed such an error.

---

[237] Appeal,para.116.
[238] Appeal,para.117.
[239] Appeal,para.118.
[240] Decision,para.135.
[241] Decision,paras.115-131.
[242] Decision,para.134.
[243] *Limaj* Appeal Judgement, para.86; *Kvocka* Appeal Judgement, para.23; *Kordić and Čerkez* Appeal Judgement, para.382. (See above para.102).

135. Moreover, the Appellant also failed to demonstrate the unreasonableness of the Chamber's assessment of the evidence before it or of its conclusions. In particular, the Appellant did not argue or explain before the Pre-Trial Chamber the linkages between individual pieces of evidence and how those linkages should have been taken into account; nor does it demonstrate now on appeal how the Chamber's purported error had a material impact on the Decision.

<u>Third Ground: Unfairness and procedural errors occasioning a failure to take into consideration relevant and probative evidence.</u>

(a)The Chamber did not err in its conduct of the proceedings pursuant to Rule 58(2)

136. The Appellant argues that the Chamber failed to take appropriate measures under Rule 58(2) for the proper conduct of the proceedings.[244] The Appellant acknowledges that the jurisprudence of the Appeals Chamber has established that "the Pre-Trial Chamber enjoys broad discretion in determining how to conduct the proceedings relating to challenges to the admissibility of a case".[245]

137. The Appellant argues that whilst it is accepted that the Chamber was not obliged to consider additional evidence, it was obliged to promulgate a procedure that provided Libya with fairness and certainty.[246] This procedure had to take into account the rapidly evolving circumstances in Libya and ensure that the Challenge was decided on the basis of the facts that existed at the time of the proceedings. Accordingly, the Chamber had an obligation to fairly consider the relevant information or evidence that

[244] Appeal,para.120.
[245] ICC-01/09-01/11-307OA, paras.88-89 and ICC-01/09-02/11-274OA, paras.86-87. *See also* ICC-01/11-01/11-293-Red,para.12, and ICC-01/11-01/11-370-Red2, paras.121,124.
[246] Appeal,para.121.

had been notified to it within a reasonable time prior to its decision on the Admissibility Challenge (including on-site visit, additional evidence contained within filings subsequent to Libya's Reply of 4 March 2013).[247]

138. Contrary to the Appellant's allegations, the Chamber established a fair system for the conduct of the proceedings pursuant to Rule 58(2) and fairly considered the circumstances in Libya.[248] Notably, although the Pre-Trial Chamber did not have the obligation to do so, it convened an oral hearing at the request of the Appellant and provided the Appellant, at its request, with three opportunities to present evidence over a prolonged period and entered its findings over a year after the challenge was lodged.

139. The Chamber gave due considerations to the specific circumstances of the Appellant. This deference included extending the time limit for the Appellant on several occasions at its request to enable it to provide its submissions,[249] and taking special circumstances into consideration when deciding issues.[250] As an example, the Chamber decided to suspend the time limit set for the Appellant to file a reply to the responses of the OTP, OPCV, and OPCD to the Admissibility Challenge, stating that it "took into account the exceptional circumstances engendered by the transition to a newly elected government in Libya and the alleged inability of counsel to obtain instructions in the absence of a Minister for Justice".[251]

140. The Chamber also convened a two-day hearing (on 9-10 October 2012) to hear submissions on the Admissibility Challenge which provided the

[247] Appeal,para.122.
[248] Decision,para.134.
[249] *See for instance*, ICC-01/11-01/11-191 and ICC-01/11-01/11-200.
[250] ICC-01/11-01/11-200,para.18; ICC-01/11-01/11-207,paras.8-13.
[251] ICC-01/11-01/11-200,para.18

Appellant with an additional opportunity to substantiate its challenge.[252] Prior to the hearing, the Chamber set the date of 3 October 2012 for submissions of any additional evidence – an opportunity that the Appellant did not avail itself of.[253]

141. The Chamber further sought additional submissions and/or additional evidence by 23 January 2013 from the Appellant in order to clarify certain issues or to allow it to substantiate its Challenge throughout the admissibility proceedings.[254] Moreover, in terms of time limits, the extensions of time provided by the Chamber exceeded what the Appellant initially requested. Despite such allowance, the Appellant repeatedly failed to provide more details of its investigations or any significant progress therein. For example, the Appellant previously indicated that it would be possible, within a few weeks of the filing of the Admissibility Challenge on 1 May 2012, to provide to the Chamber examples of the evidence that its investigation had produced and that would be relied upon in the accusation, trial and appeal phases of the domestic proceedings.[255] Similarly, Libya anticipated that a number of further investigative steps were to be conducted immediately after the filing of the Admissibility Challenge,[256] and that, once these final steps were completed within a few weeks of the filing of the Challenge, the case would move further onto the accusation stage of proceedings.[257] Despite the fact that these self-imposed time-limits were not met, the Chamber allowed for additional submissions and presentation of

[252] *See* ICC-01/11-01/11-T-2-Red-ENG,p.3, ln.15-p.4,ln.7.
[253] ICC-01/11-01/11-207,para.15 and ICC-01/11-01/11-T-2-Red-ENG,p.4,lines 8-14.
[254] *See for instance*, ICC-01/11-01/11-249; ICC-01/11-01/11-239 and ICC-01/11-01/11-288; ICC-01/11-01/11-207.
[255] Admissibility Challenge,para.41.
[256] *Ibid.*,paras.46-48.
[257] *Ibid.*,para.49.

evidence beyond these dates and offered Libya several months, as opposed to a few weeks, to substantiate its submissions. Notably, the Appellant made similar promises in its Further Submissions where it indicated that the investigation was nearly completed.[258]

142. The Chamber properly exercised its discretion in conducting the proceedings by entering into a dialogue with the Appellant in consideration of the circumstances of the case that would allow full understanding of the steps that were taken domestically and the challenges encountered by the local authorities.[259] At the same time, an admissibility determination cannot be left pending for an indefinite period of time, particularly when there is limited progress in the presentation of substantiating evidence by the challenging party. The lodging of a challenge by a State, moreover, has the effect of suspending the investigations of the Office of the Prosecutor, subject to the exceptional measures foreseen in Article 19(8): meaning that pending the determination of the challenge, no further progress is possible before the ICC. As Judge Ušacka has indicated in her dissenting opinion in the Kenya Admissibility Appeal Judgments, "[t]he sovereign rights of the State, while important, are however not the only consideration in determining the procedure under rule 58(2) of the Rules of Procedure and Evidence. Those rights must be balanced with the need to pursue the goals of international criminal justice by assuring the efficacy of the investigation and the prosecution of a case"[260]

---

[258] Further Submissions, para.48.
[259] Decision,para.136.
[260] ICC-01/09-01/11-336OA (Dissenting Opinion Judge Usacka),para.23 *citing* J.T. Holmes in: Lee, pp.74 -75.

(b) The Chamber did not err when it rejected the information submitted after 4 March 2013

143. The Appellant argues that the Chamber unfairly rejected the information provided subsequent to its Reply of 4 March 2013.[261] In this respect, the Appellant repeats some arguments already put forward in the Second Ground of Appeal. The Prosecution refers to its corresponding responses above.[262]

144. Moreover, and in respect to the alleged failure of the Chamber in considering that Gaddafi consented to being represented by two lawyers at the 2 May 2013 hearing in Zintan in relation to incidental domestic proceedings, the Appellant failed to draw the attention of the Chamber to the significance of this piece of information to enable the Chamber to give it the proper weight. It is not self-evident that the lawyers who are representing Gaddafi in "incidental domestic proceedings" - as described by the Appellant - [263] may be willing to represent him also in much more serious case concerning the alleged killings and persecution.

(c) Deciding the standard of proof and defining the meaning of the "case"

145. The Appellant further argues that the Chamber failed to adapt the procedure to deal with specific issues. In particular, the Chamber failed to clarify its position in relation to the burden and standard of proof, and failed to define the meaning of the "case" for the purpose of the admissibility determination.[264]

[261] Appeal,paras.129-131.
[262] See above,paras.128-132.
[263] Appeal,para.122.
[264] Appeal,paras.132-139.

146. It should be noted that the Appellant did not make an express request for the Chamber to preliminary decide these questions prior to its determination of the Admissibility Challenge.[265] Nonetheless, the Prosecution notes that the Chamber sufficiently stated its position regarding the burden and standard of proof prior to its determination on the question of admissibility by referring to the relevant jurisprudence. As early as 7 December 2012, the Chamber indicated that as clarified by the Appeals Chamber, a State challenging the admissibility of a case "bears the burden of proof to show that the case is inadmissible" and that, to discharge this burden, "the State must provide the Court with evidence with a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case. It is not sufficient merely to assert that investigations are ongoing."[266]

147. In its Decision, the Chamber noted that the Statute does not set out a standard of proof for the determination of admissibility of a case and stated that it was guided by the jurisprudence of the Appeals Chamber to the effect 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".[267] The Chamber correctly concluded

[265] This is consistent with a general procedural principle (albeit in a different context) established in the jurisprudence of the *ad hoc* tribunals: *See* "As provided for in Article 25 of the Statute, the role of the Appeals Chamber is limited to correcting errors of law invalidating a decision and errors of fact which have occasioned a miscarriage of justice. A party is under the obligation to formally raise before the Trial Chamber, either during trial or pre-trial, any issues that require resolution. A party "cannot remain silent on [a] matter only to return on appeal to seek a trial *de novo*." If a party raises no objection to a particular issue before the Trial Chamber when it could have reasonably done so, in the absence of special circumstances, the Appeals Chamber will find that the party has waived his right to bring the issue as a valid ground of appeal." (footnotes omitted). *Prosecutor v. Blaskic*, IT-95-14, Appeal Judgement, 29 July 2004,para.222. Citing *Prosecutor v. Furundzija*, IT-95-17/1 Appeal Judgement,para.174; *Prosecutor v. Akayesu* ,ICTR-96-4 Appeal Judgement,para.361; and *Prosecutor v. Tadic*, IT-94-1-A Appeal Judgement,para.55; cited in *Kambanda*, ICTR-97-23, Appeal Judgement,para.25.
[266] ICC-01/11-01/11-239,para.8.
[267] Decision,para.54, citing ICC-01/09-02/11-274,para. 61.

that such evidence must be capable of demonstrating ("shall demonstrate") that Libya is taking concrete and progressive steps towards ascertaining Gaddafi's responsibility.[268]

(d) The Chamber's assessment on the admission of evidence on the first limb was independent from the assessment of the second limb.

148. The Appellant argues that the Chamber committed an error in deciding that Libya was not entitled to rely upon additional evidence because serious concerns remain with respect to the second limb of the admissibility test, namely Libya's ability genuinely to carry out the investigation or prosecution against Gaddafi.[269]

149. This is incorrect. The Chamber did not reject the Appellant's request to submit evidence in support of the Admissibility Challenge because the Appellant was unable under Article 17(3). The Chamber rejected additional requests to submit more evidence in support of its Admissibility challenge because the Appellant had already been afforded with sufficient opportunities. The Chamber then noted – albeit *obiter* - that the submission of additional evidence in support of the first limb of the admissibility test would not be determinative at this stage because even if the Appellant had demonstrated that it was investigating the same case, Libya was unable within the terms of Article 17(3).

[268] Decision,para.54.
[269] Appeal,para.140.

<u>Fourth Ground of Appeal: the Chamber erred in fact and in law in its determination that, due to the unavailability of 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)</u>

150. At the outset, the Prosecution notes that the Chamber's finding with respect to inability was effectively *obiter*, since the Chamber had already found that the Appellant had failed to satisfy its burden to substantiate its challenge under the first limb of the admissibility test.[270] The Chamber found that, although the Appellant had presented some items of evidence indicating that it was investigating some discrete aspects of the ICC case,[271] it had failed to substantiate with evidence of a sufficient degree of specificity and probative value its submission that the domestic investigation covers the same case that is before the Court.[272] Thus, the first limb of the admissibility determination was not met[273] and arguably, the Chamber had no need to ascertain whether the Appellant was "unable" within the terms of Article 17(3).[274]

151. The Pre-Trial Chamber however noted that even if additional material was presented and the Appellant had proven that it is investigating the same case, the case would be nevertheless admissible due to the Appellant's inability to genuinely carry out the investigation and prosecution of the case against Gaddafi.[275] These Chamber's findings with respect to the second limb of the admissibility determination were unnecessary and, in any event, not dispositive. Hence, unless the Appeals Chamber overrules the Pre-Trial Chamber's determination on

[270] ICC-01/04-01/07-1497OA8,para.78.
[271] Decision,para.134.
[272] Decision,para.135.
[273] ICC-01/04-01/07-1497OA8,para.78.
[274] ICC-01/04-01/07-1497OA8,paras.75,79.
[275] Decision,para.137.

the first limb (ie. lack of sufficient evidence with respect to the same case), any purported error in the second limb would be inconsequential as it would not materially impact on the Decision finding the case against Gaddafi admissible.[276]

152. The Prosecution will nevertheless address the merits of the Appellant's submissions. The Appellant puts forward two sub-errors: first, it argues that the Pre-Trial Chamber erred in law when it interpreted and applied the notion of unavailability; and second and further and alternatively, it argues that the Pre-Trial 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 Gaddafi. The Prosecution will address the two sub-issues accordingly.

A. Legal Error: Erroneous Interpretation and Application of "unavailability"

153. The Appellant argues that the Chamber endorsed an erroneous interpretation of unavailability when it concluded that "its national system cannot yet be applied in full in areas or aspects relevant to the case, being thus 'unavailable', within the terms of article 17(3)"[277] and that "a number of legal and factual issues result in the unavailability of the national judicial system was unable for the purpose of the case against Mr Gaddafi".[278]

154. The Appellant argues that the Pre-Trial Chamber endorsed too broad an interpretation of unavailability that permits a subsequent finding of admissibility simply as a result of some deficiencies or inefficiencies in

[276] ICC-01/04-01/07-1497OA8,para.38.
[277] Appeal,para.144, referring to Decision,para.205.
[278] Appeal,para.145, referring to Decision,para.215.

the national system.[279] The Appellant states that the Pre-Trial Chamber should have interpreted "unavailability" as requiring consideration of actual, systemic difficulties that have a direct and quantifiable (rather than purely speculative) impact on the ongoing investigation.[280] According to the Appellant, the Chamber should have clearly defined the parameters of unavailability in light of the requisite textual, contextual and teleological analysis which would have supported a more stringent interpretation of this concept.[281] Moreover, it argues that the Pre-Trial Chamber should have carried out a fact-driven and objective assessment of the legal and factual circumstances.[282]

155. The Prosecution submits that there is no error in the Chamber's interpretation of the term "unavailability". The Chamber correctly identified the legal and factual issues that rendered the Libyan judicial system "unavailable" for the purposes of the case against Gaddafi, and required causality between the problems verified and the three scenarios set out in Article 17(3).[283] Further, and contrary to the Appellant's submissions, the drafting history, the ordinary meaning of the term as well as a contextual and purposive interpretation of the relevant provisions supports that "unavailability" should be afforded a broad meaning.

[279] Appeal,para.151. According to the Appellant, this interpretation renders otiose the drafters inclusion of "substantial" rather than "partial"
[280] Appeal,para.153.
[281] Appeal,para.150.
[282] Appeal,para.152.
[283] Decision,paras.205,215, where the PTC presents the general conclusion of its findings, and paras.206-214 where the Chamber determined causal nexus between the legal and factual issues and the three prongs under Article 17(3).

(a) Unavailability of the national judicial system

156. In order to find a State "unable", Article 17(3) requires two sets of considerations: first, "total or substantial collapse" or "unavailability" of the national judicial system, and second and as a consequence, whether the State is unable to obtain the accused, or the necessary evidence and testimony, or is otherwise unable to carry out proceedings.[284] The Prosecution observes that the chapeaux criteria for inability, namely "total or substantial collapse" or "unavailability", are alternative rather than cumulative: the Statute requires either "a total or substantial collapse" or the "unavailability of the national judicial system", the latter being held as applicable in the present case.

157. The fact that "unavailability" was included alongside "total or substantial collapse" indicates that the former is distinct from the latter. "Total collapse" is a high threshold and entails that the basic functions of the judicial system must be paralyzed.[285] On the other hand, "substantial collapse" denotes that the system, although not in a state of collapse, is nonetheless sufficiently impacted or inadequate (not accessible or not useful) such that relevant national mechanisms are unable to achieve their purpose with respect to the given case.[286]

158. Thus, while the term "partial", as noted by the Appellant, which was originally proposed by the International Law Commission and subsequently replaced for "substantial" collapse at the Rome Conference,

---

[284] Heller, K.J.The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process, *17 CRIM. L. FORUM 255* (2006),p.10.
[285] Kleffner, J, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, (OUP, 2008) ("Kleffner"),pp.152-155; El Zeidy,p.226; Stigen,p315.
[286] Kleffner,pp.155-156; El Zeidy,p.227; Gioia, F., "Comments on Chapter 3", in *Complementary Views on Complementarity*, Kleffner, F and Kor, G (eds.) (TMC Asser Press, 2006) ("Gioia"),p.107; Stigen,p.317.

may reflect the intention of the drafters to narrow the interpretation of the notion of "collapse",[287] this is irrelevant for the purposes of "unavailability of its national judicial system" which stands as a separate factor within Article 17(3). As it will be described below, a literal, contextual and teleological interpretation supports that unavailability should be given a broader interpretation.

159. The term "unavailable" in English is defined as "[not] capable of producing a desired result; [not] valid; [not] capable of being employed with advantage; [not] capable of being made use of, at one's disposal".[288] The Spanish text uses the words "*al hecho de que carece de [su administración nacional de justicia]*". The verb "*carecer*" means "to want, to be in need, to lack".[289] The French text refers to "*l'indisponibilité de celui-ci*", that would indicate that something cannot be disposed of.[290] The Arabic term ("عدم تواف ر") could be translated as non-existent, non-accessible, non-complete.[291]

160. Although a literal interpretation of the term could mean non-existent and/or non-accessible, a contextual reading of the provision and, in particular, the fact that "unavailability" is included alongside "total or substantial collapse" in the same provision indicates that the former adds something to the latter. Hence, it describes a scenario where although the

---

[287] Appeal,para.150.
[288] Oxford English Dictionary (On Line): http://www.oed.com/view/Entry/13583.
[289] Spanish Dictionary (On Line): http://www.spanishdict.com/translate/carecer%2520
[290] "Indisponible" is defined as "dont on ne peut pas disposer". See French Dictionary Larousse (On Line) http://www.larousse.com/en/dictionaries/french/indisponible/42645 .
[291] See the multiple definitions of "available" in Almaany Dictionary (On Line): http://www.almaany.com/home.php?language=arabic&word=%D8%AA%D9%88%D8%A7%D9%81%D8%B1&lang_name=English&type_word=2&dspl=0

judicial system exists (ie. there is no collapse), it cannot be disposed of or it is not accessible.[292]

161. A contextual reading of the Statute also supports a broad interpretation of "unavailability" as non-disposal of the national judicial system. In particular, the Statute uses the term "unavailable" and "unavailability" in Articles 18(6), 56(1) and 88. In the two former articles, the term refers to whether evidence exists and can be obtained. Article 88 refers to the availability of procedures under national law to enable execution of cooperation requests. These provisions suggest that the intended measures must be capable of producing adequate results.

162. The "unavailability" criterion should also be construed in light of the object and purpose of the Rome Statute and in a manner that is consistent with the determination contained in the preamble to end impunity for the crimes within the jurisdiction of the Court. [293] This affirmation would be rendered meaningless if the ICC must defer a case to national jurisdictions despite the state's actual inability to carry out its proceedings in a genuine manner.

163. A broad reading is further supported by the jurisprudence of various international human rights organs in the context of the rule of exhaustion of local remedies, notwithstanding the different jurisdictional characteristics of these organs. According to what is often referred to as the "futility test", the HRC has noted that "domestic remedies must be both effective and available", otherwise they need not be exhausted;[294] the

---

[292] Kleffner,pp.155-156; El Zeidy,p.227; Gioia,p.107; Stigen,p.317.
[293] Kleffner,p.153.
[294] *Champagnie et al. v. Jamaica*, Human Rights Committee (under CCPR), Communication No. 445/1991, (18 July 1994),para.5.1, referred to in Stigen.p.318.

ECtHR has noted that the only remedies that must be exhausted are "those that relate to the breaches alleged and at the same time are available and sufficient"[295]; and the AfCmHPR has stated that "the [remedies] must be available, effective and sufficient"[296]. The terms "effective", "available" and "sufficient" seem to overlap considerably. These organs have given the term "available" a very broad meaning, referring not only to the existence of a judicial system, but also to its accessibility and its capability of producing adequate results.[297]

164. At the same time, Article 17(3) makes clear that "unavailability" is not to be construed in the abstract: it must be linked to whether, as a consequence of this unavailability, the State is unable to obtain the accused, cannot obtain the necessary evidence and testimony, or is otherwise unable to carry out the proceedings. The inclusion of these factors has the effect of making the assessment under Article 17(3) an objective, fact-driven assessment of the situation on the ground.[298] Specifically, in its Decision the Pre-Trial Chamber considered first, the fact that the Appellant could not obtain custody or control of Gaddafi for the purposes of carrying out the proceeding; second, that the Appellant does not control all detention facilities nor does it dispose of capacity to ensure protective measures; and third, that no lawyer has been identified to represent him. Contrary to the Appellant's submissions,[299] the Pre-Trial Chamber carried out a fact-driven and objective assessment of the facts

---

[295] *Van Oosterwijck v. Belgium*, European Court of Human Rights, Application No. 7654/76, (06/11/1980),para.27, referred to in Stigen,p.318.
[296] *Dawda Jawara v. The Gambia*, African Court on Human and Peoples' Rights, Communication 147/95,para.31, referred to in Stigen,p.318.
[297] Stigen,p.318.
[298] In particular, the drafting history shows that agreement over "inability" was more easily achieved, compared to negotiations over "unwillingness", because it was perceived to require a more objective, fact-driven assessment of the factors listed in article 17(3); Holmes J, "Complementarity: National Courts *versus* the ICC", in Cassese,p.677 ; Kleffner,p.152; El Zeidy,p.222.
[299] Appeal,paras.152-153.

and relied on actual difficulties that have a direct impact on the ongoing proceedings.[300] These factual and legal factors indicate that, although the judicial system has not collapsed, the national judicial system is "unavailable", namely, is not accessible or cannot be disposed of, for the purposes of the trial of Gaddafi. Notably, the Chamber concluded that "as a consequence" of these factors any of the three limbs under Article 17(3) were met.[301] Hence, the Chamber did require a causal relation between "unavailability" and the three consequences listed in Article 17(3). Thus, there is no error of law and Libya's first sub-ground should be dismissed.

B. 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 Gaddafi

165. The Appellant presents this second sub-ground "further and alternatively" as a factual and legal error.[302] However, this sub-ground is a purely factual error where the Appellant disagrees with the factors relied upon and the conclusion reached by the Chamber.[303] Therefore, and as noted above, the relevant standard of review is one of reasonableness and the Appellant needs to show that no reasonable trier of fact would have reached the Chamber's conclusion.[304] As it will be developed below, the Appellant has failed to meet this threshold.

[300] Decision,paras.206-215.
[301] Decision,paras.205,215.
[302] Appeal,para.154.
[303] Appeal,paras.155-171.
[304] See above, para.9.

166. The Prosecution notes that it suffices that at least one of the three factors listed in the second half of Article 17(3) exists as a result of the total or substantial collapse or unavailability of the Libyan judicial system.[305]

(a) The Appellant's inability to obtain Saif Al-Islam Gaddafi

167. The Appellant argues that the Chamber erred when it found that Libya was "unable to obtain the accused" within the terms of Article 17(3) because it had not been able to secure the transfer of Gaddafi into the control of the central authorities and, due to this fact, the trial could not take place.[306] The Appellant argues that the Chamber did not require a causal link with the Appellant's "unavailability";[307] that it failed to consider that the Zintan Brigade is a local authority under the control of the central authority;[308] and that the Chamber has incorrectly elided the desirability of transfer to Tripoli with the ability of the Appellant to obtain the custody of Gaddafi and that there is no legal impediment to have the trial in Zintan.[309]

168. First, the Appellant's submissions that the Chamber did not require a causal link are incorrect. The Chamber considered a factual factor external to the judiciary[310] (lack of control over the accused person) which caused that the trial proceedings against Gaddafi cannot continue. The Chamber referred to the Libyan authorities' submissions in the Oral Hearing indicating that trials in absentia are not permitted under Libyan law when the accused is present on Libyan territory, and adequately

[305] Holmes in Cassese,p.677.
[306] Appeal,para.155 referring to Decision, paras.206, 208.
[307] Appeal,para.156.
[308] Appeal,paras.157-160.
[309] Appeal,para.161.
[310] Stigen,p.323 whereby Stigen noted that "it is submitted that 'unavailability' cover factual obstacles only insofar as they are external to, i.e. caused from outside the judiciary." Stigen further noted that the obstacles might also prevent only specific persons from seeking a remedy.

concluded that unless the central authorities gain control of Gaddafi, the trial cannot take place.[311]

169. Second, the Appellant appears to argue that it has control over the Zintan brigade.[312] The Appellant's submissions and the evidence before the Chamber appear to indicate otherwise. In particular, in the Oral Hearing on 9 October 2013, the Appellant stated that "it is correct that he presently remains in the custody of the Zintan Brigade" and noted that, once a new Prosecutor-General was appointed, he or she was expected to prioritise "working with the Zintan Brigade" and the transfer of Gaddafi from Zintan to Tripoli.[313] On 7 December 2013, in its Decision Requesting Further Submissions, the Chamber expressly asked the Appellant to clarify who has custody of Gaddafi.[314] On 23 January 2013, the Appellant confirmed that "Mr Gaddafi remains in Zintan" and provided no further clarification on the relation between the Zintan brigade and the central authorities.[315] Thus and in light of the materials before it,[316] the Chamber's conclusion that Gaddafi is currently under the custody of the Zintan militia and not under the control of the central authorities was perfectly reasonable. Contrary to the Appellant's submissions, the fact that other proceedings under Libyan law are being conducted in Zintan[317] or that international organizations have visited Gaddafi in Zintan[318] do not disturb this finding or indicate that Zintan is under the control of the central authorities. Nor would the orders extending the detention of

[311] Decision,para.208 referring toICC-01/11-01/11-T-3-Red-ENG,p.62,lns.10-14.
[312] Appeal,para.157.
[313] ICC-01/11-01/11-T-2-Red-ENG,p.29,lns.17-20.
[314] ICC-01/11-01/11-239,para.45.
[315] Further Submissions,para.99.
[316] *See for e.g.* ICC-01/11-01/11-281-Anx5.
[317] Appeal,para.159 referring to Further Submissions, para.101.
[318] Appeal,para.159 referring to Further Submissions, para.99.

Gaddafi presented by the Appellant[319] necessarily indicate this fact.[320] Thus, the Chamber did not err in not relying on these facts.

170. Third, the Appellant submits that the Chamber erred in mixing the desirability of transfer Gaddafi to Tripoli with the Appellant's inability to obtain his custody.[321] This is in error. The determinative issue to establish the Appellant's ability to obtain the accused within the terms of Article 17(3) is whether the Libyan central authorities have control over Gaddafi. In that respect, the Chamber correctly noted that Gaddafi is currently not under the control of the central authorities (in Tripoli), but under the custody of the Zintan militia.[322] As a result, proceedings against him cannot start according to Libyan law as trials in absentia when the accused is in Libyan soil are not permitted.[323] Moreover and as noted above, the Appellant linked the control over Gaddafi with his transfer to Tripoli. Further, the Appellant noted that a trial could not take place in Zintan due to the lack of infrastructure.[324]

(b) The Appellant's inability to obtain the necessary testimony

171. The Chamber concluded that the Appellant is unable to obtain the necessary testimony. It illustrated this with the example of the intended interview of two witnesses that the Appellant could not pursue because they were being held in detention facilities not yet under the control of the Government. The Chamber also indicated that the Appellant failed to

[319] Appeal,para.158 referring to Further Submissions, paras.56-58 and Annexes 9 and 10.
[320] See ICC-01/11-01/11-276, fn.37 and ICC-01/11-01/11-281,paras.107-110.
[321] Appeal,para.161.
[322] Decision,para.208.
[323] Decision,para.208 referring to ICC-01/11-01/11-T-3-Red,p.62,lns.10-14.
[324] ICC-01/11-01/11-T-2-CONF-EXP-ENG,p.19,ln.22 to p.20, ln.2.

substantiate how it envisages implementing protective measures for witnesses who agreed to testify in the case against Gaddafi.[325]

172. The Prosecution observes that the term "necessary" in Article 17(3) is not that *any* evidence cannot be gathered, but that sufficient evidence and testimony cannot be obtained to conduct a genuine criminal proceeding.[326] If the Appellant was not able to gather the testimony of two witnesses due to obstacles arising from the current situation, but collects the necessary evidence to continue with its investigation, this would not automatically render it unable for the purposes of Article 17(3). Nonetheless, in its Decision, the Chamber appears to refer to the impossibility to interview these two witnesses as an example of a much broader pattern demonstrating that the authorities are unable to ascertain control,[327] which in turn appears to have impacted on the lack of evidence presented in support of this challenge. This approach is certainly not unreasonable. In any event, given that the Chamber found Libya unable based on other factors, this purported error – by itself – would have no impact on the Chamber's overall conclusion that the Appellant is unable to obtain the necessary testimony or under the other scenarios of Article 17(3).

173. With respect to the Appellant's ability to provide witness protection, the issue is whether at this point in the Libyan domestic proceedings, namely, the investigation stage, the Appellant is deemed unable to gather

[325] Decision,paras.210-211.
[326] Stigen,p.326. Thus, evidence which is not strictly needed in order to reach sufficiently qualified decisions should not be considered as "necessary". See also Holmes, J. Lee, pp. 48-49 which refers to "key evidence or testimony".
[327] Decision,para.210. *See for e.g* ICC-01/11-01/11-281-Red2,paras.67-73.

the necessary evidence because Defence witnesses may be unwilling to testify at trial due to security concerns.

174. The Prosecution recalls the ruling of the Appeals Chamber that the admissibility of a case must be determined on the basis of the facts as they exist at the time of the admissibility proceedings.[328] Moreover, and as this Pre-Trial Chamber has noted, the ability of a State genuinely to carry out an investigation or prosecution must be assessed in the context of the relevant national system and procedures.[329] The Court must thus, on the one hand, resist engaging in speculative assessments as to the outcome of possible future events at the national level;[330] and on the other, remain vigilant to obvious obstacles, established on the basis of concrete evidence, that establish a foreseeable risk that national proceedings cannot in fact be carried out.[331]

175. The Appellant submitted that matters of witness protection during the trial phase fall within the discretion of the trial judge.[332] The Appellant also listed additional protective measures[333] but did not provide relevant provisions nor did it substantiate whether it is capable or has the expertise to ensure their implementation.[334] In light of these submissions,

[328] ICC-01/04-01/07-1497OA8,para.56.
[329] Decision,para.200.
[330] ICC-02/04-01/05-377,para.51.
[331] See discussions during negotiations, whereby some delegations expressed their concern that the Court was not to assume jurisdiction simply because the national authorities were proceeding more slowly (or less efficiently) than other States or the Court itself in handling similar cases. The critical factor to these delegations was whether there was a defect in the approach taken by the State which inevitably, if left to its conclusion, would result in a travesty of justice; Holmes, in Cassese,pp.673-4.
[332] ICC-01/11-01/11-293-Red,para.65 referring to Article 275 of the Criminal Procedure Code.
[333] ICC-01/11-01/11-293-Red,para.65 and Further Submissions,para.95: video-link, closed-session, written statement before notary, police protection […].
[334] For example, the Appellant did not indicate that these measures have been implemented in the past nor that they are been implemented in current similar proceedings.

and considering the evidence before the Chamber,[335] it was not unreasonable to conclude that without any guarantee of meaningful protective measures, there was a real and tangible risk that trial proceedings may not move forward. Therefore, the Chamber's conclusion that the Appellant had not properly substantiated its capacity to implement protective measures was not unreasonable.

(c) The Appellant is unable to otherwise carry out the proceedings

176. The Appellant explained that the case could not proceed to trial unless a lawyer was appointed to Gaddafi. The Appellant acknowledged that until the present date the suspect has no lawyer and that difficulties in finding counsel were encountered at the time of the Challenge.[336] The Chamber concluded that the Appellant had not demonstrated how these difficulties would be overcome in order to proceed to trial and that therefore the Appellant was unable to otherwise carry out the proceedings within the terms of Article 17(3).[337]

177. The Appellant argues that the Chamber erred because no lawyer is required at the investigative stage;[338] any risk that defence counsel may face is speculative;[339] and Gaddafi has now two lawyers for the purposes of the Zintan proceedings.[340]

178. The Prosecution submits that the Pre-Trial Chamber made no error. First, the difficulties in finding a lawyer for Gaddafi have been acknowledged

[335] In particular, that conflict-related detainees including senior former regime members have suffered instances of torture and mistreatment in detention facilities. See Decision,para.209,fn343.
[336] Appeal,para.168.
[337] Decision,para.214.
[338] Appeal,para.170.
[339] Appeal,para.171.
[340] Appeal,para.169 referring to ICC-01/11-01/11-232-Anx1.

by the Appellant itself, and are therefore not a matter of mere speculation.[341] Second, the Appellant has acknowledged that counsel is a pre-requisite to present the charges before the Indictment Chamber and move to the prosecution of the case.[342] Thus, unless a lawyer is provided to Gaddafi the proceedings will not move forward. Although the Chamber needs to consider the facts at the time of the admissibility proceedings[343] and should not engage in speculative assessments on how events will unfold at the domestic level, this is not the situation in the instant case: the Chamber has identified a specific obstacle which - unless adequately addressed - will impede the progress of the proceedings. Therefore, it was not unreasonable to request the Appellant to demonstrate how it intended to overcome this obstacle.

179. Third and as noted above, the Appellant did not argue before the Chamber that it should consider that Gaddafi had been provided with lawyers in an incidental domestic proceeding. Moreover, nor does the fact that two lawyers have agreed to represent Gaddafi in another case, removes the obstacle that no lawyer represents him for the much broader and complex case that relates to crimes against persons and financial crimes for a longer period of time.

(d) Misrepresentation of the ongoing nature of the investigation when assessing ability

180. The Appellant repeats arguments already put forward within the First Ground of Appeal. In particular, that the Chamber failed to give

---

[341] Appeal,para.168. See also ICC-01/11-01/11-281-Red2.1, paras.262-263 and the open sources referred to therein.
[342] Admissibility Challenge, paras.61-62; Further Submissions,para.96. *See* ICC-01/11-01/11-167-Red,para.41 referring to ICC-01/11-01/11-158-AnxB, Article 161 Libyan Criminal Procedure Code.
[343] ICC-01/04-01/07-1497OA8 para.56.

sufficient regard to the ongoing nature of the proceedings and the transitional context in which they occurred. The Appellant argues that it is difficult to see how any state emerging from conflict will be in a position to conduct domestic proceedings in spite of their efforts to do so.[344]

181. The Appellant's submissions lack merit. As noted above, the admissibility of a case must be determined on the basis of the facts as they exist at the time of the admissibility proceedings.[345] A State needs to substantiate its challenge with sufficient evidence, and cannot expect to be allowed to present additional evidence at a later stage because it filed the challenge prematurely.[346]

182. Moreover, as the Appellant appears to concede,[347] states emerging from conflicts may not be immediately able to carry out genuine investigations and prosecutions regardless of their willingness to do so. In that situation, a case will be admissible before the Court until such time as the Article 17 requirements are met. As noted above, a State does not have to file a challenge simply because the ICC has issued an arrest warrant.[348] The "earliest opportunity" in Article 19(5) refers to the earliest point in time after the conflict of jurisdictions has actually arisen.[349] As the Appeals Chamber has noted, national activities "may change over time"; "a case that was originally admissible may be rendered inadmissible by a change of circumstances in the concerned States and vice versa"; and "the Statute assumes that the factual situation on the basis of which the

[344] Appeal,para.172.
[345] ICC-01/04-01/07-1497OA8,para.56.
[346] ICC-01/09-01/11-307OA,para.100.
[347] Appeal,para.172.
[348] ICC-01/09-01/11-307OA,para.46.
[349] ICC-01/09-01/11-307OA,paras.46,100.

admissibility of a case is established is not necessarily static, but ambulatory".[350]

(e) On genuineness

183. The Appellant argues that the Chamber erred in law by failing to consider whether the investigative steps were genuine in making an assessment of Libya's ability.[351] According to the Appellant, had the Chamber considered "genuineness", it would have added "objectivity and stringency" and not applied such a high standard to its assessment of the investigative steps taken by the Appellant.[352] It argues that this error materially impacted the Decision.[353]

184. The Appellant's submissions lack merit. In relation to the Chamber's determination of the first limb of the admissibility test, the Appellant erroneously assumes that the Chamber applied a higher and incorrect standard in assessing whether the Appellant was investigating the same case. As described above, this is incorrect and no such a more stringent test was applied.[354] Moreover, it should be recalled that the Chamber will only determine whether a domestic proceeding is "genuine" once it has established that there is State activity with respect to the same case as that before the Court and proceeds to assess the State's ability and willingness.[355] The term therefore applies to the second limb of an admissibility determination and, contrary to the Appellant's submission, does not add an extra element to the Chamber's assessment under the

[350] ICC-01/04-01/07-1497OA8,para.56.
[351] Appeal,para.173.
[352] Appeal,paras.174-176.
[353] Appeal, para.176.
[354] See above, paras.40-72.
[355] ICC-01/04-01/07-1497OA 8,para.78

first limb, which is guided by whether there is evidence of a sufficient degree of specificity and probative value.

185. The Prosecution concurs that "genuinely" was introduced into the drafting of Article 17 as a term considered the least subjective from a series of options including "diligently", "good faith", "effectively" and "sufficient grounds" to describe the quality of relevant domestic proceedings.[356] This term was agreed upon as a compromise in the context of the discussions among the delegations primarily with respect to the inclusion of the concept "unwillingness". Although it still permitted some needed subjectivity to give the Court latitude on which to base its decision of finding unwillingness, to some delegations it reflected a more objective connotation.[357] While genuineness also appears in Article 17(1)(a) and (b) in relation to "inability",[358] the drafting history shows that agreement over "inability" was far more easily achieved compared to the notion of "unwillingness", because it was perceived to require a more objective, fact-driven assessment of the factors listed in Article 17(3).[359]

186. The Chamber's appreciation of the submissions received and the evidence before in its assessment of Article 17(3) does not indicate any error in its interpretation of the term "genuine" since the Chamber focused its assessment on the factors listed in Article 17(3). Specifically, in relation to the Chamber's finding on the second limb of the admissibility

[356] Holmes in Cassese,p.674.
[357] *Ibid.*
[358] There is some confusion surrounding what aspect of Article 17(1) the term "genuinely" was intended to apply to: whether genuineness applies to both ability and willingness or modifies "to carry out the investigation and prosecution" and "to prosecute" in the sense that they refer to the process of the national proceeding. See Holmes in Cassesse, p.674 Robinson D., "The mysterious mysteriousness of complementarity", Criminal Law Forum (2010) 21:67-102, pp.86-87.
[359] Holmes in Cassese,p.677; Kleffner,p.152; El Zeidy,p.222.

test, the Chamber expressly examined whether the Appellant was unable genuinely to carry out an investigation into the case at hand throughout Section V (B) of its Decision.[360] In doing so, it relied on the factors set out in Article 17(3) (namely "unavailability" combined with findings on whether as a consequence "the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings") to determine, based on the evidence before it, whether the Appellant was able to genuinely investigate the same case.[361]

187. Therefore, and as described above, the Appellant has failed to demonstrate a clear error occasioned by the Chamber's assessment of the facts, such that it is indiscernible how its conclusion could have reasonably been reached based on the evidence before it.

<u>The Appellant's Request for an Oral Hearing</u>

188. The Appellant requests the Appeals Chamber to exercise its discretion pursuant to Rule 58(2) to convene an oral hearing[362] due to the significance of the issues under appeal,[363] the fact that "the determination of this appeal will be of great interest to the broader international community" and that "an oral hearing will allow full ventilation of all the important issues arising and develop a dialogue between the Court and Libya […]".[364]

189. As the Appellant concedes, the general rule is that appeal proceedings shall be conducted in writing, pursuant to Rule 156(3), unless the Appeals

---

360 Decision,para.199 *et seq*. *See also* Decision,para.53.
361 Decision,paras.204-215.
362 Appeal,para.194.
363 Appeal,para.195.
364 Appeal,para.195.

Chamber in exercise of its discretion decides to depart from this general rule if cogent reasons are presented.[365]

190. The Prosecution submits that the Appellant has failed to provide cogent reasons to demonstrate that an oral hearing is necessary. Although the Prosecution is generally supportive of convening oral hearings to facilitate an open litigation of the relevant issues and to assist the Appeals Chamber in its determination, it submits that the Appellant has sufficient opportunity to address the relevant matters before the Appeals Chamber in written form.[366] Further, and as described above,[367] the Appellant has been given ample opportunities before the Pre-Trial Chamber to present submissions and additional evidence. An oral hearing was also convened. Granting the Appellant's request would cause unnecessary delay to a course of proceedings that were initiated more than a year ago.[368] Moreover, and assuming that the Appeals Chamber had questions and concerns, the Appeals Chamber could also avail itself of Regulation 28 of the Regulations of the Court to seek clarification or request additional details by way of written submissions.[369]

191. It should be noted that the Appeals Chamber has rejected previous requests for oral hearings based on the purported importance of the issues,[370] its novelty and precedential impact.[371] For the aforementioned,

[365] ICC-01/05-01/08-962-Corr,para.25; ICC-01/09-01/11-271OA,para.10; ICC-01/09-02/11-251OA,para.10.
[366] ICC-01/09-01/11-271OA,para.11.
[367] See above, paras. 138~~138~~-142.
[368] ICC-01/04-01/06-2582OA18,para.27; ICC-01/09-01/11-271OA,para.13. According to Rule 156(4), an appeal shall be heard "as expeditiously as possible".
[369] ICC-01/09-01/11-271OA,para.12; ICC-01/09-02/11-251OA,para.12.
[370] ICC-01/04-01/06-2582OA18,para.11.
[371] ICC-01/09-01/11-271,para.11.

the Prosecution requests that the Appellant's request for oral hearing be rejected.

The Appellant's Reiterated Request for Suspensive Effect

192. The Appellant reiterates its prior request for suspensive effect and further argues that first, the Appeals Chamber has the authority to grant suspensive effect with respect to the Appellant's obligation to surrender Gaddafi to the ICC;[372] and that second, the transfer of Gaddafi would create an irreversible situation or one that would be very difficult to correct because it "would severely curtail further 'progressive steps' and the ongoing investigation in its entirety"[373] and the transfer would prejudice other related cases such as that of Al-Senussi because the Appellant appears to have devised a wider prosecutorial strategy based on the joinder of cases against several leadership figures.[374] Third, the Appellant argues that the reasons supporting its request for suspensive effect are properly included in its document in support of appeal.[375]

193. The Prosecution has already stated its position with respect to the first and third issues noted above in its response to the Appellant's request for suspensive effect.[376] As indicated by the Appellant, the Appeals Chamber has the authority to decide on the suspension of the Appellant's obligation to surrender Gaddafi because such obligation is an immediate consequence of the Decision which is subject to the instant appeal.[377] Moreover and contrary to the Appellant's submission, the Appeals Chamber has stated in the past that "[…]for appeals against a decision on

[372] Appeal,paras.184-185.
[373] Appeal,para.188.
[374] Appeal,para.189.
[375] Appeal,paras.191-192.
[376] ICC-01/11-01/11-368.
[377] ICC-01/11-01/11-368,paras.8-9.

admissibility, the 'appeal' in terms of rule 156 (5) is the document filed pursuant to rule 154 of the Rules of Procedure and Evidence. Any request for suspensive effect must be made in the appeal, which will generally be the first filing of the appellant before the Appeals Chamber. This requirement is logical because of the urgent nature of requests for suspensive effect, and because of the need for clarity as early as possible as to whether a request for suspensive effect is made."[378]

194. Therefore, the arguments underpinning a request for suspensive effect within the terms of Rule 156(5) should be presented in the notice of appeal pursuant to Rule 154 rather than the document in support of appeal under Regulation 64.

195. Finally, the Prosecution submits that the Appellant has failed to advance any argument that shows that an irreparable prejudice will be caused as a result of the transfer of Gaddafi. The Libyan proceedings are currently in the investigation stage and the investigation against Gaddafi and other high level officials could arguably continue under Libyan law without the presence of Gaddafi in Libyan soil.

[378] ICC-01/05-01/08-817OA3,para.8. *See also* ICC-01/11-01/11-368,para.11 that refers to ICC-01/05-01/08-499OA2,paras.9-10.

Relief Sought

196. For the reasons set out above, the Prosecution requests that the Appeal and the Appellant's request for an oral hearing and suspensive effect be rejected.

Fatou Bensouda,
Prosecutor

Dated this 22nd day of July 2013

At The Hague, The Netherlands