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PRE-TRIAL CHAMBER I

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

**SITUATION IN LIBYA
IN THE CASE OF**

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

Public and Redacted, with 1 Public Annex

**Libyan Government's consolidated Reply to the Responses by the Prosecution,
Defence and OPCV to the Libyan Government's Application relating to Abdullah
Al-Senussi pursuant to Article 19 of the ICC Statute**

Source: The Government of Libya in the case of Mr Abdullah Al-Senussi
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I. INTRODUCTION

1. The Government of Libya makes this consolidated submission in reply to the Responses from the OTP, the OPCV, and the Al-Senussi Defence concerning its challenge, under article 19 of the Statute, to the admissibility of the case against Mr. Al-Senussi ("The Responses").¹

II. REQUEST FOR ADDITIONAL TIME

2. Before setting out the reply, Libya notes that this case is a litmus test for a credible and realistic complementarity system that advances the object and purpose of the ICC Statute. Pursuant to Rule 58(2), the Chamber must "decide on the procedure to be followed" and "take appropriate measures for the proper conduct of the procedure".² This includes, determining Libya's Article 19 Challenge "on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge".³
3. Unfortunately, in the last three months, the security situation has significantly deteriorated in Benghazi, the principal focus of the domestic investigation. The period of time in which work on this reply was being carried out, (i.e. July) has been described as "one of the bloodiest months".⁴ There was a range of car bombings and other explosive attacks,⁵ attacks on police stations,⁶ and a number

¹ Prosecution's Response to "Application on behalf of the Government of Libya relating to Abdullah Al-

² *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "Decision on the Conduct of the Proceedings Following the "Application on behalf of the Government of Libya pursuant to Article 19 of the Statute"", ICC-01/11-01/11-134, 4 May 2012, paragraphs 10-11.

³ Appeals Chamber Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07 OA 8-1497, 25 September 2009 ("Katanga Admissibility Appeal Decision"), para.56.

⁴ Libya Herald, 'Senior army officer murdered in Tripoli,' 9 August 2013, <http://www.libyaherald.com/2013/08/09/senior-army-officer-murdered-in-tripoli/>

⁵ Libya Herald, 'Car explosion in Benghazi – civilian driver killed,' 6 August 2013, <http://www.libyaherald.com/2013/08/06/car-explosion-in-benghazi-civilian-driver-killed/>

Libya Herald, 'Car-bomb defused in Benghazi,' 31 July 2013, <http://www.libyaherald.com/2013/07/31/car-bomb-defused-in-benghazi/>

Libya Herald, 'Car-bomb outside Radisson Blu Hotel,' 30 July 2013, <http://www.libyaherald.com/2013/07/30/car-bomb-defused-outside-radisson-blu-hotel/>

Libya Herald, 'Military police targeted with coordinated car bombs,' 16 July 2013, <http://www.libyaherald.com/2013/07/16/military-police-targeted-with-coordinated-car-bombs/>

Libya Herald, 'Benghazi security patrol targeted by car-bomb,' 2 July 2013, <http://www.libyaherald.com/2013/07/02/benghazi-security-patrol-targeted-by-car-bomb/>; Libya Herald,

of targeted assassinations.⁷ As noted by the Spokesperson for Catherine Ashton, the High Representative of the European Union for Foreign Affairs and Security Policy and Vice-President of the European Commission, those “responsible for violence against the Libyan people, be it shootings or bombings, must be brought to justice to answer for their crimes.”⁸ For precisely this reason, Libya’s government has carried out a mass mobilization of investigative and prosecutorial resources, including the placement of 900 members of the Libyan army’s Special Forces throughout Benghazi.⁹ It has also invited technical assistance by way of British and French forensic teams to work in Tripoli to help Libyan security experts in their work on the recent assassinations and bombings in Benghazi.¹⁰

4. As a direct consequence of the new and urgent priorities arising from the recent situation in Benghazi, the time available to the Libyan Prosecutor-General to devote to the provision of further instructions for the purposes of this Reply was necessarily limited. Mindful of the need to ensure an expeditious procedure in the ICC admissibility proceedings, Libya herewith files a Reply in any event. However, it is likely that further information concerning the development of the

‘Dual bombings in Benghazi confirmed,’ 28 July 2013, <http://www.libyaherald.com/2013/07/28/dual-bombings-in-benghazi-confirmed/>

⁶ Libya Herald, ‘Benghazi police station bombed again,’ 2 August 2013, <http://www.libyaherald.com/2013/08/02/benghazi-police-station-bombed-again-2/> See also, ‘Fourth bomb attack on Benghazi police station – three injured,’ 24 July 2013, <http://www.libyaherald.com/2013/07/24/fourth-bomb-attack-on-benghazi-police-station-three-injured/>

⁷ Libya Herald, ‘Founder of 17 February Coalition assassinated in Benghazi,’ 26 July 2013, <http://www.libyaherald.com/2013/07/26/founder-of-17-february-coalition-assassinated-in-benghazi/>

Libya Herald, ‘Another car bomb in Benghazi,’ 3 August 2013, <http://www.libyaherald.com/2013/08/03/38686/> Libya Herald, ‘Two more assassinations in Benghazi,’ 27 July 2013, <http://www.libyaherald.com/2013/07/27/two-more-assassinations-in-benghazi/>

Libya Herald, ‘Benghazi Air Force Search and Rescue head assassinated,’ 19 July 2013, <http://www.libyaherald.com/2013/07/19/benghazi-air-force-search-and-rescue-head-assassinated/>

Libya Herald, ‘Another senior officer murdered in Benghazi,’ 26 June 2013, <http://www.libyaherald.com/2013/06/26/another-senior-officer-murdered-in-benghazi/> Libya Herald, ‘TV presenter killed in Benghazi,’ 9 August 2013, <http://www.libyaherald.com/2013/08/09/tv-presenter-killed-in-benghazi/>

⁸ ‘Libya: EU HR Ashton concerned by incidents in Benghazi’ 29 July 2013, http://www.eu-un.europa.eu/articles/fr/article_13827_fr.htm

⁹ Libya Herald, ‘900 Special Forces to impose order in Benghazi,’ 3 August 2014, <http://www.libyaherald.com/2013/08/03/900-special-forces-to-impose-order-in-benghazi/>

¹⁰ Libya Herald, ‘French forensic squad to help with Benghazi investigations,’ 29 July 2013, <http://www.libyaherald.com/2013/07/29/french-forensic-squad-to-help-with-benghazi-investigation/>

domestic proceedings will become known in the coming weeks once the situation in Benghazi has settled down. In these circumstances, Libya requests a limited further opportunity to put in additional submissions by Monday 16th September 2013 in order to provide the Chamber with updated material in support of the issues contained in this Reply.

5. Granting this request would be consistent with Articles 17 and 19 of the Rome Statute, which ought to be interpreted in light of the constraints that are likely to be faced by national judicial systems in post-conflict transitional contexts.

III. OBJECT & PURPOSE OF THE STATUTE

6. The Responses raise arguments concerning the object and purpose of the Rome Statute in relation to a number of issues, in particular the burden and standard of proof, the “same conduct” test, the ability and willingness of the Libyan Government to conduct domestic proceedings and the validity of “positive complementarity”. The Libyan Government will therefore address these issues below.
7. As a preliminary issue, contrary to the Prosecution’s précis of the Libyan Government’s submissions, the Government does not assert that the unqualified preservation of state of sovereignty, or the “right of national prosecution at all cost”, is the goal underlying the Libyan Government’s position.¹¹ Rather, the goal of the Rome Statute (and of the Libyan Government, acting within its own jurisdiction) is to end impunity in relation to international crimes. As distinct from the regime applicable in the *ad hoc* tribunals’ where primacy-based jurisdiction was applicable, the Rome Statute was drafted in a manner that recognised that the most effective means of ending impunity is for domestic jurisdictions to carry out prosecutions.
8. For this reason, as the Libyan Government has contended, the effect of the Rome Statute is to protect the sovereign right to conduct criminal proceedings in

¹¹ Prosecution Response, paras. 46, 47.

respect of crimes which are, in substance, within the jurisdiction of the ICC, provided that those proceedings are genuine. Due deference to the sovereign right of states to conduct genuine criminal proceedings is widely regarded as the “cornerstone” of the Statute “without which there would have been no agreement” among negotiating States at the Rome Conference.¹² Those states understood that “the underlying premise of the complementarity regime was to ensure that the Court did not interfere with national investigations or prosecutions except in the most obvious cases.”¹³ This is not a mere concession to the demands of states. It was at the core of the object and purpose of the Rome Statute and was part of the draft Statute from its earliest days.

9. During the negotiations, delegates expressed the view that the Statute is based on a “strong presumption in favour of national jurisdiction”.¹⁴ The complementarity principle has been described in ICC jurisprudence as “reinforc[ing] the principle of international law that it is the sovereign right of every State to exercise its criminal jurisdiction [...]”.¹⁵ The Appeals Chamber has recognized the Statute’s “presumption in favour of domestic jurisdictions”¹⁶

¹² See e.g. S. A. Williams, “Issues of Admissibility, Article 17”, in O. Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court, Observer’s Notes, Article by Article*, (NOMOS, Baden-Baden, 1st ed., 1999), p. 392, para. 20.

¹³ John T. Holmes, ‘Complementarity: National Courts versus the ICC’, in Antonio Cassese, Paola Gaeta, John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary, Volume I* (OUP, Oxford, 2002), 667 at 675.

¹⁴ See e.g. M. Cherif Bassiouni, *Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute from 1994-1998* (Vol. 2, Ardsley, NY: Transnational Publishers, 2005), at 50-51.

¹⁵ *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta & Mohammed Hussein Ali*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, ICC-01/09-01/11 OA, 20 September 2011, (Dissenting Opinion of Judge Anita Ušacka), (“Kenya Admissibility Appeal Decision, Dissenting Opinion”) para. 19.

¹⁶ *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta & Mohammed Hussein Ali*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, ICC-01/09-01/11 OA, 30 August 2011, (“Kenya Admissibility Appeal Decision”) para. 43.

which is apparent in the Rome Statute itself,¹⁷ as well as in other jurisprudence,¹⁸ and throughout the negotiating history of the Statute.¹⁹

10. Accordingly, the core rationale of the Statute is putting an end to impunity *through* carrying out of domestic proceedings, and – where there will be no genuine domestic proceedings – through carrying out international proceedings. As noted, this was not simply a concession to the *realpolitik* of treaty negotiations, but a reflection of the insight that the ICC alone cannot end impunity, nor should it aim to do so. This is due, in part, to the size of the task, but more significantly to the value of pursuing, where possible, post-atrocity justice *within the society affected*. The Court must give effect to the Statute’s “strong presumption in favour of national jurisdictions” by interpreting article 17 reasonably and flexibly in order to enable, rather than defeat, domestic proceedings.

IV. BURDEN & STANDARD OF PROOF

The Prosecution argues that the burden of proof is on Libya in relation to both aspects of the admissibility assessment: (i) the “same case” and; (ii) the “willingness” and “ability” tests.²⁰ The Libyan Government contends that, whilst it bears the burden of proof in respect of the first limb, the standard of proof is the balance of probabilities. In respect of the second limb the Libyan Government contends that the burden is on the party alleging that the sovereign domestic criminal process is vitiated by unwillingness or inability, and that the standard of proof is concomitant with the severity of that allegation.

¹⁷ Article 17 specifically refers to preambular paragraph 10 and article 1 of the Statute, highlighting the significance of the principle of complementarity. In preambular paragraph 10, States parties: “[e]mphasiz[e] that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions”. Article 1 further provides that the Court “shall be complementary to national criminal jurisdictions”.

¹⁸ The complementarity principle has been described in ICC jurisprudence as “reinforc[ing] the principle of international law that it is the sovereign right of every State to exercise its criminal jurisdiction [...]” (Kenya Admissibility Appeal Decision, Dissenting Opinion, para. 19.) See also, Kenya Admissibility Appeal Decision, para. 43.

¹⁹ See e.g. M. Cherif Bassiouni, *Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute from 1994-1998* (Vol. 2, Ardsley, NY: Transnational Publishers, 2005), at 50-51.

²⁰ Prosecution Response, para. 16.

11. The jurisprudence relied upon by the Prosecution merits close attention. To the limited extent that it is relevant to the present situation, it supports the Libyan Government's position. In the decision in *Prosecutor v. Bemba* to which the Prosecution refers,²¹ Trial Chamber III noted, first, that "[t]he Rome Statute framework does not expressly provide where the burden of proof lies on an admissibility or abuse of process application, or to which standard".²² It then makes clear that the analysis then conducted in that case applies to challenges to admissibility *by the accused*.²³ In the decision from *Prosecutor v. Ruto, Kosgey and Sang* to which the Prosecution refers,²⁴ the Chamber finds that a state bears the burden of proof because "it is an essential tenet of the rule of law that judicial decisions must be based on facts established by evidence" and that "[p]roviding evidence to substantiate an allegation is a hallmark of judicial proceedings [...]"²⁵

12. The Libyan Government takes no issue with the burden of proof being imposed upon the accused when he/she makes an admissibility challenge. The assertion of inadmissibility is of an entirely different character when made by an accused person, rather than a state, for the following reasons.

13. As noted in the OTP's own Informal Expert Paper, the allocation of the burden of proof may often depend, in effect, upon the party alleging bad faith, or departing most significantly from the *status quo*.²⁶ As a consequence of

²¹ Prosecution Response, para. 17, referring to *Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision on the Admissibility and Abuse of Process Challenges", ICC-01/05-01/08-802, 24 June 2010, ("Bemba Admissibility Decision") paras. 201-202.

²² *Ibid*, para. 201.

²³ *Ibid*: "However, the compelling logic of the situation is that *should an accused* challenge the admissibility of the case under Article 19(2)(a) of the Statute or argue that its continuation amounts to an abuse of the process of the Court, it falls to him to establish the facts and other relevant matters that are said to support the argument" (emphasis added).

²⁴ Prosecution Response, para. 17, referring to Kenya Admissibility Appeal Decision, para. 62.

²⁵ Situation of Uganda, "Judgment on the appeals of the Defence against the decisions entitled 'Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06'", ICC-02/04-179 (OA) and ICC-02/04-01/05-371 (OA 2), 23 February 2009, para.36 (cited in Kenya Admissibility Appeal Decision, para. 62).

²⁶ Informal expert paper: "The principle of complementarity in practice", ICC-01/04-01/07-1008-AnxA, 30 March 2009, fn. 17, Annex 5.

complementarity, whenever the ICC initiates or maintains criminal proceedings, it does so on the basis that the domestic jurisdiction is not conducting any criminal process or is conducting one that is not genuine. However, the launching of an ICC investigation does not, *of itself*, have any impact upon the legal validity of sovereign acts of a state: *only the Chamber's determination of the issue of admissibility does so*. The existence of the opportunity for a state to make an admissibility challenge means that any ICC criminal investigation is entirely contingent upon the results of a future challenge.

14. The importance of this cannot be overstated. Until an admissibility challenge is made, the state concerned has given no indication as to the existence of a domestic criminal process. Of course, a state could simply acquiesce in the continuation of the international criminal process. For this reason, the Libyan Government accepts that it bears the burden of asserting the existence of a domestic criminal process that covers the same case. The possibility of effectively conceding admissibility by acquiescence means that the *status quo* does not entail a domestic process in the absence of any admissibility challenge by the state.²⁷

15. However, once a state has launched an admissibility challenge and met the burden of proof as regards the first step thereof, a new *status quo* has arisen, whereby there is no acquiescence and any finding of admissibility must entail a finding that the domestic process is vitiated by unwillingness, inability, or lack of genuineness. The starting point in respect of this burden is the general principle of international law that the sovereign acts of a State within its domestic jurisdiction are presumed to be valid unless otherwise established.²⁸ It must be emphasised, in respect of the abovementioned ICC jurisprudence observing that “judicial decisions must be based on facts established by

²⁷ Of course, if the ICC reaches a verdict, the domestic jurisdiction is precluded from exercising jurisdiction in respect of the case concerned, as a result of the *ne bis in idem* principle. This underlines a point made below, that the *ne bis in idem* principle operates through the verdict. See *infra* section V.B.3 (b).

²⁸ See Bin Cheng, *General Principles Of Law As Applied By International Courts & Tribunals* 305 (1953).

evidence”, that the need for establishment of facts by evidence applies only to facts not within the *status quo*. There is no need to present evidence to establish the legal *status quo* – i.e., that which, in the absence of any evidence being presented, a tribunal would have to find *because it is already the case*. The Appeals Chamber’s finding that “states have the primary responsibility to exercise criminal jurisdiction”²⁹ can only mean that, once a state has established the existence of a domestic process (in respect of the same case), the exercise of criminal jurisdiction at the national level is the *status quo*. As set out above, this is also the reality of the object and purpose of the Rome Statute – contrary to the Prosecutor’s suggestion that a legal presumption in favour of domestic proceedings would run counter to the “*raison d’être* of complementarity”.³⁰

16. It follows from the role that the *status quo* plays in orientating the burden of proof that the standard of proof in international law is, as reflected in the jurisprudence of the ICJ, at a “level of certainty appropriate to the seriousness of the allegation”.³¹ Judge Shahabuddeen has expressed the view that “the standard of proof varies with the character of the particular issue of fact [and a] higher than ordinary standard may, for example, be required in the case of a charge of exceptional gravity against a State”.³²

17. At the high end of the spectrum, “claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive”.³³ In the *Corfu Channel* case, the UK’s allegation that certain minefields had been laid with the connivance of the Albanian government required a “high degree of certainty” and the ICJ rightly rejected evidence “falling short of conclusive

²⁹ Kenya Admissibility Appeal Decision, para. 36.

³⁰ Prosecution Response, para. 18.

³¹ This principle is reflected, for example, in the *Case Concerning Application of the Genocide Convention (Bosnia and Herzegovina v. Yugoslavia)* (2007) ICJ, para. 210, as described below.

³² *Maritime Delimitation and Territorial Questions case (Qatar v. Bahrain)* (1995) ICJ 6, 63 (dissenting opinion of Judge Shahabuddeen).

³³ *Case Concerning Application of the Genocide Convention (Bosnia & Herzegovina v. Yugoslavia)* (2007) ICJ, para. 209.

evidence”.³⁴ Allegations of bad faith require a very high threshold of proof. The Iran-US Claims Tribunal, for example, has held that “if reasonable doubts remain, such an allegation [of bribery] cannot be deemed to be established”.³⁵ Another Iran-US Claims Tribunal decision held that allegations of forgery “must be proven with a higher degree of probability [...] the proper standard of proof [being] “clear and convincing evidence””.³⁶ The Eritrea-Ethiopia Claims Commission similarly held that the evidentiary “bar should be set very high” – requiring “clear and convincing evidence” – because of the “seriousness” and “gravity” of the allegations.³⁷

18. A finding of lack of genuineness or of unwillingness, amounts to a finding, at the very least, that is equivalent to a claim of bad faith, especially when it follows a finding that there is a national proceeding. The issue of inability is no different in this regard.
19. An allegation that a State has failed to exercise jurisdiction over crimes within the jurisdiction of the Court is comparable to the Applicant’s claim in the *Case Concerning Application of the Genocide Convention*, “that the Respondent has breached its undertakings to prevent genocide and to punish and extradite persons charged with genocide”.³⁸ In that case, and with regard to that allegation, the ICJ required “proof at a high level of certainty appropriate to the seriousness of the allegation”.³⁹
20. The fact that this matter is being heard before a criminal court does nothing to change the reality that it concerns, at its core, the legal relationship between the state of Libya and the International Criminal Court as an international organisation. Any attempt to assert that the burden of proof is on the Libyan

³⁴ *Corfu Channel Case (UK. v. Albania)*, (1949) ICJ, p. 17.

³⁵ *Oil Field of Texas, Inc v Islamic Republic of Iran*, Award No 258-43-1 (8 October 1986), 12 Iran-US CTR 308, para. 25.

³⁶ *Dadras International et al and the Islamic Republic of Iran et al*, Award No 567-213/215-3 (7 November 1995), 31 Iran-US CTR 127, para. 162.

³⁷ *Prisoners of War Eritrea’s Claim 17*, Partial Award (1 July 2003), paras. 45–47.

³⁸ *Case Concerning Application of the Genocide Convention* ICJ (2007), para. 210.

³⁹ *Ibid*

Government to prove the validity of its domestic criminal processes because it has the best access to the evidence concerned⁴⁰ is a distraction from the legal principle at stake. Accepting this argument would allow the ICC to exercise jurisdiction on the basis of mere expedience as to access to evidentiary material, without regard to legal principle.

V. THE SAME CASE: SCOPE OF “SAME CONDUCT” REQUIREMENT

21. The Prosecution makes repeated reference to prior jurisprudence indicating that a case is admissible only if the “national proceedings encompass both the person and the conduct which is the subject matter of the case before the Court”.⁴¹ It notes, as regards the issue of “conduct”, that domestic proceedings must cover “*substantially* the same conduct as alleged in the proceedings before the Court”.⁴² The Prosecution repeatedly invokes this uncontested law in support of the assertion that the Libyan Government’s approach to the meaning of “substantially the same conduct” is too broad. To be clear, there is no dispute that the “substantially the same conduct” test is applicable.

22. The Prosecution argues that the Libyan Government’s approach to the “case” and “conduct” is too broad⁴³ – indeed, so broad as to confuse the distinction between “case” and “situation”.⁴⁴ The Prosecution Response falls into error in two principal ways. First, it takes an erroneous view of the object of inquiry: what is meant by the term “case”, and specifically the term “conduct” as a constituent part of a “case”. Second, it errs as to the requisite *level of sameness* of conduct: both in general, and specifically in the context of a domestic investigation.

⁴⁰ See, for example, Prosecution Response, para. 20; Prosecution Additional Observations, para. 11.

⁴¹ Prosecution Response, paras 30, 31.

⁴² Prosecution Additional Observations, para. 11, 27 referring to Gaddafi Admissibility Decision, para.76; Kenya Admissibility Appeal Decision, para.39. (emphasis added).

⁴³ Prosecution Response, paras 21, 26.

⁴⁴ *Ibid*, para. 21.

A. Constituent elements of 'conduct'

23. The Prosecution makes a number of arguments that introduce the concept of “incidents” as an element of the meaning of “conduct”. The Prosecution argues that “case” (and therefore, “conduct”) “should [...] be understood as incident-specific”.⁴⁵ “Conduct”, the Prosecution variously contends, refers to “the underlying event, incident and circumstances”;⁴⁶ “facts occurring during specific incidents”;⁴⁷ and “facts or acts related to a given event or incident”.⁴⁸ The Prosecution asserts “incident” means “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”.⁴⁹
24. Although somewhat opaque, the Prosecution’s argument seems to be that the core of the same conduct test is whether the same *events* are covered. It is submitted that this would be wrong, both in the specific context of the present case, and in relation to the law of complementarity more generally.
25. The specific context of the present case is apparent from the Arrest Warrants pertaining to Saif Al-Islam Gaddafi and Mr. Al-Senussi, as well as the Article 58 Decision.⁵⁰ With regard to the Gaddafi case, the Chamber has recognised that

*[t]he [Gaddafi] Warrant of Arrest does not refer to specific instances of killings and acts of persecution, but rather refers to acts of such a nature resulting from Mr Gaddafi’s use of the Libyan Security Forces to target the civilian population which was demonstrating against Gaddafi’s regime or those perceived to be dissidents to the regime.*⁵¹

⁴⁵ *Ibid*, para. 33, referring to Admissibility Challenge, paras 69, 70.

⁴⁶ *Ibid*, para. 35.

⁴⁷ *Ibid*, paras 23, 27, 34.

⁴⁸ *Ibid*, para. 36. There are further formulations throughout the Prosecution’s submissions: see Prosecution Response, paras 25, 30, 36.

⁴⁹ Prosecution Additional Observations, para. 14.

⁵⁰ Prosecution Response, para. 24; “Decision on the ‘Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al- Senussi’”, 27 June 2011, ICC-01/11-01/11-1.

⁵¹ Gaddafi Admissibility Decision, para. 80 (emphasis added).

26. The Chamber also held that “the Article 58 Decision includes a long, *non-exhaustive list of alleged acts* of murder and persecution committed against an identified category of people within certain temporal and geographical parameters”,⁵² and that “the events expressly mentioned in the Article 58 Decision do not represent unique manifestations of the form of criminality alleged”⁵³ but were, rather “*samples of a course of conduct*”.⁵⁴ The Chamber also found that:

*“[I]n the circumstances of the case at hand and bearing in mind the purpose of the complementarity principle, the Chamber considers that it would not be appropriate to expect Libya’s investigation to cover exactly the same acts of murder and persecution mentioned in the Article 58 Decision.”*⁵⁵

27. The Chamber noted that assessing whether an investigation covers the “same conduct” as another entails determining whether the domestic investigation addressed Mr. Gaddafi’s “[use of] 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”.⁵⁶ This, the Chamber makes resoundingly clear, is the conduct in relation to which the admissibility assessment poses the question of substantial identity. Notably, the core of this is Mr. Gaddafi’s conduct in relation to a non-specific group of events. The same reasoning applies to Mr. Al-Senussi: the warrant of arrest does not refer to specific instances, and any reference to specific incidents in the Article 58 Decision is non-exhaustive.

28. This is indicative of the meaning of “conduct”, not only for the purposes of the *Gaddafi* and *Al-Senussi* cases, but for the purposes of article 17 more generally. The notion of “incident” is not relevant *qua* conduct, but rather because whether the same incidents are addressed by a criminal process (whether investigation,

⁵² *Ibid*, para. 81 (emphasis added).

⁵³ *Ibid*, para. 82, referring to Warrant of Arrest, p. 4.

⁵⁴ *Ibid*.

⁵⁵ *Ibid*, para. 83.

⁵⁶ *Ibid*, para. 83.

trial, or verdict) is an *indication* of whether the same conduct is addressed by it. It is submitted that “time, space and subject matter” are relevant, but it is the time, space and subject matter *of the accused’s alleged conduct* that matters. It is submitted that the focus on “conduct” means that there is greater latitude in relation to the degree of sameness needed as regards the incidents covered by a domestic investigation.

B. Degree of ‘sameness’: meaning of “substantially the same”

29. The Prosecution argues that the law concerning the parameters of an investigation as set out by the Libyan Government would permit an overly permissive approach.⁵⁷ Even if the “substantially the same conduct” test did refer primarily to incidents (which, as set out above, it does not), the Prosecution’s submissions entail an error in relation to the *level* of sameness needed.
30. Clearly, the requirement is not that the domestic process mirrors precisely that which the ICC would do in the same circumstances. The word “substantially” reflects this. The Prosecution asserts 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”.⁵⁸ This is a distinction without a difference. The mere assertions that the Libyan Government’s submissions “undermine [...] the purpose of the test altogether”⁵⁹ fails to provide any further substantiation.
31. The Prosecution’s objection to the Libyan Government’s position in relation to the requisite degree of sameness relies upon the following: (i) “time, space and subject matter” as the relevant considerations;⁶⁰ (ii) the drafting history of the Rome Statute;⁶¹ (iii) the object and purpose of the Rome Statute;⁶² (iv) the

⁵⁷ Prosecution Response, paras 21, 26. Indeed, the Prosecution appears, at points, to assert that the domestic process must deal with each and every incident that is covered by the ICC’s investigation.

⁵⁸ Prosecution Response, para. 32.

⁵⁹ *Ibid.*

⁶⁰ Prosecution Additional Observations, para 18.

⁶¹ Prosecution Response, paras 44, 45.

ordinary meaning of the word “case”;⁶³ and (v) the need for consistency across the various provisions of the Rome Statute which refer to the term “case”.⁶⁴ Each argument will be addressed below.

1. *Time, space & subject matter*

32. As noted above, the Libyan Government takes no issue with the Prosecution’s argument that the relevant considerations are time, space and subject matter.⁶⁵ However, this does not speak to the issue of the requisite *degree* of sameness. The material questions are how similar in time, space, and subject matter must the conduct be (in order to be “substantially the same”)?

2. *Drafting history*

33. The Prosecution’s arguments ostensibly concerning the drafting history amount to two submissions. First, there is simply a re-assertion of its arguments concerning the natural and common meaning of “case”⁶⁶ (addressed below). Second, there is reference to “case” being narrower than “situation”. The Libyan Government does not seek to contest this clear point, but nor does it impact upon the account of the law set out in the Al-Senussi Admissibility Challenge. It is readily apparent that the Libyan investigation is more specific than the parameters of the “situation in Libya” for the purposes of the ICC.⁶⁷

3. *“Conduct” cannot have a homogenous meaning in all situations*

34. The Prosecution and the OPCV argue that the Statute “must be interpreted in a manner which results in a coherent, rather than an internally inconsistent, system.”⁶⁸ The Prosecution asserts that the meaning of “case”, and of “conduct” in particular, must be the same in all contexts. As to the substance of this

⁶² *Ibid*, paras 46, 47.

⁶³ *Ibid*, paras 34-36.

⁶⁴ *Ibid*, paras 37-43.

⁶⁵ *Ibid*, para. 23.

⁶⁶ *Ibid*, paras 44, 45.

⁶⁷ See UN Security Council Resolution 1970, S/RES/1970 (2011).

⁶⁸ Prosecution Response, para. 37, referring to *Prosecutor v Thomas Lubanga Dyilo*, “Decision on the confirmation of charges”, ICC-01/04-01/06-803, 29 January 2007, para. 284; *Prosecutor v. Jean-Pierre Bemba Gombo*, “Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute”, 3 March 2009, ICC-01/05-01/08, paras 32-36. See also OPCV Response, paras. 29-33.

singular meaning, the Prosecution refers to the “ordinary meaning” of the word “case”, as well as to provisions of the Rome Statute that mention it.⁶⁹

35. Whilst the Libyan Government takes no issue with the argument that article 17 must “be interpreted in light of the Statute as a whole”,⁷⁰ it is submitted that the Prosecution Response errs in its argument that “case must have a uniform meaning”. This assertion fails to take into account the stage that the domestic process has reached and how this impacts upon the specificity of a “case”. The examples invoked by the Prosecution refer to a case *when it has reached the trial stage*.⁷¹ The Prosecution also fails to take account of the fact that the ICC’s own criminal process is also at the investigation stage.

36. As the Chamber has recognised, comparison of the domestic Libyan case to its international counterpart occurs at a point before the investigation is completed, and before it has progressed to trial.⁷² Article 17(1)(a) refers, *inter alia*, to a case which “is being investigated”.

37. Article 17(1)(a) is an obligation which bites on a process which is inherently dynamic, in contrast with article 17(1)(b), which refers to situations where the case “has been investigated”. An on-going investigation is necessarily conducted in progressive steps and stages. Nothing in article 17(1)(a) suggests that the case “being investigated” must be at an advanced stage where the scope of the case has been categorically determined.

38. As investigations progress, with a view to preparing a criminal trial, the issues are narrowed down and refined, and certain pieces of evidence, or certain allegations, may be discarded as lacking in supporting evidence, or unwise or improper to pursue for a diverse range of reasons. By definition, judgments are

⁶⁹ Prosecution Response, paras. 34, 37.

⁷⁰ *Ibid*, para. 38.

⁷¹ *Ibid*, para. 35.

⁷² The Chamber has clarified that the correct approach is to “assess the facts and evidence presented by Libya, with a view to concluding whether at the time of the proceedings there is an *on-going investigation* or prosecution of the case at the national level”, Gaddafi Admissibility Decision, para. 89 (emphasis added).

made as to the variation, expansion or reduction in the scope of the case. This includes which incidents are to be covered. The specificity involved in the term “case” increases as progress is made from the inception of an investigation to commencement of trial. At the point of investigation, there remains the possibility of considerable change in the process of an investigation before the scope of the trial is determined. The subject matter of an investigation – the ‘case’ being investigated – must necessarily be less specific than that which is put before a trial court. Obviously, the scope of the domestic case becomes increasingly clear as the investigation progresses,⁷³ and at the point of trial it is necessarily more specific and less subject to change.

39. The rules pertaining to indictments are indicative of the requirements of specificity of a case *when it goes to trial*. Sufficient specificity at the point of trial, in this regard, entails that “[t]he charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in an indictment so as to provide notice to an accused”.⁷⁴
40. At that point in an investigation when the case can be formulated sufficiently specifically to produce an indictment is very likely to mean that the core investigation is nearing completion and there is a progression to trial. Patently, a criminal process at an earlier stage will necessarily have *not* have defined the scope of the case, as it must at this point or at the actual commencement of trial.
41. Of course, the domestic investigation can be informed by indications of what the international investigation would include. However, the fact that the international investigation has not been completed means that it must be viewed in the context of the stage it has reached – with the concomitant potential for

⁷³ See e.g. Mark Klamberg, *Evidence in international criminal trials: confronting legal gaps and the reconstruction of disputed events* (Martinus Nijhoff Publishers 2013), at 108-11- concerning the distinctions of evidence required before the ICC during its investigation phase and at trial phase.

⁷⁴ *Karera* Appeal Judgment, para. 292. See also *Seromba* Appeal Judgment, para. 27 ; *Ntagerura et al.* Appeal Judgment, para. 25 ; *Nahimana et al.* Appeal Judgment, para. 322; *Ndindabahizi* Appeal Judgment, para. 16 ; *Muvunyi* Appeal Judgment, para. 18; *Gacumbitsi* Appeal Judgment, para. 49; *Muhimana* Appeal Judgment, paras. 76, 167, 195.

discretionary decisions to be made as it proceeds – such that it is an imperfect indicator of what the ICC trial will eventually include.

42. The ICC must not determine a case to be admissible merely because it has not yet reached the level of specificity that is commensurate with trial readiness. The inquiry must be whether the investigation concerned *could* lead to a trial for the same matters as those to which the ICC investigation (noting, of course, that if this did not eventuate, the ICC could always then act). For this reason, the Libyan Government in the Al-Senussi Admissibility Challenge advanced the argument that the concept of “criminal transaction” provided an appropriate approach to the assessment of “substantially the same conduct” in the context of an investigation. Failure to apply this approach could convert the ICC’s jurisdiction to “a form of *de facto* primacy in contradiction to the object and purpose of the Statute”.⁷⁵
43. Assessing whether the domestic investigation concerned *could* lead to a trial for the same matters as those to which the ICC investigation entails affording the domestic investigation a ‘margin of appreciation’, the elements of which include the following.
44. First, there must be a presumption of validity and good faith in relation to the choices made in a domestic investigation as regards which incidents to consider and pursue.
45. Second, there must be a refusal to find that the domestic investigation is not pursuing the same case merely because it is proceeding more slowly or less efficiently than the ICC case. Indeed, the drafters of the Statute enunciated this very point.⁷⁶

⁷⁵ Al-Senussi Admissibility Challenge, para. 16.

⁷⁶ See John T. Holmes, ‘Complementarity: National Courts versus the ICC’, in Antonio Cassese, Paola Gaeta, John R.W.D. Jones (ed.), *The Rome Statute of the International Criminal Court: A Commentary, Volume I* (OUP, Oxford, 2002), 667 at 674.

46. The *Kenya Decision* held that the words “is being investigated” merely “signify *the taking of steps* directed at ascertaining whether those suspects are responsible for that conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses.”⁷⁷

47. There is further support for the Libyan Government’s description of the law in article 19(5) of the Statute, which requires that “[a] State [...] shall make a challenge *at the earliest opportunity*.” Encouraging challenges “at the earliest opportunity” “is in the interest of the Court and the proper administration of justice because it will avoid potentially lengthy and expensive proceedings before the Court that may have to be stopped at a later stage because the case has become inadmissible”.⁷⁸ This leaves no doubt that article 17(1)(a) cannot require that a domestic investigation be at the same level as it would be at trial. A challenge at the “earliest opportunity” clearly requires only minimal evidence of an on-going investigation relating broadly to the “same conduct” – including “discrete aspects” thereof – rather than anything more stringent.

48. Article 17(1)(a) must not be interpreted such that a domestic investigation in its early stages – whether under Libyan or other national procedures – *could never* satisfy it. Defeating national jurisdictions in such circumstances does nothing to further the object and purpose of the Statute to “put an end to impunity”. To the contrary, it creates the appearance of the Court acting precipitously with regard to genuine domestic proceedings conducted by States acting in good faith.

a) Article 17(1)(a), (b), and (c)

49. The Prosecution’s argument in relation to the interpretation of paragraphs (a) to (c) of article 17(1) recognises that the three situations described in those paragraphs “cover a State’s complete range of activities with regard to criminal procedure from the opening of an investigation until the final judgment”.⁷⁹

⁷⁷ Kenya Admissibility Appeal Decision, para. 40 (emphasis added).

⁷⁸ Kenya Admissibility Appeal Decision, Dissenting Opinion, para. 21.

⁷⁹ Prosecution Response, para. 37, referring to Triffterer commentary (article 20), at 34.

However, the Prosecution appears to invoke this in support of its assertion that the requisite level of specificity in terms of a case is the same.

50. The fact that the provisions must be read systematically supports the Libyan Government's approach. At the point of investigation, as noted above, there remains the possibility of considerable change in the case before it reaches the trial stage.

b) *Article 20(3) & ne bis in idem*

51. The Prosecution argues that there is a link between the provisions pertaining to the *ne bis in idem* principle (art. 20(3)), and refers to ICC jurisprudence in this regard.⁸⁰ The Prosecution connotes the relationship as – a “clear interplay” – between the provisions concerning the principles of complementarity and of *ne bis in idem*.⁸¹ The Libyan Government takes no issue with this – either in the Admissibility Challenge or in the present filing. Indeed, this link is of profound importance in its support for the description of the law of complementarity as set out by the Libyan Government. Nor does the Libyan Government take issue with the observation that the function of article 20, and of the complementarity principle, is a guarantor of individual rights in criminal proceedings and as an orientating principle in the distribution of competencies between the ICC and the domestic jurisdiction.⁸²

52. The key point that the Prosecution misses is the way in which article 20(3) operates *in relation to investigations*. The *ne bis in idem* principle is relevant to all aspects of the criminal justice process, in order to prevent abuse through multiple investigations or prosecutions relating to the same persons for the same crimes. However, its effect – throughout the criminal justice process – always operates *through the verdict*. To illustrate this point, the reason for prohibition of a trial of the same person for the same crime is the fact that a verdict has already been reached. It should be emphasised that the Libyan Government does not

⁸⁰ *Ibid*, para. 31, referring to Kenya Admissibility Appeal Decision, para. 40; fn. 81.

⁸¹ *Ibid*, para. 38.

⁸² *Ibid*, para. 39.

hereby seek to contend that a domestic criminal process is permissible simply because there has been no completed ICC trial. The argument is, rather, that, where the international criminal process has not been completed, the relevance of *ne bis in idem* to the complementarity assessment involves, first, a projection *forward* from the current stage of the ICC investigation to gain an understanding of which conduct a verdict would be likely to address. This provides the comparator for the domestic process in a manner that properly takes into account the stage reached by the international criminal process. The second step is a projection, *back* from this view of the verdict – the comparator – to the criminal investigation at the domestic level, in order to assess whether that investigation could lead to a verdict pertaining to the same crimes as the hypothetical international verdict. As a result of the inherent nature of an investigation – and discretionary decisions made during the investigative process, the discovery of new evidence, an assessment that certain evidence is unreliable, etc. – each of the two projections involve a degree of uncertainty.

53. Whilst *ne bis in idem* underlies the assessment of whether a domestic criminal process addresses substantially the same conduct as an international counterpart, the assessment must be undertaken in a manner appropriate to the stage reached at the time of the admissibility assessment by *both the domestic and the international processes*. The question must be whether the co-existence of both the international and the domestic process *could* violate the principle of *ne bis in idem*. Only where the domestic prosecution has reached a verdict could this question be whether it does violate that principle.

c) *Article 90(1)*

54. The Prosecution also argues that there is a link between the provisions pertaining to the co-operation regime, in particular the approach taken to

requests for transfer pertaining to the “same conduct” (art. 90(1)), and to ICC jurisprudence concerning the existence of this link.⁸³

55. Once again, the approach must depend upon the stage that the domestic proceedings (and indeed, for the reasons set out above, the ICC proceedings) have reached. The question to which the provisions concerned relate is how to administer the system of co-operation with the court such that the principle of complementarity is upheld. In this regard, the arguments outlined above are simply repeated here.

56. In any event, the Prosecution’s submissions go no further than to rehearse – this time in the context of state co-operation – the bare same person, same conduct test.⁸⁴ The mere existence of this test does not support the Prosecution’s arguments, whether in the context of the state co-operation regime or any other.

d) Article 90(7)

57. Article 90(7) applies in the following situation

Where a State Party which receives a request from the Court for the surrender of a person also receives a request from any State for the extradition of the same person for conduct other than that which constitutes the crime for which the Court seeks the person’s surrender

58. Plainly the results of applying a test which refers to the criminal process of the same person, but different conduct does not provide any assistance in determining the results of applying the test of same person and same conduct. Article 90(7) is about sequencing of prosecutions to ensure that the most serious allegation is dealt with first and, to the extent that the principle of *ne bis in idem* blocks any prosecution, it blocks the less serious prosecutions.

e) Rule 51

59. The Libyan Government agrees entirely with the Prosecution’s submissions as to the relevance of Rule 51 – that the prosecution of similar conduct may well

⁸³ *Ibid*, para. 31, referring to Kenya Admissibility Appeal Decision, para. 40.

⁸⁴ *Ibid*, paras. 40, 41.

provide cogent evidence of a state's willingness. The Prosecution appears to refer to this provision in order to characterise the Libyan Government's submissions as suggestive that any prosecution of the same person would fulfil the same person, same conduct test. The Libyan Government does not invoke Rule 51 for this purpose.

60. Plainly, the effect of Rule 51 is that the existence of genuine prosecutions of different conduct may constitute valuable evidence in the assessment of the second step of the admissibility assessment: whether the state is able and willing to conduct a genuine investigation.

f) Articles 89(4) and 94

61. Similarly, the Prosecution's reference to article 89(4) and 94 appears to be based upon the assertion that the Libyan Government attempts to deny the possibility of the existence of "a crime different from that for which surrender to the [International Criminal] Court is sought", or "a case different from that to which the [ICC's co-operation] request relates".⁸⁵

62. Article 89(4) is concerned with consultation after agreement to transfer, in respect of a different case, and article 94 relates to postponement for the purposes of completion of domestic investigations, in respect of a different case.

VI. THE SAME CASE: EVIDENTIAL SCOPE OF "SAME CONDUCT" REQUIREMENT

A. Introduction

63. As outlined above, although not necessary to show this level of detail to satisfy the same case test, the Government maintains that the Libyan investigation includes each of the incidents of murder and persecution taking place in Benghazi from 15 February until at least 20 February 2011 which are itemized in the ICC's Article 58 Decision. The fact that there is sufficient identity between the domestic investigation and the ICC investigation such as to conclude that "the same case" is being investigated in Libya and in the ICC is demonstrated by

⁸⁵ See Prosecution Response, para. 43.

the array of evidential samples which were annexed to the April 2013 Admissibility Challenge together with the evidential materials relied upon as part of the Government's submissions in the Saif Al-Islam Gaddafi admissibility proceedings.⁸⁶ Each of the parties - the OTP, the OPCV and the Defence - have provided submissions on these evidential samples in their Responses which the Government will now briefly reply to in order to assist the Court in determining that the Libyan investigation pertains to the "same case" as the ICC investigation.

B. OTP Response

64. The Government notes that in its Response the Prosecution analyses these evidential samples and concludes that "Libya is investigating nearly all of the incidents covered by the Article 58 Decision ... hence Libya is investigating substantially the same conduct".⁸⁷ Although the Prosecution suggests that there are a few incidents in the Article 58 Decision that are not included in the evidential samples, it determines that "this divergence is not substantial and therefore it does not affect the substantial identity between the two cases".

65. The few incidents which the Prosecution asserts are not included in the samples of evidence provided to date by Libya are the "killing of three demonstrators on 16 February 2011 by Security Forces and the arrest of certain activists between 15 to 17 February 2011". These incidents are said to derive from sub-paragraph 36(i) of the Article 58 Decision ("on 17 February 2011, Security Forces fired automatic machine guns at civilian demonstrators in the Gurji, Ghot al-Sha'al and Fashloun areas, killing several protestors")⁸⁸ and the second part of paragraph 43 of the Article 58 Decision ("activists against the regime of

⁸⁶ See in particular: Annexes to Gaddafi Admissibility Challenge, ICC-01/11-01/11-130 (1 May 2012); Annexes to Gaddafi Further Submissions, ICC-01/11-01/11-258 (23 January 2013); Annexes to Gaddafi Submissions in Reply, ICC-01/11-01/11-293 (4 March 2013); Annex to Gaddafi Notification of Prosecutor-General, ICC-01/11-01/11-306 (28 March 2013).

⁸⁷ Prosecution Response, para 78.

⁸⁸ Footnote 63 to paragraph 36(1) of the Article 58 Decision provides: "Prosecutor's Application, para. 108; LBY-OTP-0008-0075, at 0093-0096 paras. 67-77; LBY-OTP-0005-0182, at 0189 paras. 38-42; LBY-OTP-0005-0248, at 0253 para. 26."

Muammar Gaddafi were arrested, including a journalist and other demonstrators against the Abo Sleem massacre, in Benghazi, Tripoli, Misrata and elsewhere between the 15 and 17 February 2011").⁸⁹ The Prosecution concedes that Libya has provided evidential samples of two cases of arrest and torture of demonstrators on the same dates but that the identity of the victims does not match those in the Prosecutor's investigation.⁹⁰

66. However it should be noted that the names of the victims and / or witnesses concerned in the Prosecution's investigations of these incidents are redacted from the publicly available version of the Article 58 Decision (the only version available to the Government) and the evidence underlying the Prosecutor's investigation was filed on a *Confidential and ex parte* basis before the Pre-Trial Chamber.⁹¹ The Government is placed in the unfair position of making submissions as to whether or not these incidents are covered in the plethora of evidence provided to date without the benefit of the disclosure of these specifics. It is submitted that no adverse conclusion with respect to Libya's investigation and its coverage of these incidents may be drawn absent an order that the Prosecution provide sufficient identifying particulars of these incidents to Libya and the opportunity for further brief submissions.

67. However, for the reasons set out above with respect to the legal test for "same case", Libya submits that it is not necessary, in any event, for the domestic investigation to show an exact correlation of incidents as enumerated in the Article 58 Decision for the Court to be satisfied that the investigation relates to the "same case" as that before the Court. For all these reasons, the Government maintains that the evidential samples presented to date demonstrate that its domestic investigation in respect of Mr. Al-Senussi relates to the "same case" as that before the ICC.

⁸⁹ Footnote 89 to the second part of paragraph 43 of the Article 58 Decision provides: "Prosecutor's Application, para. 130 (ii); LBY-OTP-0005-1005; Prosecutor's Application, para. 130 (iii); LBY-OTP-0005-1257".

⁹⁰ Prosecution Response, footnote 179.

⁹¹ Article 5 Decision, ICC-01/11-01/11-12 at page 1 referring to ICC-01/11-01/11-4-Conf-Exp and its Annexes.

C. OPCV Response

1. *Conduct of the domestic investigation*

68. In its Response, the OPCV asserts that there is a "lack of clarity regarding the start, the progress and the current status of the Libyan investigation" particularly in respect of the concrete investigative steps carried out by the military prosecutor versus those undertaken by the Prosecutor-General's office.⁹² On this basis the OPCV invites the Chamber to "draw the conclusion that no formal investigation existed at the dates indicated by the Libyan Government".⁹³

69. Libya notes at the outset that the OPCV's concerns do not impact upon the core admissibility question regarding the conduct of the domestic investigation, namely, whether it covers the "same case" as that under consideration before the ICC. There is therefore no proper basis contained in the OPCV Response for a finding that no investigation is in existence and that the case is admissible. Accordingly, the matters raised by the OPCV will be dealt with shortly.

70. In terms of the date of commencement of Mr Al-Senussi's investigation, as set out in the Gaddafi admissibility challenge filed on 1 May 2012, the investigation of crimes that may have been committed by Mr Al-Senussi was first initiated on 3 April 2012. As the letters from the Prosecutor-General's Office dated 11 February 2013 make clear, the investigation then commenced in earnest on 9 April 2012.⁹⁴ Thereafter, over two thousand pages of evidence (in the form of witness testimonies and documentary materials) was gathered and compiled by members of the prosecution investigative team.⁹⁵

71. With respect to the concrete investigative steps carried out by the military prosecutor, as it is the Prosecutor General's office which has jurisdiction over the case, any investigative steps taken by the military prosecutor's office before its transfer to the civilian prosecution team is of lesser relevance to the ICC's

⁹² OPCV Response, para. 53-57.

⁹³ *Ibid*, para 57.

⁹⁴ Al-Senussi Admissibility Challenge, Annexes 2 and 3.

⁹⁵ *Ibid*, Annex 2.

admissibility determination. Although the existence of a military investigation is probative of the genuineness of the overall domestic process, as the Prosecutor-General's office has confirmed, and as stated in earlier Governmental submissions,⁹⁶ all of the witness testimonies that are to be relied upon at the domestic trial have been gathered by the civilian investigative team.⁹⁷

72. Prior to the 17 July 2012 Supreme Court decision determining that jurisdiction for prosecuting Mr Al-Senussi's case lay with the civilian authorities, it was intended that any investigative materials obtained by the civilian authorities pertaining to Mr Al-Senussi would eventually be provided to the military prosecutor's office in order to assist with its military case against Mr Al-Senussi.⁹⁸ As jurisdiction for Mr Al-Senussi's case has vested in the Prosecutor General's office since July 2012, the civilian investigative materials gathered will now be relied upon by the Prosecutor-General's team.

2. *Scope of the national investigation*

73. The OPCV additionally asserts that the evidentiary materials provided by the Government "fail to satisfy the specificity requirement as articulated by the Appeals Chamber".⁹⁹ This is because it argues that although they relate to "general aspects of the individual criminal responsibility of Mr Al-Senussi such as the existence of a State policy, the suspect's command over the Security Forces and his essential contribution to the criminal plan" as well as two of the specific incidents in question (the arrests of [REDACTED] and Idriss Al-Mismari and the shooting at demonstrators at the Julyana Bridge),¹⁰⁰ they "overlook the overwhelming majority of acts contained in the Article 58 Decision".¹⁰¹ This submission is made on the basis that the evidence adduced by Libya relating to the Article 58 incidents is contained in "victims' complaints" which it asserts "do not constitute evidentiary material that the crimes alleged therein are indeed

⁹⁶ *Ibid*, para 168.

⁹⁷ *Ibid*, Annex 2.

⁹⁸ Gaddafi Admissibility Challenge, Annex E, page 3.

⁹⁹ OPCV Response, para 62.

¹⁰⁰ *Ibid*, para 63.

¹⁰¹ *Ibid*, para 63.

being investigated, although they may provide basis (*sic*) for subsequent investigations".¹⁰²

74. The OPCV's argument is fundamentally misconceived. There is no substantive distinction between the evidential status of the testimonies that the OPCV has characterised as "victims complaints"¹⁰³ and those that the OPCV describes as "witness statements".¹⁰⁴ The slight difference between these two types of testimonies is one of form - due to resources constraints some are taken on paper with an old Ministry of Justice letterhead from the pre-revolution days (entitled "General People's Committee for Justice") whereas others are taken on paper with the new Ministry of Justice letterhead. All of the evidentiary materials at Annexes 8, 9, 10, 11, 12, 14, 15, 16, 17, 20, 21, 22, 23, 24 and 26 are witness testimonies of individuals compiled through question and answer interrogatory style meetings between the witness and members of the Prosecutor-General's Office (which is an organ of the Ministry of Justice).

75. Accordingly, it is not correct to suggest that the evidence gathered to date in the Libyan investigation overlooks the majority of acts in the Article 58 Decision. The correct position is that the witness statements and other documentary materials pertain both to these individual incidents and to other important aspects of Mr Al-Senussi's individual criminal responsibility such as the existence of a State policy, the suspect's command over the Security Forces and his essential contribution to the criminal plan.

D. Defence Response

76. In its Response, the Defence makes an array of general complaints about the nature of the evidence relied upon by Libya in order to suggest that Libya has failed to submit sufficiently specific and probative evidence to demonstrate that the scope and subject matter of its domestic investigation covers the same

¹⁰² *Ibid*, para 64.

¹⁰³ Al-Senussi Admissibility Challenge, Annexes 14, 16, 17, 20, 21, 22, 23, 24 and 26.

¹⁰⁴ *Ibid*, Annexes 8, 9, 10, 11, 12, 15.

conduct as the ICC investigation.¹⁰⁵ Without referring to a single specific example to substantiate its claims, the Defence generalises that the totality of the documentary evidence submitted to date by Libya: (a) contains no relevant information for the purposes of the admissibility proceedings;¹⁰⁶ (b) is general, vague and lacking in sufficient detail to allow the Chamber to draw conclusions as to the nature and scope of the national investigation;¹⁰⁷ (c) is, to a large extent, the same as that submitted in the Gaddafi admissibility proceedings;¹⁰⁸ (d) is piecemeal and does not explain with any clarity whether and how the national investigation seeks to establish Mr Al-Senussi's responsibility for the conduct underlying the warrant of arrest.¹⁰⁹

77. In addition to these general criticisms of Libya's evidential position, the Defence Response makes lengthy submissions: (a) setting out the legal framework for the "same case" arising from the Pre-Trial Chamber's admissibility decision in the Gaddafi case;¹¹⁰ (b) summarising the subject matter of the Al-Senussi warrant of arrest and Article 58 decision;¹¹¹ (c) describing the Annexes submitted by Libya;¹¹² (d) setting out the procedural history in the Gaddafi proceedings;¹¹³ (e) speculating as to the weight to be accorded to such evidence at trial;¹¹⁴ and (f) complaining that it has received only "heavily redacted" extracts of witness statements and is thus at a disadvantage in commenting on the evidence.¹¹⁵

78. The general nature of these Defence submissions, which are descriptive rather than analytical in character, do not assist the Pre-Trial Chamber in assessing whether or not the precise evidential samples relied upon by the Government to

¹⁰⁵ Defence Response, para 22.

¹⁰⁶ *Ibid*, para 26.

¹⁰⁷ *Ibid*, para 27.

¹⁰⁸ *Ibid*, para 28.

¹⁰⁹ *Ibid*, paras 29-30.

¹¹⁰ *Ibid*, paras 13-14.

¹¹¹ *Ibid*, paras 15-21.

¹¹² *Ibid*, paras 31-36.

¹¹³ *Ibid*, paras 37-38.

¹¹⁴ *Ibid*, paras 40-41.

¹¹⁵ *Ibid*, para 41. This is despite the fact that the Government took care to only redact identifying features of witnesses in the interests of witness protection. The redactions to evidential materials are therefore very limited in nature: see Al-Senussi Admissibility Challenge, para 127.

establish that the Libyan investigation relates to the same case as the ICC investigation. The Defence's comments on the samples of evidence adduced by the Government are in fact confined to only 8 out of 20 pages (or 16 out of 47 paragraphs) of submissions purportedly scrutinising the "case" at hand in the Libyan investigation. These comments are structured according to five categories of documentary materials:

- i. official documents of the Libyan authorities;
- ii. summaries of witness statements;
- iii. extracts of redacted witness statements;
- iv. intercepts; and
- v. other materials.

79. Each category will be dealt with in turn.

1. *Official documents of the Libyan authorities*

80. The Defence submit that Annexes E and F of the Gaddafi Admissibility Challenge of 1 May 2012 (memorandums from the civilian and military prosecution bodies in relation to the scope of their investigations) provide no details as to the investigation of Mr Al-Senussi and Mr Gaddafi.¹¹⁶ This submission is in error. These annexes in fact give specific and probative evidence in relation to the contours of the Libyan investigative proceedings in relation to Mr Al-Senussi and Mr Gaddafi, and at the very least constitute important and relevant contextual evidence demonstrating the nature and seriousness of the crimes with which the domestic investigations are concerned. That is, they indicate that the two defendants are being investigated for mass killings, gravely serious persecutory acts and instances of corruption committed both during the Gaddafi regime and in the course of the 2011 revolution.

¹¹⁶ Defence Response, para 42, bullet point 2.

81. Likewise, Annex I to the 1 May 2012 Gaddafi Admissibility Challenge (a memorandum from the Prosecutor-General's office pertaining to charges) also provides important contextual evidence as to the nature of the charges which are likely to be faced by the defendants in the joint trial of former Gaddafi regime leaders.¹¹⁷ Such charges include killings, torture, misuse of authority, arbitrary detentions and incitement of an array of crimes. This annex also confirms that the evidence collected in the case to date included more than 30 witnesses in addition to telephone and video recordings and other salient documentary evidence.
82. The Defence also suggest, *inter alia*, that Annexes 2-3 and 11 to Libya's further submissions in the Gaddafi Admissibility proceedings of 23 January 2013 also contain no concrete information relating to the case of Mr Al-Senussi.¹¹⁸ Again, this is not correct.
83. Annex 2 (a letter from the Prosecutor General's office dated 15 January 2013) gives details of the confrontation process (which will be applied equally to Mr Al-Senussi and Mr Gaddafi) and also provides details as to the provenance and admissibility of telephone intercept materials relating to both Mr Al-Senussi and Mr Gaddafi.
84. Annex 3 (a Ministry of Justice letter dating 21 January 2013) confirms that the scope of the Gaddafi investigation [whose case will ultimately be joined to that of Mr Al-Senussi] is the same as the ICC investigation with respect to Mr Gaddafi. It also clarifies that Mr Al-Senussi had given a statement to the Prosecutor-General's team in relation to the conduct of Mr Gaddafi.
85. Annex 11 (a plan of action from the Prosecutor-General's investigative team dated 13 January 2013) provides a range of details specifically in relation to the criminal conduct under investigation. This document indicates that Mr Gaddafi and Mr Al-Senussi were intended to be tried together in Libya (in a trial with at

¹¹⁷ Cf. Defence Response, para 42, bullet point 3.

¹¹⁸ Defence Response, para 42, bullet points 4,6-7.

least seven other former members of the Gaddafi regime as their cases related to similar allegations of crimes (including murder and persecution) committed during the revolution. It states: "the investigation showed that, what the country went through was based on systematic general policy used by a group of the previous regime's figures, headed by the accused...Saif Al-Islam Gaddafi...and...Abdullah Mohamed Al-Senussi...and other figures of the previous regime. Their acts constitute a general framework for a set of serious crimes such as mass killings, random killing, looting, sabotage, rape and the spread the spirit of discord and fragmentation of national unity."

86. The Defence finally submits, *inter alia*, that Annexes 2-7 and 28 to the Al-Senussi admissibility challenge of 2 April 2013 do not provide any specific information about the scope and subject matter of the national investigation so as to shed light on the "same case" issue.¹¹⁹ Again, this is not correct.

87. Annex 2 (a letter from the Prosecutor-General dated 11 February 2013) relates to the scale of the investigation and confirms that over 2000 pages of evidentiary material and more than 100 witness testimonies have been gathered to date by the civilian prosecution authorities pertaining to the criminal case against Mr. Al-Senussi.¹²⁰

88. Annex 3 (a letter from the Prosecutor-General's office dated 11 February 2013) names a witness in the case who gives details of events at an air base. More importantly, it includes a list of potential crimes with which Mr. Al-Senussi may ultimately be charged including indiscriminate killing, arbitrary detention and unlawful restriction of liberty thus giving important information about the nature of the conduct under investigation.¹²¹

89. Annex 4 (a transcription of a speech by Abdullah Al-Senussi in Benghazi) in which he calls for "filthy groups" [demonstrators] to be "destroy[ed] ...

¹¹⁹ Defence Response, para 43.

¹²⁰ Cf. Defence Response, para 43, bullet point 2.

¹²¹ Cf. Defence Response, para 43, bullet point 3.

altogether". This piece of evidence is highly relevant to the plan by the Libyan State apparatus and Security Forces (led by Mr. Al-Senussi) to deter and quell, by any means, including the use of lethal force, the demonstrations of civilians that started in February 2011 against Muammar Gaddafi's regime. It is therefore wholly inaccurate to suggest that this document provides "no information about the nature and scope of the domestic investigation".¹²²

90. Annexes 5, 6, 7 and 28 (letters from the Prosecutor General's office dated 11 February 2013, the Supreme Court of Libya dated 12 February 2013 and a Decision of the Prosecutor-General dated 1 May 2011) clarify the names of the investigators in charge of Mr. Al-Senussi's case (at the relevant times) and explain the rationale for the case being handled by the civilian, as opposed to the military, prosecution authorities in Libya [Annexes 6 and 28]. Annex 6 in particular provides important evidence about the conduct being investigated in respect of Mr. Al-Senussi¹²³ in that for the case to be subject to civilian jurisdiction it has to relate to crimes committed by members of the military against the civilian population. If the case had been confined to crimes committed by the military against other members of the military, jurisdiction would have vested in the military prosecutor's office.

91. Accordingly, these evidential materials are of import to the admissibility determination in respect of Mr. Al-Senussi and are substantially probative of the fact that the Libyan investigation pertains to the "same case" as the ICC investigation.

2. *Summaries of witness statements*

92. The Defence argues in its Response that the summaries of witness statements contained in Annex C to the Gaddafi Admissibility Challenge of 1 May 2012 do not assist in establishing the scope and subject matter of the national investigation of Mr Al-Senussi.¹²⁴ The Defence's argument is made in error.

¹²² Defence Response, para 43, bullet point 4.

¹²³ Cf. Defence Response, para 43, bullet points 5-8.

¹²⁴ Defence Response, paras 44-46.

The witness summaries are sufficiently specific and probative in character to constitute evidence as to the scope and subject matter of the national investigation. They were prepared in good faith by the Deputy Prosecutor and Vice Prosecutor in office at the relevant time, both of whom are officers of the Libyan Courts with all of the associated professional conduct rules and regulations. Therefore, they may properly be treated, without any further enquiry or attempt to match them to witness statements, as evidence which is highly relevant to the "same case" issue. They show that the prosecution authorities have obtained a host of witness testimonies attesting to the role of Mr Al-Senussi and Mr Gaddafi in mobilising and leading direct perpetrators in criminal attacks on protestors (including in Benghazi) as well as documenting the murderous actions of the Gaddafi Security Forces in attempting to quell the opposition during the 2011 revolution. Accordingly, these witness summaries are of real significance in determining the nature of the domestic investigation into conduct by Mr Al-Senussi.

3. *Extracts of redacted witness statements*

a) *Witness statements attached to Al-Senussi Admissibility Challenge*

93. The Defence asserts that the many witnesses statements attached to its Admissibility Challenge of 2 April 2013 (Annexes 8-12, 14-17, 20-24 and 26) either do not mention Mr Al-Senussi or do not provide any details of his alleged role sufficient to allow the Chamber to draw conclusions about the precise scope and subject matter of the national investigation.¹²⁵ Although the Defence accept that the statements relate to conduct alleged in the ICC investigation, it is suggested that they are insufficiently detailed such as to show that Mr Al-Senussi used his position, power and connections with the Gaddafi family to control, command and instruct the Libyan Security Forces to deter and quell the civilian demonstrations by any means.¹²⁶ Rather than examine the detail of the sixteen witness statements contained in these fifteen annexes, the Defence

¹²⁵ Defence Response, para 47.

¹²⁶ *Ibid*, para 48.

merely assert that the witness statements as a whole are fragmented and disjointed thus, it is argued, making it impossible to discern the scope, scale and content of the domestic investigation with any clarity.¹²⁷

94. This broad-brush attempt to reject, wholesale, a wide selection of detailed witness statements, each of which specifically attests to matters particularised in the arrest warrant and the Article 58 Decision is unconvincing. Even a cursory analysis of the sixteen samples of witness evidence indicates that far from being disconnected or confused, together they constitute a compelling account of the criminal acts committed by Mr Al-Senussi which form the subject of the Libyan investigation.

95. By way of example, the following witness statements given by members of the Libyan military and other persons associated with the former regime give detailed "insider" evidence as to the acts outlined in the arrest warrant and Article 58 Decision:

- a. Annex 8 (a witness statement by [REDACTED]) provides detailed evidence in relation to, [REDACTED].
- b. Annex 9 (a witness statement by [REDACTED]) provides evidence as to [REDACTED].
- c. Annex 10 (a witness statement by [REDACTED]) provides further evidence about [REDACTED].
- d. Annex 11 (a witness statement by [REDACTED]) provides a first hand account of [REDACTED].
- e. Annex 12 (a witness statement by [REDACTED]) also gives a first hand account of [REDACTED].
- f. Annex 15 (a witness statement of [REDACTED]) provides an insider account of [REDACTED].

96. Likewise, the following witness statements given by civilian demonstrators and their families comprise important "crime base" evidence of attacks taking place

¹²⁷ *Ibid*, paras 49-50.

in Benghazi from 15-20 February 2011. They also, in many instances, given personal testimonies as to the involvement of Mr Al-Senussi in such criminal acts:

- g. Annex 14 (a witness statement by [REDACTED]) provides evidence as to: [REDACTED].
- h. Annex 16 (a witness statement of [REDACTED]) gives a probative account of [REDACTED].
- i. Annex 17 (a witness statement of [REDACTED]) who provides detailed evidence as to [REDACTED].
- j. Annex 20 (a witness statement of [REDACTED]), whose evidence deals with [REDACTED].
- k. Annex 21 (a witness statement of [REDACTED]) deals with [REDACTED].
- l. Annex 22 (a witness statement of [REDACTED]) [REDACTED].
- m. Annex 23 (contains witness statements by two members of the [REDACTED]) [REDACTED].
- n. Annex 24 (a witness statement by [REDACTED]) provides an account of [REDACTED].
- o. Annex 26 (a witness statement by [REDACTED]) pertains to [REDACTED].

97. In sum, these witness statements demonstrate the implementation of the plan by the Libyan State apparatus and Security Forces (in which Mr. Al-Senussi participated) to deter and quell, by any means, including the use of lethal force, the demonstrations of civilians from 15 to 20 February 2011 that resulted in killings and persecutions of hundreds of civilians in Benghazi. At least twelve of the sixteen witness statements refer specifically to the direct and active role of Mr. Al-Senussi in the implementation of this plan, including commanding and directing the activities of the Security Forces in Benghazi and personally

arresting, torturing and killing civilian demonstrators.¹²⁸ Accordingly they are highly relevant to the issue of whether the Libyan investigation relates to the same case as that before the ICC.

b) Witness statements attached to Gaddafi Further Submissions

98. The Defence also suggests that, of the three witness statements attached to the Gaddafi further submissions of 23 January 2013 (Annexes 4, 15 and 16), two do not show that Libya is investigating the same conduct as the ICC in relation to Mr Al-Senussi and one is insufficiently detailed to discern the actual contours of the investigation.¹²⁹ This argument fails to recognise the important information that may be gleaned from these witness statements and is probative of the contours of the national investigation of Mr A-Senussi.

99. While it is correct that Annex 4 (a witness statement which relates to the assembly and mobilization of military forces at [REDACTED]) does not mention Mr Al-Senussi explicitly, it is readily apparent - when considering the leadership case being pursued and the evidence adduced by Libya as a whole - that this witness statement provides important contextual information in support of the allegations against Mr Al-Senussi who, as one of the suspected orchestrators, is being investigated for his leading military role in implementing the criminal plan to suppress demonstrators at any cost.

100. In terms of Annex 15, this statement is of significance as it attests to Mr Gaddafi (who, the overall evidence suggests, like Mr Al-Senussi was one of the leading members of the plan to quell the peaceful demonstrations) distributing weapons and ordering demonstrators to be killed in front of the Gaddafi family compound. It therefore attests to the crimes that were taking place at the behest of the Gaddafi leaders in Tripoli (which were also being replicated, pursuant to the same plan, in Benghazi).

¹²⁸ See for example, Al-Senussi Admissibility Challenge, Annexes 8, 10; 12 and 15.

¹²⁹ Defence Response, para 51.

101. Finally, Annex 16 is of real relevance to the determination of whether the Libyan investigation relates to the "same case" as the ICC investigation. It recounts, inter alia, the use of armed violence against demonstrators on 17 February 2011 in Benghazi and elsewhere in Libya, the gathering of fighters in Benghazi by Mr Al-Senussi, the arrest of [REDACTED] by Mr Al-Senussi (upon Mr Gaddafi's order), Mr Al-Senussi's physical presence at the killings in Benghazi on 17 February 2011, Mr Al-Senussi's order to his troops to "shoot the dogs" at the Julyana Bridge and his personal participation in these killings. All of this conduct is included in paragraphs 67, 72, 84-90 of the Article 58 Decision in respect of Mr Al-Senussi. This statement alone demonstrates that the Libyan investigation relates to the same case as before the ICC.

4. *Intercepts*

102. The Defence erroneously suggests that the eight intercepts attached to the Gaddafi further submissions of 23 January 2013 at Annex 17 do not provide the Chamber with evidence about the scope and content of the national investigation against Mr Al-Senussi.¹³⁰ To the contrary, these intercepts constitute evidence of significant probative value establishing the core subject matter of the Libyan investigation, namely activities by members of the former Gaddafi regime engaging in a criminal plan to use unlawful force to suppress civilians and to order the killings of unarmed demonstrators. Indeed, one of the intercepts even refers to Mr Al-Senussi as attending a meeting to assess future attacks on "rebels" in various parts of Libya on 21 March 2011.¹³¹ These intercepts plainly show that the Libyan investigation covers the same case as the ICC investigation of Mr Al-Senussi.

5. *Other materials*

103. The Defence concludes its analysis of the evidence presented by Libya by arguing that all of the other documentary materials relied upon (i.e. Annexes 5-7 to the Gaddafi Further Submissions of 23 January 2013 and Annexes 13, 18, 19,

¹³⁰ Defence Response, paras 52-53.

¹³¹ Annex 17 to Gaddafi Further Submissions, page 5.

25 and 27 to the Al-Senussi Admissibility Challenge of 2 April 2013) do not prove that Libya is investigating the same unlawful conduct in respect of Mr Al-Senussi as that alleged before the ICC.¹³² This argument is misconceived.

104. Annexes 5-7 (materials relating to flights carrying armed mercenaries and equipment to Libya in mid-late February 2011 produced by [REDACTED]), provide evidential support for the fact that the Libyan investigation encompasses allegations against Mr Al-Senussi for mobilising, directing and controlling militias and mercenaries who were implementing the criminal plan to quell demonstrations by any means. This very specific type of conduct in respect of Mr Al-Senussi is featured in paragraphs 67, 72, 84-90 of the Article 58 Decision.

105. Annexes 13, 18, 25 and 27 consist of lists of medical evacuations to foreign countries, medical records and death certificates documenting gunshot wounds inflicted in February 2011 in Benghazi which led either to death or to medical treatment either in Benghazi or abroad. These documentary materials are therefore highly relevant in showing the correspondence between the crime base evidence which underpins the ICC investigation of murders and persecutory acts taking place in Benghazi at the hands of Security Forces directed by Mr Al-Senussi from 15 - 20 February 2011 and the crime base evidence underpinning the Libyan investigation of Mr Al-Senussi.

106. Annex 19 is a series of orders issued by Mr Al-Senussi to the weapons and ammunitions department in his capacity as head of the Libyan Security and Intelligence Forces requesting the supply of large quantities of various military grade weapons during the 2011 revolution. The large scale and very regular frequency of these orders is demonstrative of the leadership role attributed to Mr Al-Senussi as head of the Libyan Security Forces both in the ICC investigation and in the Libyan investigation. It therefore constitutes valid

¹³² Defence Response, paras 54-57.

evidence that is probative of the sameness of the case that is the subject of the admissibility proceedings.

E. Conclusion

107. When assessing the documentary materials relied upon by the Government, the Chamber should evaluate the evidence as a whole, taking into account both the context and the inherent links between the evidential samples, rather than isolating any particular piece of evidence for a disparate analysis. Adoption of this approach to the evaluation of the evidence will ensure that the Chamber does not fall into the same errors encountered by the Defence and the OPCV and will serve to recognise the fact that the investigation of Mr Al-Senussi is an on-going one taking place in a challenging transitional context.

108. In conclusion, Libya maintains that - contrary to submissions of the OPCV and the Defence - it has substantiated, by means of evidence of a sufficient degree of specificity and probative value, that the domestic investigation of Mr Al-Senussi covers the same "case" that is before the Court for the purposes of the Chamber's admissibility assessment.

VII. LEGAL FRAMEWORK FOR ASSESSING ABILITY AND WILLINGNESS

A. The appropriate scope and nature of the assessment of ability and willingness

109. The appropriate scope and nature of the second limb of the complementarity assessment is set out clearly in the OTP submissions in Response, which the Government endorses and reiterates:

"[W]hile Article 17 sets out benchmarks to enable the Court to identify cases that cannot be genuinely heard before national courts, the Statute's complementarity provisions should not become a tool for overly harsh structural assessment of the judicial machinery in developing countries or in countries in

the midst of post-conflict democratic transition¹³³ which, as Libya notes, will not possess a sophisticated or developed judicial system.”¹³⁴

110. In addition, as the Appeals Chamber has held, the admissibility of a case must be determined on the basis of the facts as they exist at the time of the admissibility proceedings.¹³⁵ The Appeals Chamber also noted, in the same decision, that national activities “may change over time”; that a “case that was originally admissible may be rendered inadmissible by a change of circumstances in the concerned State and vice versa”; and 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.”¹³⁶

111. As the Prosecution noted in its Additional Observations:

“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;¹³⁷ 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. In this regard it is worth noting a discussion that arose during the negotiations of the Statute: some delegations expressed their concern that the Court was not to assume jurisdiction simply because the national authorities were proceedings 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.”¹³⁸

¹³³ “Article 17” in Triffterer, p. 624.

¹³⁴ Prosecution Response, para. 72.

¹³⁵ Katanga Admissibility Appeal Decision, para. 56; see also Prosecution Additional Observations, para. 23.

¹³⁶ *Ibid.*

¹³⁷ *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, Decision on the admissibility of the case under article 19(1) of the Statute, ICC-02/04-01/05-377, 10 March 2009, **para.** 51.

¹³⁸ Prosecution Additional Observations, para. 24, referencing A. Cassese, *The Rome Statute of the International Criminal Court*, Volume 1 (OUP, 2002), pp. 673-4.

112. Both the Defence and the OPCV fail to follow this approach in their submissions in response regarding the ability and willingness of the Government to investigate the case against Mr. Al-Senussi. Rather, the submissions are characterised by sweeping assertions about the national system as a whole, without due regard to how such assertions, even if correct, bear directly upon the case against Mr. Al-Senussi.

113. In a similar vein, both the Defence and the OPCV seek to transpose directly the Chamber's findings in the Gaddafi case without paying sufficient heed to the significant differences between the two cases.¹³⁹ For instance, at paragraph 61 of its Response, the Defence states:

"The Chamber has already held that Libya is unable genuinely to investigate or prosecute Mr. Gaddafi's case. It is inconceivable in these circumstances that Libya could be found to be able to investigate or prosecute Mr. Al-Senussi's, particularly when Libya is seeking to join the cases to be tried together as they are so closely related."

114. In the following paragraph, the Defence states further that:

"The grounds on which the Chamber found that Libya is unable genuinely to investigate or prosecute Mr. Gaddafi's case apply equally to Mr. Al-Senussi's case."

115. The Government submits that it does not follow that similarities in the substantive focus of the proceedings against Mr. Al-Senussi and Mr. Gaddafi lead to a mirroring of the factors pertaining to the admissibility assessment of each case. To invite the Chamber to apply its ruling in the Gaddafi case without separate and independent consideration of the proceedings relating specifically to Mr. Al-Senussi is to ignore the requirements of the complementarity assessment, namely consideration of the specificities of the particular case before it.

¹³⁹ Albeit that the OPCV recognises "the exception of the criterion relating to Government's inability to obtain the person concerned", OPCV Response, para. 67

116. In contrast, the Prosecution correctly heeds the “significant differences between the case against Saif Al-Islam and the case against Abdullah Al-Senussi”, particularly the fact that “Senussi is under custody of the Libyan central authorities, and second, notwithstanding the existence of detention centres which are not controlled by the Libyan central authorities, it appears that Libya has the capacity to obtain the necessary evidence, which is both specific and sufficiently probative, to investigate Al-Senussi for the same case as that of the ICC”.¹⁴⁰

B. Relevance of domestic law in the assessment of the domestic proceedings

117. The Defence states at paragraph 65 of its Response that the Chamber’s decision in the Gaddafi case “makes clear that violations of national law can demonstrate that a State is ‘unable’ to conduct proceedings.” It footnotes paragraph 200 of the Chamber’s decision as authority for that assertion.

“The Chamber considers that 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. In other words, the Chamber must assess whether the Libyan authorities are capable of investigating or prosecuting Mr Gaddafi in accordance with the substantive and procedural law applicable in Libya.”

118. The Government submits that the Defence submission needs to be approached with a degree of circumspection. The Chamber is not suggesting that an assessment of violations of national law (including the relevant human rights treaties) may supplant the “inability” threshold. Rather, it is simply the Chamber’s recognition that it must assess the ability of Libya to conduct proceedings with reference to Libya’s application of its own laws to a particular suspect rather than assessing its ability against a different, external legal framework, such as the international human rights framework urged upon the

¹⁴⁰ Prosecution’s Additional Observations, para. 20.

court by the Defence. Moreover, not all violations or departures from national law would be significant or probative of article 17 admissibility. On the contrary, only those that indicate “inability” within the terms of article 17(3) would be of real relevance.

119. Furthermore, contrary to the Defence assertion at paragraph 67, consideration of the sentencing regime of a particular country is not relevant to the Court’s complementarity assessment. As Libya has previously submitted in the Gaddafi proceedings,¹⁴¹ the question of acceptable forms of punishment is entirely a matter for a particular national jurisdiction, provided that the sentence is permitted under international law. Neither the Statute generally, nor article 17 specifically, require, or were intended to serve as an incentive for, the harmonisation of sentencing provisions in domestic jurisdictions.¹⁴² A state’s recourse to the death penalty is lawful under international law and is outside the judicial purview of the ICC. According to the complementarity principle, “from the standpoint of the Statute and the Court, states are free to decide on the question in accordance with their national laws.”¹⁴³

120. This position is clearly articulated in the statement of the President of the Rome Conference at the last meeting of the plenary:

“The debate at this conference on the issue of which penalties should be applied by the Court has shown that there is no international consensus on the inclusion or non-inclusion of the death penalty. However, in accordance with the principle of complementarity, national jurisdictions have the primary responsibility for investigating, prosecuting and punishing individuals, in accordance with their national laws, for crimes falling under the jurisdiction of the International Criminal Court. In this regard, the Court would clearly not be able to affect national policies

¹⁴¹ Libyan Government’s consolidated reply to the responses of the Prosecution, OPCD, and OPCV to its further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi, ICC-01/11-01/11-293-Red, 4 March 2013, paras 90-93.

¹⁴² Carsten Stahn, “Libya, the International Criminal Court and Complementarity: A Test for ‘Shared Responsibility’” (2012) JICJ 1, 22.

¹⁴³ Jessica Almquist, “Complementarity and Human Rights: A Litmus Test for the International Criminal Court” (2008) 30 Loy. L.A. Int’l & Comp. L. Rev 335, 341.

in this field. It should be noted that not including the death penalty in the Statute would not in any way have a legal bearing on national legislation and practice regarding the death penalty. Nor shall it be considered as influencing the development of international customary law or in any other way the legality of penalties imposed by national systems for serious crimes.”¹⁴⁴

121. The negotiating history shows that the Statute was intended to reflect differing legal cultures, including divergent views regarding penalties. This is reflected in article 80 of the Statute.¹⁴⁵ The Court was not designed to be a human rights court with responsibility for harmonising standards and enforcing an agreed ideal that is confined to certain parts of the world. This is precisely what the Defence proposes by suggesting “the Chamber’s assessment of relevant human rights protections must take into account the fact that this is a case in which the suspect faces the death penalty in national proceedings”.¹⁴⁶

VIII. STATE OF LIBYA’S JUDICIAL SYSTEM

122. Both the Defence and the OPCV draw heavily from the Chamber’s decision in the Gaddafi case to conclude that the Libyan judicial system is “unavailable” in that it cannot be applied in full in areas or respects relevant to the case against Mr. Al-Senussi. The Defence further suggest that the system may be in total or substantial collapse but does not amplify these submissions in any meaningful way. The Government addresses these submissions below.

A. Control over detention facilities

123. In asserting that the Government lacks sufficient control over detention facilities “in general throughout Libya”,¹⁴⁷ the Defence and the OPCV make generalised statements about the security situation and the purported influence of militia groups over the Government without specific regard to how the

¹⁴⁴ Statement of Mr Conso (Italy) (President), 9th plenary meeting, 17 July 1998, A/CONF.183/SR.9, para 53 (contained within A/CONF.183/13 (Vol.11) at page 124.

¹⁴⁵ Carsten Stahn, page 22.

¹⁴⁶ Defence Response, para. 67.

¹⁴⁷ *Ibid*, paras 75, 79-85.

purported lack of control has impacted in relevant respects upon the investigation of the case against Mr. Al-Senussi.¹⁴⁸

124. In its submissions on the issue of detention centres, the Defence refers to several NGO reports describing the difficulties that Libya continues to face in its transition from over 40 years of authoritarian rule.¹⁴⁹ Libya has accepted throughout the admissibility proceedings that it continues to face challenges in building a new, democratic Libya based on the rule of law. Indeed, in recent months the Government has faced serious security challenges, particularly in Benghazi.¹⁵⁰ However, such challenges are only relevant to the complementarity assessment to the extent that they actually bear upon the domestic proceedings relating to Mr. Al-Senussi. The Chamber is precluded from casting judgment on the Libyan national system as a whole. It is clear that a national system can be acting under constraints in some respects and nevertheless may remain able to carry out genuine proceedings in relation to a specific suspect. As the Pre-Trial Chamber held in the Gaddafi decision, the Chamber must look at the circumstances as they bear upon the domestic proceedings relating to the particular case.¹⁵¹ Both the OPCV and the Defence have failed to substantiate in any way their assertions that the alleged control of detention facilities “generally and throughout Libya” has had any bearing at all on the Libyan Government’s investigation of the case against Mr. Al-Senussi.

125. Accordingly, the Government will not address the substance of each generalised allegation save to say that the submissions give insufficient recognition of the efforts being made by the Government, with the continued,

¹⁴⁸ OPCV Response, para. 69.

¹⁴⁹ Defence Response, para 79.

¹⁵⁰ See para. 3 above.

¹⁵¹ Gaddafi Admissibility Decision, paragraph 210.

close assistance of UNSMIL, to exert its control over detention centres throughout Libya and improve conditions within them.¹⁵²

126. With specific regard to the detention centre in which Mr. Al-Senussi is held, Al-Habda, the Defence seek to argue that the Libyan Government does not have control over that facility and accordingly that the Government cannot be said to have “obtained” Mr. Senussi within the terms of article 17(3). This strained submission is factually incorrect and legally misconceived.

127. The Defence provides very little in support of its assertion that Al-Hadba is not within the control of the Libyan Government beyond extrapolating from its general comments relating to other detention facilities in Libya. The material it does present is limited to two open source reports, which purportedly support the assertion that it is “widely reported that the prison is run by the National Guard”, and evidence of detainees at Al-Hadba presented by the Defence in a confidential and *ex parte* annex,¹⁵³ which the Government has not had an opportunity to analyse even in redacted form and cannot, therefore, either gainsay or confirm its accuracy or veracity.

128. In any event, contrary to the Defence assertion, Al Habda prison is clearly under the control of the Libyan Government and there is no question that Mr. Al-Senussi is held there under the authority of the Libyan Government. This is accepted by the Office of the Prosecutor¹⁵⁴ and was made clear in the “Report of the Registry on the execution of the Order in relation to the request for arrest

¹⁵² See UNSMIL website: <http://unsmil.unmissions.org/Default.aspx?tabid=5294&language=en-US> and most recent Briefing to the Security Council by Special Representative of the Secretary-General and Head of UNSMIL, Tarek Mitri, 18 June 2013, available at:

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

¹⁵³ Defence Response, para. 91 and Annex C.

¹⁵⁴ Prosecution Response, para. 79: “Al-Senussi is in the custody of the central government.”.

and surrender of Abdullah Al-Senussi” on 16 January 2013, which included as a confidential annex [REDACTED].¹⁵⁵

129. The Government’s control of the facility is further illustrated by the fact that it is the Government that has arranged and facilitated visits to Mr. Al-Senussi in Al Habda by human rights organisations and family members. As previously submitted to the Chamber, on 4 February 2013, four members of the Libyan Observatory for Human Rights visited Mr. Al-Senussi in Al-Habda.¹⁵⁶ Likewise, Mr. Al-Senussi’s daughter, Unood Al-Senussi, visited on 12 February 2013. In an interview with the Libya Herald, Mr. Al-Senussi’s daughter spoke of the favourable treatment she and Mr. Al-Senussi were receiving in prison and of her contact with her family.¹⁵⁷ On 15 April 2013, Human Rights Watch visited and interviewed Mr. Al-Senussi in the detention centre, which they described as “a newly renovated facility holding several senior Gaddafi-era officials”. Human Rights Watch also attested that the prison is administered by the judicial police under the authority of the Justice Ministry. The NGO noted that the visit was facilitated by Justice Minister Salah Marghani and the acting head of the detention facility, Mohammed Gweider.¹⁵⁸

130. The Defence assertion that the “extent of Governmental control [of Al-Habda] is at best questionable” is without merit. The National Guard assists the judicial police in guarding detainees at the prison, with the authority of the Libyan Government. The assertion that the National Guard has expressed a

¹⁵⁵ Report of the Registry on the execution of the “Order in relation to the request for arrest and surrender of Abdullah Al-Senussi, ICC-01/11-252, 16 January 2013, including ICC-01/11-01/11-252-Conf-Anx1; ICC-01/11-01/11-252-Conf-Anx 2 and ICC-01/11-01/11-252-Conf-Anx 3.

¹⁵⁶ See: Libya Herald, “Prison visit for Al-Senussi”, 4 February 2013, available at:

<http://www.libyaherald.com/2013/02/04/prison-visit-for-al-senussi/>

¹⁵⁷ Libya Tribune, Exclusive: Interview with Abdullah Senussi’s imprisoned daughter, 2 March 2013, available at:

Saudi Gazette, Senussi expected revolt, claims daughter”, 4 March 2013, available at:

<http://www.libyaherald.com/2013/03/02/exclusive-interview-with-abdullah-senussis-imprisoned-daughter/>

<http://www.saudigazette.com.sa/index.cfm?method=home.regcon&contentid=20130304155439>

¹⁵⁸ Human Rights Watch, “Libya: Ensure Abdallah Sanussi Access to Lawyer”, 17 April 2013, available at: <http://www.hrw.org/news/2013/04/17/libya-ensure-abdallah-sanussi-access-lawyer> (“HRW Report on Prison Visit”).

desire “to remain an independent body outside the control of the Ministry of Interior or Defence”¹⁵⁹ (the intended inference being that it is outside of Government control) is entirely misleading as it ignores the expressed intention of the National Guard to be a body directly under the Head of State – that is, under the auspices of the Government.¹⁶⁰

131. The Defence refers to a report that Mohammed Gweider, the chief administrator of the prison, was himself a prisoner of the former regime, implying that this is problematic. The Defence is however unable to point to any examples of how this has in fact impacted negatively upon Mr. Al-Senussi or, indeed, any other former Gaddafi-era officials held in the prison or had any bearing on the investigation of alleged criminality. The Defence ignore the section in the HRW report in which Mohammed Gweider openly acknowledged the pressure that the prison is under by reason of the intense anger felt toward Mr. Al-Senussi but emphasised that “Despite this, we want to be different”. He said: “We want to show them that we are not like them, so we try to treat them better.”¹⁶¹

132. Mr. Gweider also explained to HRW that he had ordered the removal of several guards from the facility after upholding a prisoner’s complaint against them. Moreover, Mr. Gweider was open about the fact that security is a major concern at the prison and that “[t]here is always the fear that we could be targeted because of whom we’re safeguarding,” he said. Given that Mr. Al-Senussi remains in custody and has reported to HRW that he has not been subject to mistreatment, nor has any been observed by them,¹⁶² it is clear that the prison authorities have not succumbed to any external pressure for vengeance¹⁶³

¹⁵⁹ Defence Response, para 88.

¹⁶⁰Libya Herald, “Head of National Guard says its future will be decided by government committee”, 8 January 2013, available at: <http://www.libyaherald.com/2013/01/09/head-of-national-guard-says-its-future-will-be-decided-by-government-committee/>

¹⁶¹ HRW Report on Prison Visit.

¹⁶² *Ibid.*

¹⁶³ Defence refer to one episode on 5 April where protesters reportedly gathered calling outside the prison calling for AS’s execution (Defence Response, para 92).

or given way to any vengeful feelings of their own that they may or may not have (contrary to the implied assertions of the Defence).

133. In the light of the above, there is simply no factual basis for the Defence assertion that the Government does not exercise control over Al Habda prison and therefore no support for its strained legal submission that the Government has not “obtained” Mr. Al-Senussi within the meaning of article 17(3).¹⁶⁴

B. Security and functioning of the judicial authorities and organs

134. The Defence submissions relating to security and the functioning of the judicial authorities and organs are again characterised by generalised, sweeping assertions without particularising how the allegations, even if correct, bear upon the case against Mr. Al-Senussi. The Government recognises that it continues to face serious security challenges but it does not accept that these security challenges are such as to amount to the unavailability or collapse of the national judicial system, which renders the Government unable to obtain the necessary testimony or evidence against Mr. Al-Senussi or otherwise unable to carry out genuine proceedings. Such security challenges may understandably cause some delay or other challenges in the proceedings but, as outlined further below, they are entirely justifiable within Libya’s, or any, post-conflict transitional context.

135. The only submission of the Defence that relates specifically to the case against Mr. Al-Senussi is the alleged “abduction” of Taha Bara.¹⁶⁵ The Defence seek to rely on unsubstantiated and unverified You Tube videos and Facebook pages to substantiate the allegation of “abduction”. One of the videos, said to describe the “attack” on Mr. Bara shows nothing more than individuals entering a house and a male seeking to shield himself from the camera, showing no visible sign of fear or distress. Rather than an “abduction”, it appears that Mr. Bara was arrested along with Khoms Congressman Akram Al-Janin and the Investment Undersecretary at the Oil Ministry following a disturbance at a villa

¹⁶⁴ Defence Response, para. 93

¹⁶⁵ *Ibid*, para. 97.

in Tripoli's Zenata area.¹⁶⁶ Mr. Bara has since been released.¹⁶⁷ The interviews in the You Tube videos referenced by the Defence do not contain any suggestion that the arrest of Mr. Bara was in any way related to his involvement with the proceedings against Mr. Al-Senussi specifically or, more generally, his position within the Attorney General's office.

136. Although there is a lack of clarity surrounding the circumstances of Mr. Bara's arrest and although it seems that an initial request by the Minister for Justice for the release of Mr. Bara went unheeded, the subsequent request of the Attorney General was fulfilled and Mr. Bara was released. Accordingly, rather than showing a lack of control or authority by the central Government, this in fact shows that it was able to reassert its full authority in these particular circumstances.

IX. LIBYA'S ABILITY

137. The Government's ability to obtain custody of the accused was discussed with regard to the Defence and OPCV submissions regarding the availability of the national judicial system. Consequently, it was dealt with above at paragraph 126-133. The Government reiterates that any assertion that the Government has not been able to obtain the accused is without merit.

A. Ability to gain access to the necessary testimony and evidence

138. The Defence and the OPCV invite the Chamber to apply directly to the Al-Senussi proceedings its ruling in the Gaddafi case regarding the purported inability of the Government to obtain control over witnesses by reason of its alleged failure to obtain control over certain detention facilities and the purported inadequacy of its witness protection measures. In the PTC decision in Gaddafi, the Chamber's finding, which is currently subject to appeal,¹⁶⁸ that the

¹⁶⁶Libya Herald, "Taha Bara Released", 16 June 2013, available at:

<http://www.libyaherald.com/2013/06/16/taha-bara-released/>

¹⁶⁷ *Ibid.*

¹⁶⁸ Document in Support of the Government of Libya's Appeal against the "Decision on the admissibility of the case against Saif Al-Islam Gaddafi" ICC-01/11-01/11-370-Red2, 24 June 2013, page 83.

Government was not able to gain sufficient control of detention facilities was said to have “a direct bearing on the investigation against Mr. Gaddafi.”¹⁶⁹ To support this, the Chamber then relied solely on the Government’s admission that it had been unable to obtain testimony from two Gaddafi-era officials as they are presently being held in detention facilities not yet under the control of the Libyan Government. However, it is respectfully submitted that the potential value of this evidence to both the Gaddafi and Al-Senussi cases is purely a matter of speculation.

139. The Defence and OPCV submissions regarding access to speculative witnesses in unidentified detention centres purportedly not under Government control and the speculative significance of their possible testimony does not show that the Government has been unable to access the *necessary* testimony in the case against Mr. Al-Senussi. The Government endorses and reiterates the submissions of the Prosecutor that:

“[N]otwithstanding the existence of detention centers which are not controlled by the Libyan central authorities, it appears that Libya has had the capacity to obtain the necessary evidence, which is both specific and sufficiently probative, to investigate Al-Senussi for the same case as that of the ICC...The Prosecution understands that the threshold under Article 17(3) is not that any evidence cannot be gathered, but that the necessary evidence and testimony cannot be obtained as a result of the total or substantial collapse or unavailability of its national judicial system. Thus, even in the scenario that Libya is not able to gather the testimony of certain witnesses due to obstacles arising from the current situation within the country, this would not deem Libya automatically unable for the purposes of Article 17(3).”¹⁷⁰

140. Both the Defence and the OPCV further submit that Libya has not provided evidence of an effective witness protection programme that would be

¹⁶⁹ Gaddafi Admissibility Decision, paragraph 210.

¹⁷⁰ Prosecution Additional Observations, para. 20 (emphasis in original).

implemented in such a way as to allow witnesses to testify in Mr. Al-Senussi's trial and that this reflects an inability to obtain the necessary testimony and evidence. Again, both parties rely upon the Chamber's ruling in this regard in the Gaddafi case.

141. That finding is subject to appeal. The Government reiterates that the Chamber must consider the admissibility of the case on the basis of the facts as they exist at the time of the admissibility proceedings and not based on speculation as to how a court may address the question of witness protection at a future, unspecified date. As the OTP has submitted:

"[I]t is difficult to predict the impact that the current lack of clarity as to the existence and effective functioning of a witness protection program in Libya can have on the presentation of the necessary evidence in subsequent proceedings." And later, *"The Chamber cannot base its decision on the admissibility of the case now on possible future facts."*¹⁷¹

142. The Government reaffirms its commitment to providing security for witnesses in the case against Mr. Al-Senussi and reiterates its submissions set out in its article 19 application.¹⁷² The Government has taken various steps to ensure the safety and security of witnesses in the case against Mr. Al-Senussi in preparation for trial proceedings. The principal protective measure at the pre-trial phase stems from the confidentiality of investigations and the associated witness measures pursuant to Article 59 of the Libyan Criminal Procedural Code. In addition to the protective measures concerning non-disclosure of investigative materials under Article 59, Libyan courts have the capacity to order protective measures at subsequent phases of the proceedings including *in camera* witness testimony, witness anonymity, and police protection where required. Witness protection during the trial stage of the proceedings falls within the discretionary powers of the trial judge under Article 275 of the Libyan Criminal

¹⁷¹ OTP June Response, para. 25.

¹⁷² Al-Senussi Admissibility Challenge, para. 91.

Procedural Code. A criminal trial judge can accept evidence in whatever form he or she deems appropriate. This provides a significant discretion, permitting a trial judge to hear evidence by way of video-link, to preserve witness anonymity (from the public rather than from the accused) by hearing the witness in closed session, or permitting the witness to give their evidence in advance of the court hearing by way of a written statement made to a notary.¹⁷³

143. The sufficiency or otherwise of such measures should not be judged prematurely and speculatively before the need for protective measures has arisen and the precise modalities of such measures required, which, as is the norm with trials of this nature, may be developed with assistance from others, including, in this instance, UNSMIL and Libya's international partners, are apparent.

B. Ability to otherwise carry out the proceedings

1. Legal Representation

144. As previously submitted by the Government, and as noted by the Prosecutor, the case against Mr. Al-Senussi cannot proceed to trial without counsel being appointed to represent Mr. Al-Senussi. If Mr. Al-Senussi does not appoint counsel himself then the Court will appoint one for him.¹⁷⁴

145. Again, as the OTP has submitted:

*"The Chamber cannot base its decision on the admissibility of the case now on possible future facts. However, the Chamber must be satisfied on the basis of submissions received, that there is no impediment or defect that would render the future appointment of counsel impossible, thereby finding Libya unable to "otherwise carry out its proceedings" within the meaning of Article 17(3)."*¹⁷⁵

146. Libya remains committed to securing legal representation for Mr. Al-Senussi. The sensitivity of the case and the security situation is such that there

¹⁷³ See Al-Senussi Admissibility Challenge, para. 177.

¹⁷⁴ Prosecution Response, para, 81.

¹⁷⁵ Prosecution Additional Observations, para 25.

has been some delay in achieving this. However, recently, several local lawyers have indicated their willingness to represent Mr. Al-Senussi in the domestic proceedings. The Ministry of Justice is cognisant of the need to ensure that Mr. Al-Senussi appoints a local lawyer by virtue of a formal power of attorney and will be taking further steps to facilitate the appointment of such a lawyer in the near future. The Government submits that the delays in relation to the appointment of defence counsel are an understandable consequence of the challenging transnational context and security difficulties. The challenges, however, are far from insurmountable and do not amount to inability or unwillingness on the part of the Government to carry out genuine proceedings.

147. The Defence make further submissions regarding their purported inability to visit Mr. Al-Senussi in Tripoli.¹⁷⁶ In doing so, the Defence alleges that the Government has “delayed in reaching any agreement” with the Registry regarding a proposed Memorandum of Understanding which details the modalities of the relationship between Libya and all the organs of the Court, including defence counsel, and the privileges and immunities attaching to those individuals. Due to the ramifications of events taking place in Zintan in the summer of 2012, the Chamber will be mindful that it is not an entirely straightforward agreement for the Government to conclude. The Defence appear to suggest that the Government has simply failed to take any steps to finalise the agreement. This is untrue.

148. On 19 April 2013, very soon after the appointment of the new Prosecutor-General, Mr. Radwan, the Libyan authorities transmitted the MOU with some comments and suggested amendments. On the same day, the Registry asked the ICC-Libya focal point whether the visit of the defence team could then take place shortly. The Libyan authorities indicated that, “the Libyan Government invite[s] the defense team for Mr. Al -Senussi to visit Libya forthwith at any time convenient for them. They will of course need to apply for the requisite visas for

¹⁷⁶ Defence Response, para. 128.

entry to Libya and, upon entry, they will be subject to Libya's domestic laws. They will also need to provide the Government with formal confirmation of their retention by Mr. Al Senussi or his family".¹⁷⁷ It is submitted that, in the absence of an agreed memorandum of understanding, it is unsurprising that the Government specified that Defence counsel would be subject to Libyan law. Furthermore, the Government's open invitation to Defence counsel to visit Mr. Al-Senussi stands and the Government has not actively sought to prevent counsel from doing so.

149. On 18 June 2013, some two months after the Government sent the draft Memorandum of Understanding to the Registry, it responded to the Government's comments and suggested amendments. In the same way that it took several weeks for the relevant organs of the ICC to progress the negotiations with respect to this type of bilateral agreement, it is unsurprising that it has taken a State a similar period of time to deal with such matters. As at the date of this filing, discussions continue between the parties and it is hoped that the Government and the Registry can reach a mutually acceptable agreement very soon.

2. *Other alleged violations of Mr. Al-Senussi's rights*

a) Circumstances of Mr. Al-Senussi's transfer into Libyan custody

150. The Defence make reference to the manner in which Mr. Al-Senussi was transferred to Libya and states that this makes it clear that "no functioning judicial process is underway at this time".¹⁷⁸

151. The issue of the transfer of Mr. Al-Senussi has previously been the subject of litigation before the Chamber in the form of a Defence application to refer Libya to the Security Council.¹⁷⁹ The Chamber has refused to make any

¹⁷⁷ Second report of the Registry on the visit of the defence team to Libya, ICC-01/11-01/11-328, 3 May 2013.

¹⁷⁸ Defence Response, para. 71.

¹⁷⁹ Urgent Application on behalf of Abdullah Al-Senussi for Pre-Trial Chamber to order the Libyan Authorities to comply with their obligations and the orders of the ICC, ICC-01/11-01/11-248, 10 January 2013; Response of the Libyan Government to the "Urgent Application on behalf of Abdullah Al-Senussi

determination regarding the circumstances of Mr. Al-Senussi's transfer from Mauritania.¹⁸⁰ It is difficult to see how any allegations regarding the transfer of Mr. Al-Senussi can, irrespective of their veracity, be said to reflect that "no functioning judicial process is underway at this time." The Defence provide no support for such an assertion and the Government submits, as it has done so in previous filings,¹⁸¹ that it is not relevant to the Chamber's admissibility determination.

b) Circumstances of Mr Al-Senussi's detention

152. The Defence raise concerns regarding Mr. Al-Senussi's detention at paragraph 132 and again at paragraphs 137 and 139 of its Response. These concerns are unsubstantiated, especially in the light of the Human Rights Watch report following its visit to Al-Habda prison in April of this year and its private, confidential interview with Mr. Al-Senussi in which he confirmed that he had not been mistreated by the prison authorities and that he has made appearances before courts when his detention has been authorised, thereby negating any suggestion that no such proceedings have taken place or that there has been any incident of torture. Contrary to the Defence's speculative assertion that it is unlikely that Mr. Al-Senussi was able to speak freely about the circumstances of his detention, it is clear that he did express some concerns in the course of that confidential meeting. Human Rights Watch reported as follows:

for Pre-Trial Chamber to order the Libyan Authorities to comply with their obligations and the orders of the ICC", ICC-01/11-01/11-264, 1 February 2013; Application for leave to reply to the "Response of the Libyan Government to the 'Urgent Application on behalf of Abdullah Al-Senussi for Pre-Trial Chamber to order the Libyan Authorities to comply with their obligations and the orders of the ICC'" of 1 February 2013, ICC-01/11-01/11-266, 5 February 2013; [Libyan Government Response to Mr Al-Senussi's "Application for leave to reply to the "Response of the Libyan Government to the 'Urgent Application on behalf of Abdullah Al-Senussi for the Pre-Trial Chamber to order the Libyan Authorities to comply](#) ICC-01/11-01/11-268, 5 February 2013; Renewed Application on behalf of Mr. Abdullah Al-Senussi to Refer Libya and Mauritania to the UN Security Council, ICC-01/11-01/11-304, 19 March 2013; Libyan Government's Response to Renewed Application on behalf of Mr. Abdullah Al-Senussi to Refer Libya and Mauritania to the UN Security Council ICC-01/11-01/11-310, 10 April 2013.

¹⁸⁰ ICC-01/11-01/11-269, 07 February 2013, para. 23. There has been no ruling by the Chamber in relation to the renewed application.

¹⁸¹ ICC-01/11-01/11-310, 10 April 2013, para. 19.

“The April 15 visit to Sanussi [sic] took place in the director’s office of the al-Hadhba Corrections Facility, without any officials present, and lasted 30 minutes. The facility is in the al-Hadhba military academy in Tripoli and is administered by the judicial police under the authority of the Justice Ministry.

Sanussi [sic], who wore a long white tunic over white trousers, a traditional Libyan garment, said he had no complaints about his treatment and conditions except that authorities did not permit him to leave his cell to exercise. The acting head of the facility, Mohamed Gweider, subsequently told Human Rights Watch that he would allow Sanussi [sic] to exercise in the open air for one hour each day.”¹⁸²

153. It is also noteworthy that some important legislative initiatives were undertaken by Libya in April of this year, which, according to UNSMIL, “are worthy of appreciation”. The General National Congress passed a law criminalizing torture, enforced disappearances and discrimination as well as a law clarifying the jurisdiction of the civilian and military justice systems and abolishing the jurisdiction of military courts over civilians. These developments reflect the Government’s commitment to protecting human rights and enforcing compliance with international norms.¹⁸³ Mr. Al-Senussi will of course continue to benefit from this commitment.

c) OPCV allegations regarding fair trial rights

154. The OPCV submissions relating to the refusal of Egyptian courts to extradite former high-level officials¹⁸⁴ should be read with caution and are of no assistance to the Chamber in making any determinations in relation to the admissibility of the case against Mr. Al-Senussi. First, the very reports relied upon by the OPCV state that other Gaddafi-era officials, arrested at the same

¹⁸² HRW Report on Prison Visit, see above.

¹⁸³ Briefing to the Security Council by Special Representative of the Secretary-General and Head of UNSMIL, Tarek Mitri, 18 June 2013, available at: http://unsmil.unmissions.org/Portals/unsmil/Documents/SC%20Briefing%20June%202013%20_12%20June%202013_%20check%20against%20delivery.pdf

¹⁸⁴ OPCV Response, para. 70.

time as Mr. Qaddafi al-Dam, whose extradition was reportedly refused, were in fact extradited from Egypt.¹⁸⁵ Secondly, the reports relied upon do not support the OPCV's assertion that the Court made a finding that Mr. Qaddafi al-Dam may be subject to the possible risk of an unfair trial. Rather, it seems that the extradition proceedings have been suspended pending the determination of Mr. Qaddafi al-Dam's claim for asylum.¹⁸⁶ In any event, second-hand, unspecified, unsubstantiated reports of a finding by an Egyptian tribunal in relation to a case which has no bearing on the circumstances of the case against Mr. Al-Senussi are of no assistance to the Chamber's admissibility determination.

155. The OPCV asserts by way of summary that "there are compelling reasons to believe that domestic proceedings of Mr. Al-Senussi will not be conducted in accordance with the internationally recognized standards for fair and independent prosecution, *as required by Rule 51 of the Rules of Procedure and Evidence*".¹⁸⁷ This reflects a lack of understanding regarding the role of due process considerations both generally and with regard to the assessment of ability.¹⁸⁸ Also, Rule 51 does not impose any requirement upon a Government but simply permits a Government to present information showing its compliance with "internationally recognized norms and standards for the independent and impartial prosecution of similar conduct" with a view to countering any allegation of unwillingness, rather than inability.

¹⁸⁵Daily News, Egypt, "Egypt court rules against handing Kadhafi cousin to Libya", 4 April 2013, available at: <http://www.dailynewsegypt.com/2013/04/04/egypt-court-rules-against-handing-kadhafi-cousin-to-libya/>

¹⁸⁶New York Times, "Egypt: Court Blocks Extradition of Ex-Qaddafi Aide to Libya", 3 April 2013, available at: <http://www.nytimes.com/2013/04/04/world/middleeast/egypt-court-rules-against-extradition-of-former-qaddafi-aide-to-libya.html>: "The court said Mr. Dam is being treated as an asylum seeker and that Egypt is obliged to respond to his request because he fears he will not be guaranteed his full rights in Libya".

¹⁸⁷ OPCV Response, para. 71 (emphasis added).

¹⁸⁸ It is only the text of article 17 (2) (dealing with unwillingness) which invites the Court to "have regard to the principles of due process recognized by international law". The text of article 17(3) contains no such reference.

X. LIBYA'S WILLINGNESS

156. The Defence Response alone contains submissions regarding Libya's "willingness" to carry out genuine proceedings in relation to Mr. Al-Senussi.

157. By way of general observation, the Government agrees with the Defence that there are three manifestations of unwillingness: that the proceedings are intended to shield the accused; that there has been an unjustified delay inconsistent with an intention to bring the person concerned to justice; that the proceedings are not being conducted independently or impartially and in a manner inconsistent with an intention to bring the person concerned to justice.

158. This list is exhaustive and each of the three manifestations of unwillingness require the identification of a 'devious intent on the part of the State, contrary to its apparent actions.'¹⁸⁹ Specifically, it requires that the State is seeking to shield the person from justice or has an absence of intent to bring the person concerned to justice. The Defence appear to ignore this requirement. There is no evidence at all of such a devious intent on the part of the Libyan Government. To the contrary, the Government has frequently and consistently indicated and demonstrated its intention to bring Mr. Al-Senussi to justice through the application of the rule of law.

159. The Government rejects as inaccurate the Defence summary of its submissions regarding the relevance of international human rights standards of due process. The Government does not assert that such standards are irrelevant to the consideration of unwillingness. Rather, it asserts that the consideration of due process does not permit a wholesale examination of the overall trial process. Due process is to be examined with a view to determining whether the process is designed to shield the person concerned from criminal responsibility or reflects an absence of intent to bring the person concerned to justice and not to ensure that the domestic proceedings accord with a particular ideal as

¹⁸⁹ L Arbour and M Bergsmo, "Conspicuous Absence of Jurisdiction Overreach" in HAM Von Hebel, JG Lammers and J Schukking (eds), "Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos" (The Hague 1999).

determined by the ICC. Throughout the negotiating history of the Statute, States frequently voiced their concern that a determination of admissibility of a case by the Court did not become a general judgment on the fairness and efficiency of the national system.¹⁹⁰ As the Prosecution submitted:

*“The court cannot find a State unwilling on the sole ground that the national proceedings violate due process, but must also find a violation of one of the three sub-paragraphs in Article 17(2)”.*¹⁹¹

160. The Government invites the Chamber to reject the Defence submissions regarding the death penalty for the reasons outlined above at paragraph 119-121. The possible imposition of the death penalty is not relevant to the court’s consideration of Libya’s willingness, nor does it import a different standard into the Court’s assessment of Libya’s actions.

1. Allegation of unjustified delay

161. The Defence submits that the purported delay in the proceedings “violates due process standards and as a result Libya is “unwilling” to conduct proceedings without unjustified delay or in a manner that suggests a genuine intent bring the suspect to justice”. This is a complete misstatement of the test under article 17(2)(b). As stated above, there must be an unjustified delay which “in the circumstances is inconsistent with an intent to bring the person concerned to justice”. The fact of a violation of due process alone or even the existence of unjustified delay do not, without establishing a “devious intent”, establish unwillingness on the part of the Government. The Defence has failed to substantiate its allegations regarding unjustified delay or provide evidence of the requisite “devious intent” on the part of the Government. Libya asserts that any delays in the proceedings are an understandable result of the challenges Libya faces as a country in transition and that they in no way demonstrate a lack of intention to bring Mr. Al-Senussi to justice.

¹⁹⁰ J. Holmes, “The Principle of Complementarity” pp. 50-51.

¹⁹¹ Prosecution Response, para. 71.

162. The Government endorses and adopts the submissions of the Office of the Prosecutor that:

“[A]t this time there appear to be no delays which can be described as presumptively excessive, unreasonable, inconsistent with an intent to bring the person to justice. Any delays, at this stage, do not appear to be attributable to anything other than obstacles arising from the challenges of establishing a fully functional government in a transitional post-conflict stage. The Prosecution recalls that it is essential that States not be held to a higher standard with regard to the speed and progress of their proceedings than has been met by the ICC itself or other international tribunals, particularly given the history of Libya, its very recent emergence from four decades of autocratic rule, and the serious security challenges facing the country.”¹⁹²

2. Independence and impartiality of the proceedings

163. Both the Defence and the OPCV make strong allegations regarding the independence of the judiciary. The Defence submits that this amounts to an unwillingness on the part of the Libyan Government to conduct genuine proceedings.¹⁹³ In contrast, the OPCV makes these allegations under the rubric of ability rather than willingness, without any real engagement with how the purported absence of independence amounts to unavailability leading to inability within the terms of article 17 (3). Notwithstanding this categorisation, the Government will deal with the factual substance of those allegations in this part.

164. As set out in its admissibility challenge, the Government is committed to bolstering the independence of the judiciary. This was the driving force behind the change in the composition of the Supreme Judicial Council (“SJC”), which is composed only of members of the judiciary and chaired by the President of the Supreme Court instead of the Minister of Justice. On 12 June 2013, the Supreme Judicial Council elected a new president (the Head of the Tripoli Appeals Court)

¹⁹² Prosecution Response, para. 79.

¹⁹³ Defence Response, paras 167-171; OPCV Response, paras 74-80.

and deputy chairman (the head of Benghazi's Appeals Court).¹⁹⁴ Previously, the NTC had taken important steps to improve the independence of the judiciary by promulgating the Constitutional Declaration of 3 August 2011, article 32 and 33 of which proclaimed the independence of the judiciary. It also issued Law 3 of 2011 adjusting law 6 of 2006 on the judiciary, with the aim of insulating the judiciary from the executive. The NTC also abolished the Internal Security Agency and the State Security Court and released numerous political prisoners.¹⁹⁵

165. The independence of the judiciary will also be embodied in the new constitution, the drafting of which has moved one step closer with the GNC's passing of legislation on 13 July 2013 regarding the election of members to the new Libya constitutional commission. The Commission will comprise 60 members elected from the country's three main regions and certain numbers of seats will be reserved for women and ethnic minorities. Once elected, the Commission will have 120 days to draft the constitution.¹⁹⁶

166. As set out in its Admissibility Challenge, Libya's judiciary, police, prosecution service and members of its legal profession have benefitted from training and other expertise gleaned from an array of international assistance measures. This engagement with its international partners reflects Libya's commitment to ensuring the highest standards of independence in its criminal justice bodies.¹⁹⁷

¹⁹⁴ Libya Herald, "Supreme Judicial Council get new president", 12 June 2013, available at: <http://www.libyaherald.com/2013/06/12/34802/> Reuters, "Libya moves a step closer to new post-Gaddafi constitution", 16 July 2013, available at: <http://www.reuters.com/article/2013/07/16/us-libya-constitution-idUSBRE96F10T20130716>.

¹⁹⁵ NTC Resolution No. 17 of 2 April 2011 on the cancellation of The Internal Security and The External Security and the transfer of their functions to the local councils.

¹⁹⁶ All Africa, Libya Prepares Constitution Amid Insecurity, 23 July 2013, available at: <http://allafrica.com/stories/201307240480.html>

¹⁹⁷ The relevant UN agencies involved include the UN Support Mission in Libya (UNSMIL), the Office of the UN High Commissioner for Human Rights (UNHCHR), the UN Office of Drugs and Crime (UNODC), and the UN Development Program (UNDP). The focal point of UN assistance has been the Human Rights, Transitional Justice and Rule of Law Division, established within UNSMIL in 2011. The Director of this Division is also the Representative of the UNHCHR in Libya, and is responsible *inter alia* for transitional justice, prison reform, human rights and judicial capacity building "Submission on

167. A review of the code of conduct of Libyan judges in light of the Bangalore Principles has also been carried out with the assistance of the UN and an UN-led workshop has been held for Libyan judges on judicial integrity and accountability. Denmark and the United Nations have also assisted with work on legislative support on the issues of judicial integrity and independence.¹⁹⁸

168. Pursuant to Rule 51, the Government can provide evidence to the Court to show that its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct. The Government submits that the proceedings in relation to Mr. Al-Mahmoudi are indicative of the impartiality and independence of its courts. Mr. Al-Baghdadi Al-Mahmoudi, Muammar Gaddafi's last prime minister, who is detained at the same prison as Mr. Al-Senussi, was extradited from Tunisia to stand trial for actions leading to the murder of Libyan citizens and of embezzlement. His trial has previously been adjourned at the request of his lawyers in order that they may adequately prepare his defence. The proceedings against him have been conducted openly and fairly, as is clear from the reports of independent observers:

*"Attending the trial were representatives from the Tunisian Ministry of Human Rights and Justice and the Tunisian League for Human [Rights]. "We're here on our own initiative to see, first hand, if he is getting a fair trial," said Chekib Derouich, spokesman for the Tunisian ministry. He added: "The fact that the trial is open to the public and the press indicates a strong desire to give Al-Baghdadi al-Mahmoudi a fair trial."*¹⁹⁹

Admissibility 23 January 2013", Annex 19; UN Security Council, Resolution 2040 (2012), UN Doc. S/RES/2040 (2012), adopted by the Security Council at its 6733rd meeting, 12 March 2012, available at: http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/2040%20%282012%29.

The European Union has also provided assistance, as have the Governments of Denmark, Finland, Korea, The Netherlands, Morocco, Peru, South Africa, Switzerland, Tunisia, the United Kingdom, and the United States.

¹⁹⁸ "Submission on Admissibility 23 January 2013", Annex 2, page 21.

¹⁹⁹ Libya Herald, Tripoli Court again postpones trial of Baghdadi Al-Mahmoudi, 13 June 2013, available at: <http://www.libyaherald.com/2013/06/13/tripoli-court-again-postpones-trial-of-baghdadi-al-mahmoudi/>

169. In addition, the recent acquittal of former Foreign Minister Abdulati Al-Obeidi and the former secretary of the General People's Congress, Mohamed Al-Zway, is indicative of the impartiality and independence of the Libyan judiciary.²⁰⁰

XI. CONCLUSIONS ON LIBYA'S ABILITY AND WILLINGNESS

170. The submissions of the Defence and the OPVC regarding Libya's willingness and ability to investigate genuinely the case against Mr. Al-Senussi fail to rise beyond generalised, unsubstantiated assertions and, at times, reflect a misunderstanding of the principles and thresholds applicable to the complementarity assessment.

171. In contrast, the submissions presented and evidence adduced by the Government, in its article 19 application and this Reply, are amply sufficient to render the case inadmissible pursuant to Article 17. Specifically, the evidence and submissions are sufficient to establish that the national judicial system is neither unavailable nor in a state of substantial or total collapse and that Libya is not unable to investigate the case against Mr. Al-Senussi. Furthermore, the actions of Libya in relation to Mr. Al-Senussi, corroborated by its treatment of other Gaddafi-era officials, establishes its willingness to bring Mr. Al-Senussi to justice within the terms of the Statute.

XII. SUBMISSIONS AS TO POSITIVE COMPLEMENTARITY

172. The Defence assertion that "Libya's submissions on "Positive Complementarity" have no statutory basis and are unfair and unworkable in practice"²⁰¹ are without merit. It is informed by an unnecessarily restrictive and impractical approach to complementarity, which risks undermining the object and purpose of the Statute.

²⁰⁰Libya Tribune, "Court finds Obeidi and Zway not guilty; Attorney General to appeal, 17 June 2013", available at: <http://www.libyaherald.com/2013/06/17/court-finds-obeidi-and-zway-not-guilty-attorney-general-to-appeal/>

²⁰¹ Defence Response, para. 177.

173. Libya's proposal for positive complementarity may be summed up as follows. Any residual or obdurate concerns the Chamber may have regarding Libya's domestic proceedings, not amounting to the clearest unequivocal indication of unwillingness or inability, ought to form the centrepiece of a monitoring and technical assistance program designed to ensure that any domestic trial might reasonably be supported. If the residual concerns cannot be allayed by such assistance and in fact increase to the extent that the proceedings become vitiated by unwillingness or inability, the Prosecution will have the clearest evidence of "new facts" which "negate the basis on which the case has previously been found inadmissible under Article 17". On the basis of those new facts, the Prosecution would then be able to submit a request for review of the admissibility decision pursuant to article 19(10).²⁰²

A. Legislative/Statutory Basis

174. The details of the Court's complementarity jurisdiction are not explicitly delineated in the Rome Statute. Article 17 provides a bare framework for understanding the concept in a practical setting. The details must be discerned from a purposive interpretation of the Statute that gives full effect to the Statute's object and purpose. Positive complementarity should be viewed as a logical, practical corollary of the obligation imposed upon states by to exercise its criminal jurisdiction over those responsible for international crimes.²⁰³ It is founded on the conception that the Court and domestic jurisdictions share a common responsibility to work towards ending impunity.²⁰⁴ Rather than representing an illogical or extreme policy, as implied by the thrust of the Defence submissions, it is a moderate vision of complementarity, whereby the ICC seeks to maximise effective prosecutions at the State level through mutual interaction with the State (e.g. through a division of labour or targeted

²⁰² Rome Statute, article 19(10).

²⁰³ Rome Statute Preamble, para. 6.

²⁰⁴ William W. Burke-White, 'Implementing a Policy of Positive Complementarity in the Rome System of Justice,' 19 (2008) *Criminal Law Forum* 59, 61.

assistance). In this proactive process, the ICC only intervenes when a State cannot be encouraged to carry out genuine proceedings or, even *with appropriate assistance*, is shown to be unable to carry out genuine proceedings.

175. Article 18(5) requires that where the Prosecutor has deferred an investigation in accordance with 18(2), the Prosecutor may request that the “State concerned periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions”. As noted above, Article 53 requires that the Prosecutor must continue to evaluate any national proceedings, a process that implies a cooperative relationship with a willing State. Through these cooperative exchanges, *bona fides* difficulties would be identified and reasonably available solutions crafted or, at least, facilitated, to enable domestic proceedings if practicable.

176. Additionally, Article 54 of the Statute provides the Prosecutor with expansive authority to ensure viable investigations and prosecutions that could, in turn, encourage or otherwise facilitate those at the domestic level. It mandates the Prosecutor to “[s]eek the cooperation of any State or intergovernmental organisation or arrangement in accordance with its respective competence and/or mandate”.²⁰⁵ Crucially, it also allows the Prosecutor to “[e]nter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person”.²⁰⁶

177. A range of obligations placed upon States mirrors this expansive authority, creating general and specific requirements to cooperate with the Court to ensure accountability. Article 86 places an obligation on State parties to “cooperate fully with the Court in its investigation and prosecution of crimes”. Article 88 provides that “States Parties shall ensure that there are procedures available under their national law for all forms of cooperation”. Article 87(5)(a)

²⁰⁵ Rome Statute, article 54(3)(c).

²⁰⁶ Rome Statute, article 54(3)(d).

and (b) permits the Court to invite any State not party to the Statute to “provide assistance... on the basis of an *ad hoc* arrangement, an agreement with such State or any other appropriate basis” with any failure enforceable through the Assembly of States Parties or Security Council. Article 93(1) provides for extensive cooperation with regard to an array of a non-exhaustive list of requests by the Court “in relation to investigations or prosecutions”, including those requests for assistance aimed at obtaining and preserving evidence and protecting victims and witnesses. Mirroring this anticipated cooperation, Article 93(10) allows for the provision of assistance and support from the Court to domestic jurisdictions for the purpose of investigation and prosecutions with regard to a non-exhaustive list of requests.²⁰⁷

178. Consistent with the Rome Statute’s expressed duty that every State must exercise its criminal jurisdiction over those responsible for international crimes,²⁰⁸ this type of two-way cooperation must be aimed at ensuring the efficiency of investigations and prosecutions of crimes falling within the jurisdiction of the Court, including those in existence at the domestic level. For example, the Prosecutor might use Article 93(10) to share evidence and information with the State, provide technical assistance and advice, and assist with the management of the protection of victims and witnesses.²⁰⁹

179. The Office of the Prosecutor has, from early on, embraced a positive approach to complementarity. In its September 2006 “Report on Prosecutorial Strategy”, the OTP noted that positive complementarity meant simply, “that it [the OTP] encourages genuine national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation”.²¹⁰ In the recent “Fifth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR

²⁰⁷ Carsten Stahn, ‘Complementarity: A Tale of Two Notions,’ 19 (2008) *Criminal Law Forum* 87, 93.

²⁰⁸ Rome Statute Preamble, para. 6.

²⁰⁹ Carsten Stahn, ‘Complementarity: A Tale of Two Notions,’ 19 (2008) *Criminal Law Forum* 87, 112.

²¹⁰ International Criminal Court, Office of the Prosecutor, *Report on Prosecutorial Strategy*, 14 September 2006, p. 5.

1970", the Prosecutor in relation to Libya, reiterated the "firm view that the strength of the Rome system lies in the possibility for shared responsibility and complementary actions between the Court and Libyan national judicial institutions".²¹¹ The Prosecutor reported on-going discussions concerning "cooperation and coordination of efforts to advance the Office's investigative activities both within and outside Libya" and "the willingness of the Office and of the Government of Libya to cooperatively work together in furthering investigations that could lead to arrest and surrender of alleged perpetrators, both inside and outside Libya".²¹²

180. Furthermore, positive complementarity is clearly a concept that the States Parties wish to embrace. The 8th Session of the Assembly of States Parties to the Rome Statute (ASP) in November 2009 adopted a Resolution which "[e]ncourages States Parties to further discuss issues related to the principle of complementarity and to explore proposals by State Parties introduced as "positive complementarity"". ²¹³ The report of the Bureau of the ASP (March 2010), annexed to the Resolution on the Review Conference²¹⁴ accepted positive complementarity as an element of the complementarity principle²¹⁵ (defining it as "all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute").²¹⁶

181. In the light of the above, the Defence assertion that "Libya's argument on positive complementarity threatens to undermine the statutory complementarity

²¹¹ Fifth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970, para. 11.

²¹² Fifth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970, para. 10.

²¹³ Resolution ICC-ASP/8/Res.3, Strengthening the International Criminal Court and the Assembly of States Parties, adopted at the 8th plenary meeting, on 26 November 2009, p.2.

²¹⁴ Resolution ICC-ASP/8/Res.9, Review Conference, adopted at the 10th plenary meeting, on 25 March 2010, by consensus, Appendix.

²¹⁵ Resolution ICC-ASP/8/Res.9, Review Conference, adopted at the 10th plenary meeting, on 25 March 2010, Appendix, 'Report of the Bureau on Stocktaking: Taking stock of the principle of complementarity: bridging the impunity gap,' para 16.

²¹⁶ *Ibid.*

regime” is unsupportable.²¹⁷ As noted above, plainly the Statute does not purport to set out the full details of the Court’s complementary jurisdiction and, contrary to the Defence assertion, a policy of positive complementarity is clearly consistent with the object and purpose of the Statute, with its deference to local justice in the pursuit of ending impunity for international crimes.²¹⁸ The Defence’s attempt to deprive the Prosecutor and the State of the statutory authority to cooperate to maximise national prosecutions, including the case before the ICC, is, not only at odds with the prevailing intent of the Assembly of State Parties, but this object and purpose. Positive complementarity is a logical consequence of the reasonable exercise of both the Prosecutor’s and the State’s obligations under the Rome Statute.

B. Monitoring and Cooperation is a Necessary Part of any ICC or Domestic Proceeding

182. The Defence’s assertion that Libya’s proposal amounts to a suggestion that any form of cooperation between the Court and a national authority with a view to strengthening the judicial/legal capacity of the latter would “amount to a safeguard from the Chamber finding a case admissible within the scope of article 17 of the Rome Statute”,²¹⁹ is incorrect. Plainly, cooperation of the nature presupposed by a policy of positive complementarity is not determinative of the admissibility thresholds within article 17. Notwithstanding cooperation and targeted assistance, the OTP will still be required to monitor any on-going domestic proceedings throughout their life span to ensure that they continue to

²¹⁷ Defence Response, para. 182.

²¹⁸ See, for example, G Mattioli and A van Woudenberg, 'Global Catalyst for National Prosecutions? The ICC in the Democratic Republic of Congo' in N Waddell and P Clark (eds), *Courting Conflict? Justice, Peace and the ICC in Africa* (London 2008), 57: 'There is certainly some support for the position that the spirit of the Rome Statute speaks in favour of a proactive interpretation of complementarity as a tool to end impunity.'

²¹⁹ Defence Response, para. 180 referring to 'Report of the Court on complementarity' (2011), ICC-ASP/10/23, para. 6; also 'Report of the Court on complementarity', ICC-ASP/11/39, para 3.

meet the requirements of Article 17²²⁰ and this would necessarily include monitoring domestic proceedings that are the object of any targeted assistance.²²¹

183. Pursuant to article 17(2), the Prosecutor would still be obliged to continuously assess whether the case remains inadmissible, whether challenges arise that undermine the conclusion that the State is willing, but also whether any reasonably available solutions might change the calculation, including, *inter alia*, an on-going consideration of institutional obstacles (e.g., arising from the relationship between the executive and judiciary or the constitutional and procedural safeguards or the existing enforcement and investigative authorities, delays in the case, etc.). Similarly, pursuant to Article 17(3), the Prosecutor would still be obliged to continuously assess whether any challenges that arise amount to “inability”, requiring, *inter alia*, an ongoing assessment of the availability of evidence (e.g., whether a particular witness is unavailable due to being held in detention centres not under government control and whether that evidence might, nonetheless, be available elsewhere) and the availability and efficacy of witness protection programs.

184. Accordingly, the Defence’s caricaturing of Libya’s submissions (that a policy of positive complementarity amounts to a proposal “that, where the ICC considers national proceedings to be inadequate, it should nevertheless allow those proceedings to continue [subject to “conditions which Libya has not

²²⁰ Markus Benzing, ‘The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity,’ 7 (2003) *Max Planck UNYB* 591, 632.

²²¹ See William W. Burke-White, ‘Implementing a Policy of Positive Complementarity in the Rome System of Justice,’ 19 (2008) *Criminal Law Forum* 59, 74, ft. 36: noting for example, “the Organisation on Security and Cooperation in Europe (OSCE) has taken primary responsibility for monitoring 11*bis* trials before the State Court of Bosnia and Herzegovina and transmits reports on the quality of the proceedings to the Prosecutor of the ICTY. [...] Human Rights Watch, Amnesty International and the International Center for Transitional Justice have all issued reports on the quality of proceedings before various national courts”.

defined and with no end-date"] until an undefined point at which their manifest inadequacy requires them to be declared inadmissible"²²²) must be rejected.

185. Of course, the monitoring of a trial at the domestic level (at any stage envisaged by the Rome Statute) will reveal investigative and trial challenges. However, it is far from inevitable that these various challenges, however engaging or testing, will amount to an adequate basis to undermine a finding of admissibility under Article 17. On the contrary, most will be characteristic of a trial process engaged in the complicated business of addressing international crimes. In these circumstances, the ICC should not act precipitously, but should examine any indices of inability. Upon closer examination, experience shows that most, if not all, will be able to be circumvented or overcome through a variety of forensic, procedural or logistical mechanisms or support, including through external assistance or national and international cooperation. Indeed, as discussed above, Articles 54, 86, 87, 88 and 93 of the Statute, provide the ICC Prosecutor with the means to confront these types of challenges in an ICC or domestic trial.

186. It is inevitable that during the course of any ICC proceedings, the Prosecutor will rely upon a wide range of assistance obtainable only through Libya's domestic criminal processes (e.g., to locate, preserve and protect witnesses and their investigative activities). The ICC Prosecutor and Libya will need to work together to ensure that any ICC trial remains viable. The converse is also true. To expect Libya's own domestic proceedings to be completely viable without a similar level of assistance from outside actors, including the ICC Prosecutor, would be wholly unrealistic and inequitable. In the normal course of any competent trial of international crimes, whether national or international, the challenges are many, but usually may be met by this type of targeted trial support or assistance.

²²² Defence Response, para. 183.

187. Contrary to the thrust of the Defence's submissions, monitoring and technical assistance programs are a routine part of the operation of courts engaged in prosecuting international crimes. The Special Court for Sierra Leone (SCSL), Rwanda's local trials, the East Timor Trials, the Extraordinary Chamber in Cambodia (ECCC), and most other localised endeavours have all relied heavily upon international assistance to ensure the success of the trials. NGO's such as Human Rights Watch (HRW), No Peace Without Justice and the International Center for Transitional Justice (ICTJ) have played a critical role in assisting local transitional justice responses. Indeed, a division of labour is a prominent feature of the completion strategies of the ICTY and ICTY, in particular through the 'rule 11 *bis* referrals'.²²³ Mindful of these imperatives, the ICC Prosecutor has consistently fostered relationships with other regional and international institutions (e.g. the UN, the European Union and the African Union).²²⁴ The Prosecutor has also expressed the OTP's willingness to provide information and other types of assistance to national authorities.²²⁵ Indeed, "the OTP is also a key participant in the Justice Rapid Response Initiative—a program launched by national governments to help states that are willing but not quite able to investigate and prosecute international crimes".²²⁶ As also observed by Burke-White, "[a] number of national governments have developed

²²³ See for further discussion, Marieke Wierda, 'The Rome Statute Review Conference: Stocktaking: Complementarity', ICTJ, June 2010, Kampala, p. 3.

²²⁴ Katharine A. Marshall, 'Prevention and Complementarity in the International Criminal Court: A Positive Approach,' 17 (2010) *Human Rights Brief* 21, 24. <http://www.wcl.american.edu/hrbrief/17/2marshall.pdf>.

²²⁵ Jenia Iontcheva Turner, 'Transnational Networks and International Criminal Justice, 105 (2007) *Michigan Law Review* 985, 1004, citing Interview with Rod Rastan, Office of the Prosecutor, Int'l Criminal Court, in the Hague, Neth. (July 2006).

²²⁶ Jenia Iontcheva Turner, 'Transnational Networks and International Criminal Justice, 105 (2007) *Michigan Law Review* 985, 1004 referring to fns 121-125 and accompanying text: "These governments include Argentina, Brazil, Canada, France, Germany, Netherlands, Norway, Sweden, Switzerland, and the UK. Also involved in the planning stages of the JRRI were the EU Commission, the ICC Office of the Prosecutor, and NGOs such as the Vera Institute for Justice, International Center for Transitional Justice, Coalition for an ICC, Argentine Anthropological Forensic Team, and International Institute for Criminal Investigations. Int'l Criminal Defence Attorneys Ass'n, Justice Rapid Response Initiative 1 & n.3 (Aug. 2004)".

special offices within their ministries of justice for the prosecution of international crimes, which regularly provide assistance to other States”.²²⁷

188. Moreover, the Court’s Registry has framed its strategic planning in terms of contributing to complementarity and building an effective Rome Statute system.²²⁸ It envisaged contributing to witness protection programs; transferring knowledge in court management; making the public archives of the Court available in situation countries; developing regional detention facilities; encouraging accountability through its outreach; collaborating with rule-of-law actors through its field offices; and maintaining a database of implementing legislation.²²⁹

189. In addition to such assistance being a normal part of international criminal prosecutions, the ICC and the Prosecutor have other more pragmatic reasons to encourage this type of mutually reinforcing cooperation. Realistically, there are limits on the number of prosecutions the ICC can bring.²³⁰ The ICC is “unable to shoulder the full load of international crimes prosecution, so it has to rely on national courts to handle many of the trials.”²³¹ Seen in this light, supporting local trials with expertise and other targeted assistance is little more than a pragmatic assessment of how best to utilise scarce resources to maximise prosecutions to end impunity.

190. The Government is not suggesting that positive complementarity is a solution to all ills or concerns arising from any situation before the ICC. As

²²⁷ William W. Burke-White, ‘Implementing a Policy of Positive Complementarity in the Rome System of Justice,’ 19 (2008) *Criminal Law Forum* 59, 81, citing the example: Bureau of Democracy, Human Rights, and Labor, U.S. Dep’t of State, Country Reports on Human Rights Practices for 2001, at 1321 (2002).

²²⁸ Silvana Arabia, ‘The Three Year Plans & Strategies for the Registry in respect of complementarity for an effective Rome Statute System of International Criminal Justice,’ prepared for the Consultative Conference on International Criminal Justice, Sept. 9-11, 2009, UN, New York.

²²⁹ Marieke Wierda, ‘The Rome Statute Review Conference: Stocktaking: Complementarity, ICTJ, June 2010, Kampala, p. 2.

²³⁰ International Criminal Court, Office of the Prosecutor, ‘Paper on some policy issues before the Office of the Prosecutor’ September 2003, p.4 http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf

²³¹ Jenia Iontcheva Turner, ‘Transnational Networks and International Criminal Justice, 105 (2007) *Michigan Law Review* 985, 990.

noted by the Defence, the Court or the Prosecution in the Uganda and the Democratic Republic of the Congo (DRC) situations did not pursue an overtly active approach to positive complementarity, even though there *may* have been questions concerning the capability of the justice systems concerned.²³² However, the Defence pays insufficient regard to the reality that the Court's jurisdiction in both those situations was triggered by the self-referral of both Uganda and the DRC. As such, there was acquiescence to the jurisdiction of the Court, reflected in a conscious inactivity on the part of the two States with regard to the particular cases being investigated by the OTP. In those circumstances, the OTP and the Pre-Trial Chambers, when considering the specific cases before them, made it plain that the inaction that existed at the State level meant that *"the formal definitions of unwillingness and inability in Article 17(2) and (3) do not come into consideration."*²³³ In those circumstances, it would have

²³² Defence Response, para. 184.

²³³ *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Prosecution's Response to Documents in Support of Appeal of the Defence for Germain Katanga against The Decision of The Trial Chamber 'Motifs De La Décision Oral Relative À L'exception D'irrecevabilité De L'affaire'), ICC-01/04-01/07-1349, 31 July 2009, para. 3; See also: International Criminal Court, 'Prosecutor of the International Criminal Court opens an investigation into Northern Uganda,' *Press Release*, ICC-OTP-20040729-65, 29 July 2004; See generally ICC No 02/04-01/05, Warrant of Arrest (Aug. 7, 2005), including the arrest warrants for Kony, Otti, Odhiambo, Lukwiya and Ongwen). See also *Prosecutor v Kony et al.* (Decision to Terminate the Proceedings Against Raska Lukwiya), ICC-02/04-01/05-248, 12 July 2007; *Prosecutor v Kony et al.* (Submission of Information Regarding Vincent Otti), ICC-02/04-01/05-258, 8 November 2007; International Criminal Court, Office of the Prosecution, Informal Expert Paper: The principle of complementarity in practice, 2003, available at <http://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf>; Payam Akhavan, 'The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court,' 99 (2005) *The American Journal of International Law*, 402, 414; Mohamed M. El Zeidy, 'The Ugandan Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State's Party Referral to the ICC,' 5 (2005) *International Criminal Law Review* 83, 102-04; *Prosecutor v Kony et al.* (Decision on the admissibility of the case under article 19(1) of the Statute), ICC-02/04-01/05-377, 10 March 2009, para.52; International Criminal Court, 'Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo,' *Press Release*, 19 April 2004; See further, 'The Office of the Prosecutor of the International Criminal Court opens its first investigation,' *Press Release*, 23 June 2004; *Prosecutor v. Thomas Lubanga Dyilo* (Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58), ICC-01/04-01/07 (10 February 2006), para. 41: *Concerning the first part of the admissibility test, the Chamber therefore holds that, on the basis of the evidence and information provided by the Prosecution in the Prosecution's Application, in the Prosecution's Submission, in the Prosecution's Further Submission and at the hearing of 2 February 2006, no State with jurisdiction over the cases against Mr Thomas Lubanga Dyilo and Mr Bosco Ntaganda is acting, or has acted, in relation to those cases. Accordingly, in the absence of any acting State, the Chamber need not make any analysis of unwillingness or inability.* (emphasis added)

been meaningless for the Court to embark upon considerations of positive complementarity in relation to those particular cases.

191. Accordingly, the Defence's attempt to undermine the notion of positive complementarity by pointing to the Court's approach to the cases arising from the Uganda and DRC situations²³⁴ is unhelpful.

C. The Possibility of Sequencing of trials

192. The Defence contend that a positive complementarity approach is 'unnecessary'²³⁵ because the national proceedings may be postponed, with a 'temporary surrender' of Mr. Al-Senussi²³⁶ to allow an ICC investigation and trial.²³⁷ This proposed sequenced approach would then, it is argued, lead to Mr. Al-Senussi being transferred from The Hague to Libya to then face any domestic proceedings. Previously, the Defence took the opposing position, accepting that the existence of the death penalty in Libya constitutes an independent "barrier" to the transfer of the case.²³⁸

193. The latest position fails to take into account salient international law and the domestic context. In sum, any sequencing of trials in which the ICC trial takes precedence will inevitably lead to an asylum request by Mr. Al-Senussi to remain in Europe, premised on Libya's maintenance of the death penalty within its domestic law. Accordingly, in order to ensure that Libya maintains the right to try Mr. Al-Senussi on allegations of mass atrocities, a policy of positive complementarity provides a rigorous method of ensuring that Libya's sovereign rights to conduct its own criminal proceedings are not undermined, except as a last resort.

²³⁴ *Ibid*, para. 184.

²³⁵ *Ibid*, para. 190.

²³⁶ Rule 183 ICC RPE.

²³⁷ Defence Response, para. 192.

²³⁸ *Ibid*, paras 58-66; Pre-Trial Chamber I, Transcript of Hearing, ICC-01/11-01/11-T-3-Red-ENG, 10 October 2012, p.4, line 13 - p.7, line 13; See also, Gaddafi Admissibility Decision, para. 159:

'The Defence asserts that the fact that Mr Gaddafi faces the death penalty in connection with domestic proceedings both heightens the obligation to ensure the application of fair trial standards and raises an independent barrier to the transfer of the case.'

194. A State's right to regulate its own penalty regime within its own judicial system ought not to constitute a bar to future domestic proceedings, particularly if less intrusive alternatives exist. This is reflected expressly in Article 80 of the Rome Statute,²³⁹ and the traditional notion of legal pluralism that underpins the admissibility provisions.²⁴⁰ For the reasons outlined below, the Defence proposal to sequence trials would result in Mr. Al-Senussi remaining in Europe, leading to the *de facto* exclusion of a Libyan trial.²⁴¹

195. At the completion of Mr. Al-Senussi's ICC trial or sentence, it is unlikely that the ICC would assist in the transfer of Mr. Al-Senussi to Libya. Although admissibility proceedings are not a test of a State's adherence to international human rights law,²⁴² the ICC may, in the light of article 21(3) of the Rome Statute,²⁴³ consider itself duty bound to take cognisance of the existence of the 'death penalty' as a sentencing option within the Libya domestic process.²⁴⁴ This is the approach taken by the ICTR and ICTY. A case may only be referred to a state where that accused will receive a fair trial and if "...the death penalty will not be imposed or carried out."²⁴⁵ Accordingly, any transfer "must contemplate whether the State in question has a "...legal framework which criminalizes the

²³⁹ W.A. Schabas, 'Penalties', in A. Cassese, P. Gaeta and J.R.W.D Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II (OUP, Oxford, 2002) 1497, at 1505.

²⁴⁰ Carsten Stahn, 'Libya, the International Criminal Court and Complementarity: A Test for 'Shared Responsibility'', 10 (2012) *Journal of International Criminal Justice* 325, 347.

²⁴¹ Ibid, 348. As Carsten Stahn explains: sequencing of trials in the present situation poses particular difficulties, '...since it might *de facto* lead to exclusion of one forum to the detriment of the other, due to the death penalty.'

²⁴² See, for example, K.J. Heller, 'The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process,' 17(2006) *Criminal Law Forum* 255, 256; Enrique Carnero Rojo, 'The Role of Fair Trial Considerations in the Complementarity Regime of the International Criminal Court: From "No Peace without Justice" to "No Peace without Victor's Justice"?' 18 (2005) *LJIL* 829, at 840-856.

²⁴³ 'The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.'

²⁴⁴ Carsten Stahn, 'Libya, the International Criminal Court and Complementarity: A Test for 'Shared Responsibility'', 10 (2012) *Journal of International Criminal Justice* 325, 347.

²⁴⁵ Rule 11bis RPE ICTR and ICTY.

alleged conduct of the accused and *provides an adequate penalty structure*'.²⁴⁶ Only after Rwanda abolished the death penalty in 2007,²⁴⁷ were the first accused transferred from the ICTR.²⁴⁸

196. According to jurisprudence emanating from the U.N. Human Rights Committee, it is likely that the U.N. would take the position that it could not assist with regard to returning an individual to a State that maintained the death penalty. In *Chitat Ng v. Canada*, the U.N. Human Rights Committee found that Canada had violated the ICCPR in extraditing Chitat Ng to the USA where he faced a possible death penalty upon conviction.²⁴⁹ Similarly, the European Court of Human Rights (ECtHR) jurisprudence suggests that the Netherlands would be unable to transfer Mr. Al-Senussi for trial to any State that maintains the death penalty.²⁵⁰ ECtHR jurisprudence suggests that the transfer or extradition to States where substantial grounds are shown for concluding that there is a real risk of the death penalty being imposed, gives rise to breaches of Articles 2 and 3 of the Convention and Article 1 of Protocol No. 13.²⁵¹ Even if Mr. Al-Senussi's asylum claim did not lead to a grant of refugee status,²⁵² the Netherlands would be unable to transfer Al-Senussi back to Libya. At best, Mr. Al-Senussi would be

²⁴⁶ *Prosecutor v. Bagaragaza* (Decision on Rule 11bis Appeal), ICTR-05-86-AR11bis, 30 August 2006, para. 9, referring to *Prosecutor v. Međakić et al.* (Decision on Joint Defence Appeal Against Decision on Referral under Rule 11bis), ICTY, IT-02-65-AR11bis.1, 7 April 2006, para. 60 [emphasis added].

²⁴⁷ Amnesty International, 'Rwanda Abolishes Death Penalty', 2 August 2007, available at <http://www.amnesty.org/en/news-and-updates/good-news/rwanda-abolishes-death-penalty-20070802>.

²⁴⁸ *Prosecutor v. Uwinkindi* (Decision on Prosecutor's Request for Referral to the Republic of Rwanda, Rule 11 bis of the Rules of Procedure and Evidence), ICTR-2001-75-R11bis, 28 June 2011, paras. 222, 223.

²⁴⁹ *Chitat Ng v. Canada*, Communication No. 469/1991, UN Doc. CCPR/C/49/D/469/1991 (7 January 1994), para. 18; See also example: *Roger Judge v. Canada*, Communication No. 829/1998, UN Doc. CCPR/C/78/D/829/1998 (20 October 2003), para. 12.

²⁵⁰ *Soering v. United Kingdom*, Appl. No. 14038/88, 7 July 1989; *Al Saadoon and Mufdhi v. United Kingdom*, Appl. No. 61498/08, 2 March 2010.

²⁵¹ *Al-Saadoon and Mufdhi v. The United Kingdom*, Appl. No. 61498/08, 2 March 2010; See also; *S.R. v. Sweden* (dec.), Appl. No. 62806/00, 23 April 2002; *Ismaili v. Germany* (dec.), Appl. No. 58128/00, 15 March 2001; *Bader and Kanbor v Sweden*, Appl. No. 13284/04, 8 November 2005; *Kaboulov v. Ukraine*, Appl. No. 41015/04, 19 November 2009.

²⁵² Example: Article 1(f)(a) of the Refugee Convention declares that no refugee status can be granted when there are 'serious reasons for considering' that the applicant has committed war crimes, crimes against humanity or genocide, the crimes currently under the jurisdiction of the ICC; Dr Mathias Holvoet and Dr Dersim Yabasun, 'Former ICC Defendant – Ngudjolo – Applies for Asylum in the Netherlands,' available at <http://www.ejiltalk.org/author/holvoetyabasun/>.

placed in a legal lacuna: required to leave the Netherlands without refugee status, but in a State where the authorities were not permitted to remove him.²⁵³

197. In sum, bearing in mind the position taken by the U.N, the European Court (ECtHR) and the *ad hoc* Tribunals' jurisprudence with regard to the death penalty, it is likely that any claim of asylum by Mr. Al-Senussi would be successful. The sequencing of trials proposed by the Defence will extinguish Libya's sovereign right to conduct criminal proceedings and deny thousands of victims any form of redress.

198. Of course, the above argument concerning the death penalty and sequencing of trials, is not, as suggested by the Defence, an argument that '[b]y invoking "positive complementarity", it [Libya] is requesting that the Court assist and contribute to a regime that administers capital punishment.'²⁵⁴ Such an argument, if accepted, would preclude any assessment of inadmissibility with regard to domestic proceedings in States that maintained the death penalty. Plainly, the issues are more nuanced. As discussed above, the Rome Statute does not attempt to legislate the severity of penalties for those judged by national courts.²⁵⁵ On the contrary, despite article 17(2) articulating certain human rights obligations that States must respect (e.g., expeditious, independent, impartial trials), it does not seek to impose a particular sentencing regime on States.²⁵⁶

²⁵³ Dr Mathias Holvoet and Dr Dersim Yabasun, 'Former ICC Defendant – Ngudjolo – Applies for Asylum in the Netherlands, Available at <http://www.ejiltalk.org/author/holvoetyabasun/>

²⁵⁴ Defence Response, para. 188.

²⁵⁵ Jessica Almqvist, 'Complementarity and Human Rights: A Litmus Test for the International Criminal Court,' 30 (2008) *Loy. L.A. Int'l & Comp. L. Rev.* 335, p.340-341, stating at footnote 24: "*But see ICCPR, supra* note 18, at art. 6(2) (not outlawing the death penalty for the most serious crimes in an absolute manner and stipulating that "[i]n countries that have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court."). *See also* Second Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 44/128, U.N. Doc. AJRES/44/128 (Dec. 15, 1989) (aiming at the abolition of the death penalty). As of February 11, 2008, the Protocol has 65 parties and 35 signatories, indicating that the world's states are still divided on the death penalty."

²⁵⁶ Jessica Almqvist, 'Complementarity and Human Rights: A Litmus Test for the International Criminal Court,' 30 (2008) *Loy. L.A. Int'l & Comp. L. Rev.* 335, p.343.

While the Statute imposes an absolute prohibition against the death penalty in relation to persons judged by the ICC²⁵⁷ it is clear that “the complementarity principle is understood to mean that this standard should not be seen as having any bearing at all in national settings”.²⁵⁸ This position was express in the negotiating history of the Statute, which was intended to reflect differing legal cultures, including divergent views regarding penalties.²⁵⁹

199. However, though it is correct that “the ICC is not a human rights monitoring body, and its role is not to ensure perfect procedures in compliance with all international standards,”²⁶⁰ the merits of a policy of positive complementarity include the prospect of ensuring that values the Chamber considers do go to the core of the admissibility assessment may be identified and protected through the rigorous monitoring process proposed below.

D. Positive Complementarity - A Fair and Workable Proposal²⁶¹

200. For the reasons advanced above, the adoption of a policy of positive complementarity is entirely consistent with the terms and the object and purpose of the Rome Statute. As argued, it offers a reasonable and proportionate alternative to the removal of Libya’s right to investigate and prosecute Mr. Al-Senussi for the allegations levelled against him by the ICC and other suspected

²⁵⁷*Ibid*, p.343, referring to Rome Statute articles 23, 77.

²⁵⁸ *Ibid*, p. 343 stating at footnote 37: “See generally ICCPR, *supra* note 18. See also Diplomatic Conference of Plenipotentiaries, June 15-July 17, 1998, *Chairman’s Working Paper on Article 75: Fines and Assets Collected by the Court*, 314, U.N. Doc. A/CONF.1831C.1IWGPIL.3 [Rev.1 (July 6, 1998)] (“States have the primary responsibility for prosecuting and punishing individuals for crimes falling under the subject-matter jurisdiction of the Court. In accordance with the principle of complementarity between the Court and national jurisdictions, the Court would clearly have no say on national policies in this field.”) See also submissions above at paras 119 to 121.

²⁵⁹ See example: article 80 of the Statute; Statement of Mr. Conso (Italy)(President), 9th plenary meeting, 17 July 1998, A/CONF.183/SR.9, para 53 (contained within A/CONF.183/13 (Vol. 11) at page 124 and Carsten Stahn, “Libya, the International Criminal Court and Complementarity: A Test for “Shared Responsibility” (2012) JICJ 1, 22.

²⁶⁰ Jessica Almquist, ‘Complementarity and Human Rights: A Litmus Test for the International Criminal Court,’ 30 (2008) Loy. L.A. Int’l & Comp. L. Rev. 335, pp.349-350.

²⁶¹ Defence Response, para. 185 [internal citations omitted].

mass atrocities against the Libyan people. The Defence arguments are disproportionately alarmist.

201. As specifically highlighted during the formal stocktaking on complementarity during the Kampala Review Conference by States Parties, civil society and other delegates, the complementarity principle should play a central role in “bringing justice closer to victims and affected communities [...] increasing its legitimacy in the affected community and therefore the restorative impact of the trial process.”²⁶² The principle is thus not just “a reluctant concession to *realpolitik* but a substantive and sound operating rule that recognizes that trials closer to the scene of events at issue have inherent practical as well as expressive value”.²⁶³ Trials at the domestic level conducted to international standards potentially can promote principles that the ICC represents in more long-lasting ways.²⁶⁴ The proximity of national prosecutions to the crimes and the evidence makes them best qualified to understand the context and circumstances of the case.²⁶⁵ Moreover, “the effectiveness and local impact” of reconciliatory mechanisms is “undoubtedly enhanced by... physical presence in the territory.”²⁶⁶ Supranational enforcement mechanisms also risk being seen as “an instrument of hegemony for powerful states”.²⁶⁷

²⁶² See Morten Bergsmo, Olympia Bekou & Annika Jones, ‘Complementarity After Kampala: Capacity Building and the ICC’s Legal Tools,’ 2 (2010) *Goettingen Journal of International Law* 791, 800.

²⁶³ Markus Benzing, ‘The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity,’ 7 (2003) *Max Planck UNYB* 591, 600; Jose E. Alvarez, ‘The New Dispute Settlers: (Half) Truths and Consequences’ (2003) 38 *Texas International Law Journal* 405, 437; similar: Otto Triffterer, ‘Der lange Weg zu einer internationalen Strafgerichtsbarkeit,’ (2002) *Zeitschrift für die gesamte Strafrechtswissenschaft* 321, 362.

²⁶⁴ Marieke Wierda, ‘The Rome Statute Review Conference: Stocktaking: Complementarity, ICTJ, June 2010, Kampala, p. 2.

²⁶⁵ See Neil J. Kritz, ‘Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights,’ 59 (1996) *Law and Contemporary Problems* 127, 133 (noting that “domestic courts can be more sensitive to the nuances of local culture”).

²⁶⁶ William W. Burke – White, ‘A Community of Courts: Toward a System of International Criminal Law Enforcement,’ 24 (2002) *Michigan Journal of International Law* 1, 88 citing Neil J. Kritz, ‘Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights,’ 59 (1996) *Law and Contemporary Problems* 127, 131.

²⁶⁷ William W. Burke – White, ‘A Community of Courts: Toward a System of International Criminal Law Enforcement,’ 24 (2002) *Michigan Journal of International Law* 1, 88.

202. Of course, domestic prosecutions are not always practicable or appropriate. Positive complementarity merely dictates that any intervention by the ICC should be the minimum required to achieve accountability, only removing the right to domestic proceedings as an action of last resort. Accordingly, the first part of any intervention should be “managerial” in nature.²⁶⁸ Only after it has failed and the domestic proceedings vitiated by unwillingness or inability, should the ICC intervene.

203. The exact working details of a policy of positive complementarity would depend upon the precise circumstances at the time of any Admissibility Decision, including the challenges identified, the OTP’s resources, and the availability of other national and international assistance. However, at a minimum, it is to be expected that it would involve the maintenance of a robust and independent monitoring body (or bodies) consisting of international and national criminal experts and an identified technical assistance body (or bodies).

204. Such an approach need not rely only upon monitoring by the Prosecution and Libya, as suggested by the Defence. Indeed, consistent with the approach suggested by the Prosecution, “the Court, including the Prosecution, should take steps to ensure the monitoring of the ongoing progress of Libya’s investigation and prosecution”.²⁶⁹ As outlined below (and a normal aspect of most internationalized courts), this may be achieved through the OTP and/or a coalition of willing legal experts. The monitoring body would assess the ongoing proceedings and assess what assistance is reasonably available, including from the ICC Prosecutor, a technical assistance body or otherwise a coalition of those willing and able to provide targeted assistance.

²⁶⁸ Neil J. Kritz, ‘Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights,’ 59 (1996) *Law and Contemporary Problems* 127,145-146.

²⁶⁹ Prosecution Response, paras 2 and 86 [emphasis added].

E. Prospective Partners

205. As indicated, it is not desirable to script a positive complementarity program at this stage prior to an indication of the appropriateness of such a program being given by the Pre-Trial Chamber. However, the involvement of respected international organisations would readily meet any concerns for ensuring that any program was sufficiently independent and rigorous. Such participants would ensure that the Court would receive accurate information and be in a position to monitor the quality of the proceedings. As noted above, in the event that the assistance proved ineffective, or the identified problems intractable, the Prosecution may decide that there are “new facts” which negate the basis on which the case has previously been found inadmissible under article 17 and make the appropriate application to the Chamber.²⁷⁰

1. *Monitoring*

206. Libya suggests that the International Bar Association's Human Rights Institute²⁷¹ as well as the Bar Human Rights Committee of England and Wales,²⁷² in addition to the ICC OTP, may be able to play a role in contributing to any independent monitoring body and program. These organisations have been contacted by counsel for the Libyan Government and have indicated a willingness to consider a monitoring role as part of a policy of positive complementarity, depending upon the precise parameters of such a scheme, financing, and other such variables to be decided in due course. In the event of a Pre-Trial Chamber decision adopting a policy of positive complementarity, many similar organisations (alongside local NGO's) could be contacted to fortify any monitoring program, including many with extensive trial monitoring

²⁷⁰ Rome Statute, Article 19(10).

²⁷¹ Whose expertise includes trial monitoring, including of ICC proceedings, see for example: http://www.ibanet.org/Human_Rights_Institute/ICC_Outreach_Monitoring/IBA_ICC_Programme_Homepage.aspx.

²⁷² Whose work includes conducting training in international human rights law, assisting in strategic litigation through long-distance support and interventions by Amicus Curiae briefs, conducting fact-finding inquiries and trial monitoring and observations. See for example: <http://www.barhumanrights.org.uk/about-bhrc>.

experience, including Human Rights Watch, the Commonwealth Lawyers Association and the International Commission of Jurists.

2. *Targeted Technical Assistance*

207. Libya suggests that there are also several organisations that may be able and willing to play a role in providing targeted assistance pursuant to any monitoring regime.

208. First, the ICC Prosecutor would be well placed, should she accept such a role, to provide a range of technical assistance, not least of which would be robust legal expertise.

209. Second, the UN's mission (UNSMIL) to Libya is a technical assistance mission. Recognising that "[n]ational ownership and national responsibility are key to establishing sustainable peace", it is designed "to assist the Libyan authorities to define national needs and priorities throughout Libya, and to match these with offers of strategic and technical advice where appropriate, and support Libyan efforts", *inter alia*, "through assisting the Libya authorities to reform and build transparent and accountable and correctional systems supporting the development and implementation of a comprehensive transitional justice strategy, and providing assistance towards national reconciliation".²⁷³

210. As discussed in detail in Libya's Al-Senussi Article 19 Challenge, Libya is working closely with the UN, including UNSMIL, the Office of the UN High Commissioner for Human Rights (UNHCHR), the UN Office of Drugs and Crime (UNODC), and the UN Development Program (UNDP), including on issues relating to transitional justice, police and prison reform, human rights and judicial capacity building.²⁷⁴ Recently, Libya invited bilateral assistance from the French and British governments with regard to the provision of specialist forensic teams to assist with the investigation and prosecution of the

²⁷³ <http://unsmil.unmissions.org/Default.aspx?tabid=3544&language=en-US>.

²⁷⁴ Al-Senussi Admissibility Challenge, paras 180 – 193.

perpetrators of the recent unlawful killings and car bombings in Benghazi.²⁷⁵ Further, UNSMIL and the Libyan government are currently in the process of agreeing additional technical assistance focused upon supporting the national efforts to prosecute senior and other members of the former regime, including the provision of assistance, *inter alia*, concerning the legal framework and capacity building for defence counsel and direct investigative assistance.

211. Third, the International Center for International Justice (ICTJ), an international NGO, that, *inter alia*, “provides technical assistance to governments, the justice sector, the UN and other international bodies.... highlight[ing] the responsibility of states to address past violations and help[ing] to set out concrete ways to do this”²⁷⁶ has indicated a willingness to provide technical assistance with regard to the trial of Mr. Al-Senussi. Naturally, the final adoption of this prospective role would depend upon the precise parameters of such a scheme, including the necessary access provided by the Libyan authorities.

F. Conclusion

212. In conclusion, pursuant to Article 17 of the Statute, the Libyan government submits that the probative evidence submitted specifically and convincingly demonstrates that Libya is investigating the “same case” and is genuinely willing and able to complete the domestic process. That is not to argue that challenges do not remain to be confronted to ensure that justice is done for Mr Al-Senussi and the Libyan people. Indeed, complex trials of international crimes in all settings - international or national – are characterised by such challenges. When assessing the domestic proceedings and any challenges which may attach to them for the purposes of determining

²⁷⁵ Saudi Gazette, ‘Foreign forensic teams to help Libya,’ 31 July 2013, available at <http://www.saudigazette.com.sa/index.cfm?method=home.regcon&contentid=20130731175451>; Libya Herald, ‘Cameron offers to send forensic team to Libya – Zeidan,’ 29 July 2013, available at <http://www.libyaherald.com/2013/07/29/cameron-offers-to-send-feronsic-team-to-libya-zeidan/>; Libya Herald, ‘Lawyers learn the power of forensics,’ 19 April 2013, available at <http://www.libyaherald.com/2013/03/19/lawyers-learn-the-power-of-forensics/>

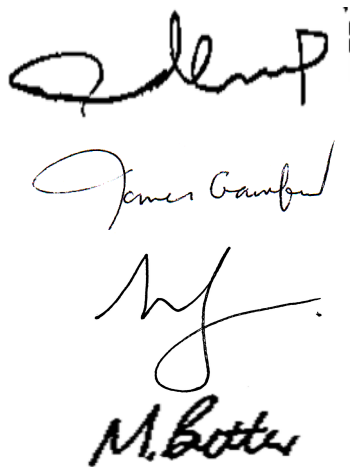
²⁷⁶ <http://ictj.org/about>.

admissibility, the Chamber should embrace a policy of positive complementarity. In other words, the Chamber should provide Libya with the opportunity to obtain the type of external assistance routinely relied upon by the ICC and all other international criminal tribunals. This will ensure a credible and realistic complementarity system that encourages and enables willing states to shoulder their responsibilities thereby advancing the object and purpose of the Rome Statute and its embryonic system of justice.

XIII. RELIEF SOUGHT

213. The Government of Libya therefore respectfully requests that the Chamber declare the case relating to Abdullah Al-Senussi inadmissible; and quash the Surrender Request.

Respectfully submitted:



Professor Ahmed El-Gehani
 Professor James Crawford SC
 Mr Wayne Jordash
 Ms Michelle Butler
*Libyan ICC Coordinator and
 Counsel on behalf of the Government of Libya
 in the case of Abdullah Al-Senussi*

Dated this 14th day of August 2013
 At London, United Kingdom