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THE APPEALS CHAMBER

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

**SITUATION IN LIBYA
IN THE CASE OF**

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

Public and Redacted

The Libyan Government's Reply to the "Observations on behalf of victims on the Government of Libya's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi'"

Source: The Government of Libya in the case of Mr Saif Al-Islam Gaddafi represented by:

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

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INTRODUCTION

1. On 31 May 2013, the Pre-Trial Chamber rendered its “Decision on the admissibility of the case against Saif Al-Islam Gaddafi” (“Admissibility Decision”).¹ The Libyan Government’s appeal and the document in support thereof were submitted on 7 and 24 June 2013 respectively. On 20 August 2013, the OPCV filed its “Observations on behalf of victims on the Government of Libya’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision on the admissibility of the case against Said Al-Islam Gaddafi’” (“OPCV Response”).² The Libyan Government hereby submits its reply thereto, in respect of each ground of appeal.

GROUND ONE

2. The OPCV asserts that the Libyan Government’s first ground of appeal is without merit.³ It makes three types of arguments in support of this assertion.

A. Arguments concerning the applicable evidentiary threshold

3. The OPCV argues that the Libyan Government’s approach “goes contrary to the requirement according to which evidence ought to be of sufficient degree (*sic*) of specificity”.⁴ It repeats this assertion in a number of guises, including that “provision of evidence regarding the precise parameters of the domestic case is a prerequisite to the complementarity assessment”.⁵
4. The Libyan Government has already set out its arguments as to why the Admissibility Decision could not have been made purely on the basis of rules of evidence. Before considering what evidence might be sufficient, it is imperative to determine (i) the burden and standard of proof; and (ii) the substantive nature of the legal test being applied. These are the topics of Ground One of the Libyan Government’s appeal.

¹ ICC-01/11-01/11-344.

² ICC-01/11-01/11-411.

³ OPCV Response, para. 21.

⁴ OPCV Response, para. 32.

⁵ OPCV Response, para. 29, also arguing that the Libyan Government’s appeal entails a “flawed understanding of the evidentiary standard applicable to admissibility proceedings”. Similarly, the OPCV argues that the Chamber’s approach was “necessary for the proper consideration of the Admissibility Challenge” (OPCV Response, para. 21). The same argument is made again at paras. 24 and 32. The OPCV’s contention that the reason for the approach taken by the Pre-Trial Chamber was “only because it lacked basic information regarding the subject-matter of the domestic proceedings” (OPCV Response, para. 26) also amounts to the same argument.

5. The OPCV does not address the burden and standard of proof. As regards the threshold that any evidence would have to meet, the OPCV simply asserts that the “precise parameters” of the domestic process must be proven.⁶ Its arguments, in this regard, simply reassert the approach taken in the Admissibility Decision and do not address the arguments advanced by the Libyan Government in its appeal in relation thereto.
6. The OPCV refers to the Appeals Chamber’s finding that a state must provide “the Court with evidence with a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the [same] case”.⁷ The Libyan Government takes absolutely no issue with this finding which says nothing about the substantive meaning of “case” or “conduct”, or about the level of sameness required. The point at issue in Ground One, is *what amounts to “same case”, not the secondary question of what evidence is sufficient to demonstrate it.*
7. The OPCV contends that, in relation to the evidence needed, the statement of a government is not determinative.⁸ Once again, the Libyan Government does not seek to contend that it is. The issue is, rather, the burden of proof and the threshold that is entailed in the “same case” test.
8. The Libyan Government’s appeal is addressed to the substantive threshold required in order to demonstrate that the same case is being pursued by the domestic jurisdiction as would be pursued by the ICC. It should be noted, for the sake of clarity, that Ground One of the appeal concerns:
 - a. the standard that was imposed upon Libya as regards the level of sameness required;
 - b. the elements to be considered in respect of whether the requisite level of sameness had been reached (the constituent elements of “conduct”); and
 - c. the burden and standard of proof in relation to the assessment of admissibility

⁶ OPCV Response, para. 29.

⁷ OPCV Response, para. 22, referring to “Judgement on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”” (Appeals Chamber), No. ICC-01/09-01/11-307, OA, 30 August 2011, para. 1.

⁸ OPCV Response, para. 30.

in relation to a challenge brought by a state which is pursuing a domestic investigation.

B. *Arguments concerning the sufficiency of particular evidence*

9. The OPCV makes a number of arguments in respect of Ground One, which concern the sufficiency of particular evidence provided by Libya.⁹ It asserts, for example, that the evidence provided by the Libyan Government did not adequately answer the Chamber's questions,¹⁰ and that "the Government failed to establish how its national investigation related to the specific factual allegations set out in the Article 58 Decision [...]".¹¹
10. These arguments too are irrelevant to Ground One of the appeal. The facts of the Libyan criminal process and the specific details of the evidence presented by Libya in its admissibility challenge do not concern the legal standard applied. Submissions concerning the erroneous nature of the Pre-Trial Chamber's factual findings are addressed below.¹²

C. *The OPCV's legal arguments*

11. The OPCV also makes some submissions which concern the legal test applied by the Pre-Trial Chamber, in particular as to the requirement of "substantially the same conduct". Among these are passing references to the legal standard applied by the Pre-Trial Chamber in the above-mentioned factual and evidential arguments (e.g., the need for the national investigation to address the same "specific factual allegations set out in the Article 58 Decision"¹³).
12. The OPCV refers repeatedly to the same person same conduct test, in support of its objections to ground one of the Libyan Government's appeal.¹⁴ It also asserts that a state's investigation must cover "the conduct alleged in the proceedings before the

⁹ See, for example, OPCV Response, paras. 25, 26.

¹⁰ OPCV Response para. 25.

¹¹ OPCV Response para. 26.

¹² See *infra*, "Ground Two".

¹³ OPCV Response para. 26.

¹⁴ See, for example, paras. 22, 33, 37.

Court”.¹⁵

13. The Libyan Government does not disagree. Ground One does not seek to circumvent the “same conduct requirement”. Rather, it raises issues as to the meaning of “conduct”, and “substantially the same”, as well as the applicable burden and standard of proof. As noted above, the arguments concerning the sufficiency of evidence do not concern these issues.
14. The OPCV’s legal submissions are opaque and confused in several respects. At one point, for example, the OPCV asserts that *two* optional tests are available in respect of the Chamber’s consideration of the conduct aspect of admissibility assessment, and that “a Pre-Trial Chamber is equally correct in adopting the ‘substantially same conduct’ standard or the *more exigent* ‘same conduct’ (*sic*) depending on the specific circumstances of the case”.¹⁶ No authority is cited, and no further explanation given.
15. The OPCV argues that, “in light of the specific circumstances of the case, requiring proof of the ‘actual contours’ and ‘precise scope’ of domestic proceedings was necessary for the proper consideration of the Admissibility Challenge”.¹⁷ It does not, however, specify which “specific circumstances” it invokes for this purpose.
16. The OPCV also appears to advance several arguments concerning the *existence* of a domestic criminal process – i.e., step one of the admissibility assessment – which is not in issue in the present appeal. Indeed, it appears to devote a whole sub-section to asserting that, “the Pre-Trial Chamber’s approach to the level of specificity for establishing the existence of a national investigation was correct”.¹⁸ It also refers to the Appeals Chamber’s definition of “being investigated”: “the taking of steps directed at ascertaining whether this individual is responsible for that conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses”.¹⁹ The Libyan Government is in full agreement with the Appeals

¹⁵ OPCV Response, para. 31.

¹⁶ OPCV Response, para. 39 (emphasis added).

¹⁷ OPCV Response, para. 21.

¹⁸ OPCV Response, sub-title to II.A.2, at p. 11.

¹⁹ OPCV Response, para. 30, referring to “Judgement 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

Chamber on these issues. The existence of an investigation is not in dispute. To the extent that this quote provides any guidance as to the threshold to be applied to the question of sameness, it provides an indication as to the activities in relation to which it may be useful to present evidence for the purposes of the admissibility challenge. It says nothing about the degree of sameness required.

17. The OPCV recognises that, as regards preliminary admissibility challenges under article 18 of the Statute, there is a distinction between the approach taken to the assessment of whether the domestic and international cases are the same.²⁰ It should be noted, of course, that the Libyan Government did not seek to argue that the approach taken to the assessment of sameness in respect of two cases at the point of investigation should be akin to that envisaged under article 18.
18. However to the extent that the approach to a preliminary challenge under article 18 is different – as the OPCV argues – it serves to illustrate the Libyan Government’s point that the further in advance of a trial one looks, the less specific one can reasonably expect a “case” to be. For this reason – as already set out in considerable detail²¹ – the assertion that there must be a unitary understanding of the level of specificity entailed by the word “case” across the Statute must be rejected. Indeed, the OPCV entirely contradicts its own argument (and likewise, that of the OTP) by observing that the word “case” must entail a different level of specificity for the respective purposes of articles 17 and 18.²²
19. The Libyan Government takes no issue with the OPCV’s assertion that “[t]he admissibility assessment is [...] nothing more than a comparison between two concurrent investigative processes”, with “[t]he purpose of [...] determin[ing] whether there is a conflict of jurisdictions between the court on the one hand and a national jurisdiction on the other”.²³ For this very reason, the level of sameness required for a

Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute” (Appeals Chamber), No. ICC-01/09-01/11-307, OA, 30 August 2011, para. 1.

²⁰ OPCV Response, para. 33.

²¹ See “Libyan Government’s consolidated Reply to the Responses by the Prosecution, OPCV and Defence to the Libyan Government’s Application relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute”, ICC-01/11-01/11-403, paras. 34-62.

²² OPCV Response, para 40.

²³ OPCV Response, para. 23.

finding that the domestic investigation pertains to the same conduct must properly take into account the stages that the domestic and international investigations have reached, and assess whether they could lead to trials and verdicts in respect of substantially the same conduct.

GROUND TWO

20. The OPCV suggests that the Pre-Trial Chamber committed no error of law in finding that Libya has not substantiated that its domestic investigation covers the same case as that before the Court. This submission is supported by an array of erroneous arguments. Each will be dealt with in turn.

Annexes E & F

21. First, in relation to Annexes E and F, the OPCV accepts that Annex E refers specifically to the shooting of demonstrators at the Juliana Bridge on 17 February 2011 (a crime central to the ICC investigation) but maintains that these Annexes do not clarify the scope or subject matter of the domestic investigation.²⁴ This is despite the fact that the Annexes deal with an array of murders and persecutory crimes committed by the Gaddafi regime, thereby showing that the domestic investigation covers crimes with the same characterisation and gravity as those in the ICC investigation.
22. The OPCV also submits that as Annexes E and F (memorandums from the Prosecutor-General's office as to the scope of the investigations of Mr Gaddafi and Mr Al-Senussi) were "specifically prepared by the Libyan authorities for the purpose of the Admissibility Challenge" they do not have "sufficient probative value".²⁵ This argument appears to be based upon a misconstruction of the Appeals Chamber's rulings that "a statement by a Government that it is actively investigating is not [...] determinative" and that "in such a case the Government must support its statement with tangible proof to demonstrate that it is actually carrying out relevant investigations".²⁶

23. The Appeals Chamber's rulings indicate only that an overarching statement by a

²⁴ OPCV Response, para 45.

²⁵ OPCV Response, para 46.

²⁶ Prosecutor v Ruto, Kosgey & Sang, Admissibility Judgment, para 63.

Government that it is actively investigating cannot be said to be determinative of the admissibility assessment as a whole. The Appeals Chamber has not ruled that individual pieces of evidence which are generated by Governmental authorities in support of the Government's admissibility application are automatically deemed to be of insufficient probative value in relation to any sub-issue forming part of the admissibility assessment. Such an approach would be absurdly reductionist and undermine the essence of the complementarity assessment

24. Moreover, at no stage has the Libyan Government urged the Court to accept its own unsubstantiated submission that it is actively investigating the same case. Rather, it has submitted an array of evidential materials to substantiate its admissibility application, some have been generated by Government officials and others are documentary materials independently generated. Each piece of evidence must be individually and carefully assessed to determine the proper weight that is to attach to that piece of evidence. This assessment must be conducted in light of the totality of the evidence submitted. A summary assessment by a Chamber that all items of evidence generated by a Government are to be regarded as lacking probative value regardless of their contents, as the OPCV appears to suggest, would be unreasonable and a ruling that no reasonable Trial Chamber could adopt. The same flawed reasoning applies in relation to the OPCV's submissions with respect to Annexes 3 and 11.²⁷

Materials from the admissibility challenge in respect of the Al-Senussi case

25. Second, in relation to the Chamber's failure to take into account the evidential materials submitted as part of the Al-Senussi Admissibility Challenge, the OPCV asserts that the Government did not explicitly state that it intended to rely on evidential material from the Al-Senussi Admissibility Challenge.²⁸ This is because the Government *was deprived of the opportunity to do so*. After the Al-Senussi Admissibility Challenge was filed on 2 April 2013, Libya sought to make submissions on the issue of reliance by the Chamber on these materials in the Gaddafi admissibility proceedings.²⁹

²⁷ OPCV Response, para 58.

²⁸ OPCV Response, para 49.

²⁹ See: Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, "Libyan-Government's Request for leave to reply to the Defence for Mr. Saif Al-Islam Gaddafi's "Response to the "Application on behalf of the

The Pre-Trial Chamber did not decide on this request before rendering its admissibility determination.

26. The OPCV additionally submits that it would have been procedurally improper to take into account these Al-Senussi evidential materials as, “all supporting evidence must in principle be filed along with the Admissibility Challenge”.³⁰ This argument is advanced merely in an attempt to discredit the detailed submissions in the Government’s Third Ground of Appeal (as to the unfairness which arose from the Pre-Trial Chamber’s imposition of an arbitrary cut-off point (which was not communicated to the parties) after which evidence from the parties was no longer to be considered).³¹ The Government continues to rely upon these submissions. As argued in Ground Three of the Government’s Appeal, pursuant to Article 58(2), the Chamber had to decide on a fair process for the conduct of the proceedings to ensure that the challenge was based on the most up-to-date evidence. This required more than the application of ostensibly arbitrary deadlines as urged upon the Appeal Chamber by the OPCV.

Annex 5

27. Third, in relation to Annex 5 (a letter from an airline) the OPCV erroneously suggests that the Pre-Trial Chamber “correctly noted that the ‘destination and the time of departure of the aircraft were stated to be unknown’”.³² This is wrong. While it is true that Annex 5 does not state the destination of the flight (although the Government would suggest that in light of events occurring at the time, there is more than a reasonable inference to be drawn that a plane loaded with mercenaries and weapons leaving Tripoli was destined for Benghazi), the document states very clearly that the plane was [REDACTED]. It is therefore abundantly clear that the aircraft took off shortly after 01:00 UTC on 16 February 2011, and that the Pre-Trial Chamber erred in failing to recognise the specificity of the evidence in this document.

Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute”, 3 May 2013, ICC-01/11-01/11-327.

³⁰ OPCV Response, paras 50-52.

³¹ Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi, “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, 24 June 2013, paras 120-141.

³² OPCV Response, para 54.

Annexes 6 & 7

28. Fourth, the OPCV argues that Annexes 6 and 7 (flight manifests) “fall short from establishing that the flights listed carried armed mercenaries” as they “only refer to regularly scheduled commercial flights”.³³ A cursory analysis of Annexes 6 and 7 shows this submission to be in error. Annex 6 refers very clearly to charter flights by [REDACTED] and the [REDACTED], as well as indicating a pattern of landings and timings during the height of the revolution which show that the flights were not regularly scheduled commercial flights. Likewise, Annex 7 states explicitly which flights were regularly scheduled and which were not, showing clearly that a good proportion (if not the majority) of the flights in mid to late February 2011 (i.e. the dates of the ICC investigation) were specially chartered flights to destinations where protesters were being killed by Government Forces.

Annexes 9 & 10

29. Fifth, the OPCV submits that Annexes 9 and 10 (i.e. two orders for extension of detention of Mr Gaddafi) are insufficiently detailed, as they do not itemise the exact date and location of each killing for which Mr Gaddafi is being investigated.³⁴ This assertion is plainly misconceived. It is not to be expected that an order extending detention would itemise each incident being investigated with the same precision and detail as one would expect in an indictment subsequently prepared for trial. However, this obvious fact does not prevent the drawing of reasonable inferences with regard to the subject matter. Annexes 9 and 10 did in fact refer to the incidents contemplated in the Article 58 Decision and should have been regarded by the Chamber as containing specific information about the criminal conduct under investigation in Libya.

Witness statements & summaries

30. Finally, the OPCV makes similarly erroneous assertions as to the level of detail required in each piece of evidence with respect to the witness summaries and the witness statements submitted by Libya.³⁵ Contrary to the tenor of the OPCV's

³³ OPCV Response, para 55.

³⁴ OPCV Response, para 59.

³⁵ OPCV Response, paras 60-63.

submissions, it is not necessary for every individual piece of evidence tendered by the Government to refer in detail to every single allegation in the Article 58 Decision, including also the relevant location and date. Clearly, as noted above, the only reasonable approach, having regard to Libya's right to due process, to an assessment of a collection of evidence is for each piece to be regarded as part of the factual matrix that builds and gives due consideration to the contents of other pieces of evidence. In this way, each individual witness summary and witness statement would have been regarded by the Pre-Trial Chamber as being of sufficient specificity in relation to one or more allegations in the Article 58 Decision and when assessed together ought to have been viewed as providing evidence showing that the same case is under investigation at the national level.

GROUND THREE

31. In relation to Ground Three of the Government's appeal ("Unfairness and procedural errors occasioning a failure to take into consideration relevant and probative evidence"³⁶), the OPCV advances the following submissions in response:

- (i) [A]ppellate review does not serve the purpose of reconsidering "what the Pre-Trial Chamber could have done" but is rather limited to the issue of "whether the Pre-Trial Chamber erred in what it did";³⁷
- (ii) The "Pre-Trial Chamber showed considerable, and perhaps even excessive flexibility in allowing the government to complement and provide further evidence to substantiate its Admissibility Challenge. It cannot therefore be said that Libya was not given sufficient opportunity to present supporting evidence";³⁸
- (iii) No procedural error arises from the Chamber's refusal to receive additional evidence because the Appeals Chamber has held that a State cannot "expect to be allowed to present additional evidence", and "Libya could not have legitimately expected to be given unlimited opportunities to present additional

³⁶ The Appeal, paras. 120 – 139.

³⁷ The OPCV Response, para. 66 [emphasis in original].

³⁸ *Ibid*, para. 67.

evidence or alter the grounds of the Admissibility Challenge”;³⁹

32. It is submitted that the OPCV Response to Ground Three of Libya’s Appeal raises undisputed issues of law and marginally relevant issues that fail to address the gravamen of Libya’s complaint. Its submissions, therefore, ought to be disregarded.
33. Libya does not dispute that that the Appeal’s Chamber stated in the Kenya Admissibility proceedings that the “appellate review does not serve the purpose of reconsidering “what the Pre-Trial Chamber could have done” but is rather limited to the issue of “whether the Pre-Trial Chamber erred in what it did””⁴⁰ or that the Appeals Chamber emphasised in those proceedings that a State cannot ““expect to be allowed to present additional evidence”.
34. These legal principles are of marginal relevance to Libya’s complaint. Kenya’s principal complaint in both appeals was that the “Pre-Trial Chamber should not have decided on the Admissibility Challenge at the time it did, but should have given Kenya more time to submit additional evidence”.⁴¹ The Appeals Chamber found, *inter alia*, that amendment of an admissibility challenge or acceptance of additional supporting evidence was not justified merely on the basis that the State made the challenge prematurely.⁴² The situation is entirely distinct from the position advanced by Libya in its appeal.
35. Libya’s Ground Three concerns wider due process considerations than whether the Chamber should have given Libya more time to file additional submissions.⁴³ Ground Three concerns whether Libya was deprived of a process, pursuant to Article 58(2), that took into account Libya’s domestic circumstances and procedural delimitations, as

³⁹ *Ibid*, para. 70.

⁴⁰ The OPCV Response, para. 66 [emphasis in original].

⁴¹ “Judgement on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”” (Appeals Chamber), No. ICC-01/09-01/11-307, OA, 30 August 2011, para. 95: See also “Judgement on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”” (Appeals Chamber), No. ICC-01/09-01/11-274, OA, 30 August 2011, para. 95

⁴² *Ibid*, para. 99 and 98.

⁴³ Libya’s Appeal, para. 120 – 141.

notified to the Chamber from the outset,⁴⁴ and was sufficiently clear and certain⁴⁵ to provide for a procedure that guaranteed and “facilitated or promoted the admission of the most current information or evidence arising from an *ongoing*, evolving investigation”.⁴⁶

36. The gravamen of the complaint is not that the Chamber decided prematurely, but that it failed to:

- a. take into account the restrictions imposed by Article 59 of Libya’s Code of Criminal Procedure, requiring non-disclosure of “examples of the evidence”;⁴⁷
- b. address Libya’s good faith offer to circumvent these difficulties by an on-site inspection (rather than the type of disclosure prohibited);⁴⁸ and
- c. indicate when Libya was expected to finalise its provision of evidence (related to the ongoing domestic investigation).

37. Given the lack of certainty concerning the standard and burden of proof, this latter point was critical and ought not to be reduced to a consideration of “timing”. Libya *was* provided with opportunities to file evidence and the Chamber *had* the discretion to decide when Libya had been provided with sufficient opportunity to support its Challenge. However, due process and the importance of national proceedings in the context of a jurisdiction based upon complementarity meant that these decisions had to be notified to Libya so that the state was clearly apprised of the available opportunities.

38. This lack of notice – not the timing – deprived Libya of the opportunity to respond to its own procedural constraints or otherwise supplement its challenge promptly or within the time frame eventually allowed. Libya could not know there was a “cut-off time” for service of evidence, unless it was clearly informed. Libya did not expect that it would have unlimited opportunities, only that it would be informed in advance of the time when those opportunities would be exhausted.

⁴⁴ Example: *Ibid*, para. 126.

⁴⁵ *Ibid*, para. 121.

⁴⁶ *Ibid*, para. 125.

⁴⁷ *Ibid*, para. 126

⁴⁸ *Ibid*.

GROUND FOUR

39. The Government rejects the OPCV's contention that the Pre-Trial Chamber did not err in fact or in law in its determination of Libya's inability to investigate the case. The OPCV submissions in support of this contention are characterised by a misunderstanding and misrepresentation of the Government's arguments and the presentation of erroneous arguments on its own behalf.

Lack of substantive assessment of 'unavailability'

40. First, in relation to the unavailability of the Libyan judicial system, the OPCV asserts that, contrary to the Government's submissions, the Chamber did examine the "unavailability" condition prior to considering "inability".⁴⁹ In doing so, the OPCV ignores the subtlety of the Government's argument, which asserts that, although the Chamber explicitly stated that it was considering "unavailability", it failed to do so in effect. The closest the Chamber came to an explicit delineation of what constitutes "unavailability" is its reference to Libya continuing "to face substantial difficulties in exercising its judicial powers fully across the entire territory."⁵⁰ The Chamber then, as the Government submitted, merged considerations of "unavailability" and "inability" by pointing to the purported failure to obtain custody of the accused, failure to obtain *some* testimony and the absence of legal representation as examples, in effect, of "substantial difficulties in exercising its judicial powers fully" or "unavailability". In doing so, the Chamber applied inherently circular reasoning, contrary to the correct interpretation of the Statute.

Relevance of systemic difficulties

41. Secondly, the OPCV misrepresents the Government's submissions regarding the relevance of systemic difficulties.⁵¹ The Government does not suggest that the Court is not required to carry out a fact-specific assessment of the case before it. Rather, the Government asserts that the Chamber must consider whether there are actual, systemic difficulties in the national system that have a direct and quantifiable (rather

⁴⁹ OPCV Response, para. 73.

⁵⁰ Impugned Decision, para. 205.

⁵¹ OPCV Response, paras. 74 and 75.

than purely speculative) impact on the on-going investigation. The assessment of the direct and quantifiable impact of the systemic difficulties is, of course, a fact-specific assessment.

42. Furthermore, to adopt an alternative interpretation, which focuses on “practical challenges” and “discrete examples”, as the OPCV appears to suggest,⁵² would be to create a role for the court which is neither desirable nor intended: an adjunct to strained or struggling judicial systems, rather than a court of last resort, which assumes jurisdiction only in exceptional circumstances.⁵³

Legal status of the Zintan Brigade

43. Thirdly, the OPCV assertion that the Government’s submission regarding the legal status of the Zintan Brigade and its relationship with the central government amounts to a “new factual allegation”⁵⁴ is entirely misconceived. It is not a new factual assertion at all but a legal assertion relating to pre-existing facts, which have always been before the Court. The need to make this legal assertion so explicitly arose as a result of the Pre-Trial Chamber operating upon an erroneous premise that the judicial system operating in Zintan falls outside of Libyan authority, when it reached its determination regarding the Government’s ability to obtain the accused.⁵⁵ The legal status of the relationship had not previously been addressed or determined. To assert that permitting the Government to make submissions on this issue would be to allow the Government “to alter the factual basis for its Admissibility Challenge so as to defeat the fairness of the proceedings” is to fundamentally misinterpret the argument and ignore the reason for its inclusion in the Government’s grounds of appeal.

Ability to obtain necessary testimony

44. Fourthly, the OPCV appears to chastise the Government for not contesting the specific

⁵² Although the argument is somewhat convoluted and, later in paragraph 74, the OPCV states that “unavailability is intended to cover the situation where although there is no collapse in the national criminal justice system, it is not accessible or may not be disposed of.” Logically, this would seem to require a consideration of systemic issues.

⁵³ Holmes, 'Complementarity: National Courts versus the ICC', 686; Philips, 'The International Criminal Court Statute: jurisdiction and admissibility' JK Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law' (2003) 1 JICJ 86, 97.

⁵⁴ OPCV Response, para. 78.

⁵⁵ Document in Support of Appeal, para. 157.

factual findings that form the basis of the Chamber's ruling regarding Libya's ability to obtain necessary testimony.⁵⁶ Again, this is entirely misconceived. The Government did not challenge the factual finding because it is the Government that provided the Pre-Trial Chamber with the very basis of its factual finding: the failure to obtain testimony from two witnesses.⁵⁷

45. Furthermore, the OPCV attempts to lend misconceived support to the Chamber's reliance on the failure to obtain testimony of two witnesses on the basis that "it was obviously not the Chamber's intention to draw an exhaustive list of incidents that are likely to hinder the Appellant's ability to obtain witness –related evidence."⁵⁸ This misses the point entirely. The Government's complaint is not solely about the number of examples provided by the Chamber to illustrate the purported inability but its wholesale failure to provide any support for its assertion that the this failure has a "direct bearing on the investigation against Mr. Gaddafi".⁵⁹ Without this analysis, that assertion is, according to the Government, entirely speculative and does not provide a proper basis for a finding of inability. Moreover, the OPCV's claim that the "Chamber's analysis was much broader and took into account the actual difficulties to obtain similar evidence in light of the prevailing security conditions in the country and lack of control" is wholly unsupported.⁶⁰ The Chamber was not able to point to "actual difficulties" and its findings in this regard were, again, purely speculative and insufficient to ground a finding of inability.

Witness protection

46. Fifthly, the OPCV misrepresents both the Chamber's findings regarding witness protection issues and the Government's submissions. The OPCV asserts that the Chamber "provided further reasons relating to the absence of protective measures for

⁵⁶ OPCV Response, para. 80.

⁵⁷ Libyan Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi", 23 January 2013, ICC-01/11-01/11-258- ConfExp, with Annexes 1-23, para. 50, Document in Support of Appeal, para. 164.

⁵⁸ OPCV Response, para 80.

⁵⁹ The Impugned Decision, paragraph 210.

⁶⁰ OPCV Response, para. 80.

witnesses under Libyan law at the trial stage.”⁶¹ This is incorrect. The Chamber did not find that there was an absence of protective measures but rather found that was “not persuaded by the assertion that the Libyan authorities currently have the capacity to ensure protective measures”.⁶² Although not expressly stated in these terms, the Chamber effectively decided that this possible failure constitutes “unavailability” of the judicial system leading to an inability to obtain relevant testimony. This finding is purely speculative in character. As such, the Government’s objection to the Court’s rejection of Libya’s submission (that trial judges have discretionary powers to order protective measures on the basis that it constitutes an unwarranted intrusion upon the right of a sovereign state to determine its own domestic procedures) is entirely well founded.

Appointment of defence counsel for Mr. Gaddafi

47. Finally, the OPCV misinterprets the Government’s submissions regarding the appointment of defence counsel for Mr. Gaddafi. First, the OPCV ignores the correlation between this ground of appeal and appeal ground 3 (relating to procedural fairness) in its request that the Chamber ignored submissions relating to the appointment of lawyers at Mr. Gaddafi’s hearing in Zintan.”⁶³

48. In addition, the OPCV incorrectly asserts that the submissions regarding the appointment of lawyers at the Zintan hearing is in contradistinction to its previous submission that Mr. Gaddafi had waived his right to appoint a lawyer during the investigative stage.⁶⁴ The fact that Mr. Gaddafi had earlier in the investigation suggested that he did not wish to avail himself of his right to a lawyer has no bearing on his later decision, made at the May 2013 hearing in Zintan, that he did wish to have lawyers represent him and did appoint them for this purpose.

⁶¹ OPCV Response, para 81.

⁶² The Impugned Decision, paragraph 211.

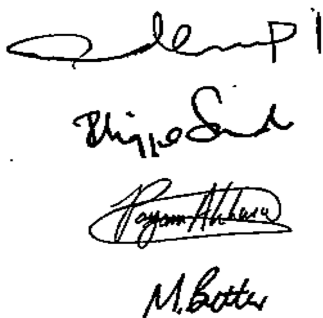
⁶³ Document in Support of Appeal, para. 169.

⁶⁴ OPCV Response, para. 84.

CONCLUSION

49. For all these reasons, Libya invites the Court to reject the OPCV submissions.

Respectfully submitted:



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Dated this 30th day of August 2013

At London, United Kingdom