



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 Version
(with one confidential Annex A)**

The Libyan Government's further submissions in reply to the Prosecution and Gaddafi Responses to "Document in Support of Libya's Appeal against the "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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A. INTRODUCTION

1. On 31 May 2013, the Pre-Trial Chamber rendered its “Admissibility Decision”.¹ The Government of Libya (“The Government”) submitted its appeal and the document in support thereof (“Appeal”) on 7 and 24 June 2013 respectively. The “Prosecution Response”² and “Gaddafi Response”³ were filed on 16 and 18 July respectively. The Libyan Government hereby replies to both submissions. In doing so, it relies upon the outline of its additional submissions contained within its application to make the same,⁴ whilst also mindful of the Appeals Chamber’s (“the Court”) ruling as to the proper scope of these additional submissions.⁵

B. SUBMISSIONS

(a) Preliminary observations

2. The Prosecution and Gaddafi Defence submit that in the Admissibility Decision the Pre-Trial Chamber did not err in law or in fact.⁶ The Gaddafi Defence also makes several arguments that are irrelevant⁷ or that would only be valid by way of a cross-appeal in respect of the Admissibility Decision.⁸ It also asserts once again that the Government has “misrepresented the contents of its evidence”;⁹ that it has “consistently” attempted to mislead the Court;¹⁰ and even that counsel misinformed the Appeals Chamber in relation to their ability to receive instructions from the Prosecutor-General.¹¹ The Defence also makes the highly inflammatory comment that “Libya seeks to shift any deficiencies in its appreciation of the law from the responsibility of Counsel to the Chamber”.¹² A central theme in the Gaddafi Defence’s numerous and repetitive submissions before the Pre-Trial Chamber was that this alleged bad faith was the means by which Libya sought to “evade meeting its obligations before the ICC”.¹³ However, these serious allegations have never been supported by proper evidence and have no place in these proceedings,

¹ “Decision on the admissibility of the case against Saif Al-Islam Gaddafi”, ICC-01/11-01/11-344.

² “Prosecution Response to the ‘Document in Support of the Government of Libya’s Appeal against the Decision on the admissibility of the case against Saif Al-Islam Gaddafi’”, ICC-01/11-01/11-384.

³ “Defence Response to the ‘Document in Support of the Government of Libya’s Appeal against the Decision on the admissibility of the case against Saif Al-Islam Gaddafi’”, ICC-01/11-01/11-386.

⁴ ICC-01/11-01/11-389; “Decision on the Libyan Government’s request to file further submissions”, ICC-01/11-01/11-442.

⁵ “Decision on the Libyan Government’s request to file further submissions”, ICC-01/11-01/11-442.

⁶ Gaddafi Response, para. 8. It is far from clear what Mr. Gaddafi means by the assertion that the Libyan Government makes improper “grave” allegations against the Pre-Trial Chamber. The Appeal simply concerns legal and factual errors which meet the appellate standard of review.

⁷ Gaddafi Response, paras. 181 and 190.

⁸ For example, Gaddafi Response, paras. 152-156; Gaddafi Response, paras. 171-180.

⁹ Gaddafi Response, para. 27.

¹⁰ Gaddafi Response, para. 27.

¹¹ Gaddafi Response, para. 196-201.

¹² Gaddafi Response, para. 224.

¹³ Gaddafi Response, para. 45.

irrespective of their adversarial nature.

3. It bears emphasizing that in its Response the Defence maintains that Libya's alleged failure to transfer the Gaddafi Case to the Accusation Chamber is proof of the Libyan Government's bad faith in respect of its obligations to the Court.¹⁴ The Gaddafi Defence has also argued the exact opposite before Pre-Trial Chamber I: namely, that transfer of the case to the Accusation Chamber is proof of the Government's bad faith towards the Court.¹⁵ This reflects the unfounded and fluctuating nature of Mr. Gaddafi's submissions in this regard. Furthermore, the Gaddafi Defence appears to have attempted to bolster its assertion of Libyan defiance with suggestions in the press that the transfer to the Accusation Chamber hearing was, in fact, the beginning of the trial.¹⁶

(b) The Accusation Chamber Dossier

4. The Government has consistently explained in its submissions before the Pre-Trial Chamber that pursuant to Article 59 of the Libyan Code of Criminal Procedure it is prevented from disclosing the evidence against Mr. Gaddafi during the investigative phase of proceedings to persons outside of the investigation.¹⁷ Following the making of an express exemption to this requirement by the Minister of Justice in January 2013, the Government has provided a limited number of samples of evidence to the ICC in the spirit of cooperation.¹⁸ Despite the complexity of the investigation in the transitional context of post-Gaddafi Libya, and despite reassurances by Libya that it would be in a position to disclose all of the relevant evidence once the case progressed to the accusation phase of proceedings, the Pre-Trial Chamber elected to render its Decision prior to this stage being reached. On 19 September 2013, the initial hearing was held before the Accusation Chamber for Mr. Gaddafi, Mr. Al-Senussi, and thirty-seven other defendants.¹⁹
5. Counsel for the Libyan Government obtained on Friday a copy (in Arabic) of the dossier handed to the Accusation Chamber by the Prosecutor-General's office on Thursday, 19 September 2013, thereby signifying the transfer of the case from the investigation phase to the accusation phase of the proceedings. This dossier (which in itself is over 1000 pages) is based upon several thousand witness statements and interviews currently in possession of the Libyan authorities as well as many tens of thousands of other

¹⁴ See, for example, Gaddafi Response, para. 8.

¹⁵ See Gaddafi Defence's "Urgent Notification", 29 August 2013, ICC-01/11-01/11-424.

¹⁶ <http://www.theguardian.com/world/2013/sep/17/libya-trial-gaddafi-senussi>: "John Jones QC called for this week's trial to be cancelled".

¹⁷ See, for example, Gaddafi Admissibility Challenge, paragraph 40; Document in Support of Appeal, para. 16.

¹⁸ See, Annex 1 to Government's Further Submissions, 23 January 2013 (ICC-01/11-01/11-258-Red2).

¹⁹ See attached confidential Annex A.

documentary materials. These witness statements and certain of the documentary materials are in the process of being provided to counsel now that the obstacles posed by Article 59 of the Libyan Criminal Procedure Code (due to the stage of the case) have been overcome.

6. This material was gathered in the course of the ongoing investigation that was underway at the same time as the admissibility proceedings before the Pre-Trial Chamber. It, together with the minutes of the Accusation Chamber (translated as “Indictment Chamber”) hearing held on 19 September 2013, together with the minutes of a decision to allow defence teams to view the accusation file (which are submitted as Confidential Annex A to this Response), reflect the contours and scope of the case as it developed during the investigation.
7. Two working days after the commencement of the accusation phase, the translated hearing minutes are now submitted to the Court and the dossier itself (in Arabic) has been provided to Counsel. Following the requisite translation, and with the leave of the Court, Counsel undertakes to submit the relevant extracts of the Accusation Chamber dossier (as well as relevant witness statements and evidential materials) relating to the case of Mr. Gaddafi in the near future. However, at the present juncture, the contents of both the hearing minutes and the fact of the dossier per se provides context and further credibility to the materials already before the court. Of course, prior to translation, it is not possible to make specific submissions concerning particular aspects of the contents of the dossier. However, the very existence of the materials is a categorical rejoinder to the Gaddafi Defence’s arguments, showing that the Libyan Government’s submissions concerning the progress of the domestic case have been made in good faith throughout.

(c) Request for admission of Confidential Annex A and to file further evidence and submissions

8. In the light of the foregoing, the Libyan Government requests, on the basis of Rule 149,²⁰ as well as the Appeals Chamber’s inherent competence to ensure the fair and expeditious conduct of proceedings before it, (i) admission of the annex as additional material relevant to the Appeal; and (ii) an opportunity to file, by 2 December 2013, the relevant extracts of the Accusation Chamber dossier and additional witness statements and evidential materials as well as limited submissions on their contents.

²⁰ Rule 149 states, *inter alia*, that “rules governing proceedings and the submission of evidence in the Pre-Trial and Trial Chambers shall apply *mutatis mutandis* to proceedings in the Appeals Chamber”. The Appeals Chamber, therefore, may “decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings” (per Rule 58(2)).

9. In making these requests, the Libyan Government notes that a key consideration in respect of the possibility for the Appeals Chamber to receive new material is that its appellate jurisdiction is corrective – i.e., the purpose of an appeal is “to determine whether the determination [by the Pre-Trial Chamber] on the admissibility of the case or the jurisdiction of the Court was in accord with the law”.²¹ Consequently, the Appeals Chamber has refused the admission of new evidence on appeal where this entails the mere assertion that the facts have changed since the previous decision on admissibility. Libya’s request is fundamentally distinguishable for two principal reasons.
10. First, the material pertains to the investigation *during the period in relation to which the Admissibility Decision* was made. As already noted, the material could not have been provided to the Chamber as a result of Libyan law. It would be fundamentally unfair if compliance with its own criminal procedure precluded consideration by the Appeals Chamber of the Libyan Government’s arguments.
11. Second, the legal question of the extent to which the Court should presume the validity of states’ domestic processes is in issue in the appeal, and Confidential Annex A sheds light upon this very point in respect of the *period to which the Admissibility Decision*. The material, therefore, is relevant to the present admissibility challenge.

(d) Ground One

12. Both Responses reflect a misapprehension of the Government’s appeal submissions. In particular, contrary to the Responses, there is absolutely no suggestion in the appeal that “each and every dispute must be resolved in favour of domestic prosecutions”;²² that “a State only has to establish that it is conducting investigations”;²³ or that Chamber required either “complet[ion of the] domestic investigation” or “an exact match between [the domestic] case and the ICC proceedings”.²⁴

i. Purported distinction between evidentiary and substantive requirements

13. Both Responses assert that the Pre-Trial Chamber’s decision was that it could not determine the scope of the investigation on the basis of the evidence submitted, and both Responses seek to distinguish this type of finding from a finding concerning the scope of the investigation being of insufficient ‘sameness’. They argue that the Appeal incorrectly conflates the question of sufficiency of the evidence with that of the legal test of

²¹ Decision on the "Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber's Decision on Admissibility" ICC-01/09-01/11-234, para. 11.

²² Gaddafi Response, para. 84.

²³ Gaddafi Response, para. 90.

²⁴ Prosecution Response, paras 38, 43.

‘substantially the same conduct’.²⁵ The arguments rely upon a distinction between: (i) evidentiary requirements for determining the scope of an investigation; and (ii) substantive assessment of ‘sameness’ for the purposes of whether the Libyan and international investigations covers “substantially the same conduct”.

14. Clearly, the finding that the “evidence, taken as a whole, does not allow the Chamber to discern the actual contours of the national case against Mr. Gaddafi” was predicated on the qualifying phrase that followed it “*such that* the scope of the domestic investigation could be said to cover the same case as that set out in the Warrant of Arrest issued by the Court”.²⁶ Neither Prosecution nor Defence (nor the Pre-Trial Chamber) suggest that the evidence presented was insufficient to show *anything* about the domestic case, but rather that *that which it does show does not meet the test*. To the extent that this involves an argument about sufficiency of evidence, it cannot be interpreted other than as *indicative of* the legal threshold being applied. The distinction that the Prosecution and the Defence invoke is illusory and does not support their argument.

15. Further, it would be absurd if there were recognition of the stage that an investigation had reached in the assessment of whether the domestic process was substantially similar, but no way to put that into practice because of the evidentiary standard applicable to determining the scope of the investigation.

ii. Use of the phrase ‘precise scope’

16. Mr. Gaddafi’s assertion that it is “fallacious for Libya to maintain that the Chamber ever applied a ‘precise scope’ test”²⁷ is misguided. First, the Pre-Trial Chamber did use the phrase “precise scope”.²⁸ Second, the nature of the Libyan Government’s arguments concerned the standard actually applied by the Pre-Trial Chamber – not the superficial question of which words were used to describe it, upon which Mr. Gaddafi bases his Response.²⁹ The phrase “precise scope” is quoted because it reveals the standard underpinning the assessment of the scope of the investigation in the Pre-Trial Chamber’s decision.

17. The Chamber’s finding was made on the basis of certain documents that it deemed to be evidence of an investigation into the same conduct, and certain documents that it did not.³⁰ The Chamber identified documents which it considered indicative of “investigative

²⁵ Prosecution Response, para. 42; Gaddafi Response, para. 68. See also paras. 69-76, 96, 97.

²⁶ Gaddafi Admissibility Decision, para. 135 (emphasis added).

²⁷ Gaddafi Response, para. 67.

²⁸ Gaddafi Admissibility Decision, para. 123.

²⁹ Gaddafi Response, paras. 9, 20, 65, 66.

³⁰ In the latter category were Annexes C and D to the Admissibility Challenge and Annexes 1-3 and 9-11 to Libya’s Further Submissions: Gaddafi Admissibility Decision, paras. 116, 117, 123.

steps” concerning “certain discrete aspects that arguably relate to the conduct of Mr. Gaddafi as alleged in the proceedings before the Court”³¹ included Annexes 4, 15, 16, and 17 to Libya’s Further Submissions (which contain witness statements and intercept evidence) but did not satisfy the first arm of the admissibility assessment.³²

18. The analysis in respect of Annex C to the Admissibility Challenge (which contains summaries of witness statements) is revealing. The Chamber noted that the summaries do have “some probative value”³³ but ultimately found that they “do not allow the Chamber to draw conclusions as to the *precise scope* of the domestic investigation”.³⁴ However, in arriving at this conclusion, the Chamber made explicit its threshold test, namely that it was assessing the content of these documents to ascertain whether each revealed the “precise scope” of the investigation.

iii. Relevance of article 19(5) and the alleged “risk to the administration of justice”

19. Both Responses dispute the relevance or impact of the requirement under article 19(5) of making the admissibility challenge “at the earliest possibility” as to the level of specificity required of a domestic process.³⁵ The Gaddafi Defence asserts that the Libyan Government’s argument has already been considered and dismissed by the Appeals Chamber in its judgment in the Kenya Admissibility Appeal.³⁶ It refers, in this regard to the finding that article 19(5) only requires an admissibility challenge once the state concerned “is in a position to actually assert a conflict of jurisdictions”, but not “just because the Court has issued a summons to appear”.³⁷

20. The Libyan Government takes no issue with the Appeals Chamber’s jurisprudence, but rather the Gaddafi Defence’s distortion of its meaning beyond recognition. The Appeals Chamber was rightly making it clear that article 19(5) does not require a state to make an admissibility challenge prematurely or speculatively. By contrast, Mr. Gaddafi seeks to employ this finding in order to deny that which the Appeals Chamber has made clear elsewhere: that the Chamber must base its assessment upon “the facts as they exist at the

³¹ Gaddafi Admissibility Decision, para. 134.

³² Gaddafi Admissibility Decision, paras. 124-131.

³³ Gaddafi Admissibility Decision, para. 121.

³⁴ Gaddafi Admissibility Decision, para. 123.

³⁵ Gaddafi Response, paras 78-82; Prosecution Response, paras. 36, 73, 74.

³⁶ Gaddafi Response, para. 80, referring to ICC-01/09-01/11-307, para.2, in turn referring to “evidence *with a sufficient degree of specificity and probative value*”.

³⁷ *Prosecutor v. Ruto, Kosgey & Sang*, “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-01/09-01/11-307, para.46.

time of the proceedings concerning the admissibility challenge”.³⁸

21. In other words, the requisite level of ‘sameness’ for inadmissibility must depend upon the stage reached by the criminal process concerned. Article 19(5), and the jurisprudence just quoted demonstrate recognition that admissibility challenges can take place at any point (even, and indeed, especially) the earliest point in a state’s criminal justice process. In the light of this, basic fairness requires that the ICC take into account the stage of proceedings reached.
22. As regards the Prosecution’s argument concerning article 19(5),³⁹ it should be noted that the Libyan Government does not ask for a lower standard of proof. It submits, rather, that what amounts to proof must – at a consistent standard –take into account the stage reached by the domestic criminal process and the comparator (the international investigation). This also demonstrates the misguided nature of Mr. Gaddafi’s assertion that acceptance of the Libyan Government’s arguments would “increase the risk that the proper administration of justice will be frustrated”.⁴⁰ This entails both a misconception of the Libyan Government’s submissions, and an erroneous argument about the nature of the “risk” involved.
23. The fact that the Accusation Chamber dossier is only available now resoundingly reinforces these points, and further undermines the arguments concerning article 19(5) in the Responses.

iv. Constituent “aspects” of a case

24. The Prosecution describes the Appeal as asserting that the domestic investigation need cover “some – not all – aspects of the case before the Court”.⁴¹ The Prosecution’s submissions simply beg the question of the meaning of “aspects”, an issue which, as the Prosecution recognises, remains unresolved in the jurisprudence.⁴² One candidate is the notion of “incidents”, to which the Prosecution refers on a number of occasions in its Response.⁴³ It is submitted that the core of the test cannot be whether a domestic investigation addresses the same criminal outcomes, either as a matter of the law of complementarity in general or in the specific context of the *Gaddafi* case.

³⁸ “This is because the admissibility of a case under article 17 (1) (a), (b) and (c) of the Statute depends primarily on the investigative and prosecutorial activities of States having jurisdiction. These activities may change over time”. *Prosecutor v. Katanga & Chui*, “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-01/04-01/07-1497, para. 56.

³⁹ Prosecution Response, paras 73, 74.

⁴⁰ Gaddafi Response, para. 82 (emphasis in original).

⁴¹ Prosecution Response, para. 40, referring to Appeal, paras. 72, 74, 81. See also Prosecution Response, para. 47.

⁴² Prosecution Response, paras. 50, 67. Likewise the Prosecution’s contention that any investigation “must have certain contours or defining parameters” (Prosecution Response, para. 43).

⁴³ See also Prosecution Response, paras. 68-70.

25. The word “conduct” is itself indicative of this. A criminal “event” or “incident” is not relevant *qua* conduct, but rather because incidents are a key aspect of *the subject matter of conduct*. Whether the same incidents are addressed by a criminal process (whether investigation, trial, or verdict) may be *evidence* as to whether the same conduct is addressed by it, but is not the central aspect of “conduct”. Several persons could be responsible for the same criminal incident, particularly where the alleged mode of liability is not direct commission. But the reverse is not true: a person could not be held responsible for the same incident more than once through multiple types of conduct, as such convictions would be duplicitous.

26. It is submitted, further, that the focus on “conduct”, means that there is considerable flexibility in respect of necessary similarity as to coverage of incidents between the domestic and international investigations. Even at the point of trial, when a higher standard of specificity can be expected of a case, it is less problematic to amend an indictment so as to include new *incidents*, than it is to allege new kinds of conduct in respect of those incidents. The ICTR Appeals Chamber notes that

*Whether particular facts are “material” depends on the nature of the Prosecution case. The Prosecution’s characterization of the alleged criminal conduct and the proximity of the accused to the underlying crime are decisive factors in determining the degree of specificity with which the Prosecution must plead the material facts of its case in the indictment in order to provide the accused with adequate notice.*⁴⁴

27. Moreover, the specificity demanded as regards alleged incidents varies depending upon the type of *conduct* alleged.⁴⁵

28. The specific context of the present case is apparent from the Arrest Warrants and the Article 58 Decision.⁴⁶ 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

⁴⁴ *Ntagerura* Appeal Judgment, para. 23; *Kvo~ka et al.* Appeal Judgement, para. 28.

⁴⁵ *Ntakirutimana* Appeal Judgement, paras. 73-74: “the inability to identify victims is reconcilable with the right of the accused to know the material facts of the charges against him because, in such circumstances, the accused’s ability to prepare an effective defence to the charges does not depend on knowing the identity of every single alleged victim. The Appeals Chamber recalls that the situation is different, however, when the Prosecution seeks to prove that the accused personally killed or harmed a particular individual. [...] [T]he Prosecution’s obligation to provide particulars in the indictment is at its highest when it seeks to prove that the accused killed or harmed a specific individual”.

⁴⁶ 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.

*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.*⁴⁷

29. The Chamber has held that “the events expressly mentioned in the Article 58 Decision do not represent unique manifestations of the form of criminality alleged”⁴⁸ but are, rather “*samples* of a course of conduct of the Security Forces, under Mr. Gaddafi's control”.⁴⁹ It has also noted that:

*in 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.*⁵⁰

30. The Chamber noted that assessing “whether the alleged domestic investigation addresses the same conduct underlying the Warrant of Arrest and Article 58 Decision” entailed 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”.⁵¹ This, the Chamber makes resoundingly clear, is the conduct in relation to which the admissibility assessment poses the question of substantial identity.
31. The error in the Prosecution’s submissions is apparent from its assertion that the “Pre-Trial Chamber actually adopted a very broad interpretation of the ‘substantially the same conduct’ test” on the basis of the contents of the Warrant of Arrest and Article 58 Decision.⁵² In this regard the Prosecution conflated the ramifications of the progress made in the ICC’s investigation *in this particular case* with the standard imposed by the ‘substantially the same conduct’ test.

v. *Relevance of ne bis in idem*

32. The Prosecution bases a significant part of its Response upon the relevance of the *ne bis in idem* principle to the assessment of whether the domestic case is “substantially the same” as the international case.⁵³ The Libyan Government takes no issue with the important role played by the *ne bis in idem* principle, as a guarantor of individual rights in criminal proceedings, and as an orientating principle in the distribution of competencies between

⁴⁷ Gaddafi Admissibility Decision, para. 80 (emphasis added).

⁴⁸ Gaddafi Admissibility Decision, para. 82, referring to Warrant of Arrest, p. 4.

⁴⁹ Gaddafi Admissibility Decision, para. 82, referring to Warrant of Arrest, p. 4.

⁵⁰ Gaddafi Admissibility Decision, para. 83.

⁵¹ Gaddafi Admissibility Decision, para. 83.

⁵² Prosecution Response, para. 48. See also, paras. 68, 69.

⁵³ Prosecution Response, paras. 38, 54-66.

states and the ICC.

33. The key point that the Prosecution submissions miss, however, is the way in which article 20(3) operates *in relation to investigations*. The effect of the *ne bis in idem* upon any stage of the criminal justice process can be understood only on the basis of an actual or potential verdict. For example, a trial of a person for matters in relation to which he/she has already been tried is prohibited either because a verdict has already been reached in respect of that matter or because it would be abusive or disproportionate to expose someone to the risk of a guilty verdict on multiple occasions. The Libyan Government does not hereby seek to contend that a domestic criminal process is permissible simply because there has been no completed ICC trial. However, 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 (potential) 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, then, is a projection *back* from this view of the potential 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 process thereof, the discovery of new evidence, etc. – each of the two above-mentioned projections involve a degree of uncertainty.
34. 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.

vi. Object and purpose of the Rome Statute

35. Both Responses refer to the “Statute as a whole” and the aims thereof.⁵⁴ Mr. Gaddafi makes the curious argument that complementarity – itself being at the core of the aims of the Rome Statute – “cannot be used as a basis to undermine or circumvent the

⁵⁴ Prosecution Response, para. 50. See also, Gaddafi Response, paras. 84, 85.

manifestation of that agreement”.⁵⁵ The Prosecution misstates the Libyan Government’s position as mere “preservation of State sovereignty in the exercise of a State’s own criminal jurisdiction”.⁵⁶

36. The goal of the Rome Statute (and of the Libyan Government, within its own jurisdiction) is to end impunity for international crimes. In this regard, the ICC shares its object and purpose with other international criminal tribunals. The fundamental difference between the ICC’s complementarity regime and jurisdictions based on primacy is *how this is to be achieved*. As distinct from the primacy-based jurisdiction of the *ad hoc* tribunals, the Rome Statute was drafted with the recognition that the most effective and most desirable means of ending impunity is for domestic jurisdictions to carry out prosecutions.
37. For this reason, it is submitted that the effect of the Rome Statute is threefold: (i) to modify the sovereign right to conduct criminal proceedings such that, in relation to crimes which are within the Rome Statute, it is no longer absolute, but is contingent upon ability and willingness to conduct genuine proceedings; (ii) *to protect that right once modified*; (iii) and to create a jurisdiction in which will prosecute international crimes properly where this modified right will not be exercised. This is apparent from the text of the Rome Statute⁵⁷ and its negotiating history of the Statute,⁵⁸ as well as the Court’s jurisprudence.⁵⁹ The central role for domestic proceedings 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, because of the value of pursuing, where possible, post-atrocity justice *within the society affected*. The Court must interpret article 17 reasonably and flexibly in order to enable, not defeat, domestic proceedings.

(e) Ground Two

38. Ground Two of the Appeal concerns errors in the assessment of the evidence in the Admissibility Decision. It is submitted that the Accusation Chamber dossier will illuminate the domestic investigation from which it emerged. As discussed above, it is also a strong indication of the lack of credibility to Mr. Gaddafi’s assertions that the Admissibility Challenge and its supporting material were part of a plan to mislead the Pre-

⁵⁵ Gaddafi Response, para. 84.

⁵⁶ Prosecution Response, para. 75.

⁵⁷ 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”.

⁵⁸ 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.

⁵⁹ ICC-01/09-01/11 OA (Dissenting Opinion of Judge Anita Ušacka), para. 19; ICC-01/09-01/11 OA, para. 43.

Trial Chamber and defy legal obligations.

i. Relationship between Grounds One and Two

39. Mr. Gaddafi contends that Ground Two is flawed by inconsistency with Ground One.⁶⁰

Patently, Ground Two concerns the approach taken to the evidence, rather than to the legal standard applied, and thus contends that even if the Pre-Trial Chamber's approach to the "same case" test were not erroneous, it nonetheless made errors of law and fact in its approach to the evidence. The accusation dossier will both illuminate errors in relation to the assessment of the material submitted with the Admissibility Challenge and will also itself provide evidence of the contours of the case to the level of specificity which (as set out in Ground One of the Appeal) was erroneously required of the Libyan Government at an earlier stage.

40. As part of his arguments concerning Ground Two, Mr. Gaddafi asserts that the Pre-Trial Chamber committed a legal error in its definition of the term 'case' by construing it too broadly.⁶¹ It asserts this error in a misguided attempt to refute the Government's submissions as to the legal error committed by the Pre-trial Chamber in interpreting 'case' too narrowly. Such an argument, which patently relates to Ground One, could only have been made in the form of a cross-appeal of the Admissibility Decision by the Defence. Placing it in Ground Two does not distract from this point. The Libyan Government, therefore, refers to the arguments in respect of Ground One, above and in its Appeal.

ii. Characterisation of Ground Two

41. Both Responses erroneously contend that the Government erred in describing its second ground of appeal as an error of law and fact.⁶² An "error of fact" is, of course, a legal error in respect of the range of *legally* permissible interpretations of particular facts. But even notwithstanding this, the Responses exhibit a failure to appreciate that the Chamber's error was not *only* improper in its assessment of the evidence before it, but also in its application of an incorrect legal approach (i.e., the assessment of isolated pieces of evidence rather than the totality of the evidence) and thus an error of law.⁶³

iii. Misconstruction of the evidential materials considered by the Chamber

42. On several occasions, the Gaddafi Response misconstrues the evidence referred to by the Government in its Document in support of appeal⁶⁴ in order to erroneously suggest that such evidence does not provide evidential support for the Governments submission that

⁶⁰ Gaddafi Response, para. 77

⁶¹ Gaddafi Response, paras. 105-113.

⁶² Prosecution Response, para. 187; Gaddafi Response, paras. 22, 114.

⁶³ Prosecution Response, paras. 133-135.4

⁶⁴ Gaddafi Response, paras. 131, 135, 143, 161, 174.

the Pre-Trial Chamber erred by giving insufficient weight to certain key documents. The Defence does this by making purely speculative assertions regarding the circumstances in which the evidence in Annexes 9 and 10 and the witness summaries was obtained and the subsequent impact upon the evidential value of that evidence. It is inappropriate for the Court to be invited to accede to matters of pure speculation. [REDACTED]

(f) Ground Three

43. The Prosecution and the Defence have failed to grasp the precise nature of the Appellant's third ground of appeal, which relates to fairness with regard to *overall* conduct of the proceedings by the Pre-Trial Chamber, notwithstanding its apparent flexibility. In particular, both the Prosecution and the Defence misrepresent the argument by failing to recognise the Government's concern about the Chamber's insufficient recognition of the obstacles posed by Article 59 of the Libyan Criminal Procedural Code and the Chamber's unpreparedness to take up suggestions proffered by the Libyan Government as exceptional measures.⁶⁵ In particular, its rejection of the Government's invitation to view the investigation file in Tripoli - an extraordinary measure designed to advance the admissibility proceedings whilst at the same time protecting confidentiality to the greatest extent possible. Furthermore, the Gaddafi Response incorrectly describes the Government's invitation to view the case file in Tripoli as *ex parte*, and intended to exclude the Defence.⁶⁶ The invitation was not exclusive in the way the Defence alleges and was in fact extended to the Defence.⁶⁷

44. [REDACTED]

45. Furthermore, the Defence allegation that the Government has been disclosing information "completely routinely and systematically" is a gross overstatement without foundation. The Defence references its previous submissions, which do not in fact provide support for this sweeping assertion⁶⁸ and the Court is invited to disregard it as being entirely without merit.

46. The Defence assertion that "Libya failed to show a connection between the appointment of the new Prosecutor-General and any concrete positive developments in the Gaddafi

⁶⁵ For example, the Prosecution asserts that Libya failed to take advantage of opportunities provided to it that may have facilitated the discharge of its burden of proof (Prosecution Response, Para. 141).

⁶⁶ Gaddafi Response, para. 188.

⁶⁷ See, for example, "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-Conf, para. 43.

⁶⁸ The Defence's own filing refers to the fact that intercept evidence is widely available. Furthermore, the Government has not publicly disclosed names of any insider witnesses. The Government does not accept that identifying potential witnesses in such general terms as "Gaddafi-era official" or "insider" is not a sufficiently identifiable feature to violate confidentiality.

case or the Libyan justice sector at large” and, further, that the Chamber was entitled to disregard this information because Libya had failed to demonstrate its significance to the factual matrix in existence at that point in time”⁶⁹ is inaccurate and should be disregarded. As set out in the Appeal, the immediate precursor to Libya’s requests for a final period of six weeks to adduce additional evidence and for the Pre-Trial Chamber to undertake a site visit to Tripoli to inspect the investigative case file in the Prosecutor-General’s office was the imminent appointment of Mr. Abdul Kader Radwan as the new Prosecutor-General.⁷⁰ Furthermore, the significance of the appointment of a new Prosecutor-General for the Government’s ability to file additional evidence before the ICC pertaining to the domestic investigation was specifically alerted to the Chambers.⁷¹ The Accusation Dossier will further illuminate the significance of the appointment of Mr. Radwan.

47. Furthermore, the Defence misrepresents the Government’s submissions relating to the appointment of local lawyers in his incidental domestic proceedings. The Government did not make any submissions to the effect that the local lawyers would, could or should be involved in the domestic prosecution of the Rome Statute conduct. Rather, the Government reiterated in its Appeal that in relation to the core crime allegations against him, Mr. Gaddafi had not exercised his right to appoint counsel during the investigative stage of the proceedings. Upon entering the accusatory phase of the proceedings, the Chambre d’Accusation will appoint counsel for Mr. Gaddafi if he has not chosen one himself. The attached note of the hearing before the Accusation Chamber on 19 September 2013 details the legal representation for the various co-accused, thereby supporting Libya’s submissions in this regard on numerous occasions. The Accusation Chamber will not proceed further until a legal representative has been appointed to all the defendants, including Mr. Gaddafi. Indeed, the Accusation Chamber has adjourned the proceedings until the 3 October when it is expected that Mr. Gaddafi will be in attendance. Furthermore, the Accusation Chamber will be actively addressing the question of legal representation for Mr. Gaddafi in these proceedings in accordance with the requirement under Libyan law that he is entitled to legal representation from the commencement of the accusation phase.

48. Furthermore, the Defence states incorrectly that Libya has “failed to cite any information or evidence in the record concerning the apparent appointment of counsel for Mr. Gaddafi in connection with the national security proceedings in Zintan”.⁷² To the contrary, the Prosecutor provides an account of the court hearing provided by the

⁶⁹ Gaddafi Response, para. 221.

⁷⁰ Appeal, para. 112.

⁷¹ Appeal, para. 113.

⁷² Gaddafi Response, paras. 33 and 207.

Defence.⁷³

(g) Ground Four

49. The Responses, particularly the Defence Response, are characterised by a misapprehension or misrepresentation of the Government's submissions regarding the Court's finding of inability, as set out in Ground 4. Before turning to those inaccuracies, the Government first notes the Prosecution's somewhat novel submissions regarding the interpretation of "unavailability", culminating with a slightly curious English formulation that a national judicial system is "unavailable" when it "cannot be disposed of or is not accessible."⁷⁴ The Prosecution do not substantiate this assertion sufficiently to warrant the adoption of this seemingly novel formulation, which is based primarily on a dubious textual formulation. Nor does the Prosecution substantiate its assertion that there is considerable overlap between "unavailable", "effective" and "sufficiency" in the international human rights context, notwithstanding that terms such as "effectively" were explicitly eschewed by the negotiators. The Prosecution further asserts that human rights tribunals have given "available" a "very broad meaning, referring not only to the existence of a judicial system, but also to its accessibility and its capability of producing adequate results".⁷⁵ The Prosecution appears to be introducing a results-based test, which appears to be at odds with the Statute. Again, the Prosecution does not substantiate this assertion sufficiently to warrant the adoption of this seemingly novel formulation and the Defence reiterates the submissions on the correct interpretation of "unavailability", as set out in the Appeal.⁷⁶

50. Both the Prosecutor and the Defence assert that, contrary to the Government's submissions, the Chamber did examine the "unavailability" condition prior to considering "inability".⁷⁷ In doing so, both the Defence and the Prosecution ignore 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. Mindful of the Court's direction that the Government must not repeat arguments it has already submitted in its response to the observations of victims and of Ms. Hosseinioun, the Government simply

⁷³ "Addendum to the "Urgent Defence Request" of 21 January 2013, and Request for Finding of Non-Compliance", 07 May 2013, ICC-01/11-01/11-332-Anx3: Full Press conference by Al-Alagi and Usama Al-Juweili concerning Saif's Trial 02-05-2013).

⁷⁴ Prosecution Response, para. 160.

⁷⁵ Prosecution Response, para. 161.

⁷⁶ Appeal, paras. 144-153.

⁷⁷ For example, Gaddafi Response, para. 240; Prosecution Response, para. 164.

cross-references its submissions in this regard in order to ensure that the Chamber is fully appraised of the correct position.⁷⁸

51. The Defence submissions are characterised by the inaccurate recollection/restatement of previous “concessions” purportedly made by the Libyan Government in the course of the admissibility proceedings. Of particular note is the alleged concession by Libya that “a trial in Zintan would not satisfy the admissibility criteria before the ICC.”⁷⁹ No such concession was ever made. The reference cited in support of this allegation is a comment by President el-Magariief, referred to in the course of the admissibility hearing, in which he stated that there is no prospect of a trial taking place in Zintan due to inadequate courtroom facilities and the other infrastructure that will be needed for a trial.”⁸⁰ This does not amount to a concession that a trial in Zintan would not or could not satisfy the admissibility criteria. Rather it expresses a preference for the trial to be held in Tripoli where there is a specially built court complex. The statement of the President needs also to be considered within the broader context of Mr. Gaddafi’s trial, arising from the reality that his trial is joined to that of 38 Gaddafi-era officials. Whilst it would not, therefore, be practical or usual practice to transfer all of those defendants to Zintan for prosecution and, therefore, the preference would be for him to be tried in Tripoli. This does not amount to a concession that a trial in Zintan would or could not satisfy the admissibility provisions.
52. Furthermore, the Defence asserts that Libya conceded that “the absence of a defence counsel was related to systemic difficulties concerning the risk faced by defence lawyers, which rendered their assistance otherwise unavailable as concerns the trials of associates of the former regime.”⁸¹ This is inaccurate and is not supported by the references cited by the Defence (which includes one of its own filings and a filing of the Libyan Government which contains no such concession) or more generally. That is, as Confidential Annex A shows, the Gaddafi-era officials, whose cases have just been referred to the Accusation chamber, are represented by lawyers.⁸² Accordingly, the Chamber should disregard the Defence submissions in this regard.
53. In addition, the Defence inaccurately summarises an interview with Prime Minister Zeidan, claiming that he “went so far as to expressly acknowledge that the Government had been unable to secure the transfer of Mr. Gaddafi to Tripoli because it lacked control

⁷⁸ See Response of the Libyan Government to “Observations on behalf of Mishana Hosseinioun pursuant to Rule 103”, 29 August 2013, ICC-01/11-01/11-426.

⁷⁹ Gaddafi Response, para. 249.

⁸⁰ ICC-01/11-01/11-T-2-Red-ENG WT, pp. 19-20.

⁸¹ Defence Response, para. 255

⁸² See Confidential Annex A; also Gaddafi Admissibility Challenge, paras. 59, 62.

over parts of Libya.” The full text of that interview, set out in the Defence’s own filing, shows that no such express acknowledgement was made.⁸³ Rather, the Prime Minister stated that at that particular time “it was found that it is safer to keep him where he is, on a security level and many other levels” and referred to the security challenges being faced by Libya in general terms as a post-revolution State.

54. The Defence submissions regarding witness protection and obtaining testimony entirely miss the Government’s point that the Impugned Decision failed to explain how any concerns regarding the ability to obtain particular testimony had any impact upon the actual progress of the investigation, reflecting a fundamental misapprehension of the Government’s submissions. Rather, the Defence simply repeats its previous allegations regarding the purported mistreatment of witnesses.⁸⁴
55. Furthermore, purportedly under the rubric of the witness testimony issue, the Defence asserts that “it was patently clear at the time that the Chamber issued its decision that Libya lacked the capacity to ensure the protection and security of Court participants, such as judges, counsel and witnesses”. The Defence fails to substantiate this assertion, which was not a finding of the Pre-Trial Chamber, and fail to engage with the critical question of the actual impact upon the investigation of Mr. Gaddafi. In any event, the fact that the investigation is now complete and has now proceeded to the Accusation phase reflects the reality that at the time of the PTC’s determination of the admissibility of the case, the relevant authorities were clearly able to carry out the investigation and obtain testimony which is necessary for the prosecution of Mr. Gaddafi.

C. CONCLUSION

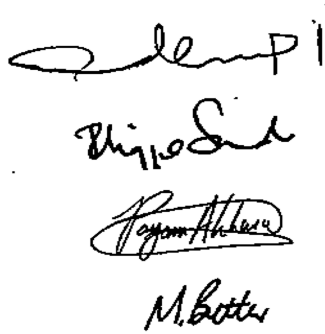
56. Libya seeks the permission of the Court to:
 - a. submit Confidential Annex A as additional material relevant to the Appeal; and
 - b. provide additional evidence (including relevant extracts of the Accusation Chamber dossier pertaining to Mr Gaddafi) and make further submissions on this additional evidence by 2 December 2013.
57. Libya invites the Court to:
 - a. reject the arguments advanced the Gaddafi and Prosecution Responses;
 - b. accept the additional submissions advanced by the Government in reply; and

⁸³ ICC-01/11-01/11-281-Red2, footnote 283.

⁸⁴ Gaddafi Response, para 278 and 284; Government’s Application to make additional submissions, para. 47.

- c. allow the appeal against the Pre-Trial Chamber's decision rendering the case admissible and grant the relief requested therein.

Respectfully submitted:



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Professor Philippe Sands QC

Professor Payam Akhavan

Ms Michelle Butler

ICC Focal Point and Counsel on behalf of the Government of Libya
(in the proceedings relating to Saif Al-Islam Gaddafi)

Dated this 23rd day of September 2013

At London, United Kingdom