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THE APPEALS CHAMBER

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

SITUATION IN LIBYA

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

Public Redacted

Defence Response to “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: Defence for Mr. Saif Al-Islam Gaddafi

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

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I. Introduction

1. The Defence's submissions in relation to Libya's Further Submissions of 23 September 2013¹ are as follows:
 - a. Libya's Further Submissions should be dismissed *in limine* for failing to comply with Regulation 36(3);
 - b. Libya's request to introduce additional evidence should be dismissed *in limine* and/or on the merits; and
 - c. Libya's Further Submissions are misconceived and should be rejected.

a) Libya's Further Submissions fail to comply with Regulation 36(3), and should be dismissed in limine

2. The Appeals Chamber specifically directed that Libya's Further Submissions should not exceed 20 pages.²
3. The approximate word count of Libya's submissions is 7,849 words (not including the cover pages). For the 18 pages of substantive argument, that constitutes an average of 436 words per page. This is in clear breach of the stipulation in Regulation 36(3) of the Regulations of the Court that "an average page shall not exceed 300 words".
4. If Libya had complied with the 300 words per page maximum, therefore, its page count would have been more than 26 pages, exceeding by a very wide margin the prescribed 20 pages.
5. The Regulations exist for a purpose. The Court must ensure that its Regulations are respected. Moreover the breach of the regulations is not negligible but significant. The Defence is obviously prejudiced in having to respond within the time limit to a lengthier filing, while itself keeping within the prescribed page limit.
6. Since Libya did not seek authorisation to exceed the word and page limits, its Further Submissions should be summarily dismissed and it should not be given the opportunity to re-file its submissions.

b) Libya's request to introduce additional evidence should be dismissed in limine and/or on the merits

¹ "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", ICC-01/11-01/11-454-Conf ("Further Submissions").

² ICC-01/11-01/11-442.

7. If, notwithstanding the foregoing, the Chamber is prepared to entertain Libya's Further Submissions, and the Defence is required to respond to this excessively lengthy filing, then the Defence submits that Libya's request to introduce additional evidence should be dismissed *in limine* and/or on the merits.

i. Transcript of the hearing of 19 September 2013

8. Libya has attached to its filing, *Confidential Annex A*, "as additional material relevant to the appeal", which purports to be a transcript of a hearing before the Accusation Chamber on 19 September 2013.
9. Again, Libya has not sought prior authorisation to submit this Annex, nor provided an explanation as to why it did not seek prior leave. This is sufficient to merit dismissal.³ The Chamber should therefore disregard the Annex in its entirety.
10. If, notwithstanding this, the Chamber is willing to consider retroactively granting authorisation to Libya to file this material, the Defence opposes its admission for the following reasons:
1. The evidence is self-evidently new material that was not before the Pre-Trial Chamber; since the Appeals Chamber's jurisdiction is corrective only, it has no jurisdiction to consider this material; and
 2. Libya's attempt to argue that this material is not new is entirely unconvincing.

1. The evidence is new material that was not before the Pre-Trial Chamber; since the Appeals Chamber's jurisdiction is corrective only, it has no jurisdiction to consider this material

11. The transcript, relating as it does to a hearing held in Tripoli on 19 September 2013, came into existence long after the Pre-Trial Chamber rendered its decision on admissibility on 31 May 2013. It is, therefore, in every sense of the word, "new", and thus inadmissible.
12. It is beyond argument that the Appeals Chamber's jurisdiction is corrective only. The Pre-Trial Chamber, putting it very simply, could not possibly have erred by not taking into consideration a hearing which only took place three and a half months after it had rendered its decision. There is simply nothing to "correct".

³ ICC-01/05-01/08-680, para.12; ICC-01/04-01/07-1336, para.7.

2. Libya's attempt to argue that this material is not new is unconvincing.

13. At paragraphs 9 to 12 of its Further Submissions, Libya attempts to circumvent the restrictions on the admission of this new evidence on appeal, by deploying two arguments. Both are completely untenable.

14. Libya states at paragraph 10:

“the material pertains to the investigation during the period in relation to which the Admissibility Decision was made. [...] the material could not have been provided to the Chamber as a result of Libyan law ...”

15. As far as the transcript is concerned, it is not the case that it *“could not have been provided to the Chamber as a result of Libyan law”*. It could not have been provided to the Chamber because the hearing only took place on 19 September 2013, and so neither the transcript nor the event even existed when the Chamber was deliberating.

16. The fact that the material *“pertains to the investigation during the period in relation to which the Admissibility Decision was made”* is fairly meaningless. Libya does not cite any authority for the proposition that they are drawing any meaningful distinction in law. It is axiomatic that almost anything that happens in Mr. Gaddafi's case in the future will, in one way or other, pertain to the prior investigation. However that does not render it all admissible as not being “new”.

17. Libya's second argument is even less tenable, referring as it does to a *“legal question”* which *“is in issue in the appeal”*. Self-evidently a legal question is not resolved by adducing evidence of new facts, but by legal argument.

18. Finally, Annex A, containing as it does information which postdates the appealed Decision, does not comply with the Appeals Chamber's direction that the purpose of the additional submissions is to provide further ‘clarification’ on the specific issues referred to in Libya's request.⁴ The Appeals Chamber has previously rejected requests to invoke Regulation 28, where the party is not seeking to *“clarify or to provide additional details”* of documents before the Appeals Chamber, but to provide information that postdates the impugned decisions and the filings in the present appeals.”⁵

⁴ ICC-01/11-01/11-442, paras. 5, 13.

⁵ ICC-01/04-01/06-1476, para.3.

ii. *Libya's request to file "the relevant extracts of the Accusation Chamber dossier and additional witness statements and evidential materials as well as limited submissions on their contents", by 2 December 2013*

19. This request, likewise, should be dismissed for the reasons set out above.
20. First, self-evidently this material is "new" as it was not before the Pre-Trial Chamber when it rendered its Admissibility Decision. Since the Appeals Chamber's jurisdiction is corrective only, it has no jurisdiction to consider this material.
21. Second, Libya's arguments for carving out an exception for this material are unconvincing, for the reasons set out in paragraphs 13 to 17 above.
22. Moreover, the material that Libya seeks to adduce on 2 December 2013 is not only plainly "new" in the sense that it was not available to the Pre-Trial Chamber, but some of it may be "new" in the absolute sense, as post-dating 31 May 2013. Certainly Libya has not stated in terms that every item of material that it wishes to adduce on 2 December 2013 was already in existence at 31 May 2013, and in the context of an on-going investigation it is possible that there will be statements and other material in the dossier that post-date 31 May 2013. To admit material that was not only not before the Pre-Trial Chamber, but came into existence after its decision on admissibility, is entirely outside the Appeals Chamber's corrective jurisdiction.
23. For the Appeals Chamber to rule otherwise would represent a unwarranted departure from the Chamber's decisions in the *Kenya* cases, which excluded Kenya's request to submit an updated investigative file at the appellate level.⁶
24. Libya's argument that it could not provide the material previously, "*as a result of Libyan law*" and that "*[i]t would be fundamentally unfair if compliance with its own criminal procedure precluded consideration by the Appeals Chamber of the Libyan Government's arguments*" (paragraph 10) should also be soundly rejected.
25. If Libya was unable to submit the additional evidence at the time of the admissibility proceedings, then Libya's present ability to submit such materials (or at least its ability to do so on 2 December 2013) must be considered to be a new factual development, which did not form part of the Pre-Trial Chamber's determination of the admissibility challenge. Libya's request therefore falls squarely within the Appeals Chamber's interdiction on additional evidence based on new factual developments.

⁶ ICC-01/09-01/11-234, para.12

iii. The request to submit new material should also be rejected on the merits

26. In addition to the foregoing, it should be noted that Libya's interpretation of Article 59 has not remained the same throughout these proceedings. Although Libya has now expressly claimed that at the time of the admissibility proceedings, "the material could not have been provided to the Chamber as a result of Libyan law (emphasis added)",⁷ in its January 2013 submissions, Libya was willing to disclose detailed investigative materials to the Pre-Trial Chamber or the Prosecution, or permit the Pre-Trial Chamber to send representatives to view the "full investigative case file (emphasis added)" *in situ*.⁸
27. These proposals were not conditional on the case first progressing to the next stage of the proceedings.⁹ Libya's objection at that point in time concerned disclosure of these further materials to the Defence, even though Libya had conceded that Article 59 did not prevent disclosure to the Defence during the investigative phase of the proceedings.¹⁰
28. Libya has also averred on appeal that its proposal to allow representatives of the Chamber to view the full investigation file *in situ* extended to the Defence.¹¹ There is therefore absolutely no logical reason as to why Libyan law could apparently accommodate – prior to the Accusation hearing - both the viewing of the entire investigative file by all ICC parties *in situ*, and the submission of select documents by filing, but not others.
29. Moreover, although the case has apparently been referred to the Accusation Chamber, the charges have not yet been confirmed, and it is still possible that the Accusation Judge could order the Prosecutor to conduct further investigations.¹² The objective of Article 59, which according to Libya is to "avoid prejudice to further or on-going

⁷ ICC-01/11-01/11-454-Conf, para. 10.

⁸ ICC-01/11-01/11-258-Red2, paras, 33, 35,38.

⁹ Libya's reference to six weeks was tied to the date of the issuance of the Pre-Trial Chamber's decision and the time taken to collate the materials, and not any domestic developments. ICC-01/11-01/11-293-Conf, paras.7, 42. There was also no time restriction imposed on the Chamber's ability to travel to Tripoli to view the entire case file.

¹⁰ ICC-01/11-01/11-130-Conf, para.59; ICC-01/11-01/11-258-Red2, para.93;ICC-01/11-01/11-130-Conf-AnxC, p.7.

¹¹ ICC-01/11-01/11-454-Conf, para. 43.

¹² ICC-01/11-01/11-130-Conf-AnxC, p.7; ICC-01/11-01/11-T-2-CONF-EXP-ENG, p.26, lines12-13.

investigations” and protect the presumption of innocence,¹³ could therefore still be invoked to restrict disclosure at the present juncture of the proceedings. Libya does not appear to consider that possibility, although it is provided for by its domestic law.

30. Libya’s request to submit further evidence and submissions on 2 December 2013 is also completely lacking in specificity, which renders it impossible to determine the relevance of the information to the appeal.

31. In requesting to submit “the relevant extracts of the Accusation Chamber dossier and additional witness statements and evidential materials”,¹⁴ Libya has not specified whether the information specifically concerns Mr. Gaddafi or is related to the ICC allegations. Libya’s distinction between the Accusation Chamber dossier, and additional witness statements and evidence is also ambiguous, leaving open the possibility of material being adduced which was collected pursuant to investigations which are not currently before the Accusation Chamber, or collected unofficially.

32. Given the number of defendants in the proceedings, the extraordinarily broad range of the charges,¹⁵ and the multiple investigations that have been initiated at various times, it is respectfully submitted that the Appeals Chamber could not conceivably render an informed decision on such a vague and speculative basis.¹⁶

33. The admission of further submissions in December 2013 would also unacceptably protract the admissibility proceedings, violating the overarching statutory emphasis on resolving admissibility proceedings in an expeditious manner.¹⁷ Whereas Libya asserted in its January 2013 submissions that it would only require six weeks to prepare the evidential dossier concerning Mr. Gaddafi for the Chamber,¹⁸ it now asserts that it requires almost two and half months to prepare the material which apparently existed “during the period in relation to which the Admissibility Decision was made”.¹⁹ Libya has provided absolutely no explanation as to why it did not commence translating this material in January so that it would be in a position to effect timely disclosure, if its request was granted.²⁰

¹³ ICC-01/11-01/11-258-Red2, para.31.

¹⁴ ICC-01/11-01/11-454-Conf, para.8.

¹⁵ ICC-01/11-01/11-258-Red2, para.82.

¹⁶ ICC-01/05-01/08-680, paras.31-32.

¹⁷ ICC-01/11-01/11-386-Conf, paras.183-186.

¹⁸ ICC-01/11-01/11-258-Red2, para. 35.

¹⁹ ICC-01/11-01/11-454-Conf, para. 10.

²⁰ In considering whether to admit additional evidence outside of the deadline, Trial Chamber II has found that an excessive workload or a persistent lack of resources are not excuses for failing to act with due diligence and

34. Continued uncertainty regarding the ultimate forum for Mr. Gaddafi's trial prejudices Mr. Gaddafi's right to be tried before the ICC in an expeditious manner,²¹ and undermines the ICC's surrender order. The Court will, of course, note that Mr. Gaddafi continues to languish in detention while these proceedings continue. The Libyan authorities have conspicuously failed to surrender him to the ICC. It is evident from Libya's Further Submissions that, rather than having any plans for him to be in The Hague by 3 October 2013, "*it is expected that Mr. Gaddafi will be in attendance*" before the Accusation Chamber on that date.²² Libya's submissions therefore contain within themselves a clear expression of Libya's intention to continue to disregard the ICC surrender order.
35. It is therefore apparent that even if the Libyan Government exercised custody over Mr. Gaddafi – which it clearly does not – it has never expressed an intention to comply with its obligation to surrender Mr. Gaddafi immediately to the ICC and has shown by its acts and the words of its officials that it does not intend to. Notwithstanding the Appeals Chamber's decision on suspensive effect, the absence of a final ruling on admissibility has allowed Libya justify its failure to surrender Mr. Gaddafi by referring to his trial as an "internal Libyan affair".²³
36. Given that the Libya has not sought prior authorisation from the Pre-Trial Chamber to delay the implementation of its surrender obligation, it would be unacceptable for Libya to benefit from that non-compliance by securing a further opportunity to submit evidential items which are the fruits of its non-compliance.
37. If Libya were permitted to file additional evidence relating to new circumstances on appeal, this would also provide Libya with a *de facto* opportunity to submit a new challenge on appeal. Such a challenge *de novo* would subvert the strict statutory regulation concerning the number of admissibility challenges. If the Appeals Chamber were to consider new facts on appeal, it would also deprive the Defence of their right to an independent appeal of admissibility determinations, thus rendering "the concept of appeal incoherent".²⁴

failing to respect the right of the Defence to be tried without undue delay: ICC-01/04-01/07-1336, para 6. See also ICC-01/04-01/07-2259, para.43.

²¹ The Pre-Trial Chamber has cited the pending appeal as a factor, which militates against the commencement of pre-confirmation proceedings: ICC-01/11-01/11-440, para.29.

²² ICC-01/11-01/11-454-Conf, para.47.

²³ Prime Minister Zeidan, 5 minute mark, video interview with Christine Amanpour, 26 September 2013

<http://amanpour.blogs.cnn.com/2013/09/26/libya-is-not-failing-pm-zeidan-tells-amanpour/>

²⁴ ICC-01/09-01/11-234, para.12.

38. Moreover, since the Pre-Trial Chamber declined to enter any findings on Article 17(2), even if the Appeals Chamber were to uphold Libya's appeal, the challenge would have to be referred back to the Pre-Trial Chamber for further consideration as to whether the criteria of Article 17(2) are met. It would therefore not be in the interests of judicial economy to introduce evidence at the appellate phase.
39. By directly incorporating evidence of discrete developments into its appellate submissions, Libya has also sought to isolate these developments from contemporaneous events which strongly militate against the Appeals Chamber finding in Libya's favour. If the Appeals Chamber were minded to admit this new evidence, then the Defence requests the Appeals Chamber to rule on this matter in advance of its final determination, in order to enable the Defence to submit a timely application for leave to file countervailing evidence on these issues.²⁵
40. Finally, even if the Appeals Chamber were to admit Annex A into evidence, rather than providing "context and further credibility to the materials already before the Court",²⁶ the information contained within underscores why Libya's appeal must be rejected.
41. [Redacted].
42. [Redacted],²⁷ [Redacted].
43. [Redacted].²⁸

c) Libya's Further Submissions are misconceived and should be rejected.

Specific arguments concerning the OTP and Defence Responses

i. Purported distinction between evidentiary and substantive requirements

44. Libya's arguments on this point undermine the very argument that it seeks to make.²⁹ Libya's concedes that the Pre-Trial Chamber's finding concerns "an argument about sufficiency of evidence",³⁰ that is, the Pre-Trial Chamber's assessment as to whether the evidence met the test ("*that which it does show does not meet the test*"),³¹ rather

²⁵ [Redacted]

²⁶ At para. 7.

²⁷ ICC-01/11-01/11-454-Conf-AnxA, p.5.

²⁸ ICC-01/11-01/11-454-Conf-AnxA, p.8.

²⁹ ICC-01/11-01/11-454-Conf, paras.13-15.

³⁰ ICC-01/11-01/11-454-Conf, para.14.

³¹ ICC-01/11-01/11-454-Conf, para.14.

than the legal analysis underpinning the test itself. This cannot be described as anything but a question of fact.

ii. Use of the phase ‘precise scope’

45. Libya has not disputed the requirement that a challenging State must adduce evidence “with a sufficient degree of specificity and probative value that it is investigating the case”.³² In the same manner that absence of the name of the witness or the date of the statement would impact on the probative value of a statement, lack of information concerning the temporal scope of the evidence is also relevant to both the specificity and probative value of the statement. Libya’s citation of Annex C demonstrates this point.³³ The Chamber’s found that the summaries had some probative value, but did not allow the Chamber to draw conclusions concerning the precise scope of the domestic investigation. This illustrates that the Chamber considered that information pertaining to the scope of the investigations (in other words, the temporal, geographic and substantive ambit of the allegations) was relevant to the Chamber’s assessment of probative value and specificity.
46. In the same way that the Appeals Chamber found that evidence tendered in the Kenya admissibility challenges lacked the requisite specificity because there was no information concerning the “time and location of those visits or the cases in which these inquiries took place”,³⁴ Libya has failed to demonstrate that the Chamber erred by determining that lack of information concerning the scope of investigations was relevant to the Chamber’s assessment of the probative value and specificity of Libya’s evidence.

Relevance of Article 19(5) and the alleged “risk to the administration of justice”

47. Libya’s submissions on this point reflect a mere disagreement with Defence and Prosecution arguments, rather than any error on the part of the Pre-Trial Chamber.
48. Libya asserts that the fact that the “Accusation Dossier is only available now” reinforces why the Chamber should not expect a degree of specificity in evidence tendered during the early stages of an investigation. In so doing, Libya has contradicted its argument that the reason why Libya could not disclose the contents of

³² ICC-01/09-01/11-307, para.2.

³³ ICC-01/11-01/11-454-Conf, para.18.

³⁴ ICC-01/09-01/11-307, para.69.

the Accusation Dossier earlier was because of Article 59, not because the contents did not exist earlier in the investigation.

49. There is also a fundamental distinction between quantity and quality of evidence. The amount of evidence collected by national authorities may increase over time. However, in order to demonstrate that Libya was investigating a specific case – as understood by Article 19 - rather than general allegations of criminality, which are covered by Article 18, Libya was required to demonstrate a correlation between its investigative activities and the ICC case. Whilst it is correct that a State can challenge at the earliest point in the criminal justice process (which Libya did not do in any case), a State can only do so insofar as it can demonstrate that its investigations concern the same person and same conduct as the ICC case, and therefore fall within the framework of Article 19. To hold otherwise would render the distinction between Articles 18 and 19 meaningless.³⁵

Constituent “aspects” of a case

50. Again, Libya’s arguments on this point consist entirely of a disagreement with the Prosecution, rather than any demonstration of error on the part of the Chamber. Indeed, Libya has failed to demonstrate how its arguments on this point are relevant to the Chamber’s actual findings or Libya’s appellate grounds.

Relevance of ne bis in idem

51. Again, Libya’s submissions on this point concern a mere disagreement with the Prosecution rather than any alleged error on the part of the Chamber.

Object and purposes of the Rome Statute

52. Libya misunderstands the concepts underpinning the ICC Statute and the complementarity regime. The Rome Statute is not predicated on an assumption that “the most effective and most desirable means of ending impunity is for domestic

³⁵ Libya’s citation at footnote 38 of the Katanga Appeal is completely misplaced. The Appeals Chamber was addressing the situation in which a State that was actively investigating the case, ceases to do so. It was not addressing the evidential standard for the same person same conduct test.

jurisdictions to carry out prosecutions”.³⁶ As is made clear by the Preamble, the Statute is predicated on the assumption that the effective prosecution of alleged crimes is the most effective method to eliminate impunity.³⁷ A State only has the right to conduct prosecutions itself insofar as it has demonstrated that it is capable of conducting effective prosecutions; if the State is unable to do so, then the overarching objective of ensuring effective prosecutions (and thereby eliminating impunity) requires that the case be prosecuted at the ICC.³⁸

Ground Two

Relationship between Grounds One and Two

53. Since Libya is unable to demonstrate any error as concerns the material actually put before the Chamber at the time of the admissibility proceedings, it is forced to rely on the promise of disclosure of evidence in two and a half months’ time.³⁹ This is ample demonstration of the flaws in its appeal. The Appeals Chamber can only assess whether the Pre-Trial Chamber erred on the basis of the material put before it, at the time of the admissibility proceedings.

54. Libya has also mischaracterised the arguments of the Defence. The Defence has not filed a cross-appeal, but rather submitted arguments based on “well established principle of *majori continet in se minus*, that the greater includes the lesser.”⁴⁰ It is possible for the Appeals Chamber to confirm that there is no error in the outcome of the Pre-Trial Chamber’s decision or application of the test to the evidence, without confirming the legal validity of the test itself. In particular, if the test applied by the Chamber was broader than that which is required by Article 19, then it follows that Libya’s appeal on this point must be dismissed because any error operated to the advantage of Libya.

Characterisation of Ground Two

55. Libya seeks to transform what are plainly errors of fact into errors of law, to which a less stringent appellate test applies. Libya has failed to cite any instances in the

³⁶ ICC-01/11-01/11-454-Conf, para.36.

³⁷ “Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”, Preamble.

³⁸ ICC-01/04-01/07-1497, para.85.

³⁹ ICC-01/11-011/-454-Conf, para.39.

⁴⁰ ICC-01/04-01/06-1084, para.49.

Decision where the Chamber stated an incorrect legal standard for the evaluation of evidence. Even if the Chamber had assessed each evidential item in isolation (which Libya has failed to demonstrate), this error would concern the manner in which the Chamber assessed the evidence, not the legal test employed by the Chamber.

Misconstruction of the evidential materials considered by the Chamber

56. Libya's submissions on this point relate solely to a disagreement with the Defence rather than any error on the part of the Chamber.

57. [Redacted]

Ground Three

58. As noted above, Libya's reliance on Article 59 is both flawed and contradictory. Libya has completely failed to address the fact that Article 59 applies vis-à-vis the public, and not persons participating in the investigation.⁴¹ Article 59 did not preclude disclosure to the ICC; it only required that such disclosure be conducted on a confidential basis. Moreover, if Article 59 could accommodate the Chamber and the parties viewing the entire investigations dossier in Tripoli, then it could have accommodated the inclusion of this material as confidential attachments to Libya's further submissions in January 2013.

59. [Redacted],⁴² [Redacted].

60. [Redacted].⁴³

61. [Redacted]⁴⁴ [Redacted].

62. [Redacted].⁴⁵ [Redacted],⁴⁶ [Redacted],⁴⁷ [Redacted].

63. In terms of the relationship between the appointment of the new Prosecutor-General and the ability of Libya to meet the admissibility criteria, Libya has failed to demonstrate any nexus between this appointment and Libya's proposal to submit evidence within 6 weeks (a time period which Libya linked to the time required to complete translation) or for the Chamber to conduct a site visit. The questionable relevance of this development is demonstrated by the fact that four months later, when

⁴¹ ICC-01/11-01/11-386-Conf, paras.54, 212-214.

⁴² ICC-01/11-01/11-228-Conf-Exp; ICC-01/11-01/11-323-Conf-Exp, para.23.

⁴³ ICC-01/11-01/11-235-Conf-Exp-AnxA, ICC-01/11-01/11-228-Conf-Exp-Red, para.10.

⁴⁴ ICC-01/11-01/11-233-Conf-Exp, paras.30-32.

⁴⁵ ICC-01/11-01/11-239, p.23.

⁴⁶ ICC-01/11-01/11-261-Conf, para.29.

⁴⁷ ICC-01/11-01/11-265-Conf-Exp-Red, para.16.

the Chamber issued its Decision, Libya had still failed to advance the case to the Accusation stage, or to finalise a Memorandum of Understanding on privileges and immunities, which would have been required to facilitate a site visit.

64. In terms of the appointment of counsel to Mr. Gaddafi in the Zintan proceedings, Libya has failed to demonstrate any nexus between its submissions and the Chamber's findings concerning Libya's inability to secure legal representation for Mr. Gaddafi in connection with the 'core crime allegations', a right that accrues from the commencement of the investigation.⁴⁸
65. Apart from the fact that it is impermissible to introduce new factual developments in order to cast doubt upon the Chamber's appreciation of the facts in existence at the time of the admissibility proceedings, Annex A underscores the difficulties faced by Libya in securing legal representation, rather than the opposite. In light of the very real possibility of conflicts of interests between defendants,⁴⁹ the decision of the Prosecutor-General to prosecute all 38 defendants simultaneously is likely to exacerbate this difficulty.
66. Finally, in relying upon a Prosecution submission citing to a Defence filing,⁵⁰ which in turn, concerned Libya's failure to return privileged documents, Libya has drawn attention to its own failure to submit any evidence of this issue to the Pre-Trial Chamber.

Ground Four

67. An admissibility challenge cannot be said to be supported by relevant and probative information if during the course of litigation before the ICC, the challenging State's position undergoes a *volte face*. Throughout its Further Submissions, Libya has relied heavily on the commencement of the Accusation phase in Tripoli, and related evidence. Nonetheless, rather than addressing the key flaw concerning the Government's ability to pursue an effective prosecution against Mr. Gaddafi in Tripoli – that is, its inability to obtain custody over Mr. Gaddafi - the Government now seeks to maintain Zintan as at least a hypothetical venue.⁵¹

⁴⁸ ICC-01/11-01/11-130-Conf, para.59.

⁴⁹ [Redacted]

⁵⁰ ICC-01/11-01/11-454-Conf, para.48.

⁵¹ ICC-01/11-01/11-454-Conf, para.51.

68. Libya predicated its entire admissibility submissions to the Pre-Trial Chamber on the basis that the trial would be conducted in Tripoli.⁵² Having now commenced the Accusation proceedings in Tripoli, the entirely hypothetical question as to whether Mr. Gaddafi *could* be prosecuted in Zintan is irrelevant to the Chamber's assessment as to whether Libya has the ability to carry out the proceedings against Mr. Gaddafi, which are before a court in Tripoli.⁵³
69. In terms of the issue of legal representation, Libya's submission that the Defence arguments are "inaccurate" constitutes a mere disagreement.⁵⁴ The Libyan authorities have, moreover, acknowledged that in the absence of any protection provided by the State, Libyan lawyers might decline to represent Mr. Gaddafi.⁵⁵ Libya has also explicitly cited the nexus between the security situation and Libya's ability to secure legal representation for Mr. Al-Senussi before the Pre-Trial Chamber,⁵⁶ and should therefore be estopped from asserting a contrary position before the Appeals Chamber.
70. It is also inappropriate for Libya to try to rely upon developments which postdate the Pre-Trial Chamber's decision to demonstrate that it possessed the ability to prosecute this case at the time of the admissibility proceedings.
71. With respect to the custody of Mr. Gaddafi, if Libya does exercise effective custody over Mr. Gaddafi, then it should have immediately surrendered him to the ICC following, at the latest, the Appeals Chamber's decision refusing suspensive effect. Instead, Libya has sought to rely on the "complex dynamics of the relationship between Zintan and Tripoli" in order to intimate that this 'relationship' somehow prevented it from fulfilling this obligation.⁵⁷ It is impossible, in such circumstances to identify any distinction between an inability to obtain custody over Mr. Gaddafi for the purposes of surrendering him to the ICC, and an inability to obtain custody over him for the purposes of conducting effective prosecutions.
72. Semantic debate of this nature is sterile. It cannot disguise the situation on the ground. Prime Minister Zeiden has himself stated that the authorities had decided that it was 'safer' for Mr. Gaddafi to remain in Zintan because Libya was 'destroyed', not complete, unstable, lacking institutions, and a 'wound' with 'infections'.⁵⁸ Regarding

⁵² See for example, ICC-01/11-01/11-T-3-Red-ENG, p.62.

⁵³ See ICC-02/04-01/05-377, paras.49-51.

⁵⁴ ICC-01/11-01/11-442, para.13.

⁵⁵ ICC-01/11-01/11-190-Conf-Cor, para.386.

⁵⁶ ICC-01/11-01/11-455, para.28.

⁵⁷ ICC-01/11-01/11-450, fn.13.

⁵⁸ ICC-01/11-01/11-281-Anx2, p.2.

the issue of witness protection and the availability of witness testimony, apart from the fact that Libya has selectively referenced Defence submissions on this point, it has failed to address the fact that Article 17(3) expressly includes an inability to obtain “the necessary evidence and testimony” as an independent ground for determining that the case is admissible before the ICC. Although the Chamber explicitly referenced the impact on the actual progress of the investigation,⁵⁹ it was superfluous for the Chamber to have done so.⁶⁰

73. Libya also incorrectly states that the Chamber made no findings concerning Libya’s inability to afford protection to Court participants such as judges, counsel and witnesses.⁶¹ The Chamber found that “senior former regime members have not been protected from torture and mistreatment in detention facilities”,⁶² that “the Chamber is not persuaded by the assertion that the Libyan authorities currently have the capacity to ensure protective measures”,⁶³ and that the “Defence cautions that significant practical impediments exist to securing legal representation for Mr. Gaddafi in view of the security situation in Libya and the risk faced by lawyers who act for associated of the former regime. The Chamber notes that this position was confirmed by the Libyan Government during the Admissibility Hearing.”⁶⁴

74. Libya’s further assertion that the Defence “fail[ed] to engage with the critical question of the impact on the actual investigation of Mr. Gaddafi”⁶⁵ incorrectly seeks to put the onus of both the admissibility challenge and the appeal on the Defence. In any case, the Pre-Trial Chamber referenced this lack of protection within the context of its findings concerning Libya’s inability to obtain testimony, and its inability to secure legal representation for Mr. Gaddafi – and thereby demonstrated the actual impact on the investigation of Mr. Gaddafi. The fact that the case has now been transferred to the Accusation Chamber both falls outside the scope of the appellate proceedings, and fails to establish anything apart from the fact that the Prosecution has filed a dossier and charges with the Accusation Chamber.

II. Relief Sought

⁵⁹ ICC-01/11-01/11-344-Conf, para.210.

⁶⁰ Cf ICC-01/11-01/11-454-Conf, para.54.

⁶¹ ICC-01/11-01/11-454-Conf, para.55

⁶² ICC-01/11-01/11-344-Conf, para.209.

⁶³ At para.211.

⁶⁴ At para.212.

⁶⁵ ICC-01/11-01/11-454-Conf, para.55.

75. The Defence respectfully requests the Appeals Chamber to reject the Further Submissions *in limine* due to non-compliance with Regulation 36(3).

76. In the alternative, the Defence requests the Appeals Chamber to:

- i. Reject Libya's request to admit additional evidence *in limine*, or on the merits; and
- ii. Reject Libya's appeal.



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Dated this, 30th Day of September 2013

At London, United Kingdom