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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

**Document in Support of the Government of Libya's Appeal against the
"Decision on the admissibility of the case against Saif Al-Islam Gaddafi"**

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INTRODUCTION

1. The Government of Libya (“Libya” or “the Government”) hereby submits its Document in Support of its Appeal against the Decision of Pre-Trial Chamber I (“the Chamber”) on the admissibility of the case against Saif al-Islam Gaddafi (“the Impugned Decision”), delivered on 31 May 2013.¹ The Government filed its notice of appeal on 7 June 2013.²
2. The Government submits this document in support of its appeal in accordance with articles 82(1)(a) and 83(2)(a) of the Statute, Rule 154 of the Rules of Procedure and Evidence and Regulation 64(2) of the Regulations of the Court.
3. The Government submits the following four grounds in support of its appeal:
 - i. The Chamber erred in law by holding that “a number of investigative steps” by the Libyan authorities, covering “discrete aspects” of the case before the ICC, failed to satisfy the “same conduct” test under article 17(1)(a) of the Statute;
 - ii. The Pre-Trial Chamber erred in fact and in law in finding that Libya has not substantiated that its domestic investigation covers the same case as that before the ICC;
 - iii. The Chamber erred procedurally, or acted unfairly, by failing to “take appropriate measures for the proper conduct of the procedure”, thereby depriving Libya of the ability to rely upon highly relevant evidence in support of its admissibility challenge.

¹ *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “Decision on the admissibility of the case against Saif Al-Islam Gaddafi”, 31 May 2013, ICC-01/11-01/11-344-Red, paragraph 83, (“The Impugned Decision”).

² *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “The Government of Libya’s Appeal against Pre-Trial Chamber I’s “Decision on the admissibility of the case against Saif Al-Islam Gaddafi””, 07 June 2013, ICC-01/11-01/11-350.

- iv. The Chamber erred in fact and in law in finding that, due to the unavailability of its national judicial system, Libya is unable to obtain the accused or the necessary evidence and testimony or is otherwise unable to carry out its proceedings, pursuant to article 17(3) of the Statute.
4. The errors identified in the four grounds of appeal, cumulatively or in the alternative, materially affected the Impugned Decision in that, but for those errors, the Chamber would have found the case inadmissible. Further and alternatively, the errors identified in the four grounds of appeal, cumulatively or in the alternative, resulted in such unfairness in the admissibility proceedings as to affect the reliability of the Impugned Decision.
5. Accordingly, pursuant to article 83(2)(a) of the Statute, Libya respectfully requests the Appeals Chamber to reverse the Impugned Decision and find that the case against Mr. Gaddafi is inadmissible.

FACTUAL AND PROCEDURAL BACKGROUND

6. This case has come before the Court against the backdrop of the mass-atrocities and collapse of the Gaddafi regime during the 2011 revolution and Libya's gradual transition to a stable and democratic State. Despite considerable challenges and constraints, Libya has made its best efforts to cooperate and engage with the Court, in compliance with its international obligations.
7. At issue in this appeal is whether the Court interprets and applies the principle of complementarity in a reasonable and flexible manner so that States like Libya, undertaking relevant investigations in good faith during difficult post-conflict, transitional circumstances, are enabled to realistically exercise national jurisdiction, consistent with the object and purpose of the Statute.

8. On 26 February 2011, the Security Council adopted Resolution 1970, referring the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the ICC Prosecutor, pursuant to article 13(b) of the Statute.³ The situation underpinning this referral was the 2011 revolution, following 42 years of Muammar Gaddafi's tyrannical rule.⁴ At virtually the same time, the National Transitional Council ("NTC") was founded to represent disparate groups of rebels in Libya.⁵ Although the NTC held some control in Benghazi, Misrata, al-Bayda and Tobruk, the Gaddafi regime was dominant until the last few months of 2011.⁶ Less than one month after the adoption of Resolution 1970 and the founding of the NTC, the ICC Prosecutor opened an investigation in relation to the situation in Libya.⁷

9. On 16 May 2011, after an initial investigation of less than two and a half months' duration, the Prosecutor sought arrest warrants against Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi.⁸ On 27 June 2011, the Chamber issued the warrants.⁹ The warrants relate to murders and persecutions allegedly committed from 15 February 2011 until at least 28 February 2011, through the use of the

³ United Nations Security Council, Resolution 1970 (2011), UN Doc. S/RES/1970, adopted by the Security Council at its 6491st meeting, 26 February 2011 ["Resolution 1970"].

⁴ See *Situation in the Libyan Arab Jamahiriya*, "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'", Pre-Trial Chamber I, 27 June 2011, ICC-01/11-12, paragraph 72.

⁵ Ronald Bruce St. John, "Libya: From Colony to Revolution" (revised ed.), Oxford (2012), p. 286; Human Rights Watch, "World Report 2011: Libya", available at: <http://www.hrw.org/world-report-2012/world-report-2012-libya>

⁶ Indeed, as late as October 2011, key parts of Libya (such as Bani Walid, Sebha and Sirte) remained strongholds of support for the Gaddafi regime (see Ronald Bruce St. John, "Libya: From Colony to Revolution" (revised ed.), Oxford (2012), p. 286).

⁷ *Situation in the Libyan Arab Jamahiriya*, "Decision Assigning the Situation in the Libyan Arab Jamahiriya to Pre-Trial Chamber I", Presidency, 4 March 2011, ICC-01/11-1 (with annex).

⁸ *Situation in the Libyan Arab Jamahiriya*, "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi", Pre-Trial Chamber I, 16 May 2011, ICC-01/11-4-Red (with annexes).

⁹ *Situation in the Libyan Arab Jamahiriya*, "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'", Pre-Trial Chamber I, 27 June 2011, ICC-01/11-12.

Gaddafi-era state apparatus and the security forces.¹⁰

10. On 5 July 2011, the Registrar notified the Libyan authorities of a request for cooperation in the arrest and surrender of Mr Gaddafi.¹¹ On 19 November 2011, Mr. Gaddafi was captured near the town of Obar, apparently trying to flee to Niger.¹² His capture was communicated to the Chamber in a letter from the newly-established Libyan authorities on 23 November 2011.¹³
11. The NTC was able to begin marshalling an investigation into criminal conduct on the very same date that Mr. Gaddafi was captured. Progress continued thereafter, and on 8 January 2012, the then Libyan Prosecutor-General was able to commence an investigation of Mr. Gaddafi and others for serious crimes, including murder and rape, allegedly committed during the 2011 revolution (including in the period between 15 February to 28 February 2011).
12. Soon after, on 23 January 2012, the Libyan authorities sought postponement of its obligation to surrender Mr. Gaddafi to the Court pending the completion of national proceedings in relation to other crimes allegedly committed by Mr. Gaddafi.¹⁴
13. On 2 March 2012, in the immediate aftermath of the Gaddafi regime, the UN Human Rights Council adopted the "Report of the International Commission of Inquiry on Libya".¹⁵ This acknowledged the immense post-conflict challenges faced by Libya,

¹⁰ Warrants of Arrest in respect of Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, 27 June 2011, ICC-01/11-01/11-2, ICC-01/11-01/11-3, ICC-01/11-01/11-4.

¹¹ ICC-01/11-01/11-5; ICC-01/11-01/11-25-Conf.

¹² BBC News, "Gaddafi's son Saif-al-Islam captured in Libya", 19 November 2011, <http://www.bbc.co.uk/news/world-middle-east-15804299>

¹³ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "Implementation of the 'Decision to Add Document to Case Record'", Registry, ICC-01/11-01/11-34-Anx, 29 November 2011, annex 1.

¹⁴ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "Report of the Registrar on Libya's observations regarding the arrest of Saif Al-Islam Gaddafi, 23 January 2012, ICC-01/11-01/11-44, with confidential Annex 1.

¹⁵ United Nations Human Rights Council, Report of the International Commission of Inquiry on Libya, UN Doc. A/HRC/19/68, 2 March 2012, ("UN Commission of Inquiry Report").

but recognised the new Libyan Government's commitment to restoring stability and improving the human rights situation, and the assistance that it provided to the Commission.¹⁶ The Report referred to positive developments in the administration of criminal proceedings “against 41 Gaddafi loyalists accused of crimes during the conflict”, and in the legal protection of human rights through the Libyan Government’s “Law establishing the National Council for Civil Liberties and Human Rights”.¹⁷ Such developments were also recognised in the Report of the Secretary-General on the United Nations Support Mission in Libya (“UNSMIL”), of 1 March 2012.¹⁸

14. On 7 March 2012, the Chamber issued its “Decision on Libya’s Submissions regarding the arrest of Saif Al-Islam Gaddafi” dismissing the request for postponement and requesting the Libyan Government “to make its decision to grant the Surrender Request and to inform the Chamber accordingly within seven days of notification of the Arabic translation of the decision”.¹⁹

15. On 22 March 2012, through its “Notification and Request”, the Libyan Government notified Pre-Trial Chamber I of its intention to challenge the admissibility of the case concerning Mr. Gaddafi pursuant to articles 19(2)(b), (5) and (6) of the Rome Statute by 30 April 2012. It also requested that, pending a decision on this challenge, the Chamber suspend its surrender request in relation to Mr. Gaddafi in accordance with, *inter alia*, article 95 of the Statute and Rule 58 of the Rules of Procedure and

¹⁶ UN Commission of Inquiry Report, pp. 5, 6, 20-22, 31 40, 115-17.

¹⁷ UN Commission of Inquiry Report, page 20

¹⁸ UN Security Council, “Report of the Secretary-General on the United Nations Support Mission in Libya”, UN Doc. S/2012/129, 01 March 2012, paragraph, paragraph 29.

¹⁹ *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “Decision on Libya’s Submissions Regarding the Arrest of Saif As-Islam Gaddafi”, 07 March 2012, ICC-01/11-01/11-72-Conf.

Evidence.²⁰

16. On 1 May 2012, the Libyan Government filed the “Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute”²¹ (“Gaddafi Admissibility Challenge”). Libya alerted the Pre-Trial Chamber to the fact that, because the investigation was still in the early pre-accusatorial stage, it was prohibited by its domestic legislation from disclosing “examples of the evidence that has been produced pursuant to the investigation and that will be relied upon in the accusation, trial and appeal phases of the case”.²² Article 59 of Libya’s Procedural Code mandates that, “for the duration of the investigative phase of proceedings, the Libyan prosecution services [...] may only disclose summary reports of their investigations to persons who are not involved in the Libyan investigative or prosecutorial team”.²³

17. On 4 May 2012, the Chamber issued a Decision on the conduct of the proceedings relating to the Gaddafi Admissibility Challenge wherein it, *inter alia*, invited the Prosecutor, the Office of Public Counsel for Defence (the “OPCD”), the Security Council and the Office of Public Counsel for victims (the “OPCV”) to submit their responses to the Admissibility Challenge no later than 4 June 2012.²⁴ Although the Chamber accepted that it had a “broad” discretion pursuant to rule 58(2) of the Rules to decide on the procedure to be followed,²⁵ the Chamber did not set a timetable, or give any guidance as to the issues to be addressed. Nor did it provide

²⁰ *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “Notification and Request by the Government of Libya in response to “Decision on Libya’s Submissions Regarding the Arrest of Saif Al-Islam Gaddafi””, 22 March 2012, ICC-01/11-01/11-82-Conf.

²¹ See *Prosecutor v. Saif Al-Islam and Abdullah Al-Senussi*, Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11, 1 May 2012 (“Gaddafi Admissibility Challenge”).

²² Gaddafi Admissibility Challenge, paragraph 41.

²³ Gaddafi Admissibility Challenge, paragraph 40.

²⁴ *The Prosecutor v. Saif Al-Islam and Abdullah Al-Senussi*, “Decision on the Conduct of the Proceedings Following the “Application on behalf of the Government of Libya pursuant to Article 19 of the Statute””, 04 May 2012, ICC-01/11-01/11-134.

²⁵ *Ibid*, paragraphs 10-11.

guidance as to either the nature of any evidence it might consider to be outstanding or the sufficiency of evidence already submitted. The only instruction relevant to procedure was an invitation to “the Prosecutor, the OPCD, the Security Council and the OPCV to submit observations on the Admissibility Challenge, if any no later than 4 June 2012”.²⁶ The time limit for the OPCD was subsequently extended and eventually set for 24 July 2012.²⁷

18. On 1 June 2012, the Chamber decided that Libya could postpone the execution of the request for surrender of Mr. Gaddafi pursuant to article 95 of the Statute.²⁸

19. All of these proceedings took place in the immediate aftermath of the Gaddafi regime’s collapse, during the rule of the NTC and prior to post-conflict stabilization and democratic elections to establish a new Government. Nonetheless, during this time, Libya’s investigation progressed, and UNSMIL and the international community provided substantial assistance for post-conflict judicial capacity building.²⁹

20. On 7 July 2012 Libya held its first democratic election since 1965. This election was supervised by the NTC and was designed to select a 200 member General National Congress (the “GNC”) to replace the NTC from 6 August 2012 as the legislative authority of Libya. The GNC was charged with appointing a new Prime Minister and Cabinet. The Libyan High National Election Commission announced the

²⁶ *Ibid.*

²⁷ *The Prosecutor v. Saif Al-Islam and Abdullah Al-Senussi*, “Decision on the OPCD “Request Pursuant to Regulation 23bis of the Regulations””, 18 July 2012, ICC-01/11-01/11-187-Red.CC-01/11-01/11-187-Red.

²⁸ *The Prosecutor v. Saif Al-Islam and Abdullah Al-Senussi*, “Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Rome Statute”, 01 June 2012, ICC-01/11-01/11-163.

²⁹ In relation to capacity building, see, for example, Annexes 19-23 to the Libyan Government’s Further Submissions and Annexes 1-3 of Libya’s Consolidated Reply.

results of the election on 17 July 2012, with the ‘National Forces Alliance’ taking 39 of the 80 seats.³⁰

21. On 30 July 2012, counsel for the Libyan Government filed the “Libyan Government Request for Status Conference and Extension of Time to file a Reply to the Responses to its Article 19 Admissibility Challenge”. In that filing, they informed the Chamber that, as a result of the election on 7 July 2012, it would not be possible to obtain further instructions on the case until the appointment by the recently elected GNC of the new Libyan Minister of Justice, Attorney-General and Prosecutor-General. It requested that a status conference be convened to discuss procedural matters related to the Admissibility Challenge and an extension of time be for the filing of Libya's reply to the Responses.³¹
22. On 9 August 2012, the Chamber requested that counsel for Libya file a report, by 7 September 2012, updating the Chamber as to the status of appointments to key posts in the new Libyan Government (Minister of Justice, Attorney-General and Prosecutor-General in Libya), counsel's ability to obtain instructions from them, and any domestic proceedings against Mr. Gaddafi. At the same time, the Chamber suspended the 13 August 2012 deadline for Libya's reply to the Responses, and postponed determination of a new deadline pending receipt of the requested report.³²
23. On 7 September 2012, counsel for Libya provided the requisite details in the “Libyan Government's provisional report pursuant to the Chamber's Decision of 9 August

³⁰ Libya Herald, “National Congress Party Results”, Tripoli 18 July 2012, accessible at <http://www.libyaherald.com/2012/07/18/party-results/>.

³¹ *The Prosecutor v. Saif Al-Islam and Abdullah Al-Senussi*, “Libyan Government Request for Status Conference and Extension of Time to file a Reply to the Responses to its Article 19 Admissibility Challenge”, 30 July 2012, ICC-01/11-01/11-192.

³² *The Prosecutor v. Saif Al-Islam and Abdullah Al-Senussi*, “Decision on the “Libyan Government Request for Status Conference and Extension of Time to file a Reply to the Responses to its Article 19 Admissibility Challenge””, 09 August 2012, ICC-01/11-01/11-200.

2012 & Request for leave to file further report by 28 September 2012”, informing the Pre-Trial Chamber that the appointments of the new Minister of Justice and the new Prosecutor-General would likely be finalised before 28 September 2012 and that it had not been possible to obtain instructions upon the other identified issues. Counsel for the Libyan Government requested leave to file a more detailed report on the issues by 28 September 2012.³³

24. After a request by the Libyan Government for a status conference, the Chamber issued an order, on 14 September 2012, convening a hearing on Libya’s Admissibility Challenge on 8 and 9 October 2012 (“Admissibility Hearing”). It was decided, *inter alia*, that “3 October 2012 was the final date for all parties and participants to file in the record of the case any evidence relevant to the Admissibility Challenge upon which the participants intend to rely upon at the hearing”.³⁴

25. The Justice Minister, Salah Bashir Margani – a prominent human rights defender who has received an award from Human Rights Watch for his work – was appointed immediately prior to the oral hearing. Given the complexities of appointing a new cabinet amidst delicate negotiations and compromises, a new Prosecutor-General could not be appointed in time to appear at the oral hearing, as requested by the Chamber. Indeed, the Libyan request for a status conference in place of a full admissibility hearing (rejected by the Chamber) was driven by the reality that, at that time, there was no Prosecutor-General who could appear on

³³ *The Prosecutor v. Saif Al-Islam and Abdullah Al-Senussi*, “Libyan Government’s provisional report pursuant to the Chamber’s Decision of 9 August 2012 & Request for leave to file further report by 28 September 2012”, 07 September 2012, ICC-01/11-01/11-205.

³⁴ Impugned Decision, paragraph 8, citing Pre-Trial Chamber I, “Order convening a hearing on Libya’s challenge to the admissibility of the case against Saif Al-Islam Gaddafi”, 14 September 2012, ICC-01/11-01/11-207.

behalf of Libya, as well as the impossibility of obtaining instructions during the period immediately preceding the hearing date.³⁵

26. Pursuant to the Chamber's order, on 9 and 10 October 2012, representatives of the Government, the Prosecutor, the OPCD and the OPCV appeared before the Chamber.³⁶ During the admissibility hearing, Libya's representative submitted that, given Libya's transitional context, the Court should engage with Libya on a constructive and ongoing basis, receiving further reports and submissions "until such time as it has satisfied itself that Libya has had a reasonable opportunity to pursue a case - at which time the Chamber can then make a decision on admissibility".³⁷

27. On 7 December 2012, the Chamber requested that Libya provide, by 23 January 2013, further submissions and supporting evidence in relation to a series of issues identified by the Chamber after the Admissibility Hearing.³⁸ The Chamber reiterated its view that "a decision on the admissibility of the case must be based on the circumstances prevailing at the time of issuance".³⁹ Having expressed its view concerning the "concept of 'evidence' within the context of admissibility proceedings",⁴⁰ the Chamber requested information and any evidence in support "relevant to the admissibility of the case and on which they intend to rely for the purposes of the Admissibility Challenge" by the 23 January 2012.⁴¹ The Chamber

³⁵ Ibid.

³⁶ See Pre-Trial Chamber I, Transcript of Hearing, 9 October 2012, ICC-01/11-01/11-T-2-CONF- EXP-ENG; Transcript of Hearing, 10 October 2012, ICC-01/11-01/11-T-3-CONF-EXP-ENG.

³⁷ The Impugned Decision, paragraph 32 *citing* Pre-Trial Chamber I, Transcript of Hearing, 9 October 2012, ICC-01/11-01/11-T-2-Red-ENG, p. 44, line 12 - p. 46, line 9.

³⁸ The Impugned Decision, paragraph 11, *citing* Pre-Trial Chamber I, Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi, 7 December 2012, ICC-01/11-01/11-239 ("Decision of 7 December 2012").

³⁹ Decision of 7 December 2012, paragraph 14, *citing* Decision on the OPCD requests in relation to the hearing on the admissibility of the case, ICC-01/11-01/11-212, paragraph 9.

⁴⁰ Decision of 7 December 2012, paragraph 10.

⁴¹ *Ibid*, paragraph 48.

also found it “appropriate to establish a time limit for the provision from the parties and participants of their respective responses to the submissions of Libya pursuant to the present decision”.⁴² Accordingly, the Chamber ordered the Prosecutor, the OPCV and OPCD to provide responses to Libya’s submissions by 11 February 2013, with the deadline for the OPCV subsequently extended.⁴³

28. On 23 January 2013, Libya filed its further submissions, together with a number of annexes attached thereto.⁴⁴ Libya’s further submissions contained a proposal that, in view of the prohibition against disclosure of evidence during the investigation stage of proceedings under Article 59 of the Libyan Code of Criminal Procedure, and the resource constraints in translating numerous documents from Arabic into English, the Pre-Trial Chamber “*send a representative to Tripoli to view the entire case file or allow the Libyan Government an additional six weeks to prepare copies of the full investigative materials if a fuller inspection is deemed necessary*”.⁴⁵

29. On 12 February 2013, the Prosecutor filed her response to Libya’s Further Submissions together with annexes.⁴⁶ The Prosecution concluded, *inter alia*, that:

“[D]ue consideration should be given to the challenges that Libya is facing in this transitional post-conflict stage and to the fact that it has secured relevant international assistance. Therefore, the Prosecution considers that Libya should be

⁴² *Ibid*, paragraph 49.

⁴³ *Ibid*, paragraphs 49–51.

⁴⁴ The Impugned Decision, paragraph 13, *citing* “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- Conf-Exp, with Annexes 1-23 (“Libya’s Further Submissions”).

⁴⁵ The Impugned Decision, paragraph 39, *citing* Libya’s Further Submissions, paragraph 70 [emphasis added].

⁴⁶ The Impugned Decision, paragraph 14 *citing* “Prosecution’s Response to “Libyan Government’s further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi””, 12 February 2013, ICC-01/11- 01/11-276-Conf-Exp, with Annexes A-C (“Prosecutor’s Response to Libya’s Further Submissions”).

*afforded reasonable time to provide additional materials to demonstrate that it is investigating the same case”.*⁴⁷

30. Further, the Prosecution, whilst asserting that “the supporting evidence provided is insufficient to conclude on a balance of probabilities that Libya is indeed investigating substantially the same conduct as the one described in the Article 58 Decision”, it accepted that the “information provided [to date] *does [...] sufficiently demonstrate the existence of national proceedings against the suspect.* As such, Libya should be required to furnish additional samples from its investigative file *within a reasonable timeframe*”.⁴⁸

31. On 18 February 2013, the OPCV and the Defence filed their observations on the Libyan Government’s Further Submissions.⁴⁹

32. On 4 March 2013, Libya filed its consolidated reply to the responses to Libya’s Further Submissions.⁵⁰ In that reply, Libya informed the Chamber, *inter alia*, of the “imminent appointment of a new Prosecutor-General” with a “mandate given by the General National Congress, rather than the transitional government”.⁵¹ Libya explained that it was anticipated that the new appointment would ensure that the case against Gaddafi was progressed “to fruition”.⁵² Libya requested that the Chamber either grant six weeks for the production of such further evidential

⁴⁷ Prosecutor’s Response to Libya’s Further Submissions, paragraph 2 [emphasis added].

⁴⁸ *Ibid*, paragraph 38 [emphasis added].

⁴⁹ The Impugned Decision, paragraph 15, *citing* OPCV’s Observations on “Libyan Government’s further submissions on issues related to admissibility of the case against Saif Al-Islam Gaddafi”, 18 February 2013, ICC-01/11-01/11- 279 (“OPCV Observations on Libya’s Further Submissions”); Response to the “Libyan Government’s further submissions on issues related to admissibility of the case against Saif Al-Islam Gaddafi”, 18 February 2013, ICC-01/11-01/11- 281-Conf, with Annexes 1-13 (“Defence Response to Libya’s Further Submissions”).

⁵⁰ The Impugned Decision, paragraph 17, *citing* “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”, 4 March 2013, ICC-01/11-01/11-293-Conf, with Annexes 1-3 (“Libya’s Consolidated Reply”).

⁵¹ *Ibid*, paragraph 6.

⁵² *Ibid*, paragraph 43.

samples related to the case of Mr. Gaddafi as may be considered necessary; in the alternative, to travel to Tripoli to inspect the case file in order to review the evidence collected by Libya during its investigation.⁵³

33. On 28 March 2013, Libya notified the Chamber of the appointment of a new Prosecutor-General and reiterated its request to the Chamber to be authorized to adduce further evidential samples relating to the investigation of Gaddafi and/or to travel to Tripoli to inspect the case file against Mr. Gaddafi.⁵⁴ In particular Libya argued that *“[t]he appointment of the first Prosecutor-General by the General National Congress will have significant implications on further cooperation with the Court as well as the progress of the case against Mr Saif Al-Islam Gaddafi”*.⁵⁵

34. On 4 April 2013, the Government filed its admissibility challenge in relation to Mr. Al-Senussi, which, given the close investigative links between it and the case against Mr. Gaddafi, included evidential materials pertaining to Mr. Gaddafi.⁵⁶ The Defence filed submissions regarding the propriety of the Chamber relying upon evidence filed in the Al-Senussi Admissibility Challenge as part of its determination on the Gaddafi Admissibility Challenge.⁵⁷ On 10 May 2013, Libya sought leave from the Chamber to reply to those submissions.⁵⁸ The Chamber did not issue a decision on that Request.

⁵³ The Impugned Decision, paragraph 40, *citing* Libya’s Consolidated Reply, paragraphs 6, 7, 42.

⁵⁴ The Impugned Decision, paragraph 18, *citing* “Notification by Libyan Government supplemental to its 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”, 28 March 2013, ICC-01/11-01/11-306, with Annex 1 (“Supplemental Notification”).

⁵⁵ Supplemental Notification, paragraph 4 [emphasis added].

⁵⁶ It was explicitly noted that the evidential materials contained in the Annexes is to be considered alongside the evidence filed in the Gaddafi admissibility proceedings: AS Admissibility Challenge, para 173.

⁵⁷ *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “Response to the “Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute””, 23 April 2013, ICC-01/11-01/11-313.

⁵⁸ *The 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 IMPUGNED DECISION

35. On 31 May 2013, two months after the appointment of the new Prosecutor General, the Chamber issued the Impugned Decision in which it declared admissible the case against Mr. Gaddafi. The key findings of the Chamber, which the present appeal seeks to challenge, include:

- a. The Chamber's determination that "the evidence, taken as a whole, does not allow the Chamber to discern the actual contours of the national case against Mr. Gaddafi such that the scope of the investigation could be said to cover the same case as that set out in the Warrant of Arrest issued by the Court. Libya has fallen short of substantiating, by means of evidence of a sufficient degree of specificity and probative value, the submission that the domestic investigation covers the same case."⁵⁹
- b. The Chamber's ruling that Libya has had "sufficient opportunities to submit evidence in support of its Admissibility Challenge"⁶⁰ as well as its decision not to take into account "the information provided by the parties in filings subsequent to Libya's Reply of 4 March 2013, as the significance of this information has not been sufficiently demonstrated".⁶¹
- c. The Chamber's conclusion that "the submission of additional evidence in support of the first limb of the admissibility test would not be determinative at this stage because [...] serious concerns remain with respect to the second

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.

⁵⁹ The Impugned Decision, paragraph 135.

⁶⁰ *Ibid*, paragraph 137.

⁶¹ *Ibid*, paragraph 23.

limb of the admissibility test, namely Libya's ability genuinely to carry out the investigation or prosecution against Mr. Gaddafi." ⁶²

- d. The Chamber's determination that "although the authorities for the administration of justice may exist and function in Libya, a number of legal and factual issues result in the unavailability of the national judicial system for the purpose of the case against Mr. Gaddafi. As a consequence, Libya is, in the view of the Chamber, unable to secure the transfer of Mr. Gaddafi's custody [...]. Moreover, the chamber is not persuaded that the Libyan authorities have the capacity to obtain the necessary testimony. Finally the Chamber has noted a practical impediment to the progress of domestic proceedings [...] as Libya has not shown whether and how it will overcome the existing difficulties in securing a lawyer for the suspect".⁶³

THE STANDARD FOR APPELLATE REVIEW

36. Neither the Statute nor the Rules set out the grounds that can be raised in support of an appeal against an admissibility decision pursuant to article 82 (1) (a) of the Statute. This is in contrast to the grounds set out in articles 81, and again in 83 (2), which provides that the Appeals Chamber may "[r]everse or amend" a decision if it "finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision [...], or that the decision [...] appealed from was materially affected by error of fact or law or procedural error".

37. The Appeals Chamber has previously noted that, given the absence of explicit grounds for appeal in article 82, "the parties are at liberty to raise any relevant

⁶² *Ibid.* paragraph 137

⁶³ *Ibid.* paragraph 137

grounds”, including those set out in article 81(1).⁶⁴ With regard to the latter, the Appeals Chamber considered “acceptable” the Prosecutor’s submission that it is proper to import the grounds in article 81(1) into article 82 (1) (a).⁶⁵

38. The Appeals Chamber has not expressly adopted a standard of review for errors of law. However, in practice,⁶⁶ the Appeals Chamber appears to have adopted the approach apparent in international jurisprudence whereby the Appeals Chamber will consider the purported error of law, articulate the correct legal standard and review the relevant factual findings accordingly.⁶⁷

39. The Appeals Chamber has held that when reviewing a question of fact in a decision on the admissibility of a case, it “may justifiably interfere with a *sub judice* decision” if the findings of the Chamber are flawed on account of:

- i. a misdirection on a question of law;
- ii. a misappreciation of the facts founding its decision;
- iii. a disregard of relevant facts; or
- iv. taking into account facts extraneous to the *sub judice* issues.⁶⁸

⁶⁴ *Situation in the Democratic Republic of the Congo*, “Judgment on the Prosecutor’s Appeal Against the Decision of the Pre-Trial Chamber I Entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58””, ICC-01/04-169, 13 July 2006, paragraph 32.

⁶⁵ *Ibid* at paragraph 35.

⁶⁶ See for example, *Situation in the Democratic Republic of the Congo*, “Judgment on the Prosecutor’s Appeal Against the Decision of the Pre-Trial Chamber I entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58””, 13 July 2006, ICC-01/04-169.

⁶⁷ See for example, *The Prosecutor v. Dragomir Milošević*, Appeal Chamber “Judgment”, 12 November 2009, IT-98-29/1-A, paragraphs 13-14 and footnotes cited therein.

⁶⁸ *The Prosecutor v. Jean-Pierre Bemba Gombo*, “Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled “Decision on the Admissibility and Abuse of Process Challenges”, 19 October 2010, ICC-01/05-01/08-962, paragraph 63, referring to *The Prosecutor v. Thomas Lubanga Dyilo*, “Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release”, 09 June 2008, ICC-

40. With regard to review of a Chamber's exercise of discretion, the Appeals Chamber has ruled that it will only interfere with a discretionary decision in limited circumstances⁶⁹ and will not reverse an impugned decision simply because it would have decided it differently.⁷⁰ The conditions justifying appellate interference in a discretionary decision are:

- i. where the exercise of discretion is based on an erroneous interpretation of the law;
- ii. where it is exercised on patently incorrect conclusions of fact; or
- iii. where the decision is so unfair and unreasonable as to constitute an abuse of discretion.⁷¹

41. In addition, the Appeals Chamber requires that for a successful appeal, the error raised by an appellant must have materially affected the impugned decision.⁷² Accordingly, "as part of the reasons in support of a ground of appeal, an appellant is obliged not only to set out the alleged error, but also to indicate, with sufficient

01/04-01/07-572 (OA 4), paragraph 25 and setting out in footnote 116 the subsequent Appeals Chamber decisions applying the same standard

⁶⁹ *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, "Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19 (1) of the Statute" of 10 March 2009", 16 September 2009, ICC-02/04-01/05-408 OA3, paragraph 80.

⁷⁰ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 10 November 2009 Entitled "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings"", 12 July 2010, ICC-01/04-01/07-2259 OA10, paragraph 34.

⁷¹ *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, "Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19 (1) of the Statute" of 10 March 2009", 16 September 2009, ICC-02/04-01/05-408 OA3, paragraph 80.

⁷² *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo 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", 25 September 2009, ICC-01/04-01/07-1497 OA8, paragraphs 37-38.

precision, how this error would have materially affected the impugned decision.”⁷³

In this regard, the Appeals Chamber has held that:

*“A decision is materially affected by an error of law if the Chamber or Pre-Trial Chamber would have rendered a decision that is substantially different from the decision that was affected by the error.”*⁷⁴

I. GROUND ONE: The Pre-Trial Chamber erred in law by holding that “a number of investigative steps” covering “discrete aspects” of the case failed to satisfy the requirement of an “investigation” of the same case as that before the Court

A. Introduction

42. There are two stages to the admissibility assessment: (i) whether there exists a national investigation and/or prosecution in relation to the case within the ICC’s jurisdiction; and (ii) where such proceedings exist, whether they are vitiated by an unwillingness or inability to carry them out genuinely. The first part of this analysis is itself divided into two issues: whether the domestic case covers: (i) the same person; and (ii) the same conduct.⁷⁵

⁷³ *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, “Judgment on the appeal of the Defence against the “Decision on the admissibility of the case under article 19 (1) of the Statute” of 10 March 2009”, 16 September 2009, ICC-02/04-01/05-408 OA3, paragraph 48; *The Prosecutor v. Jean-Pierre Bemba Gombo*, “Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled “Decision on the Admissibility and Abuse of Process Challenges”, 19 October 2010, ICC-01/05-01/08-962 OA3, paras.102, 106, 133-134; *The Prosecutor v. Jean-Pierre Bemba Gombo*, “Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled “Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence””, 19 November 2010, ICC-01/05-01/08-1019 OA4, paragraph 69.

⁷⁴ *Situation in the Democratic Republic of the Congo*, “Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58””, 13 July 2006, ICC-01/04-169, paragraph 84.

⁷⁵ See 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

43. The Chamber found that Libya is conducting an “ongoing” domestic investigation in relation to Mr. Gaddafi, thereby satisfying the “same person” requirement of the “same case” test. Therefore, the only issue for the Chamber to determine with regard to the first limb of the admissibility assessment pursuant to article 17(1)(a) was whether, at the time of its admissibility determination, the Government’s domestic investigation covered the “same conduct” as the ICC case.
44. The Government submits that the Chamber erred in law by holding that, although the “evidence presented satisfactorily demonstrates that a number of progressive steps directed at ascertaining Mr Gaddafi’s criminal responsibility have been undertaken” and that these steps covered “discrete aspects” of the same case before the ICC,⁷⁶ Libya has nevertheless “fallen short” of establishing that the same case that is before the court “is being investigated” within the meaning of article 17(1)(a).
45. Specifically, the Chamber erred in finding that, beyond proving that a “case is being investigated”, which covers aspects of the same case before the ICC (which the Chamber found proven), the Government was required to provide additional proof of the “actual contours” and “precise scope” of its domestic investigation.⁷⁷
46. The Government submits that requiring dispositive proof of the “actual contours” and “precise scope” of the investigation amounts to:
- a. a legal error regarding the level of identity required between a domestic and an international investigation by importing a legal standard that is inconsistent with the plain meaning of the words “being investigated” under article 17(1)(a), and their logical interpretation in the context of other provisions of the Statute; and

of the Case Pursuant to Article 19(2)(b) of the Statute’, Muthaura and others (ICC-01/09- 02/11-274), Appeals Chamber, 30 August 2011, paragraph. 39.

⁷⁶ Impugned Decision, paragraph 132-134.

⁷⁷ The Impugned Decision, paragraph 135.

- b. the adoption of an overly exacting and narrow interpretation, which is inconsistent with the Statute's presumption in favour of national jurisdictions, based on the objective of encouraging, rather than defeating, domestic proceedings.

47. Had the Chamber applied the correct legal standard, it would have found that the ICC case "is being investigated" by Libya. This amounts to an error of law invalidating the Impugned Decision's finding that Libya has failed to establish the requirements of article 17(1)(a).

48. This ground of appeal is without prejudice to Ground of Appeal 2, which submits that the evidence presented to the Chamber was sufficient for a finding that Libya was investigating the same case as the ICC case.

49. Further and in the alternative, the Chamber erred in law by failing to provide a reasoned opinion explaining why "a number of investigative steps" did not satisfy the requirements of article 17(1)(a), and why an additional element of proof of the "actual contours" and "precise scope" of the case was required.

B. Errors in requirement of proof of "precise scope" of investigation

1. Level of similarity required by the "substantially the same conduct" test

50. The Chamber made clear that the relevant comparator, as between the Libyan investigation and that of the ICC, was the "conduct underlying the Warrant of Arrest and Article 58 Decision".⁷⁸ The Chamber characterised this conduct as

⁷⁸ *Ibid.*

*[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*⁷⁹

51. In clarifying the scope of the “same conduct” test, the Chamber held that, in view of the complementarity principle, “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 as constituting instances of Mr. Gaddafi’s alleged course of conduct.”⁸⁰

52. The Chamber’s own description of the conduct underlying the Warrant of Arrest and the Article 51 Decision (with flexibility as to *types of crimes committed*) reflects this. The inappropriateness of requiring exact correspondence is underlined by the requirement that “[for] a case to be inadmissible under article 17 (1) (a) of the Statute, the national investigation must cover the same individual and *substantially* the same conduct as alleged in the proceedings before the Court.”⁸¹

a) General error as to level of ‘sameness’

53. By requiring proof of the “actual contours” and “precise scope” of its domestic investigation,⁸² the Chamber clearly applied a legal standard which required more than *substantially* the same conduct, and which necessarily and erroneously requires

⁷⁹ The Impugned Decision at paragraph 83.

⁸⁰ The Impugned Decision at paragraph 83.

⁸¹ *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, “Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19 (2) (b) of the Statute” Dissenting Opinion of Anita Ušacka”, 20 September 2011, ICC-01/09-01/11 OA (Dissenting Opinion of Judge), paragraph 19 (“AC Kenya Admissibility Decision, Dissenting Opinion of Judge Anita Ušacka”) [emphasis added].

⁸² See for example, The Impugned Decision, paragraph 135.

the domestic criminal process to encompass nearly all aspects – or at least more than “certain aspects” – of the ICC case.

54. The Chamber made its finding that the Libyan Government had not met the “substantially the same conduct” despite also finding that that “the evidence presented satisfactorily demonstrates that *a number of progressive steps* directed at ascertaining Mr Gaddafi’s criminal responsibility have been undertaken by the Libyan authorities, and that an ‘investigation’ is currently ongoing at the domestic level.”⁸³ It held further that:

“[S]ome items of evidence show that a number of investigative steps have been taken by Libya with respect to certain discrete aspects that arguably relate to the conduct of Mr Gaddafi as alleged in the proceedings before the Court. These aspects include instances of mobilisation of militias and equipment by air, the assembly and the mobilization of military forces at the Abraq Airport, certain events in Benghazi on 17 February 2011, and the arrest of journalists and activists against the Gaddafi regime.

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55. The existence of “progressive steps” must be interpreted in the context of the intention of negotiating states to base the Statute on a “strong presumption in favour of national jurisdictions”.⁸⁵ Such intentions, which informed the negotiation of the Rome Statute throughout, cannot be easily dismissed by theoretical deference to sovereign rights that are contradicted by rulings that in substance defeat domestic proceedings.

56. It is notable in this regard that 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 of the Statute, States parties:

⁸³ The Impugned Decision, paragraph 132 (emphasis added).

⁸⁴ The Impugned Decision, paragraph 134 (emphasis added).

⁸⁵ See for example, Sixth Committee - 4 - Press Release GA/L/2881 30th Meeting (AM) 3 November 1995.

“[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”. During the negotiations, delegates expressed the view that the Statute is based on a “strong presumption in favour of national jurisdiction.”⁸⁶ The complementarity principle has been described in ICC jurisprudence as “reinforce[ing] the principle of international law that it is the sovereign right of every State to exercise its criminal jurisdiction...”.⁸⁷ Due deference to this “sovereign right” is widely regarded as the “cornerstone” of the Statute “without which there would have been no agreement” at the Rome Conference.⁸⁸ Among negotiating States “the underlying premise of the complementarity regime was to ensure that the Court did not interfere with national investigations or prosecutions except in the most obvious cases.”⁸⁹ The Appeals Chamber itself has previously recognized the Statute’s “presumption in favour of domestic jurisdictions”.⁹⁰ To the extent possible, therefore, the Court must give effect to this strong presumption by interpreting article 17 reasonably and flexibly in order to enable, rather than defeat, domestic proceedings.

⁸⁶ See for example, 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 pages 50-51.

⁸⁷ AC Kenya Admissibility Decision, Dissenting Opinion of Judge Anita Ušacka, paragraph 19.

⁸⁸ See for example, S Williams, “Issues of Admissibility” in O Triffterer (ed) “Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article” (NOMOS, Baden-Baden, 1st ed., 1999), p. 392, paragraph 20.

⁸⁹ See J. Holmes, “Complementarity: National Courts Versus The ICC”, in A. Casesse et al., “The Rome Statute of the International Criminal Court: A Commentary, Volume I (2002), at 675.

⁹⁰ *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, “Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19 (2) (b) of the Statute” 30 August 2011, ICC-01/09-01/11-274 OA, paragraph 43 (“AC Kenya Admissibility Decision”).

b) Error as to requisite level of ‘sameness’ as regards an *ongoing* domestic investigation

57. The process of comparing a domestic investigation to its international counterpart occurs before the domestic investigation is completed. Article 17(1)(a) provides:

Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;⁹¹

58. With respect to the text of article 17(1)(a), the term “case” is conditioned by the subsequent words “is being investigated”. The verb “is being investigated” is transitive in relation to “the case”. It may be contrasted with article 17(1)(b) which refers to situations where the case “has been investigated”. In line with this, in the Impugned Decision, the Chamber clarified that it “will assess the facts and evidence presented by Libya, with a view to concluding whether at the time of the proceedings there is an *ongoing investigation* or prosecution of the case at the national level.”⁹²

59. It is submitted that the Pre-Trial Chamber erred in setting a standard that requires an ongoing domestic investigation to be analysed on the basis of its “precise scope”. The Libyan Government submits that the Chamber’s finding imports an excessively specific description of the domestic investigation – that is by definition incomplete – into the comparative assessment of the domestic and international investigations.

⁹¹ Emphasis added.

⁹² The Impugned Decision, paragraph 89 (emphasis added).

(1) *Inherent lack of specificity in an ongoing investigation*

60. An ongoing investigation is necessarily conducted in progressive steps and stages. Nothing in the terms of article 17(1)(a) suggests that the case “being investigated” must have reached a stage at which the “actual contours” or “precise scope” of the final case have clearly emerged or been established.
61. As investigations progress, with a view to preparing a criminal trial, the issues are narrowed down and refined, and certain pieces of evidence, or certain allegations, may be discarded as lacking in the required substantiation or corroboration, or unwise or improper to pursue for a diverse range of reasons. By definition, judgments are made as to the variation, expansion or reduction in the scope of the case.⁹³ The specificity involved in the term “case” must, therefore, increase as progress is made from the inception of an investigation, through the accusation stage to commencement of trial. At the point of investigation, there remains the possibility of considerable change in the process of an investigation before an indictment is framed.
62. Patently, “investigative steps” at an earlier stage will necessarily have *not* have concluded or defined the “actual contours” and “precise scope” of the case. The ICC must not remove the case from the domestic jurisdiction simply because it has not happened yet. This argument applies even more forcefully when consideration is given to the nature of the criminal justice system in Libya, which is based on the Italian model, and which comprises four stages – investigation, accusation, trial, and appeal.⁹⁴ Accordingly, by the very nature of the criminal justice process, the

⁹³ With regard to the assessment of whether a domestic investigation addresses the same conduct, there must be a presumption that such exercises of judgment are undertaken in good faith, as the subsequent question of genuineness/willingness/ability address any contention that they are not.

⁹⁴ As recognised by the Chamber at paragraph 201 of The Impugned Decision.

“actual contours” and “precise scope” of the investigation is unlikely to occur before the accusation stage. That the Chamber was determined to render its admissibility decision when it did, before the domestic investigation had progressed to the accusation phase (at which point, the “precise scope” of the case would have been more apparent), provides additional support to the argument that it should not have interpreted the requirements of an ongoing investigation in such an exacting manner.

63. A contextual reading of the relevant provision supports a broad and permissive interpretation of what constitutes the “case being investigated”. This finds support in particular from article 19(5) of the Statute, which requires that “[a] State [...] shall make a challenge *at the earliest opportunity*.” This leaves no doubt that article 17(1)(a) cannot require that a domestic investigation be at such a stage at the time of the admissibility challenge, such that its “actual contours” and “precise scope” are established. To the contrary, as indicated by ICC jurisprudence, encouraging challenges “at the earliest opportunity” “is in the interest of the Court and the proper administration of justice because it will avoid potentially lengthy and expensive proceedings before the Court that may have to be stopped at a later stage because the case has become inadmissible.”⁹⁵ A challenge at the “earliest opportunity” clearly requires only minimal evidence of an ongoing investigation relating broadly to the “same conduct” – including “discrete aspects” thereof – rather than the more stringent requirements imposed by the Chamber.

64. The Chamber, therefore, erred in imposing upon Libya a requirement of demonstrating the degree of investigative progress or finality imported by the additional requirements of proving the “actual contours” and “precise scope”. On the contrary, Libya was only required to adduce sufficient evidence to show

⁹⁵ AC Kenya Admissibility Decision, Dissenting Opinion of Judge Anita Ušacka, paragraph 21.

generally that an investigation was ongoing into Mr. Gaddafi's control of state apparatus and security forces in the commission of crimes against civilians in relevant locations.

(2) *Article 17(1)(a) contains obligations of conduct*

65. The Government's interpretation of the requirements of article 17(1)(a) gains further support from the general distinction "commonly drawn [in international law] between obligations of conduct and obligations of result."⁹⁶ An "ongoing" investigation under the Statute evidently entails an obligation of conduct rather than one of result. It is "in the nature of 'best efforts' obligations" rather than "guarantees of outcome."⁹⁷ To be clear, this does not mean a reduced intensity of obligation: it means that the obligation concerned pertains to *process* (the carrying out of an investigation, trial, etc.), not to outcome (the decision to go to trial, the decision to convict or acquit, etc.).

66. In human rights treaties for instance, States "enjoy a wide discretion as regards the choice of the means calculated to ensure that their legal systems are in compliance" with such obligations.⁹⁸ Provided that States are making "best efforts" to investigate the same case, they must be granted "wide discretion" and deference as to the decisions that are made regarding the investigation and the procedures that are followed.

67. The effect of the Chamber's strict interpretation and application of article 17(1)(a) is to disregard the "best efforts" of the Government. Indeed, bearing in mind the inherently dynamic nature of an ongoing investigation, it is difficult to see how a

⁹⁶ ILC Articles on State Responsibility (2001), page 56.

⁹⁷ Yearbook of the ILC (1999), Vol. I, p. 9, paragraph 35.

⁹⁸ *Colozza v. Italy*, Eur. Court H.R., Series A, No. 89 (1985), pp. 15–16, para. 30, citing *De Cubber v. Belgium*, *ibid.*, No. 86 (1984), p. 20, paragraph 35.

domestic investigation (particularly one in its early stages) *could ever* satisfy the Chamber's requirements.

68. Further, although the Chamber made no finding that Libya's domestic investigation progressed insufficiently over the few months preceding the admissibility decision, to the extent that the Chamber implicitly required evidence of *more* progress at this stage of proceedings such that the "actual contours" and "precise scope" of the domestic investigation could be established, it was in legal error. The drafters of the Statute specifically observed that the fact that domestic investigations are merely "proceeding more slowly" or "less efficiently" than the ICC case cannot justify interference by the Court.⁹⁹ A case is not admissible simply because the Court considers that it may perform the task better or more expeditiously than the challenging State.

69. In addition, the Chamber's approach is inconsistent with the Appeals Chamber's jurisprudence, which does not suggest that a case is admissible unless the "actual contours" or "precise scope" of a domestic investigation are established. The *Kenya Decision* held that the words "is being investigated" merely "signify *the taking of steps* directed at ascertaining whether those suspects are responsible for that conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses."¹⁰⁰ The "taking of steps" is necessarily a progressive investigation that proceeds in stages. It is obvious that the "actual contours" and "precise scope" of the domestic case become increasingly clear as the investigation

⁹⁹ See J. Holmes, "Complementarity: National Courts Versus The ICC", in A. Casesse et al., "The Rome Statute of the International Criminal Court: A Commentary, Volume I (2002), at 674.

¹⁰⁰ AC Kenya Admissibility Decision, paragraph 40 (emphasis added).

progresses.¹⁰¹ There is no reason in logic or principle why a partially complete investigation that relates to “aspects” of the overall ICC case should be insufficient.

70. Defeating national jurisdictions in such circumstances does nothing to further the object and purpose of the Statute to “put an end to impunity”. To the contrary, it creates the appearance of a Court that is giving short shrift to domestic proceedings by States acting in good faith.

2. The object & purpose of the Statute and the ongoing role of the ICC in domestic proceedings

71. A rush to judgment in the context of an ongoing investigation is not required to fulfill the Court’s mandate of ensuring that the most serious crimes of international concern “do not go unpunished” and to “put an end to impunity”.¹⁰²

72. This is because a finding of inadmissibility concerning an ongoing investigation does not preclude the Court from a subsequent finding of admissibility, depending on the progress of the domestic investigations. In deference to the rights and duties of sovereign States to exercise national jurisdiction, it is possible to make a finding of inadmissibility based on a the taking of “progressive investigative steps” in relation to “aspects” of the same case before the ICC and to subsequently declare the case admissible if it has not sufficiently progressed over time to demonstrate its “actual contours” and “precise scope”. As the Appeals Chamber has noted:

¹⁰¹ See for example, Mark Klamberg, "Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events", Martinus Nijhoff Publishers, 2013), International Criminal Law Series at pages 108-11 concerning the distinctions of evidence required before the ICC during its investigation phase and trial phase.

¹⁰² ICC Statute, preambular paragraphs 4-5.

*“[T]he 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. Thus, a case that was originally admissible may be rendered inadmissible by a change of circumstances in the concerned States and vice versa.”*¹⁰³

73. In pointed contrast, a State may submit a new challenge to admissibility under article 19(4) *only* in “exceptional” circumstances, a standard that does not apply to subsequent “challenges” by the Prosecutor. In other words, a finding of admissibility prejudices States more than a finding of inadmissibility prejudices the future exercise of jurisdiction by the Court.

74. In sum, a finding of inadmissibility where Libya’s ongoing domestic investigations are found to cover some but not all aspects of the ICC case would respect the “strong presumption in favour of national jurisdictions” while leaving open the option of exercising international jurisdiction at a later stage if domestic proceedings do not progress satisfactorily. This flexible and continuous review procedure is exactly what the drafters of the Statute contemplated in adopting the complementarity principle. A finding of inadmissibility by the Appeals Chamber in the present case would give effect to that intention and further the eradication of impunity by empowering national jurisdictions in challenging transitional situations.

¹⁰³ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo 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”, 25 September 2009, ICC-01/04-01/07-1497, 0A8, paragraph 56.

C. Failure to provide a reasoned opinion

75. Further and in the alternative, the Impugned Decision erred in law by failing to provide a reasoned opinion explaining why “a number of investigative steps” did not satisfy the requirements of article 17(1)(a), and why an additional element of proof of the “actual contours” and “precise scope” of the case was required.

76. In arriving at its conclusion that Libya has failed to satisfy the requirements of Article 17(1)(a), the Impugned Decision refers to Appeals Chamber jurisprudence setting forth the “same conduct” test.¹⁰⁴ It refers in particular to the *Kenya Admissibility Decision* as follows:

*“[T]he defining elements of a concrete case before the Court are the individual and the alleged conduct. It follows that for such a case to be inadmissible under article 17(1)(a) of the Statute, the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court.”*¹⁰⁵

77. The Chamber did not provide any reasoning as to how it moved from the requirement that “the national investigation must cover “substantially the same conduct” to the more exacting requirement of proof of the “actual contours” and “precise scope” of the investigation in relation to that conduct. The Chamber failed to address pertinent factors, such as the particular stage of a domestic investigation within the broader context of the Libyan criminal justice system, and why it chose not to draw reasonable inferences from these factors in favour of inadmissibility.

78. With respect to judicial decisions, ICC jurisprudence deems “essential that it indicates with sufficient clarity the basis of the decision”¹⁰⁶ and that “[t]he reasons for a decision

¹⁰⁴ *Decision*, para. 76.

¹⁰⁵ AC Kenya Admissibility Decision, paragraph 39.

¹⁰⁶ *The Prosecutor v. Thomas Lubanga Dyilo*, “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”, 14 December 2006, 01/04-01/06 OA 5, paragraph 20.

should be comprehensible from the decision itself”.¹⁰⁷ The right to a “reasoned opinion” is “a component of the fair hearing requirement” under international human rights law.¹⁰⁸ It is necessary to enable the parties and the Appeals Chamber to “expeditiously and efficiently identify the decisive facts established by the Trial Chamber and examine the evidence and reasoning for those facts.”¹⁰⁹

79. Instead of providing a reasoned opinion, the Impugned Decision merely states that:

*“The Chamber considers that the determination of what is “substantially the same conduct as alleged in the proceedings before the Court” will vary according to the concrete facts and circumstances of the case and, therefore, requires a case-by-case analysis.”*¹¹⁰

80. Based on this general statement on “case-by-case” analysis of the evidence, the Chamber does not explain anywhere why the “same conduct” test requires proof of the “actual contours” and “precise scope” of the domestic investigation. This clearly fails to satisfy the requirement of a “reasoned opinion”, and thus constitutes an error of law and/or procedural error requiring the Appeals Chamber to reverse the Impugned Decision in relevant part.

¹⁰⁷ *The Prosecutor v. Thomas Lubanga Dyilo*, “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”, 14 December 2006, ICC-01/04-01/06 (OA 6), paragraph 33.

¹⁰⁸ See for example, *The Prosecutor v. Anto Furundžija* Appeal Chamber “Judgement”, 21 July 2000, IT-95-17/1-A, paragraph 69; *The Prosecutor v. Momir Nikolić*, “Judgement on Sentencing Appeal”, 8 March 2006, IT-02-60/1-A, paragraph 96; *The Prosecutor v. Dragoljub Kunarac et al*, “Judgement”, 12 June 2002, IT-96-23 & 23/1-A, paragraph 41); *The Prosecutor v. Milutinović et al*, “Decision on Interlocutory Appeal from Trial Chamber Decision Granting Nebojsa Pavkovic's Provisional Release”, 1 November 2005 IT-05-87-AR65.1, paragraph 11.

¹⁰⁹ *Prosecutor’s Office of Bosnia and Herzegovina v. Mirko Todorović and Miloš Radić*, “Appeal Judgment”, 17 February 2009, State Court of BiH, paragraphs 12-13.

¹¹⁰ The Impugned Decision, paragraph 77.

D. Ground One: Conclusion

81. For these reasons, cumulatively and alternatively, Libya respectfully submits that, in applying an incorrect interpretation of article 17 (1) (a), the Chamber erroneously concluded that Libya had failed to show that it was investigating the same case. The Appeals Chamber should reverse the relevant part of the Impugned Decision and apply the correct test, namely that the Chamber's determination that Libya is undertaking several progressive "investigative steps" covering "aspects" of the "same conduct" satisfies the requirements of article 17(1)(a) of the Statute.

II. GROUND TWO: The Pre-Trial Chamber erred in fact and in law in finding that Libya has not substantiated that its domestic investigation covers the same case as that before the ICC

A. Introduction

82. The Government submits that the Chamber erred in fact and in law in finding that "Libya has fallen short of substantiating, by means of evidence of a sufficient degree of specificity and probative value" that the domestic investigation covers the same case as that before the ICC.¹¹¹ In light of the array of specific and probative evidence relied upon by Libya in support of its Admissibility Challenge, this finding was patently incorrect.

83. The Chamber fell into clear error by:

- (a) Having insufficient regard to (or misappreciating) all the evidence provided by Libya to the Court contained in the evidential materials annexed to its Admissibility Challenge filed in May 2012, its Additional

¹¹¹ The Impugned Decision, paragraph 135.

Submissions filed in January 2013¹¹² and its Admissibility Challenge in relation to Abdullah Al-Senussi (in so far as this pertained to the case of Saif Al-Islam Gaddafi) filed in April 2013.

(b) Failing to take into account other specific and probative evidence, including evidence as to the appointment of a new Prosecutor-General, and evidence which would have been provided by Libya to the Court if:

- i. The Chamber had granted Libya's requests for a further six weeks in which to provide the Court with further evidential materials; and
- ii. The Chamber had accepted Libya's invitation to undertake a site visit to Tripoli to examine the Prosecutor-General's investigative files;

(c) The Chamber conducted a flawed and unreasonable evaluation of the evidence by isolating particular categories and individual pieces of evidential materials and erroneously minimizing their significance rather than evaluating the evidence as a whole, with due regard to the factual matrix within which it is being conducted, thereby taking account of the important links between the evidential materials provided.

84. The Chamber's decision was accordingly based on errors of law and fact, including a misappreciation of the facts upon which the findings were based. This misappreciation is of such a magnitude that interference by the Appeals Chamber is warranted as the Chamber's conclusion that Libya is not investigating the same case as that before the ICC could not reasonably have been reached on the evidence

¹¹² The Annexes to Libya's Consolidated Reply relate to limb 2 of the Admissibility Assessment rather than limb 1 as considered here.

before it.¹¹³ The Chamber's reasoning is further undermined by a disregard of relevant facts about the investigation that were before the Chamber.¹¹⁴ These errors had a material affect on the impugned decision such that the decision would have been "substantially different". If the Chamber had not made these errors, and had instead properly considered the evidence and applied a reasonable approach to its evaluation, it would have found that Libya was investigating the same case as that before the ICC. This finding, together with a correct approach to the legal and factual issues underpinning the Impugned Decision with regard to the second limb of the admissibility test, would have ensured that the case would have been declared inadmissible.

B. Failure to give sufficient weight to relevant facts and evidence which were before the Chamber

85. The Chamber also fell into error by failing to give sufficient weight to relevant facts that were before the Chamber and were substantiated by evidence of a sufficient degree of specificity and probative value.

¹¹³ AC Kenya Admissibility Decision, paragraph 56, citing *Prosecutor v Callixte Mbarushimana*, "Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled "Decision on the Defence Request for Interim Release"", 14 July 2011, ICC-01/04-01/10-283(OA), paragraphs 1 and 17.

¹¹⁴ AC Kenya Admissibility Decision, paragraph 56; citing *The Prosecutor v. Jean-Pierre Bemba Gombo*, "Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa", 02 December 2009, ICC-01/05-01/08-631-Red (OA-2), paragraph 61; citing *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, "Judgment in the appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of the Pre-Trial Chamber I on the Application of the Appellant for Interim Release", 9 June 2008, ICC-01/04-01/07-572 (OA 4), paragraph 25; see also *The Prosecutor v Jean-Pierre Bemba Gombo*, "Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled "Decision on the Application for interim release", 16 December 2008, ICC-01/05-01/08-323 (OA), paragraph 52.

1. Documents

86. In the Impugned Decision at paragraphs 115 to 118, the Chamber erroneously discounted the evidential value of various documents provided by Libya as it wrongly regarded that evidence as either: “falling short of clarifying the scope or subject matter of the domestic investigation”¹¹⁵ or “not contain[ing] specific information as to the criminal conduct under investigation in Libya”.¹¹⁶ In some cases the Chamber made no apparent findings of fact on the documents and gave no reasoning as to the weight to be attributed to such documents in spite of the fact that they demonstrably were of a sufficient degree of specificity and probative value relevant to Libya’s arguments concerning the ‘same case’ issue.¹¹⁷

a) Annexes E & F and other Abdullah Al-Senussi materials

87. In paragraph 115, the Chamber appears to have disregarded Annexes E and F almost entirely in its evaluation of the evidence. These documents are opinions by the Libyan Prosecution authorities relating to, *inter alia*, murders allegedly committed by Abdullah Al-Senussi and, in respect of Annex E murders, rapes and international crimes committed by Saif Al-Islam Gaddafi). It does so on the basis that “the link between Al-Senussi’s domestic investigations and those against Mr Gaddafi has not been shown by Libya and it is not apparent to the Chamber from the evidence before it”. Although the Chamber accepted that Annex E “contains some information relevant to the case against Mr Gaddafi”, it ruled that it “fell short of clarifying the scope or subject matter of the domestic investigation”. This finding is a clear error of fact.

¹¹⁵ The Impugned Decision, paragraph 115.

¹¹⁶ The Impugned Decision, paragraph 116 & 117.

¹¹⁷ The Impugned Decision, paragraphs 118. Cf. The Impugned Decision, paragraph 134.

88. No reasonable Chamber would have disregarded the fact that the very proceedings before it relate to a joined case against Saif Al-Islam Gaddafi and Abdullah Al-Senussi (with case number ICC-01/11-01/11) for their joint and individual roles in committing crimes against humanity (including murder) during the 2011 revolution. This fact alone ought to have provided more than a sufficient basis for presuming the relevance of evidential materials pertaining to Abdullah Al-Senussi when determining the scope and contours of the Libyan domestic investigation.

89. Moreover, the documentary evidence adduced by Libya within the Saif Al-Islam Gaddafi admissibility proceedings specifically showed that the Gaddafi and Al-Senussi cases were intended to be joined and tried together in Libya as they related to similar allegations of crimes (including murder and persecution) committed during the revolution and were accordingly linked.¹¹⁸ Indeed Annex 11 to Libya's Additional Submissions supports the proposition of a joinder of the domestic cases on the basis that "such crimes are inseparable in both facts and committers without undermining the legal structure on which the investigations were built". It is for this reason that much of the evidence in the Saif Al-Islam Gaddafi admissibility proceedings refers also to the Al-Senussi domestic investigation.¹¹⁹ Indeed, much of the evidence in the Al-Senussi admissibility proceedings also refers to the Saif Al-Islam Gaddafi domestic investigation.¹²⁰

90. The relationship between the two domestic investigations is also attested by the fact that the Government initially sought to challenge admissibility for both Saif Al-Islam Gaddafi and Abdullah Al-Senussi together in May 2012 even though it requested severance of the two admissibility challenges on the basis that at that time

¹¹⁸ See for example, Annex 11 to Additional Submissions.

¹¹⁹ See for example, Annexes A, C, E and F to Admissibility Challenge and Annexes 2, 16 and 17 to Additional Submissions.

¹²⁰ Abdullah Al-Senussi Admissibility Challenge, Annexes 8, 10, 12, 15.

Mr. Al-Senussi had not yet been extradited to Libya.¹²¹ In Libya's May 2012 Admissibility Challenge, it was stated in terms that:

"The crimes against the person alleged in relation to Mr Al-Senussi are in respect of many of the same factual matters as Mr Gaddafi arising during the 2011 revolution – including those appearing in the ICC Article 58 Decision.¹²² Accordingly, there is close cooperation between these two judicial proceedings in this regard. In particular, the investigations carried out by the Prosecutor-General in relation to Mr Gaddafi will be referred to the Military-Prosecutor for potential use with respect to crimes alleged to have been committed by Mr Al-Senussi in due course."

91. In these circumstances it was clear error of fact for the Chamber to both fail to have proper regard to Annexes E and F to the Admissibility Challenge which contained specific and probative evidence in relation to the contours of the Libyan investigative proceedings in relation to Abdullah Al-Senussi and Saif Al-Islam Gaddafi and was, at the very least, important and relevant contextual evidence in showing the seriousness of the crimes with which the domestic investigation was concerned.

92. Likewise, it was a patent error of fact for the Chamber to fail to take into account the evidential materials submitted as part of the Al-Senussi Admissibility Challenge (in so far as they pertained to Mr. Gaddafi) when deliberating on the Gaddafi Admissibility Challenge. Indeed, the propriety of reliance by the Chamber on evidence filed in the Al-Senussi Admissibility Challenge as part of its determination on the Saif Al-Islam Gaddafi Admissibility Challenge is a matter on which the

¹²¹ Gaddafi Admissibility Challenge, paragraph 73.

¹²² *Situation in the Libyan Arab Jamahiriya*, "Decision on 'Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi'", Pre-Trial Chamber I, 27 June 2011, ICC-01/11-12.

Defence for Saif Al-Islam Gaddafi had made submissions¹²³ and in relation to which Libya sought leave to reply from the Chamber on 10 May 2013.¹²⁴ No decision has been delivered in relation to that request. In addition, in the Al-Senussi Admissibility Challenge, it was expressly noted that the evidential materials contained in the Annexes thereto is to be considered alongside the evidence filed in the Gaddafi admissibility proceedings.¹²⁵

93. Any reasonable Pre-Trial Chamber ought therefore to have taken account of the materials contained in the Abdullah Al-Senussi Admissibility Challenge in the absence of a determination in advance that they would not be so considered. Such a determination would, of course, have had to follow receipt of submissions from the Libyan Government on their admissibility in the Gaddafi admissibility proceedings. The Chamber's failure to instigate these submissions additionally amounts to a procedural error as argument in Ground 3 of this Document in Support of the Appeal.

94. The evidential materials annexed to the Abdullah Al-Senussi Admissibility Challenge which ought to have been evaluated by the Chamber are as follows:

¹²³ *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "Response to the "Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute"", 23 April 2013, ICC-01/11-01/11-313.

¹²⁴ *The 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 Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute", 03 May 2013, ICC-01/11-01/11-327.

¹²⁵ Al-Senussi Admissibility Challenge, para 173.

a. Annexes 8, 9, 10, 11, 12, 14, 15, 16, 17, 20, 21, 22, 23, 26;¹²⁶

These annexes are witness statements given to the Libyan prosecution officials investigating the cases of Saif Al-Islam Gaddafi and Abdullah Al-Senussi by civilians and military officials.

Those given by members of the Libyan military (including very senior officers such as military commanders and members of the High Security Committee, as well as ordinary soldiers) pertain to:

- i. Advanced notice of likelihood of protests and planning of response;¹²⁷
- ii. Involvement with others, including Saif Al-Islam Gaddafi, in directing and coordinating attacks on revolutionaries in Benghazi and Tripoli;¹²⁸
- iii. Instructions and active encouragement to suppress protestors through the use of all means possible;¹²⁹
- iv. Active incitement of discord between tribal groups in furtherance of Muammar Gaddafi's policy of fostering and manipulating such discord as a means of maintaining control of the Libyan people;¹³⁰
- v. Orders to supply the front with logistics and weapons as well as monitoring and directing activities at the front;¹³¹

¹²⁶ [REDACTED]

¹²⁷ [REDACTED]

¹²⁸ [REDACTED]

¹²⁹ [REDACTED]

¹³⁰ [REDACTED]

¹³¹ [REDACTED]

- vi. Recruitment and funding of mercenaries to assist in suppressing the revolutionaries directly and also indirectly, by instructing other members of the military, including his son;¹³²
- vii. Meetings [REDACTED] to organise the recruitment and deployment of mercenaries and to discuss tactics to gain control over revolutionaries, including the use of mortars and the laying of mines;
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- viii. Involvement in the recruitment, funding, arming and deploying of “volunteers” to engage in suppressing the revolutionaries;¹³⁴
- ix. Provision of narcotics to mercenaries and volunteers in order to motivate and encourage compliance with instructions;¹³⁵
- x. Leadership of “supreme security room” from June 2011.¹³⁶

¹³² [REDACTED]

¹³³ [REDACTED]

¹³⁴ [REDACTED]

¹³⁵ [REDACTED]

¹³⁶ [REDACTED]

Those given by civilian eyewitnesses (including victims, protestors, revolutionary fighters and their family members) relate to:

- i. Multiple deaths and injuries suffered by peaceful protestors on different dates, including in Benghazi between 15 and 20 February 2012, substantiated by medical evidence and official records;¹³⁷
- ii. The use of heavy weaponry and snipers to target unarmed protestors in Benghazi, including individuals trying to flee;¹³⁸
- iii. The unlawful detention and torture of protestors in the internal security headquarters, supervised and implemented by Abdullah Al-Senussi.¹³⁹

In short, these witness statements demonstrate the implementation of the plan by the Libyan State apparatus and Security Forces (in which Saif Al-Islam Gaddafi participated) to deter and quell, by any means, including the use of lethal force, the demonstrations of civilians starting in February 2011, which resulted in killings and persecutions of hundreds of civilians across Libya. At least four of the witness statements refer specifically to the active role of Saif Al-Islam Gaddafi in the implementation of this plan, including directing the activities of the Security Forces.¹⁴⁰ Accordingly they are highly relevant to the issue of whether the Libyan investigation relates to the same case as that before the ICC.

¹³⁷ [REDACTED]

¹³⁸ [REDACTED]

¹³⁹ [REDACTED]

¹⁴⁰ [REDACTED]

b. Annex 4.¹⁴¹

This annex is a transcription of a speech by Abdullah Al-Senussi in Benghazi in which he calls for “filthy groups” [demonstrators] to be “destroy[ed]... altogether. It is relevant to the plan by the Libyan State apparatus and Security Forces (in which other evidence suggests Saif Al-Islam Gaddafi participated) to deter and quell, by any means, including the use of lethal force, the demonstrations of civilians that started in February 2011 against Muammar Gaddafi’s regime.

c. Annex 19.¹⁴²

This annex is a set of orders by Abdullah Al-Senussi requesting weapons and ammunition to be sent to various elements of the Security Forces. It is relevant to the implementation of a State policy (which Saif Al-Islam Gaddafi implemented) in February 2011, aimed at deterring and quelling, by any means, including by the use of lethal force against civilians, the demonstrations against the regime of Muammar Gaddafi.

d. Annex 13.¹⁴³

This annex is a list of medical evacuations including the country to which persons injured were evacuated to, the kind of injury they sustained and the date of their admission into hospital. It is relevant to the injuries that were sustained by demonstrators during the 2011 revolution at the hands of the Gaddafi-State apparatus and Security Forces.

¹⁴¹ [REDACTED]

¹⁴² [REDACTED]

¹⁴³ [REDACTED]

e. Annexes 18, 25 and 27:¹⁴⁴

These annexes are a series of medical reports and death certificates documenting gunshot injuries sustained by demonstrators. It is relevant to the attacks on civilians during the 2011 revolution carried out by the Gaddafi-State apparatus and Security Forces.

95. If the Chamber had considered the materials summarized above, together with Annexes E and F to the Saif Al-Islam Gaddafi Admissibility Challenge, when deliberating on admissibility, it would have found that the Libyan domestic investigation in respect of Saif Al-Islam Gaddafi relates to the “same case” as that before the ICC. Various pieces of evidence referred to above were of direct relevance to the question of the scope and contours of the domestic case against Mr. Gaddafi and were of sufficient specificity and probative value to be accorded significant weight by the Pre-Trial Chamber. They provide direct evidence of the conduct included in the Warrant of Arrest for Mr. Gaddafi, which the Chamber in paragraph 133 determined was the appropriate test for determining whether the “same case” element of admissibility has been satisfied.

b) Flight-related documents

96. The Chamber additionally erred in fact in its evaluation of Annexes 5, 6 and 7 to Libya’s Additional Submissions¹⁴⁵ at paragraphs 118 and 134 of the Impugned Decision by seemingly reaching no conclusions at all as to the weight to be attributed to these documents. These documents, which consisted of materials relating to flights carrying armed mercenaries and equipment to Libya in mid-late

¹⁴⁴ [REDACTED]

¹⁴⁵ [REDACTED]

February 2011, were documents produced independently of the Libyan Ministry of Justice [REDACTED].

97. They provide evidential support for the fact that the Libyan investigation encompasses allegations against Saif Al-Islam Gaddafi for arranging finance and logistical matters (including the mobilization of mercenaries) for the implementation of the criminal plan to quell demonstrations by any means. This very specific type of criminal conduct in respect of Saif Al-Islam Gaddafi is also featured in paragraphs 27, 67, 72 and 80 of the Pre-Trial Chamber's Article 58 Decision of 27 June 2011.
98. While the Chamber accepted in paragraph 134 of the Impugned Decision that "some items of evidence [including the flight materials] show that a number of investigative steps have been taken by Libya with respect to certain discrete aspects that arguably relate to the conduct of Mr Gaddafi" as alleged at the ICC, it reached no conclusion as to the proper weight to be attributed to these materials anywhere in the Impugned Decision. This is a clear error of fact that materially affected the Chamber's determination. As entirely independent documents which specifically attest to the logistics for the transport of mercenaries (ie. the specific criminal conduct alleged against Mr Gaddafi), they are highly relevant and probative. Failing to place substantial weight upon them is a factual error which no reasonable fact finder could have made on the totality of the evidence.

c) Other documents

99. The Pre-Trial Chamber erred in fact in paragraphs 116 to 117 of the Impugned Decision in failing to attribute sufficient weight to Annex I to the Admissibility Challenge and Annexes 3, 9, 10, and 11 to the Additional Submissions concluding

erroneously that these documents “do not contain specific information as to the criminal conduct under investigation in Libya”. This finding is patently wrong and flies in the face of a plain reading of each of these documents:

a. *Annex I:*¹⁴⁶

This annex provided significant details as to the criminal conduct alleged noting that this conduct is confirmed by “more than 30 witnesses in addition to telephone and video recordings and some documents” and that the crimes themselves were instances of murder and persecution. This document then goes on to list all of the specific offences under Libyan law with which Saif Al-Islam could be charged in respect of these crimes.

b. *Annex 3:*¹⁴⁷

This document specifically confirmed that the “incidents of murder and persecution outlined in paragraphs 32-65 of the International Criminal Court’s [Article 58 Decision] ... dated 27 June 2011 ... are included within the scope of the criminal investigation against Saif Al-Islam Gaddafi” and that the “allegations relating to the individual criminal responsibility of Saif Al-Islam Gaddafi in the 27 June 2011 Decision ... are covered by evidence gathered in the criminal investigation against Saif Al-Islam Gaddafi”.

c. *Annex 9:*¹⁴⁸

This specifically states that the charges relate to: killings by gunshot on the Juliana Bridge in Benghazi; distribution of weapons to Libyans ... for the purpose of fighting; giving orders for killings in the Tawergha region; and

¹⁴⁶ Al-Senussi Admissibility Challenge, Annex 1 – Confidential: Letter from Counsel Ali Muftah Wanees to the Attorney General in Benghazi, dated 09/06/2012, submitting an investigation file containing complaints from 2011-2012.

¹⁴⁷ Libya’s Further Submissions, Annex 3 – Public – Ministry of Justice letter relating to contours of investigation, 21 January 2013.

¹⁴⁸ Libya’s Further Submissions, Annex 9 - Public – Extension of Detention Order 30 October 2012

the killing of the journalist Idris Al-Mismari. Apart from killings in the Tawergha region of Libya, each of these specific allegations of criminal conduct is a mirror of the specific allegations of criminal conduct at the ICC.

d. Annex 10:¹⁴⁹

Likewise, this refers specifically to an allegation that Saif Al-Islam incited one tribe against the other and the use of criminal gangs. Again, these are specific allegations of criminal conduct that replicate or mirror those in the ICC case.

e. Annex 11:¹⁵⁰

This provided a range of details specifically in relation to the criminal conduct under investigation. It stated: “the investigation showed that, what the country went through was based on systematic general policy used by a group of the previous regime’s figures, headed by the accused ... Saif Al-Islam Gaddafi ... and ... Abdullah Mohamed Al-Senussi ... and other figures of the previous regime. Their acts constitute a general framework for a set of serious crimes such as mass killings, random killing, looting, sabotage, rape and the spread the spirit of discord and fragmentation of national unity.”

100. It is clear from these extracts of the five annexes that each contains specific and probative evidence as to the exact criminal conduct under investigation in Libya which is capable of satisfying a reasonable Chamber that the Libyan investigation covers the ‘same case’ as that at the ICC. The Chamber’s failure to attribute significant evidential weight to them was unreasonable and an abuse of discretion. Its conclusion that these annexes fall short of substantiating the ‘same case’ issue because they “do not contain specific information as to the criminal conduct under

¹⁴⁹ Libya’s Further Submissions, Annex 10 - Public – Extension of Detention Order

¹⁵⁰ Libya’s Further Submissions, Annex 11- Public – Attorney-General Memorandum regarding joinder of cases, 13 January 2013

investigation in Libya” could not reasonably have been reached on the evidence before it.¹⁵¹ It constitutes a clear error of fact that had a material impact on the Impugned Decision.

2. Summaries of witness statements

101. The Pre-Trial Chamber erred in fact and law in paragraphs 119 to 123 of the Impugned Decision in failing to attribute sufficient weight to the summaries of witness statements contained in Annex C to the Admissibility Challenge. It erroneously concluded that the “scant level of detail and the lack of specificity of the summaries do not allow the Chamber to draw conclusions as to the precise scope of the domestic investigation”.¹⁵²

102. This finding is patently wrong and illustrates an unreasonable approach to the level of detail needed in order to satisfy the Appeals Chamber’s requirement that submissions pertaining to the issue of ‘same case’ are supported by evidence of sufficient specificity and probative value. There is no Appeals Chamber requirement that witness summaries (as opposed to witness statements) are insufficient to meet this standard and the Pre-Trial Chamber was accordingly wrong to allocate them merely “some inferential value about the existence and content of the evidence”.¹⁵³ The witness summaries were prepared in good faith by the Deputy Prosecutor and the Vice Prosecutor in office at the relevant time, both of whom are officers of the Libyan Courts with all the associated professional conduct rules and regulations. Therefore, contrary to the Chamber’s erroneous finding that it would be desirable to verify the accuracy of their contents by comparison with their

¹⁵¹ Impugned Decision, paragraphs 116 and 117.

¹⁵² The Impugned Decision, paragraph 123.

¹⁵³ The Impugned Decision, para 121.

corresponding witness statements, they ought – without any further enquiry - to have been treated by the Chamber as documents which, in the absence of an evidenced challenge to their authenticity, were both highly relevant to the ‘same case’ issue and which were to be attributed substantial evidential weight.

103. Moreover, as outlined in the Pre-Trial Chamber’s summary of the witness summaries contained in paragraph 120 of the Impugned Decision, they provide significant details of the Libyan investigation into Mr Gaddafi’s alleged conduct, indicating that:

“Mr Gaddafi was running State affairs before and during the revolution and was in charge of the “management” of the revolutionary crisis; was the brain behind the killings; held meetings and communications with the High Security Committee, Abdullah Al-Senussi and Khamis Gaddafi; ordered the mobilisation, recruitment and arming of supporters including young men to fight, kill and suppress the protester even if that lead to the eradication of the Libyan people. Reference is also made to the fact that Mr Gaddafi: [REDACTED]; [REDACTED] and [REDACTED].”

104. In the context of the very significant detail showing the scope and contours of the criminal conduct alleged against Saif Al-Islam Gaddafi which can be readily gleaned from a review of pages 1 to 5 of the witness summaries at Annex C (as is apparent in the Chamber’s summary of them above) it is abundantly clear that the Chamber’s conclusion that they lacked detail and specificity is manifestly wrong. It is a conclusion that no reasonable Chamber could have reached. The error materially impacted on the Impugned Decision, as a proper evaluation of the witness summaries would have led to the conclusion that the Libyan domestic investigation in respect of Saif Al-Islam Gaddafi related to the ‘same case’ as before the ICC

3. Witness statements

105. The Chamber erred in fact in paragraphs 124 to 127 of the Impugned Decision by failing to give Annexes 4, 15 and 16 to Libya's Additional Submissions decisive weight when considering whether the domestic investigation relates to the 'same case' as that before the ICC. It is notable that although it makes no express finding as to the weight to be attributed from these witness statements, the Chamber does appear to have placed a degree of weight on two out of three of the statements in concluding that "a number of investigative steps have been taken by Libya with respect to certain discrete aspects that arguably relate to the conduct of Mr Gaddafi as alleged in the proceedings before the Court".¹⁵⁴ This is apparent from the listing of three out of the four aspects by the Chamber in support of its conclusion (the assembly and mobilization of military forces at the Abraq Airport;¹⁵⁵ certain events in Benghazi on 17 February 2011;¹⁵⁶ and the arrest of journalists against the Gaddafi regime¹⁵⁷) correlate to the contents of the two out of three of the witness statements.

106. However, given that these Annexes were highly probative pieces of evidence containing specific allegations as to the criminal conduct of Saif Al-Islam Gaddafi forming part of the domestic investigation, they ought to have been accorded substantial weight by the Chamber and ought to have been the subject of an express finding as to the weight attributed to them. The particular factual errors in the Chamber's reasoning with respect to these Annexes are as follows:

a. Annex 4:¹⁵⁸

¹⁵⁴ Impugned Decision, paragraph 134.

¹⁵⁵ Annex 4.

¹⁵⁶ Annex 16.

¹⁵⁷ Annex 16.

¹⁵⁸ [REDACTED]

The Chamber erred in finding that “it is not apparent from this statement [which relates to the assembly and mobilization of military forces at Abraq airport] that it was taken in relation to the investigation of the role of Mr Gaddafi”. Had the Chamber adopted a correct approach to consideration of the evidence as a whole, it would have been apparent that this witness statement provides important contextual information in support of most of the allegations and prospective charges against Mr. Gaddafi in the domestic investigation who, as one of the suspected orchestrators and leaders, is being investigated for his logistical role in implementing the criminal plan to suppress demonstrators at any cost.¹⁵⁹ It was therefore plainly wrong not to give considerable evidential weight to a witness statement of this kind.

b. *Annex 15*:¹⁶⁰

The Chamber erred in finding that the statement attests to Mr. Gaddafi promising to distribute weapons “without however, doing so”.¹⁶¹ Putting to one side the fact that evidence establishing that a leader is planning to supply weapons to direct perpetrators is critical evidence in leadership cases, in fact, the statement clearly says that the witness heard from his “neighbours that Saif Gaddafi distributed Kalashnikovs”. The Chamber further erred in taking the view that the statement merely “may” indicate that “steps directed at ascertaining Mr Gaddafi’s responsibility in relation to the same case are being taken”. The statement recounts in detail a chilling incident in which civilians who have been arrested and had their hands tied were brought to Saif Al-Islam and beaten in front of them before he inquired whether they were “rats” and then ordered that they be killed in front of

¹⁵⁹ [REDACTED]

¹⁶⁰ [REDACTED]

¹⁶¹ Impugned Decision, paragraph 125.

him". This eyewitness account of the killing of an unarmed civilian, combined with a hearsay account of daily killings outside of the Gaddafi compound ought to have been given decisive weight by the Court on the 'same case' issue. It attests to the gathering of both direct and indirect evidence in support of allegations against Mr. Gaddafi for the core crimes of murders and persecutions of protestors. Accordingly, and undeniably, it is a witness statement directly matching the criminal conduct alleged in the ICC case. The Trial Chamber's error of fact in failing to attribute decisive weight to this piece of evidence was therefore patently wrong.

c. Annex 16:¹⁶²

The Chamber erred in fact by not making any express findings as to the proper weight to be attributed to this piece of evidence - a witness statement of an individual [REDACTED]. The witness statement ought to have been regarded as decisive of the 'same case' issue as it recounts, *inter alia*:

- i. the use of armed violence against demonstrators on 17 February 2011 in Benghazi and elsewhere in Libya;
- ii. Saif Al-Islam Gaddafi's direct role in furthering the violence;
- iii. Saif Al-Islam Gaddafi's logistical role in arranging for mercenaries and troops to kill demonstrators; and
- iv. Saif Al-Islam Gaddafi's order to arrest the journalist Idris Al-Mismari.

107. All of this alleged conduct is contained in the ICC's article 58 Decision and accordingly this statement alone demonstrates that the Libyan investigation relates

¹⁶² [REDACTED]

to the same case as that before the ICC. The Trial Chamber's error of fact in failing to attribute decisive weight to this piece of evidence was therefore patently wrong.

108. The errors of fact outlined above had a material impact on the decision as a proper evaluation of the evidence would have resulted in the Chamber ruling that the Libyan investigation related to the same case as that before the ICC. By contrast, the Chamber's findings were ones that could not reasonably be reached on the evidence before it.

4. Intercepts

109. The Chamber erred in fact in paragraphs 128 to 132 of the Impugned Decision by failing to give Annex 17 to Libya's Additional Submissions decisive weight when considering whether the domestic investigation relates to the 'same case' as that before the ICC. It determined that the eight intercepts in this piece of evidence, which show Mr. Gaddafi's integral role in the planning and coordination of the use of force to suppress civilians and his oversight of activities throughout Libya merely "relate to the repression of demonstrations against the Gaddafi regime from 15 February 2011 until at least 28 February 2011". However, given that the intercepts record Mr. Gaddafi ordering the killing of rebels; planning for the use of guns against unarmed protestors; and stating that there will be no retreat, it ought to have attributed decisive weight to this document. This amounted to a misappreciation of the evidence before it. The Chamber's error of fact had a material impact on the decision as a reasonable evaluation of the intercepts would have led to the conclusion that the Libyan investigation related to the same case as that before the ICC. By contrast, the Chamber's finding with respect to the intercepts was one that could not reasonably be reached on the evidence before it.

C. Failure to take into account other specific and probative evidence pertaining to the scope of the domestic investigation

110. The Chamber also erred by failing to take into account other specific and probative evidence pertaining to the scope and contours of the domestic investigation which would have been available to the Court if it had granted Libya's requests to both adduce further evidential materials and to undertake a site visit to Tripoli. These requests were contained in Libya's Reply of 4 March 2013¹⁶³ and in Libya's Notification of the appointment of a new Prosecutor-General of 28 March 2013.¹⁶⁴ They were that: (1) Libya be granted six weeks from the rendering of its decision on the additional submissions filed with the Court on 23 January 2013 to adduce such further evidential samples relating to the investigation of Saif Al-Islam Gaddafi as it may consider to be necessary; and / or (2) that the Pre-Trial Chamber travel to Tripoli to inspect the case file in order to review the evidence collated by Libya during its investigation of Saif Al-Islam Gaddafi.

111. As also referred to in Ground 3 of this Document in Support of the Appeal (relating to procedural error and/or unfairness), the Appeals Chamber erred in not acceding to these requests. Such requests were made in good faith at a time when the Government was doing its utmost, in challenging circumstances, to produce evidence attesting to the scope and contours of its ongoing national proceedings in respect of Saif Al-Islam Gaddafi. These efforts were being made amidst a rapid and ongoing fundamental change in Libya (particularly within Libya's system of

¹⁶³ *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "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", 04 March 2013, ICC-01/11-01/11-293-Red, paragraphs 7 and 125, paragraphs 7 and 125

¹⁶⁴ Supplemental notification, paragraph 5.

criminal justice) occurring since the issuance of the ICC's arrest warrant for Mr. Gaddafi on 27 June 2011.

112. In that time, an oppressive regime has been overthrown; the country has emerged from a bloody civil war; a transitional government has steered the country through its first democratic election in five decades; Libya's judiciary, police, prosecution service and members of its legal profession have benefitted from training and other expertise gleaned from an array of international assistance measures; a new Minister of Justice, Salah Marghani, who has been honoured by Human Rights Watch for his "extraordinary activism" and commitment to "protect[ing] the rights and dignity of others" has been appointed and is actively working to implement international best practice standards within Libya's justice system.¹⁶⁵ 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 which took place on 20 March 2013.

113. 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 Chamber [REDACTED]

114. In these circumstances, the Chamber's refusal to accede to Libya's requests to adduce additional evidence within a modest timeframe of six weeks or to conduct a site visit to Tripoli where it could inspect the investigative case file for itself in order

¹⁶⁵ Human Rights Watch, "Awards for Rights Activists from Congo, Libya: Winners Named for the 2012 Alison Des Forges Award", 14 August 2012, available at: <http://www.hrw.org/news/2012/08/14/awards-rights-activists-congo-libya>

to satisfy itself of the contours and scope of the domestic case was a decision which could not be taken by any reasonable Pre-Trial Chamber. In the Impugned Decision, the Chamber provided no analysis or reasoned determination on the *ex parte* submissions made by Libya with respect to the significance of the Prosecutor-General's appointment in refusing the Government's request to be granted more time to adduce further evidence and / or to undertake a site visit to Tripoli.¹⁶⁶ Indeed, it is plain from the Impugned Decision that the appointment of a new Prosecutor-General and the implications that this would have for the Government's ability to substantiate its submission that the domestic investigation was for the 'same case' as the ICC investigation was a matter which was wholly disregarded by the Chamber and formed no part of its admissibility determination. Any reasonable Pre-Trial Chamber would not have failed to consider these important facts.

115. The additional evidence that would have been adduced before the Court had further submissions being considered by the Chamber and/or an inspection of the case file in Tripoli carried out, would have been of sufficient specificity and probative value to satisfy the Chamber that the domestic investigation was in

¹⁶⁶ Impugned Decision, paragraphs 136-137.

relation to the same case as that before the ICC. As well as being a procedural error, as outlined in Ground 3 of this Document in Support of the Appeal, declining to take into account such evidence also amounted to a clear error of fact, which had a material effect on the Impugned Decision.

D. Unreasonable approach to the evaluation of evidence

116. The Chamber erred by carrying out a flawed evaluation of the evidence relied upon by Libya to satisfy the same case test. Libya affirms the requirement of the Appeals Chamber that a State challenging admissibility must substantiate its case by means of evidence of a “sufficient degree of specificity and probative value”.¹⁶⁷ However, it asserts that the Pre-Trial Chamber erred in law and fact when assessing the evidentiary materials relied upon by Libya so as to wrongly conclude that Libya had fallen short of substantiating, by means of evidence of a sufficient degree of specificity and probative value, that the domestic investigation covers the same case that is before the Court.¹⁶⁸

117. The above analysis of the evidence considered or discounted by the Chamber shows that the Chamber fell into error by isolating particular categories of materials, discounting many of those categories wholesale and conducting a reasoned evaluation of only part of the evidence adduced by the Government.¹⁶⁹ This flawed approach resulted in only a few of the many pieces of evidence submitted by the Government being properly evaluated in order to determine whether or not the Libyan domestic investigation related to the same case as the ICC proceedings. The pieces of evidence singled out for analysis by the Chamber were Annexes C, D, E, F,

¹⁶⁷ AC Kenya Admissibility Decision, paragraph 62.

¹⁶⁸ The Impugned Decision, paragraph 135.

¹⁶⁹ The Impugned Decision, paragraphs 106, 114-135.

and I to the Admissibility Challenge and Annexes 2, 3, 4, 5, 6, 7, 9, 10, 11, 15, 16 and 17 to the Government's Further Submissions.¹⁷⁰

118. Despite the Chamber's stated intention to consider "the evidence taken as a whole", it in fact adopted an unreasonable approach and conducted a disparate analysis of the evidence submitted by the Government. Specifically, it failed to consider whether there were linkages between individual pieces of evidence and then take those linkages into account. It is apparent from its reasoning in paragraphs 114 to 135 of the Impugned Decision that this was not the approach taken. The result of the Chamber's flawed approach was that the specificity and probative value of the evidential material was diluted as the documents were considered without reference to their context or their proper place within the factual matrix of the Libyan investigation. The unfairness caused by this incorrect evaluation of the evidence is manifest particularly in circumstances where the domestic investigation is an ongoing one in a challenging transitional context. If the Chamber had properly assessed the evidence as a whole and applied the requirement of evidence of a sufficient degree of specificity and probative value reasonably, it would have reached the conclusion that Libya's domestic investigation related to the same case as the ICC investigation.

E. Ground Two: Conclusion

119. The errors of law and fact outlined above, whether considered individually or in combination, materially affected the decision. If the Chamber had instead properly considered the evidence and applied a reasonable approach to its evaluation it

¹⁷⁰ The Impugned Decision paragraphs 115-131.

would have concluded that Libya was investigating the same case as that before the ICC.

III. GROUND THREE: Unfairness and procedural errors occasioning a failure to take into consideration relevant and probative evidence

A. The Chamber failed to “take appropriate measures for the proper conduct of the procedure” occasioning a failure to take into consideration relevant and probative evidence

120. It is submitted that the Chamber erred procedurally, or acted unfairly, pursuant to Rule 58(2), by failing to “take appropriate measures for the proper conduct of the procedure”, thereby depriving Libya of the ability to rely upon highly relevant evidence in support of its admissibility challenge. It is submitted that the unfairness and the errors, “materially affected the impugned decision”¹⁷¹ occasioning a Decision that was so unfair and unreasonable as to constitute an abuse of discretion. The Decision would have been ‘substantially different’ but for the unfairness and the errors.¹⁷²

121. It is accepted that the Chamber had a broad discretion pursuant to Rule 58(2) to “decide on the procedure to be followed” and take “appropriate measures for the

¹⁷¹ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo 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”, 25 September 2009, ICC-01/04-01/07-1497 OA8, paragraph 37 citing *Situation in the Democratic Republic of the Congo*, “Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58””, 13 July 2006, ICC-01/04-169, 13 July 2006, paragraph 84.

¹⁷² AC Kenya Admissibility Decision, paragraph 89.

proper conduct of the proceedings”.¹⁷³ However, the Chamber had an obligation to determine Libya’s Article 19 Challenge “on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge”.¹⁷⁴ In sum, whilst it is accepted that the Chamber was not obliged to consider additional evidence, (“nor could the State expect to be allowed to present additional evidence”¹⁷⁵), the Chamber was obliged to promulgate a procedure that provided Libya with fairness and certainty (concerning the methodology underpinning the discharge of its purported burden of proof).

122. The procedure had to take into account the rapidly evolving circumstances in Libya and ensure that the Challenge was decided on the basis of the facts that existed at the time of the proceedings. This meant that relevant information or evidence that had been notified to the Chamber within a reasonable time prior to the Impugned Decision had to be fairly considered. In particular, the Chamber had an obligation to address:

- (i) Libya’s offer to allow the Chamber to inspect the totality of the investigative file held in Tripoli; and
- (ii) The evidence contained within filings subsequent to Libya’s Reply of 4 March 2013, *inter alia*: (a) relating to significant changes occasioned by the appointment of a new Prosecutor-General (with a mandate given by the General National Congress, rather than the transitional government)¹⁷⁶; (b) evidence submitted in support of the admissibility challenge relating to Mr. Al-

¹⁷³ *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “Decision on the Conduct of the Proceedings Following the “Application on behalf of the Government of Libya pursuant to Article 19 of the Statute””, 04 May 2012, ICC-01/11-01/11-134, 4 May 2012, paragraphs 10-11.

¹⁷⁴ AC Katanga Admissibility Decision, para.56.

¹⁷⁵ The Impugned Decision, para. 136.

¹⁷⁶ Libya’s Consolidated Reply, paragraph 43.

Senussi;¹⁷⁷ and (c) other more recent evidence of relevant progress pertaining to the domestic investigation (e.g., the appointment of a new Prosecutor General, “further evidential samples related to the case of Mr. Gaddafi as may be considered necessary”¹⁷⁸, and information showing that Mr. Gaddafi consented to being represented by two lawyers (one appointed by his aunt and one by the Court at his hearing in Zintan on 2 May 2013 relating to incidental domestic proceedings.¹⁷⁹)

123. The Chamber’s procedural unfairness with regard to this additional evidence unfairly deprived Libya of due process and highly probative evidence in support of its challenge.

124. As indicated above, it is accepted that the Chamber had a broad discretion pursuant to Rule 58(2) to “decide on the procedure to be followed” and take “appropriate measures for the proper conduct of the proceedings”.¹⁸⁰ However, the principles underpinning the term “appropriate measures” have not been defined in the ICC jurisprudence. In the *Kenya Admissibility Decision*, the majority repeatedly referred to the “broad discretion” enjoyed by a Pre-Trial Chamber and examined a range of alleged due process violations (such as, the refusal to permit further evidence and the refusal to hold an oral hearing¹⁸¹) but declined to enunciate any general principles.¹⁸² However, guidance was provided in the dissenting opinion in the same case. Although the dissenting decision disagreed with the majority’s qualitative assessment of the fairness of the proceedings, all judges were unified in

¹⁷⁷ See for example: Al-Senussi Admissibility Challenge, paragraphs 136-138, 145, 156, 162-174 and 180-193.

¹⁷⁸ Libya’s Consolidated Reply, paragraphs 6, 7 and 42.

¹⁷⁹ Also considered in support of Appeal Ground 2, above.

¹⁸⁰ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the Conduct of the Proceedings Following the “Application on behalf of the Government of Libya pursuant to Article 19 of the Statute”, ICC-01/11-01/11-134, 4 May 2012 (“Libya Pre-Trial Decision dated 4 May 2013”), paras 10-11.

¹⁸¹ See example: Kenya Appeals Decision, dated 20 September 2011, para. 86..

¹⁸² Kenya Appeals Decision, dated 20 September 2011, para. 89, 89 and 97.

their recognition of the need to ensure due process. In particular, as outlined in that Dissenting Opinion, the Chamber's broad discretion is circumscribed by the need to balance:

"[A]ll interests at stake, including the sovereign rights of the State. In so doing, the Chamber must also consider that a State may raise a second challenge to the admissibility of a case only with the leave of the Chamber and in "exceptional circumstances", as provided for in article 19 (4) of the Statute. Accordingly, a State making use of its right to challenge the admissibility of a case may expect the Court fully to respect the State's rights when framing the procedure for determining the admissibility challenge. This procedure must take into account the specific circumstances put forward by the State, including the State's clearly evinced intentions. The understanding that the rights of the State are at the core of decision-making is confirmed by the drafting history of rule 58 of the Rules of Procedure and Evidence and related rules about which a commentator concluded: "The Rules ensure a form of 'due process' for States".¹⁸³ Such rules of "due process" for States will develop over time".¹⁸⁴

The sovereign rights of the State, while important, are however not the only consideration in determining the procedure under rule 58 (2) of the Rules of Procedure and Evidence. Those rights must be balanced with the need to pursue the goals of international criminal justice by assuring the efficacy of the investigation and the prosecution of a case.¹⁸⁵ In addition, the overall interests of justice as well as the interests of victims have to be respected. Finally, the Chamber has to adapt the

¹⁸³ AC Kenya Admissibility Decision, Dissenting Opinion of Judge Anita Ušacka, para. 22 *citing* J. T. Holmes "Jurisdiction and Admissibility" in: R. S. Lee (ed.). The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence, (Transnational Publishers, 2001) p. 348.

¹⁸⁴ AC Kenya Admissibility Decision, Dissenting Opinion of Judge Anita Ušacka, paragraph 22 *citing* as e.g. C. F. Amerasinghe, Evidence in International Litigation, (Brill, 2005) compiling and comparing rules of evidence of several tribunals [emphasis added].

¹⁸⁵ Kenya Appeals Decision, Dissenting Opinion of Judge Ušacka dated 20 September 2011, para. 23 *citing* J. T. Holmes in: R. S. Lee (ed.). The International Criminal Court: The Making of the Rome Statute, (Kluwer Law International, 1999), pp. 74 -75.

*procedure to the specific issues arising in the case at hand, such as uncertainties as to the legal and factual situation at hand or the fact that proceedings are conducted for the first time. By taking into account those criteria, a procedure needs to be implemented that "best meet[s] the needs of transparency, efficiency, respect for national primacy and urgent action where doubts about national proceedings are raised".*¹⁸⁶

125. The Chamber failed to implement a procedure that reflected the dynamic nature of the complementarity assessment and ensured a form of 'due process' for Libya with regard to the fair admission of evidence. As the Appeals Chamber has noted, "the Statute assumes that the factual situation on the basis of which the admissibility of a case is established is not necessarily static, but ambulatory."¹⁸⁷ 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."¹⁸⁸ The Chamber erred in failing to adopt a procedure that facilitated or promoted the admission of the most current information or evidence arising from an *ongoing*, evolving investigation. Having been notified of highly probative evidence (such as the existence of an investigative file, transitional justice developments or the fact that Mr. Gaddafi was legally represented at a hearing relating to his domestic proceedings), it was not within the reasonable discretion of the Chamber to disregard it.

126. Moreover, the Chamber failed to adopt an adequate (or arguably any) procedure to take into account the restrictions imposed by Article 59 of Libya's Code of Criminal

¹⁸⁶ Kenya Appeals Decision, Dissenting Opinion of Judge Ušacka dated 20 September 2011, para. 23 *citing* J. T. Holmes, Complementarity: National Courts versus the ICC, in: A. Cassese, P. Gaeta, J. R.W.D. Jones (ed.) *The Rome Statute of the International Criminal Court: A Commentary*, Volume I (Oxford 2002), p. 684 [emphasis added].

¹⁸⁷ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo 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", 25 September 2009, ICC-01/04-01/07-1497 OA8, paragraph 56. ("Katanga Admissibility Decision")

¹⁸⁸ Katanga Admissibility Decision, paragraph 56.

Procedure, requiring non-disclosure of “examples of the evidence” and permitting only the disclosure of the “summary reports of investigations to persons who are not involved in the Libyan investigative or prosecutorial team”.¹⁸⁹ The procedural history demonstrates that, from the very commencement of the admissibility proceedings, Libya alerted the Chamber to this procedural limitation under its laws. Libya provided a timeframe for the resolution of these issues, namely after the completion of the investigative phase.¹⁹⁰ Libya also proposed on three separate occasions (23 January 2013¹⁹¹, 4 March 2013¹⁹² and the 28 March 2013¹⁹³), that these difficulties could be circumvented by an on-site inspection of the file in Tripoli. Notwithstanding this, the Chamber failed to consider or decide these issues in advance of the Impugned Decision, thereby failing to ensure a procedure that allowed Libya to rely upon the best available evidence, prior to the accusation phase of proceedings when evidence would be more readily accessible with fewer legal constraints.

127. In circumstances where the Chamber failed to address a (repeated) proposal to inspect the totality of the investigative file and had not indicated to Libya that it did not appreciate the significance of the most up-to-date information (see Ground 2, above), it was plainly illogical and unfair to reject this evidence on the basis that it is “for the challenging State to ensure that the challenge is sufficiently substantiated by evidence”.¹⁹⁴

128. As the Decision correctly observed with regard to other salient issues encountered during the procedure; “[i]n light of the circumstances of the case the Chamber

¹⁹⁰ Gaddafi Admissibility Challenge, paras. 40 - 41

¹⁹¹ The Impugned Decision, paragraph 13, *citing* Libya’s Further Submissions.

¹⁹² The Impugned Decision, paragraph 17, *citing* Libya’s Consolidated Reply.

¹⁹³ Supplemental Notification, paragraph 4.

¹⁹⁴ The Impugned Decision, paragraph 136.

believed it was important to enter into a dialogue with Libya that would allow full understanding of the steps that were taken domestically and the challenges encountered by the local authorities”.¹⁹⁵ Had the Chamber, prior to rejecting Libya’s challenge, engaged in this dialogue concerning these critical issues, Libya would have been able to rely upon this highly probative and contemporaneous evidence and this would have impacted upon the Chamber’s decision.

B. The Chamber’s rejection of relevant and available evidence on the erroneous basis that “the significance of... information...[provided by the parties in filings subsequent to Libya’s Reply of 4 March 2013 had]...not been sufficiently demonstrated”

129. The Chamber unfairly rejected the information provided by Libya subsequent to Libya’s Reply of 4 March 2013 on the basis that its significance had not been sufficiently demonstrated.¹⁹⁶ In particular, Libya advanced submissions concerning positive changes relating to the imminent appointment of a new Prosecutor-General that would have “significant implications on further cooperation with the Court as well as the progress of the case against Mr. Saif Al-Islam Gaddafi”.¹⁹⁷ Libya informed the Chamber that the Prosecutor-General would have a “mandate given by the General National Congress, rather than the transitional government”.¹⁹⁸ Libya explained that the new appointment was to ensure that the case against Gaddafi was progressed “to fruition”.¹⁹⁹

130. On 28 March 2013, Libya notified the Chamber of the appointment of a new

¹⁹⁵ The Impugned Decision, paragraph 136.

¹⁹⁶ The Impugned Decision, paragraph 23.

¹⁹⁷ Supplemental Notification, paragraph 4.

¹⁹⁸ Libya’s Consolidated Reply, paragraph 6.

¹⁹⁹ Libya’s Consolidated Reply, paragraph 43.

Prosecutor-General, arguing this appointment would have a significant impact upon the efficient progress of the domestic case, as well as cooperation with the Court. Despite this information, and subsequent demonstration of the positive impact on the development of the domestic proceedings and transitional justice generally (as evidenced, *inter alia*, through the submissions advanced in the Al-Senussi case), the Chamber disregarded the information concluding its “significance had not been sufficiently demonstrated”.²⁰⁰

131. Had the Chamber had any doubts concerning the significance of this information, or any of the changes post 4 March 2013,²⁰¹ due process dictated that these ought to have been brought to Libya’s attention so that this highly relevant and probative, contemporaneous evidence might be fairly considered.

C. The Chamber failed to adapt the procedure to the specific issues (such as uncertainties as to the legal and factual situation at hand)

132. The Chamber failed to adapt the procedure to deal with the multiple legal and factual uncertainties that arose during the admissibility proceedings, depriving Libya of the certainty required to understand and discharge the burden of proof. The conclusion - that “[i]n the view of the Chamber, Libya has had sufficient opportunities to submit evidence in support of its Admissibility Challenge”²⁰² – was based upon a failure to appreciate that Libya was, from the outset, not made aware of the precise standard of proof.

133. In the circumstances, it was incumbent upon the Chamber to clarify their position relating to the burden and standard of proof. There was a divergence of views

²⁰⁰ The Impugned Decision, paragraph 23.

²⁰¹ *Ie.* the information referred to above at paragraph 122.

²⁰² The Impugned Decision, paragraph 137.

concerning the applicable burden and standard of proof with regard to the two limbs of the complementarity assessment (whether an investigation was ongoing and whether the State is unwilling or unable genuinely to carry out such investigation or prosecution). Of particular concern were the diffuse views concerning the standard of proof, with views ranging from the “balance of probabilities” to “clear and convincing evidence” to “necessarily a very high one”.²⁰³

134. Similarly, there was a significant degree of disagreement concerning the meaning of the “case”. In particular, there were divergent views concerning: whether the relevant domestic investigation or prosecution had to “exactly match all of the features of the Court’s investigation or prosecution”²⁰⁴; or cover “substantially the same conduct”;²⁰⁵ the relationship of conduct to incidents;²⁰⁶ whether “the same incidents” or “same conduct and series of events” had to be investigated;²⁰⁷ or whether the “person” had to be charged “under the same legal qualifications as those applicable in the case before the Court”.²⁰⁸

135. As the Impugned Decision correctly noted, “the Chamber... reminded Libya [during the procedure] of the necessity to provide concrete, tangible and pertinent evidence that proper investigations are currently ongoing” and provided guidance concerning the *type* of evidence that had to be submitted (“material capable of proving that an investigation is ongoing and that appropriate measures are being envisaged to carry out the proceedings”).²⁰⁹ However, by failing to decide the standard of proof, the Chamber neglected to provide guidance concerning *the*

²⁰³ The Impugned Decision, paragraphs 43-51.

²⁰⁴ See for example, The Impugned Decision, paragraph 68.

²⁰⁵ See for example, The Impugned Decision, paragraph 62.

²⁰⁶ See for example, The Impugned Decision, paragraphs 75-76.

²⁰⁷ See for example, The Impugned Decision, paragraphs 64, 69 and 72.

²⁰⁸ See for example, The Impugned Decision, paragraphs 62, 66-67 and 71.

²⁰⁹ The Impugned Decision, paragraph 55 *citing*, inter alia, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi, ICC-01/11-01/11-239, 7 December 2012, paragraphs 10-11.

cogency of this type of evidence required.

136. Further, the Chamber even failed to provide this certainty in the Impugned Decision. Even though, the Impugned Decision stated that the State had to produce “evidence of a sufficient degree of specificity and probative value”²¹⁰ to show “*the actual contours* of the national case²¹¹ and “*the precise scope* of the domestic investigation,”²¹² it does not define the standard of proof demanded. In sum, the procedure throughout fell short of providing any certainty concerning the *precise* standard of proof, rather than the type of evidence that might go to satisfaction of it, placing Libya at a distinct disadvantage in the proceedings.

137. The failure to articulate a standard of proof at any stage must also be viewed in the light of Libya’s proposal to allow the Chamber to view the totality of the investigative file and the attempt to rely upon highly probative contemporaneous evidence subsequent to Libya’s Reply of 4 March 2013. This evidence was the best evidence at Libya’s disposal. Given the uncertainties surrounding the nature and quality of evidence required to satisfy the (undefined) standard of proof, it was of pivotal importance to the fairness of the process that the Chamber considered all relevant and available evidence.

138. This evidence may have been of “sufficient degree of specificity and probative value” to meet the standard envisaged by the Chamber in its (undefined) standard of proof. The evidence would have significantly impacted upon the conclusions, *inter alia*, that “some items of evidence show that a number of investigative steps have been taken by Libya with respect to certain discrete aspects that arguably relate to the conduct of Mr Gaddafi as alleged in the proceedings before the Court”,²¹³ or

²¹⁰ The Impugned Decision, paragraph 54.

²¹¹ The Impugned Decision, paragraph 135 (emphasis added).

²¹² The Impugned Decision, paragraph 123 (emphasis added).

²¹³ The Impugned Decision, paragraph 134.

that it was not possible to “discern the actual contours of the national case against Mr Gaddafi”.²¹⁴ This evidence would have provided the Chamber with a substantially enhanced view of the investigation, its contours and precise scope. Further, the developments concerning Libya’s new Prosecutor –General, developments in capacity building, and the appointment of legal representatives for Mr. Gaddafi in his domestic proceedings were of critical importance to the second limb of the complementarity assessment, namely ability.²¹⁵

139. The procedure adopted by the Chamber removed swathes of highly significant and probative evidence from the assessment thereby depriving Libya of fairness and due process.

D. Linking the propriety of the admission of evidence on the first limb (“the case) with the merits of the assessment of the second limb (“inability”)

140. The Trial Chamber further erred in deciding that Libya was not entitled to rely upon additional evidence that, “serious concerns remain with respect to the second limb of the admissibility test, namely Libya's ability genuinely to carry out the investigation or prosecution against Mr Gaddafi”.²¹⁶ Again, it was incumbent upon the Chamber to ensure due process for Libya. The question of whether Libya should be allowed to submit additional evidence in support of the first limb of the test could not be made contingent upon the assessment of the merits on the question of the second limb (“inability”). The Chamber had an obligation to not only consider the merits of each separately, but also to ensure that the failure to discharge the burden of proof in relation to one limb of the admissibility test was not permitted to

²¹⁴ The Impugned Decision, paragraph 135.

²¹⁵ See in this regard the arguments in support of Appeal Ground 4, set out below.

²¹⁶ The Impugned Decision, paragraph 137.

undermine procedural fairness and due process with regard to the other.

E. Ground Three: Conclusion

141. Accordingly, it is submitted that the identified unfairness and the errors, materially affected the impugned decision, occasioning a Decision that was so unfair and unreasonable as to constitute an abuse of discretion. The Decision would have been “substantially different” had the procedure adopted pursuant to Rule 58(2) ensured that all relevant evidence relating to the investigation, including the most contemporary evidence of the evolving domestic investigation, was taken into consideration.

IV. GROUND FOUR: The Chamber erred in fact and in law in its determination that, due to the unavailability of its national judicial system, Libya is unable to obtain the accused or the necessary evidence and testimony or otherwise carry out its proceedings, pursuant to article 17(3) of the Statute.

142. The Chamber’s finding, that the Libyan judicial system is “unavailable” with regard to the case against Mr. Gaddafi and, therefore, “unable” within the terms of article 17(3), constituted an error of law. It is based on an incorrect and inadequately reasoned interpretation of the relevant provision, which is contrary to a plain, contextual and teleological reading of the Statute.

143. Further and alternatively, the Chamber erred in fact and in law by finding that, due to the “unavailability” of the Libyan judicial system, it is “unable” in relation to the case against Mr Gaddafi. In particular, the Chamber erred by finding that Libya: (i) is unable to secure the transfer of Mr Gaddafi’s custody into State authority and that

this constitutes an inability to “obtain the accused”; (ii) does not have the capacity to obtain the necessary testimony; and (iii) has not shown whether and how it will overcome the existing difficulties in securing a lawyer for the accused and that this is relevant to whether Libya is “otherwise unable to carry out its proceedings”.

A. Erroneous interpretation and application of “unavailability”

144. At paragraph 205 of the Impugned Decision, the Chamber ruled that:

[I]t is apparent from the submissions that multiple challenges remain and that Libya continues to face substantial difficulties in exercising its judicial powers fully across the entire territory. Due to these difficulties, which are further explained below, the Chamber is of the view that its national system cannot yet be applied in full in areas or aspects relevant to the case, being thus “unavailable” within the terms of article 17(3) of the Statute. As a consequence, Libya is “unable to obtain the accused” and the necessary testimony and is also “otherwise unable to carry out [the] proceedings” in the case against Mr Gaddafi in compliance with its national laws, in accordance with the same provision. (emphasis added)

145. Later, under the heading “overall conclusion on inability”, the Chamber ruled that:

“In light of the above, although the authorities for the administration of justice may exist and function in Libya, a number of legal and factual issues result in the unavailability of the national judicial system for the purpose of the case against Mr Gaddafi. As a consequence, Libya is, in the view of the Chamber, unable to secure the transfer of Mr Gaddafi’s custody from his place of detention under the Zintan militia to state authority and there is no concrete evidence that this problem may be resolved in the near future. Moreover, the Chamber is not persuaded that the Libyan authorities have the capacity to obtain the necessary testimony. Finally, the Chamber has noted a practical impediment to the progress of domestic proceedings against Mr

Gaddafi as Libya has not shown whether and how it will overcome the existing difficulties in securing a lawyer for the suspect.”

146. Article 17 (3) provides that:

In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

147. The text of article 17(3) provides for two cumulative sets of considerations: first, “collapse” or “unavailability” of the national judicial system and secondly, whether, due to that “collapse” or “unavailability”, the State is “unable to obtain the accused, or the necessary evidence and testimony, or otherwise unable to carry out proceedings.”²¹⁷

148. Despite purporting to make determinations on the two requisite sets of considerations, the Chamber in fact fails to do so. The Chamber commented that there were “legal and factual issues”, which resulted in Libya’s “unavailability” but failed to address in any meaningful way the extent or degree to which they in fact constituted “unavailability” within the terms of the Statute. The closest the Chamber comes to expressing a view regarding “unavailability” is that “Libya continues to face substantial difficulties in exercising its judicial powers fully across the entire territory”.²¹⁸

149. Rather, the Chamber appears to bypass proper consideration of that condition precedent by, in effect, referring to Libya’s purported inability “to obtain the

²¹⁷ “Informal expert paper: The Principle of Complementarity in Practice”, 30 March 2009, ICC-01/04-01/07-1008-AnxA, paragraph 49.

²¹⁸ The Impugned Decision, paragraph 205.

accused or the evidence and testimony or otherwise ... carry out its proceedings” as examples or evidence of “unavailability”.

150. The Chamber’s assessment was undermined from the outset by a failure to articulate a definition of “unavailability”. Given the uncertainty surrounding the precise meaning of “unavailability”,²¹⁹ it was incumbent upon the Chamber to define clearly the parameters of this condition precedent for a finding of inability. In doing so, the Chamber should have conducted the requisite textual, contextual and teleological analysis in accordance with the rules of treaty interpretation. The Chamber failed to do this. Had they done so, it would have been clear that the standard for a determination of inability is a stringent one, permitting ICC action only in exceptional circumstances.²²⁰ This is consistent with the Statute’s deference to domestic prosecutions, which is evident in the drafters’ consideration of admissibility in general as well as in their consideration of the first condition precedent for inability, namely collapse of the national judicial system. In that regard, the drafters insisted that a “total or substantial collapse” was required, rather than a “total or partial” collapse. As stated by John Holmes:

“The purpose of including inability in the Statute was to address the situation where there has been a collapse of the institutions of the country, including its judicial system. ... The example of Rwanda after the genocide was cited by many during the negotiations. Article 17, therefore, first requires that there be a collapse or unavailability of the national judicial system ... The need for the collapse to be total or substantial, rather than partial, was to preclude the Court from assuming jurisdiction

²¹⁹ The travaux préparatoires and academic commentary provide little assistance regarding the interpretation of “unavailability” as the focus of negotiations was on the other precondition for inability, namely “collapse...of the national judicial system”.

²²⁰ See J. Holmes, “Complementarity: National Courts Versus The ICC”, in A. Casesse et al., “The Rome Statute of the International Criminal Court: A Commentary, Volume I (2002), at 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.

*merely because an armed conflict exists in a State and the judicial system is partially affected. Even in such instances, the State may be able, through shifting resources or transferring the trial to other venues, to effect a genuine prosecution. Article 17 requires that there be a substantial impact on the national judicial system.”*²²¹

151. It is submitted that an interpretation of “unavailability”, which gives due regard to its context (particularly its textual proximity to “total or substantial collapse”) and the object and purpose of the Statute, dictates that it sets a similarly high threshold for ICC intervention as that intended by “total or substantial collapse”. Indeed, adopting too broad an interpretation of “unavailability”, which permits a subsequent finding of admissibility simply as a result of some deficiencies or inefficiencies in the national system, would render otiose the purposeful use of the term “substantial” rather than “partial” in relation to “collapse” - the alternative prerequisite for a finding of inability.²²²

152. Furthermore, it was the intention of the drafters that an assessment of inability be a fact-driven, objective assessment of the legal and factual circumstances existing in the relevant State.²²³ As one commentator has stated:

“[T]he existence of substantial legal or factual obstacles entailing a lack of effective remedies may only constitute unavailability if this qualification can be made by an external observer without entering into value (quality) judgments regarding the internal functioning of the national justice system concerned. The qualification must

²²¹ See J. Holmes, “Complementarity: National Courts Versus The ICC”, in A. Casesse et al., “The Rome Statute of the International Criminal Court: A Commentary, Volume I (2002), at 677.

²²² Kai Ambos, “The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court: Is there sufficient willingness and ability on the part of the Colombian authorities or should the Prosecutor open an investigation now?” (Göttingen, Germany, 5 January 2011), page 7.

²²³ See J. Holmes, “Complementarity: National Courts Versus The ICC”, in A. Casesse et al., “The Rome Statute of the International Criminal Court: A Commentary, Volume I (2002), at 677.

be based on objective (quantitative) factors which are easily verifiable from outside of the system..."²²⁴

153. In its determination, the Chamber focussed solely on discrete examples of difficulties that the Government is facing (failure to obtain statements from two witnesses, non-transfer of Mr. Gaddafi, speculative concerns regarding witness protection, difficulties in obtaining legal representation). It is submitted that, in doing so, the Chamber has erroneously set too high a standard for an investigating state to satisfy. Instead, the Chamber should have interpreted "unavailability" as requiring consideration of actual, systemic difficulties that have a direct and quantifiable (rather than purely speculative) impact on the ongoing investigation. It is submitted that this error materially impacted upon the Impugned Decision because, had the Chamber adopted the correct, more stringent interpretation of "unavailability" it would not have declared Libya "unable" to carry out the investigation or prosecution.

B. The Chamber erred in fact and in law by finding that the Libyan judicial system is "unable" in particular material regards in relation to the case against Mr Gaddafi

154. Further and alternatively, irrespective of the meaning of "unavailability", the Chamber erred in fact and in law by finding that, due to the "unavailability" of the Libyan judicial system, it is "unable" in particular material regards in relation to the case against Mr Gaddafi. Specifically, the Chamber erred by finding that Libya: (i) is unable to secure the transfer of Mr Gaddafi's custody into State authority and that this constitutes an inability to "obtain the accused"; (ii) does not have the capacity to

²²⁴ Kai Ambos, *supra*, page 7.

obtain the necessary testimony; (iii) has not shown whether and how it will overcome the existing difficulties in securing a lawyer for the suspect and that this is relevant to whether Libya is “otherwise unable to carry out its proceedings”.

1. Inability to obtain the accused

155. At paragraph 206 of the Impugned Decision, the Chamber “*notes that Libya has not yet been able to secure the transfer of Mr Gaddafi from his place of detention under the custody of the Zintan militia into State authority.*” Thereafter, at paragraph 208, the Chamber concludes that “*without the transfer of Mr. Gaddafi into the control of the central authorities, the trial cannot take place.*”

156. The Chamber erred in fact and in law by reaching this determination without a sufficient consideration as to whether the “inability” to secure the transfer of Mr. Gaddafi is due to the “unavailability” of the Libyan judicial system (see error in law above) and whether this amounted to an inability to obtain the accused *for the purposes of the proceedings* pursuant to article 17(3). Rather, it is based on several erroneous premises.

157. First, it is based on the erroneous premise that the judicial system operative in Zintan falls outside of Libyan authority. This is patently incorrect as it fails to recognise that the Zintan Brigade is a Government-sanctioned local authority and that there is no distinction in international law between a central and local authority.²²⁵ It would be contrary to settled principles of international law to

²²⁵ See, for example, The commentary to Article 4 of the International Law Commission’s Draft Articles on State Responsibility, which confirms the well-established principle that attribution of conduct to “State organs”: is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of government of whatever kind or classification, exercising whatever functions, and *at whatever level in the hierarchy, including those at provincial*

interpret “the State” exclusively in terms of “central” authorities, not least in a transitional context where the consolidation of the State is necessarily a complex and gradual process.

158. The Government provided numerous examples to the Chamber of the central Libyan Government exercising its authority in Zintan in relation to the domestic proceedings alongside the Zintan Brigade, which is responsible for supervising his detention. As the Government submitted to the Chamber, since October 2012, each of the extensions of Saif Al-Islam Gaddafi’s periods of detention have been judicially approved by Tripoli based judges who have travelled to Zintan to conduct private hearings (ie. a closed session). The local authorities in Zintan have facilitated these hearings.²²⁶ Mr. Gaddafi has been questioned by officers from the Prosecutor-General’s office, tasked to work on the cases of former Gaddafi regime officials. Conducted in cooperation with the Zintan Brigade, this questioning by the Prosecutor-General’s team has proceeded and further illustrates the concrete steps that Libya has been able to make with regard to the investigation.²²⁷

159. In addition, upon the authorisation of the Libyan Minister of Justice, representatives of the International Committee of the Red Cross and Human Rights Watch have visited Mr. Gaddafi on several occasions. Finally, court hearings have been held in Zintan by a Libyan court applying Libyan law²²⁸. Further, the Libyan Government and the Zintan Brigade have agreed a proposal for the members of the Zintan Brigade responsible for guarding Mr. Gaddafi in Zintan to be trained and

or even local level. (International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001), page 40, para. 6. The same applies to “[c]onduct of persons or entities exercising elements of governmental authority” under Article 5: “The justification for attributing to the State under international law the conduct of “parastatal” entities lies in the fact that the internal law of the State has conferred on the entity in question the exercise of certain elements of the governmental authority.” (*Ibid.* page 43, para. 6).

²²⁶ Libya's Further Submissions, paragraph 49.

²²⁷ Libya's Further Submissions, paragraph 52.

²²⁸ Libya's Further Submissions, paragraph 51.

regularised so as to form part of the judicial police which would then guard him upon his transfer to a central government controlled prison in Tripoli.²²⁹

160. The Chamber has given insufficient regard to these factors, which establish that the Libyan Government is able to exercise its authority over Mr. Gaddafi alongside the local authority in Zintan.

161. Secondly, the Chamber has incorrectly elided the desirability of transfer to Tripoli with the ability of Libya to “obtain the custody of Mr. Gaddafi”. The Government has stated that it wishes for Mr. Gaddafi to be transferred to Tripoli in order that his trial takes place alongside other Gaddafi-era officials in a custom-built courthouse. The fact that this has not yet occurred does not reflect an inability on the part of the Libyan Government to “obtain” Mr. Gaddafi within the meaning of the Statute. Indeed, equating the carrying out of a transfer from one area falling within the authority of Libya to another with an (in)ability to obtain the accused is patently incorrect. Furthermore, there is no legal impediment to his trial being conducted in Zintan should the Libyan authorities decide to pursue this route. In light of these clear indices of sufficient control by the central government in Zintan, alongside an absence of any evidence showing that the domestic proceedings have been disrupted as a consequence of Mr. Gaddafi’s detention in Zintan, it is submitted that no reasonable Tribunal would have concluded that *“without the transfer of Mr. Gaddafi into the control of the central authorities, the trial cannot take place.”* Accordingly, the Chamber erred in finding that the failure to transfer Mr. Gaddafi to Tripoli equates to an inability to obtain his custody.

²²⁹ Libya's Further Submissions, paragraph 50.

2. Inability to obtain testimony

162. The Chamber made factual errors regarding Libya's "lack of capacity to obtain the necessary testimony" which, according to the Chamber, is "due to the inability of judicial and governmental authorities to ascertain control and provide adequate witness protection".²³⁰

163. With regard to the purported inability to "ascertain control", the Chamber elaborates by stating that it "is of the view that this lack of full control over certain detention facilities has a direct bearing on the investigation against Mr. Gaddafi."²³¹ To support this, the Chamber then relies solely on the Government's own admission that it has been unable to obtain testimony from two Gaddafi-era officials as they are presently being held in detention facilities not yet under the control of the Libyan Government. Given that the Government provided the Chamber with examples of other witnesses it has been able to interview, including Gaddafi-era officials, the weight placed on the absence of these two statements is wholly disproportionate and the extrapolation that this has a "direct bearing on the investigation against Mr. Gaddafi" is entirely speculative. Accordingly, a failure to obtain two statements, the likely impact of which is a matter of speculation, does not even approach the kind of "inability" required by article 17(3).²³² It is submitted that no reasonable tribunal would have reached such a conclusion based on those particular facts.

²³⁰ The Impugned Decision, paragraph 209.

²³¹ The Impugned Decision, paragraph 210.

²³² See, R Lee, "The International Criminal Court: The Making of the Rome Statute (Kluwer Law International, 1999), pages 48-49, which refers to "key evidence or testimony". This imports some kind of qualitative assessment of the importance of the evidence in the context of the investigation generally and cannot be a matter of pure speculation.

164. The Chamber finds further that it is “not persuaded by the assertion that the Libyan authorities currently have the capacity to ensure protective measures”.²³³ 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.

165. The Court’s rejection of Libya’s submission that trial judges have discretionary powers to order protective measures²³⁴ constitutes an unwarranted intrusion upon the right of a sovereign state to determine its own domestic procedures. The Court indicates that it had received no evidence about specific protection programmes and identified the kinds of measures that may be imposed for the protection of witnesses. However, the Court is not a review or appellate court and it cannot dictate how domestic proceedings are conducted, especially, as in this instance, where the Chamber’s view is informed by an international ideal of witness protection. Furthermore, there is no evidence to suggest that there has been any failure or incapacity on the part of the Libyan authorities that has had any bearing on, or caused any impediment to, the investigation itself. Absent a clear finding in this regard, no reasonable tribunal could have found that the Libyan judicial system is “unavailable” within the terms of the Statute and that this has caused an inability to obtain testimony.²³⁵

166. Furthermore, the likely or possible protective measures which may be in place when the case proceeds to trial and how they might impact upon witnesses giving testimony is, again, a matter of pure speculation. The Court must allow the Libyan authorities the opportunity to apply their own domestic processes and address any issues relating to witness protection as and when they arise, rather than conduct a

²³³ The Impugned Decision, paragraph 211.

²³⁴ The Impugned Decision, paragraph 211.

²³⁵ The Impugned Decision, paragraph 209.

speculative assessment based on an idealised standard. This is especially so given that the admissibility assessment must be made on the basis of information before the Chamber at the time of the proceedings and also that the assessment is an ongoing one and the ICC Prosecutor may seek a redetermination of admissibility if concerns arise regarding the conduct of the future trial.

3. Otherwise unable to carry out its proceedings: appointment of defence counsel

167. The Chamber erred in finding that an apparent difficulty in appointing a defence lawyer “appears to be an impediment to the progress of proceedings against Mr Gaddafi” and that “if this impediment is not removed, a trial cannot be conducted in accordance with the rights and protections of the Libyan national justice system”.²³⁶

168. As Libya indicated in its submissions on 23 January 2013²³⁷, and again on 4 March 2013²³⁸, the Government has made considerable efforts to secure legal representation for Gaddafi.²³⁹ Libya accepts that this process has been difficult and no lawyers had been found at the time of those filings.

²³⁶ The Impugned Decision, paragraph 214.

²³⁷ Libya’s Further Submissions, paragraph 97, Minister of Justice stated that Ministry officials “have been in continuous high level contact with the Libyan Law Society and the Popular Lawyers Office in order to select a suitably qualified and committed highly qualified counsel or a team of defence counsels to represent him during his forthcoming trial”.

²³⁸ Libya’s Consolidated Reply, paragraph 53: “the Libyan Government is in the process of approaching the Bar Associations of Tunisia and Egypt to obtain a suitably qualified and experienced counsel for Saif Al-Islam Gaddafi who will be permitted, together with a Libyan lawyer, to represent Saif Al-Islam Gaddafi in the Libyan proceedings.”

²³⁹ *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “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).

169. Since then, legal representatives were appointed for Mr. Gaddafi at his hearing in Zintan on 2 May 2013 relating to incidental domestic charges levelled against him. One of the lawyers is a private lawyer appointed by Mr. Gaddafi's aunt and the second was appointed by the Court. Mr. Gaddafi explicitly confirmed to the court that he consented to the lawyers representing him. Those proceedings were subsequently adjourned partly at the request of defence counsel so that they had sufficient time to consider the case file fully.²⁴⁰ Due to the Chamber's errors of fairness and procedure enumerated in Ground Four – declining to take into account evidence after 4 March 2013 – the Chamber failed to take into consideration this information.

170. In addition, it is important to note that submissions were before the Chamber to the effect 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. Pursuant, to Article 106 of the Code of Criminal Procedure the presence of counsel during questioning in the investigative phase is only guaranteed if the suspect has appointed counsel. 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.²⁴¹

171. Furthermore, any concern on the part of the Chamber regarding the risk posed to defence counsel is purely speculative. Absent a finding that the Libyan authorities cannot ensure that Mr. Gaddafi will be represented at his trial, the Chamber erred in finding that the difficulties experienced by the Libyan authorities amount to "unavailability" within the terms of the Statute.

²⁴⁰ *Ibid.*

²⁴¹ Libyan Government's Further Submissions, paragraphs 96-97 and Libya's Consolidated Reply, paragraph 54.

4. Misappreciation of the ongoing nature of the investigation when assessing ability.

172. Further, in determining that the Libyan judicial system is “unavailable”, the Chamber failed to give sufficient regard to the *ongoing* nature of the proceedings as well as the transitional context in which they were occurring.²⁴² Although the Chamber recognised the progress that Libya has made and continues to make in terms of capacity building, it did not give due regard to the continuing nature of the investigation and the efforts being made by Libya with the assistance of its international partners.²⁴³ If the approach of the Chamber is not reversed, it is difficult to see how any state emerging from conflict will be in a position to continue to conduct domestic proceedings in spite of their concrete and concerted efforts to do so. Further to this, the Chamber erred by failing to give any consideration to the possibility of “positive complementarity” efforts to assist Libya in conducting its investigation and prosecution and the place that this may have in an assessment of admissibility

5. Failure to consider the “genuineness” of the investigative steps taken by Libya

173. Finally, the Chamber erred in law by failing to consider whether the investigative steps carried out by Libya are “genuine”. Having taken it upon itself to consider the ability of the Libyan Government to conduct an investigation, notwithstanding its determination regarding the “same conduct” test, the text of the Statute necessitated

²⁴² See Appeal Ground One for full consideration of this error.

²⁴³ See, for example, Annexes 19-23 to the Libyan Government’s Further Submissions and Annexes 1-3 of Libya’s Consolidated Reply.

that the Chamber consider the “genuineness” of Libya’s investigation in making an assessment of its ability.

174. In the course of the negotiations of the Statute, while “unwillingness” and “inability” emerged as the key factors to consider in determining when national proceedings had to give way to ICC proceedings, there was a widely-held opinion that some additional objectivity needed to be inserted into the assessment. ‘Genuineness’ developed as the key criterion against which an investigation would be assessed (article 17(1) (a)). As Holmes points out, ‘the concern was that the Court should not take the approach that it could do the job of investigation and prosecution better than the domestic courts, which terms such as ‘effectively’ [which had been canvassed] might imply.’²⁴⁴ A common concern expressed by delegates at various points in the drafting process was that the complementarity assessment should not empower the ICC to act as an appellate type court and pass judgement on the internal functioning and integrity of national judicial systems.²⁴⁵ The Ad Hoc Committee expressed the view that ‘[t]his would impinge on the sovereignty of national legal systems and might be embarrassing to that State to the extent that it might impede its eventual cooperation with the Court’.²⁴⁶ Many delegates favoured a standard that would limit the Court’s discretion to assume jurisdiction only in *extraordinary* cases where there was no likelihood of a *bona fide* prosecution occurring.²⁴⁷

175. “Genuinely” arose as an option in the course of the Preparatory Committee’s discussions and was ultimately accepted as the least objectionable word. Other

²⁴⁴ See J. Holmes, “Complementarity: National Courts Versus The ICC”, in A. Casesse et al., “The Rome Statute of the International Criminal Court: A Commentary, Volume I (2002), at 674.

²⁴⁵ UN, “Report of the Ad Hoc Committee on the Establishment of an International Criminal Court” (1995) (UN Doc A/50/22), paragraph 43; UN, “Summary of the Proceedings of the Preparatory Committee During the Period 25 March -12 April 1996 (7 May 1998) (A/AC.249/1), paragraphs 115, 126.

²⁴⁶ UN, ‘Report of the Ad Hoc Committee’, para 115.

²⁴⁷ J Bleich, ‘Complementarity’ (1997) 25 Denver J Intl L & Policy, 281, 286.

terms such as “good faith” and “diligently” were jettisoned on the grounds that, like “ineffective”, they invited overly subjective determinations.²⁴⁸ In the course of the Rome Conference, the coordinator of the informal consultations referred to the Oxford English Dictionary for elucidation of the meaning of “genuine” and was particularly impressed with the aspect of the definition that read “having supposed character, not sham or feigned”.²⁴⁹ “Genuinely” was thus in line with the consistently-held view that the function of the complementarity provisions was to allow the Court’s proceedings to take precedence over “sham” domestic proceedings.

176. A consideration of a State’s genuineness is an inextricable element of any consideration of a State’s ability to carry out an investigation and yet the Chamber has failed to refer to it at all or place any weight on the genuineness of the concrete investigative steps taken by the Libyan Government. The failure to consider an explicit requirement of the relevant provision is a clear legal error. Had the Chamber given any or proper consideration to the added objectivity and stringency imported by “genuinely”, the Chamber may not have applied such an impermissibly high standard to its assessment of the investigative steps being undertaken by the Libyan Government, which has led to an incorrect finding of admissibility. Accordingly, the error materially affected the Impugned Decision and should it should be reversed in relevant part.

177. In summary, all the specific errors enumerated under Ground 4, both separately and cumulatively, led to the erroneous conclusion that Libya failed to satisfy the second limb of the complementarity assessment - ability genuinely to carry out the

²⁴⁸ Holmes, ‘Complementarity: National Courts versus the ICC’, 674.

²⁴⁹ Holmes, ‘The Principle of Complementarity’, 50; R Jensen, ‘Complementarity, ‘Genuinely’ and Article 17: Assessing the Boundaries of an Effective ICC’ in JK Kleffner and G Kor (eds), *Complementary Views on Complementarity: Proceedings of the International Roundtable on the Complementary Nature of the International Criminal Court* (Amsterdam, 25/26 June 2004, The Hague 2006), 159..

investigation or prosecution – and accordingly, that the case is admissible. Had the Chamber not made the legal and factual errors listed above its decision would have been materially different.

REITERATION OF REQUEST FOR SUSPENSIVE EFFECT

178. As set forth in the notice of appeal of 7 June 2013, Libya requests:

*that the Appeals Chamber suspend the order for the surrender of Saif Al-Islam Gaddafi pending the conclusion of the present appeal, pursuant to article 82(3) of the Statute.*²⁵⁰

179. The Libyan government hereby reiterates this request, which it submits has been properly made.²⁵¹

180. As noted in the Impugned Decision, Libya's Admissibility Challenge "requested that the Chamber postpone the execution of the surrender request pursuant to article 95 of the Statute".²⁵² On 1 June 2012, the request for postponement was granted "until such time that the Chamber has ruled on the Admissibility Challenge".²⁵³ Having ruled that the case is admissible, the Impugned Decision:

²⁵⁰ *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "The Government of Libya's Appeal against Pre-Trial Chamber I's "Decision on the admissibility of the case against Saif Al-Islam Gaddafi"", 07 June 2013, ICC-01/11-01/11-350, paragraph 12.

²⁵¹ And, in doing so, notes the arguments set out by the Defence for Mr. Gaddafi in *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "Defence Response to Government of Libya's Request for Suspensive Effect", 17 June 2013, ICC-01/11-01/11-357.

²⁵² The Impugned Decision, paragraph 3, referring to "Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute", 1 May 2012, ICC-01/11-01/11-130-Conf, with confidential Annexes A-K, (public redacted version in ICC-01/11-01/11-130-Red), paragraphs 103-106.

²⁵³ The Impugned Decision, paragraph 6, referring to Pre-Trial Chamber I, "Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Rome Statute", 1 June 2012, ICC-01/11-01/11-163 (emphasis added).

“[reminded] Libya of its obligation to surrender Saif Al-Islam Gaddafi to the Court”.²⁵⁴

181. The Appeals Chamber has noted that:

*“As neither article 82(3) of the Statute nor rule 156 (5) of the Rules of Procedure and Evidence stipulate in which circumstances suspensive effect should be ordered, this decision is left to the discretion of the Appeals Chamber. Therefore, when faced with a request for suspensive effect, the Appeals Chamber will consider the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under these circumstances.”*²⁵⁵

182. The assessment of whether suspensive effect should be granted is based upon whether “the implementation of the decision under appeal” would “create an irreversible situation that could not be corrected” or “would be very difficult to correct and may be irreversible”. The concern therefore is to prevent a situation that “could potentially defeat the purpose of the appeal”.²⁵⁶

183. The Libyan Government submits that:

- a. restoration of the obligation to transfer of Mr. Gaddafi to the ICC is an aspect of the implementation of the decision under appeal;

²⁵⁴ The Impugned Decision, page 91.

²⁵⁵ See *The Prosecutor v. Jean-Pierre Bemba Gombo*, “Decision on the request of Mr. Bemba to give suspensive effect to the appeal against the “Decision on the admissibility and abuse of process challenges”, 09 July 2010, ICC-01/05-01/08-817, paragraph 11 [emphasis added]. See also on the first requirement: *The Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the request of Mr. Thomas Lubanga Dyilo for suspensive effect of his appeal against the oral decision of Trial Chamber I of 18 January 2008”, 22 April 2008, ICC 01/04-01/06-1290.

²⁵⁶ See *The Prosecutor v. Jean-Pierre Bemba Gombo*, “Decision on the request of Mr. Bemba to give suspensive effect to the appeal against the “Decision on the admissibility and abuse of process challenges”, 09 July 2010, ICC-01/05-01/08-817, paragraph 11 [emphasis added]. See also on the first requirement: *The Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the request of Mr. Thomas Lubanga Dyilo for suspensive effect of his appeal against the oral decision of Trial Chamber I of 18 January 2008”, 22 April 2008, ICC 01/04-01/06-1290.

- b. the effect of implementation of the Impugned Decision could potentially defeat the purpose of the appeal and/or create a situation which would be very difficult to correct and may be irreversible; and
- c. the procedural requirements for an application for suspensive relief have been satisfied.

A. Transfer of Mr. Gaddafi to the ICC is an aspect of the implementation of the Impugned Decision

184. The Appeals Chamber's power to grant suspensive relief exists irrespective of whether the *sub judice* decision made legal findings or orders concerning Libya's obligation to surrender Mr. Gaddafi to the ICC.²⁵⁷

185. The function of suspensive relief is to postpone the *effects* of the validity of a decision until the substantive appeal is determined.²⁵⁸ The subject matter of the present appeal is the Chamber's decision that the Gaddafi case is admissible and the Government's request for suspensive relief is concerned with the *implementation* of the impugned decision.

B. Effect of implementation of the Impugned Decision

186. The Government asserts that the implementation of the decision under appeal would: create an irreversible situation or one that would be very difficult to correct; or potentially defeat the purpose of the appeal.

²⁵⁷ Contrary to the assertions set out in *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "Defence Response to Government of Libya's Request for Suspensive Effect", 17 June 2013, ICC-01/11-01/11-357, paragraph 22.

²⁵⁸ See *Situation in Uganda*, Appeals Chamber "Decision on the Prosecutor's "Application for Appeals Chamber to give Suspensive Effect to Prosecutor's Application for Extraordinary Review", 13 July 2006, ICC-02/04-01/05-92, reclassified on 05 February 2008, paragraph 3.

187. The purpose of the present appeal is to allow the Libyan domestic criminal process in respect of Mr. Gaddafi to continue to completion. It should be noted that this is not a situation of “inactivity”. The Impugned Decision found that:

*[T]he evidence presented satisfactorily demonstrates that a number of progressive steps directed at ascertaining Mr Gaddafi’s criminal responsibility have been undertaken by the Libyan authorities, and that an ‘investigation’ is currently ongoing at the domestic level.*²⁵⁹

188. Surrender of Mr Gaddafi to the ICC in advance of the determination of the appeal would severely curtail further “progressive steps” and the ongoing investigation in its entirety. It could prevent the continuation of the Libyan domestic criminal process, and prevent or irreversibly impede the progress of the domestic investigation in respect of Mr. Gaddafi. These effects would undermine the purpose of the appeal.

189. Additionally, other factors exist that would create “an irreversible situation” or one that “would be very difficult to correct and may be irreversible”. Transfer would, for example, prejudice other related cases against Gaddafi-era leadership figures, including but not limited to Mr. Al-Senussi. As set forth in Libya’s admissibility submissions,²⁶⁰ the prosecutorial strategy devised with the assistance of the UN Support Mission in Libya (UNSMIL) is based on a joinder of the separate cases against these several leadership figures. The surrender of Mr. Gaddafi, therefore, would undermine the domestic investigation concerning his individual culpability, as well as creating substantial impediments with regard to a wider prosecutorial strategy and Libya’s transitional justice policy as a whole..

²⁵⁹ The Impugned Decision, paragraph 132 (emphasis added).

²⁶⁰ Gaddafi Admissibility Challenge.

190. Clearly, these factors go well beyond the threshold of indicating that implementation of the Impugned Decision could defeat the purpose of the appeal and/or give rise to consequences which would be very difficult to correct and may be irreversible. Accordingly, Libya submits that it has provided compelling reasons within the purview of article 82(3) to justify the granting of an order for suspensive effect of the Mr. Gaddafi's surrender order, pending conclusion of the appeal.

C. Satisfaction of the procedural requirements for a request for suspensive effect

191. The Government submits that its request for suspensive effect, contained within its notice of appeal filed on 7 June 2013 satisfies the procedural requirements for an application for suspensive effect.²⁶¹

192. Pursuant to Rule 156(5), "[w]hen filing the appeal, the party appealing [...] must [...] request that the appeal have suspensive effect in accordance with article 82, paragraph 3". This is exactly what was done.²⁶² The reasons supporting a request for suspensive relief are inherent in, and contingent upon, the substantive appeal. As a result, the necessary argumentation in support of such a request, is the very existence of an appeal. There is no additional procedural requirement.

²⁶¹ Contrary to the Defence assertions in its Defence Response, para. 36.

²⁶² Further, whilst this point is peripheral for present purposes, it is suggested that article 82(3) is an *exception* to the requirement of a request at the point of filing the appeal. A plain reading of the provision suggests that the Appeals Chamber could find that mere fact of a substantive appeal could allow that the Appeals Chamber could, upon a later request, find that an appeal *of itself* gave rise to suspensive effect without a an explicit request in the appeal notice. It would, in any event to suggest that a State making a proper request within the five-day notice requirement under Rules 154(1) and 156(5) is in breach of its obligation to surrender until such time as the Appeals Chamber has ruled on the request.

REQUEST FOR AN ORAL HEARING

193. The Government of Libya hereby requests an oral hearing in respect of the present appeal.

194. Rule 156(3) indicates that “[t]he appeal proceedings shall be in writing unless the Appeals Chamber decides to convene a hearing”. The Appeals Chamber has the same broad discretion as the Pre-Trial and Trial Chambers to “decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings” (Rule 58(2)).²⁶³ Article 69(2), which also applies to appeal proceedings, reflects the perceived value in the oral presentation of evidence and argument . Whilst Rule 156(4) requires that an appeal “be heard as expeditiously as possible”, this cannot mean that an opportunity for the Chamber to hear, engage in, and consider key arguments on important jurisprudential questions, should be sacrificed in favour of speed.

195. The issues arising in this appeal are of such significance to warrant the exercise of the Chamber’s discretion to convene an oral hearing. This is the first admissibility challenge relating to an extant domestic investigation and, as such, it raises issues of significant and general importance regarding the application of the complementarity principle to an “active” State. It is also only the second investigation triggered by a Security Council referral (and Libya is the only one of those two situation states actively engaged with the Court).²⁶⁴ Accordingly, the determination of this appeal will be of great interest to the broader international community, States and non-States parties alike. An oral hearing will allow full ventilation of all the important issues arising and develop a dialogue between the Court and Libya that it has sought to maintain throughout these proceedings.

²⁶³ Pursuant to Rule 149: “Parts 5 and 6 and 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”.

²⁶⁴ *CF. Situation in Darfur, Sudan.*

196. This case is of historic importance for the Libyan people. It is also of considerable significance to – and is being followed closely by – the international community. In several of his reports on Libya, the UN Secretary General explicitly acknowledged the need to uphold the “Libyan ownership” of the Libyan transition.²⁶⁵ Recognising that Libya is in a post-conflict phase and engaged in judicial sector reform as part of a “historic transition”,²⁶⁶ the Secretary-General stated that “[t]o succeed, Libya must be given the space required to determine its future”, adding that “[i]n this context, the role of the United Nations should be to support Libyans in their efforts”.²⁶⁷ He further stated that “the international community as a whole, will best support Libya [...] by being responsive to Libya’s own emerging sense of its needs for international support”.²⁶⁸

197. In this light, the manner in which this appeal is addressed by the Court will inform the way the perceptions of the Libyan people as to the legal process underlying the complementarity principle and the international community’s response to the democratic aspirations of the new Libya. A public hearing will help effect the greatest possible openness and transparency as to the criminal process pertaining to Mr Gaddafi. It will also foster a better understanding of the ICC’s processes and procedures, thereby reinforcing perceptions of its legitimacy.

198. The Libyan Government remains genuinely committed to carrying out its sovereign right to conduct *genuine* domestic criminal investigations and prosecutions as appropriate. Libya’s particular interest in these proceedings is further amplified by the fact it is not a party to the ICC Statute, but is a “State which

²⁶⁵ United Nations Security Council, Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2011/727, 22 November 2011; United Nations Security Council, Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2012.129, 01 March 2012.

²⁶⁶ *Ibid.* page 1.

²⁶⁷ *Ibid.* pages 11 and 12.

²⁶⁸ *Ibid.* page 19.

has jurisdiction over a case, on the ground that it is investigating or prosecuting the case”, pursuant to article 19(2)(b).

199. For the reasons set forth above, the Government of Libya respectfully requests that the Appeals Chamber grant an oral hearing on its appeal in respect of the Gaddafi admissibility appeal.

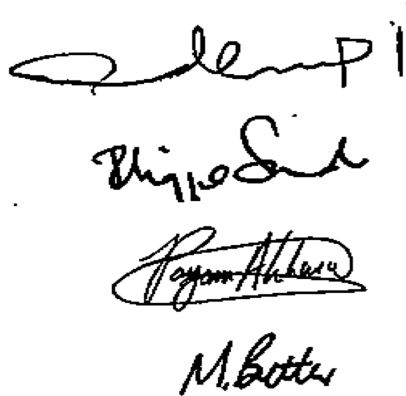
RELIEF SOUGHT

200. Pursuant to articles 19(6), 82(1)(a) and 83(2)(a) of the Statute, the Government respectfully requests that the Appeals Chamber:

- i. Reverse the “Decision on the admissibility of the case against Saif Al-Islam Gaddafi” of Pre-Trial Chamber I, dated 31 May 2013;
- ii. Determine that the case against Saif Al-Islam Gaddafi is inadmissible.

201. The Government reiterates its request for suspensive effect of the Impugned Decision.

Respectfully submitted:



Professor Ahmed El-Ghani

Professor Philippe Sands QC

Professor Payam Akhavan

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 24th day of June 2013

At London, United Kingdom