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THE APPEALS CHAMBER

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

**SITUATION IN LIBYA
IN THE CASE OF**

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

Public

**Response to the “Document in Support of Appeal on behalf of Abdullah Al-Senussi
against Pre-Trial Chamber I’s ‘Decision on the admissibility of the case against
Abdullah Al-Senussi’”**

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I. INTRODUCTION

1. The Libyan Government hereby files its Response to the “Document in Support of Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I’s ‘Decision on the admissibility of the case against Abdullah Al-Senussi’” (“Appeal”), which was filed on 4 November 2013.¹ The Defence seeks:
 - a. Admission of new evidence before the Appeals Chamber;
 - b. An oral hearing in respect of the appeal;
 - c. Reversal of the “Decision on the admissibility of the case against Abdullah Al-Senussi” (“Admissibility Decision”);²
 - d. A finding that the case against Mr. Al-Senussi is admissible before the Court;
 - e. An order for the immediate surrender of Mr. Al-Senussi to the Court.
2. The Government opposes the grounds of appeal advanced by the Appellant in their entirety as well as the relief sought and invites the Chamber to reject the appeal in full.

II. SUBMISSIONS

Standard of review

3. The Appellant correctly submits that the standard of review applicable in this appeal requires an error that *materially affected* the impugned decision.³ The appellant is obliged to set out with sufficient precision both the nature of the alleged error, and “how this error would have materially affected the impugned

¹ ICC-01/11-01/11-474.

² ICC-01/11-01/11-466.

³ Appeal, paras. 7, 8, referring to *Prosecutor v. Katanga*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, 25 September 2009, para. 37; *Prosecutor v. Banda and Jerbo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled ‘Reasons for the Order on translation of witness statements (ICC- 02/05-03/09-199) and additional instructions on translation’, ICC-02/05-03/09-295, 17 February 2012, para. 20; *Prosecutor v. Calliste Mbarushimana* Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled “Decision on the confirmation of charges”, ICC-01/04-01/10-514, 30 May 2012, para. 15.

decision".⁴

4. The Appeals Chamber has identified the criteria "justifying appellate interference" with the Pre-Trial Chamber's discretion to be: (i) "where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is exercised on a patently incorrect conclusion of fact; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion".⁵
5. Whilst the Appellant correctly notes that an error of fact may arise from "misappreciating facts, disregarding relevant facts, or taking into account facts extraneous to the *sub judice* issues",⁶ its submissions fail to note the Appeals Chamber's approach to the Pre-Trial Chamber's assessment of facts. The Appeals Chamber "will interfere only in the case of a clear error, namely where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it".⁷ Whilst the following relates, in substance, to the issue of interim release, it sets out the principles which are applicable more generally:

⁴ Appeal, para. 7, referring to *Prosecutor v. Joseph Kony et al.*, 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", ICC-02/04-01/05-408, 16 September 2009, para. 48.

⁵ Appeal, para. 10, referring to *Prosecutor v. Joseph Kony et al.*, 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", ICC-02/04-01/05-408, 16 September 2009, para. 80. See also, *Prosecutor v. Kenyatta*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', ICC-01/09-02/11-274, 30 August 2011, paras. 87, 88.

⁶ Appeal, para. 9, referring to *Prosecutor v. Bemba*, 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", ICC- 01/05-01/08-962, 19 October 2010, para. 63, 64. See also *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "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", 9 June 2008, ICC-01/04-01/07-572, para. 25.

⁷ *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'", 2 December 2009, ICC-01/05-01/08-631, para. 61; *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, para. 17

[T]he appraisal of evidence lies, in the first place, with the Pre-Trial Chamber. In reviewing a claim that a Pre-Trial or Trial Chamber has misappreciated facts in a decision on interim release, the Appeals Chamber will defer or accord a margin of appreciation both to the inferences that Chamber drew from the available evidence and to the weight it accorded to the different factors militating for or against detention⁸

6. Similarly, the Appeals Chamber has held that:

[I]t will not interfere with a Pre-Trial or Trial Chamber's evaluation of the evidence just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case of a clear error, namely where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it. In the absence of any clear error on the part of the Pre-Trial Chamber, the Appeals Chamber defers to the Pre-Trial Chamber.⁹

Ground 1: Ability and willingness

7. The Appellant contends that the Pre-Trial Chamber erred in finding that Libya “was not unwilling and not unable genuinely to carry out the proceedings against Mr. Al-Senussi in Libya”.¹⁰ It advances this claim on the following bases:
- a. that the Pre-Trial Chamber failed to accord sufficient weight to the issue

⁸ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “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”, 9 June 2008, ICC-01/04-01/07-572, para. 25. See also *Prosecutor v. Jean-Pierre Bemba Gombo*, “Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 26 September 2011 entitled ‘Decision on the accused's application for provisional release in light of the Appeals Chamber's judgment of 19 August 2011’”, 23 November 2011, ICC-01/05-01/08-1937, para. 48; Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 6 January 2012 entitled “Decision on the defence's 28 December 2011 ‘Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo’” ICC-01/05-01/08-2151, para. 16; *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, para. 17.

⁹ Similarly, this was set out by the Appeals Chamber with regard to the review of appeals judgments on interim release but it applies equally to purported errors in the appreciation of evidence in the determination of the admissibility of the case: ICC-01/04-01/10-283OA, para. 17.

¹⁰ Appeal, para. 10, referring to Admissibility Decision, para. 310.

of the interactions between Mr. Al-Senussi and his ICC Defence team – indeed, that this should have been decisive as to the issue of admissibility;

- b. the Pre-Trial Chamber improperly interpreted the evidence in respect of Mr. Al-Senussi's legal representation in the domestic proceedings in Libya;
- c. that the Pre-Trial Chamber failed to come to the correct conclusion in respect of alleged due process failures in the Libyan legal system, as well as the level of stability and security in Libya.

8. Each of these arguments should be dismissed for the reasons set out below. However, by way of general observation, the Government notes that throughout Ground 1 of its Document in Support of its Appeal it is unclear whether the Appellant alleges an error of fact, law or procedure. This alone justifies summary dismissal of the Appellant's arguments. Furthermore, the appeal submissions are replete with errors in interpretation and application. In particular, the Appeal misconstrues the applicable legal standards, seeking to apply, for example, irrelevant aspects of international human rights law to the admissibility assessment. Moreover, even if these legal standards apply, the Appellant's submissions are characterised by the repetition of generalised and speculative assertions, rather than any meaningful attempt to demonstrate a breach. Finally, the Appellant consistently misinterprets the relevant international law and fails to appreciate the specificities of the Libyan judicial system.

1. *Interactions with ICC Defence team*

9. First, the Appellant asserts that the Chamber "failed to take into account" the lack of contact between the Appellant team and Mr. Al-Senussi.¹¹ This is entirely unjustified – not least because in the next paragraph the Appellant refers

¹¹ Appeal, para. 32, and repeated in para. 34.

explicitly to the Pre-Trial Chamber taking into account precisely that issue¹² (before asserting in the next paragraph that it did not¹³).

10. This confusion aside, the Appellant asserts that the Pre-Trial Chamber “misses the vital point that his rights have been violated by being refused access to his lawyers”;¹⁴ that “Mr. Al-Senussi’s most essential of rights [is] to be represented and heard by the Chamber”;¹⁵ and that the occurrence of a legal visit is a prerequisite for determining the admissibility challenge (and should have been decisive even if the Defence failed to make this argument before the Pre-Trial Chamber).¹⁶

11. The Appellant argues that the Pre-Trial Chamber erred because it “should have determined whether the proceedings were prejudiced” by the absence of direct interaction between Mr. Al-Senussi and his ICC Defence team.¹⁷ It is alleged that the Chamber erred by failing to find that Libya’s alleged failure to permit Mr Al-Senussi’s access to legal representation did not give rise to “irreversible prejudice” (that is, prejudice “which cannot be reversed and remedied”¹⁸) and that this prejudice was dispositive of the issue of Libya’s willingness and ability.¹⁹ The Appellant likewise takes issue with the Chamber’s observation that the Appellant had not insisted upon a visit before making a ruling on admissibility.²⁰ Mr. Al-Senussi argues that, “it was wrong for the Chamber to rely on the fact that the Defence had not asserted that a legal visit was a necessary pre-condition for the Defence to make its submissions”.²¹

12. Notwithstanding some of the factual inaccuracies in the Defence assertions and

¹² Appeal, para. 33.

¹³ Appeal, para. 34.

¹⁴ Appeal, para. 34.

¹⁵ Appeal, para. 34.

¹⁶ Appeal, paras. 34, 37.

¹⁷ Appeal, para. 37.

¹⁸ Appeal, para. 53(ii).

¹⁹ Appeal, paras. 23; 34; 37, 47.

²⁰ Appeal, para. 33, referring to Admissibility Decision, para. 29.

²¹ Appeal, paras. 35, 37.

the reasonableness of the efforts of the Libyan Government to finalise arrangements for a visit by counsel for Mr. Al-Senussi in the ICC proceedings,²² the Appellant's arguments on this topic²³ must be rejected for the following reasons:

- a. they rely upon a conflation of two distinct issues: first, that of the role of the accused, and the accused's legal representatives, in a dispute concerning the appropriate forum for the criminal proceedings; and second, the rights of the accused in criminal proceedings;
- b. the Appellant fails to disclose to the Appeals Chamber the *nature* of its own instructions and/or the alleged prejudice suffered; and
- c. the Appellant has not previously raised the arguments (and the alleged prejudice) in respect of an in-person meeting with their client, thereby rendering its arguments unsuitable for consideration by the Appeals Chamber.

a) Due process requirements in admissibility proceedings

13. The submissions of the Appellant conflate two distinct issues: first, that of the role of the accused and the accused's legal representatives in a dispute concerning the forum for the criminal proceedings; and second, the rights of the

²² See, Libyan Government's consolidated Reply to the Responses by the Prosecution, Defence and OPCV to the Libyan Government's Application relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute, paras 145 – 150; Libya's Response to Additional Submissions and Addendum, 14 August, 2013, (ICC-01/11-01/11-403-Red2) ("Libya's Consolidated Reply"), Government's Submissions and Response to Defence "Filing on behalf of Mr. Abdullah Al-Senussi pursuant to "Decision on additional submissions in the proceedings related to Libya's challenge to the admissibility of the case against Abdullah Al-Senussi" of 19 September 2013" and ""Addendum" filed on 5 September 2013"" (26 September 2013) (ICC-01/11-01/11-455) ("Libya's Response to Additional Submissions and Addendum"), paras 29-31;

²³ Appeal, para. 44 – "The only reasonable inference that could be drawn, which the Pre-Trial Chamber should have drawn, is that Libya has delayed excessively in arranging any visit and has no genuine intention of allowing Mr Al-Senussi to speak with his Defence team'. See also, in the same vein, Appeal, paras. 42, 43. The Appellant's reference to their own submissions - Appeal, para. 38, referring to Defence Response on behalf of Mr. Abdullah Al-Senussi to "Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute", ICC-01/11-01/11-356, 14 June 2013, paras. 126, 138 (hereinafter "Defence Response of 14 June 2013"); Filing on behalf of Mr. Abdullah Al-Senussi pursuant to "Decision on additional submissions in the proceedings related to Libya's challenge to the admissibility of the case against Abdullah Al-Senussi" of 19 August 2013, ICC-01/11-01/11-418, 26 August 2013, paras. 19, 21 (hereinafter "Further Submissions of 26 August 2013").

accused in the criminal proceedings. This is apparent throughout the Appellant's arguments concerning their interactions with their client, for example, the non-specific argument that "the least that a national system must provide in order even to claim to conduct fair and impartial trial proceedings is to permit the accused to have access to his lawyers".²⁴

14. Only by attempting to merge these issues could the Appellant attempt to rely upon articles 67(1) and 55(2) of the ICC. The extracts from article (67)(1), to which the Appellant refers, state:

In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

[...]

(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

[...]

(d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;

15. Similarly, article 55(2) is also plainly concerned with the determination of charges – that is, ensuring due process in criminal proceedings before the court. The remainder of article (67)(1) (not cited in the Appeal) reinforces the same point.

16. In reality, neither of these provisions support the argument advanced by the

²⁴ Appeal, para. 38.

Appellant. In the language of the European Court of Human Rights, for example, the difference between the role of the defence in an admissibility challenge and in a criminal trial is that the latter entails “determination of the civil rights” of the accused – that is, the determination of criminal charges. This reflects the language of article 67(1), as cited above. The European Court is equally clear that the adjudication of whether a person will be transferred to another jurisdiction for the purposes of a criminal trial, as in extradition proceedings, *does not* involve determination of the civil rights of the accused.²⁵

17. In other words, the nature of a person’s due process rights in a particular situation is a corollary of the type of decision being made, rather than the name or title assigned to the party concerned, whether ‘Defence’ or ‘Accused’ or otherwise. The ‘right’ in issue in admissibility proceedings is that of the domestic jurisdiction to carry out criminal proceedings. The Libyan Government has previously made submissions as to the *nature* of the domestic jurisdiction’s right (indeed its obligation) to conduct criminal proceedings.²⁶ The

²⁵ *Mamatkulov and Askarov v. Turkey* (2005) 41 EHRR 494; *Salgado v. Spain*, Application No. 65964/01; *EGM v. Luxembourg*, Application No. 24015/94; *GK and BIF v. The Netherlands*, Application No. 12543/86; *Kirkwood v. UK* (1984) 37 DR 158; *H v. Spain* (1983) 37 DR 93; *X v. Belgium*, Application No. 7256/75. The only minor caveat in this regard is the situation in which a national of the country concerned is to be extradited, in which case the proceedings can affect a citizen’s right to enter and remain in the country of citizenship. This was the situation faced by the UK Supreme Court in *Lukazewski v. The District Court in Torun, Poland* [2012] UKSC 20. See, in particular, para. 31, per Lord Mance. Note extradition is not a direct comparison because extradition involves a relationship in which there is no overarching jurisdictional claim that is provided by a UN Security Council Resolution – it is matter of bilateral relations between states. In the presence of jurisdiction which is already part of the domestic legal order, in the sense that it is on the basis of a Security Council Resolution, even less is in issue in terms of determination of rights.

²⁶ See, for example, “The Libyan Government’s further submissions in reply to the Prosecution and Gaddafi Responses to ‘Document in Support of Libya’s Appeal against the “Decision on the admissibility of the case against Saif Al-Islam Gaddafi”’”. It is submitted that the effect of the ICC Statute is threefold: (i) to modify the sovereign right to conduct criminal proceedings such that, in relation to crimes which are within the ICC Statute, it is no longer absolute, but is contingent upon ability and willingness to conduct genuine proceedings; (ii) *to protect that right once modified*; (iii) and to create a jurisdiction in which will prosecute international crimes properly where this modified right will not be exercised. This is apparent from the ICC Statute itself (Article 17 specifically refers to preambular para. 10 and article 1 of the Statute, highlighting the significance of the principle of complementarity. In preambular para. 10, States parties: “[e]mphasiz[e] that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions”. Article 1 further provides that the Court “shall be complementary to national criminal jurisdictions”). The complementarity

function of the admissibility proceedings is to determine which jurisdiction takes priority as between the concurrent jurisdiction of the state of Libya and the ICC. At the core of these proceedings lies the delineation of the legal relationship between the state of Libya and the ICC as an international organisation.

18. This is reflected in the Pre-Trial Chamber's finding in the *Gaddafi* proceedings that Libya is the "triggering force and main actor in [admissibility] proceedings".²⁷ This determination was made in the context of deciding whether Libya should be permitted to file a reply to responses addressing admissibility issues, but it reflects the requirements of due process in admissibility proceedings as set out herein.

19. The Libyan Government does not seek to argue for any diminution in the participation of the Appellant in the present admissibility proceedings. Rather, it seeks clarity as to the principles applicable to such participation. The right to representation, as a matter of due process, does not require that an accused be represented by counsel in relation to decisions such as the location of the trial. This being so, barriers to such representation cannot evince, or even suggest, inability or unwillingness to conduct genuine domestic proceedings. Accordingly, the Appellant has failed to establish any error on the part of the Pre-Trial Chamber.

principle has been described in ICC jurisprudence as "reinforc[ing] the principle of international law that it is the sovereign right of every State to exercise its criminal jurisdiction[...]" (*Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta & Mohammed Hussein Ali*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", 20 September 2011, ICC-01/09-01/11 OA (Dissenting Opinion of Judge Anita Ušacka), para. 19.) See also *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta & Mohammed Hussein Ali*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", 30 August 2011, ICC-01/09-01/11 OA, para. 43. This is also apparent from the negotiating history of the Statute: See e.g. M. Cherif Bassiouni, *Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute from 1994-1998* (Vol. 2, Ardsley, NY: Transnational Publishers, 2005), at 50-51.

²⁷ ICC-01/11-01/11-191, para. 8.

20. In light of these issues, and the Defence's failure to identify any prejudice arising, it is unfortunate that the Appellant should assert, without proper basis, that the Pre-Trial Chamber's reasoning "exposes the bias of the Chamber in not being prepared to identify Libya's failings, when they are plain to see".²⁸

b) Lack of prejudice

21. Contrary to the Appellant's argument that the Pre-Trial Chamber erred by failing to assess any prejudice suffered, it clearly did address its mind to this question. It correctly noted "that the Defence ability to properly raise certain factual matters may have been prejudiced by [the] absence of direct contacts with Mr. Al-Senussi",²⁹ but found that this did not impact decisively upon its decision. The assertion by the Appellant that it was wrong for the Pre-Trial Chamber to reach this conclusion must be rejected for the following reasons.

22. First, as noted above, the assessment of the substance of any prejudice must be predicated upon the nature of proceedings, and for the reasons outlined above, the nature of any prejudice suffered by Mr. Al-Senussi as a result of the lack of direct contact between him and his ICC lawyers is not to be equated with a denial of legal representation in a criminal trial.

23. Second, the Defence is precluded from advancing these arguments for the first time during the appeal in respect of the Admissibility Challenge. The Defence failed to allege or meaningfully articulate the alleged prejudice arising from the lack of instructions.³⁰ As the Pre-Trial Chamber correctly noted:

At the same time, the Chamber observes that the Defence has not argued that a legal visit to Mr Al-Senussi was a necessary pre-condition for the Defence to make its submissions on the Admissibility Challenge such that a determination

²⁸ Appeal, para. 35.

²⁹ Admissibility Decision, paras. 29, 219.

³⁰ Admissibility Decision, para. 29

*of the challenge would need to be suspended until after the taking place of the visit. Rather, it has on several occasions requested the Chamber to proceed to a determination on the merits of the Admissibility Challenge on an urgent basis.*³¹

24. During the Admissibility Challenge, the Defence did not claim that it was unable to continue or that any prejudice to Mr. Al-Senussi's trial rights was such that it was irremediable or irreversible. It failed to justify the assertion that the lack of contact between Mr. Al-Senussi and his ICC counsel is "reason alone to find that Libya is unwilling and unable to try Mr Al-Senussi".³²

25. The Appellant's submissions correctly note that the parties are at liberty to raise "any relevant ground of appeal", and that these grounds can include errors of procedure, fact, law and "[a]ny other ground that affects the fairness or reliability of the proceedings or decision."³³ However, the Appeals Chamber "will not review the findings of the Pre-Trial Chamber *de novo*, instead it will intervene in the findings of the Pre-Trial Chamber only where clear errors of law, fact or procedure are shown to exist and vitiate the Impugned Decision."³⁴ The Appeals Chamber will also not interfere with a Pre-Trial or Trial Chamber's evaluation of the evidence just because the Appeals Chamber might have come to a different conclusion; it will interfere only in the case of a clear error, namely where it cannot discern how the Chamber's conclusion could have reasonably

³¹ Admissibility Decision, para. 29 and fn. 57.

³² Appeal, para. 50. The same argument applies to the Appellant's claims concerning treatment in the domestic legal system. See *infra*, 'Other issues concerning due process in Libya'.

³³ Appeal, para. 6; ICC Statute, Article 81(1)(b).

³⁴ *Prosecutor v. Bemba*, "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'", 2 December 2009, ICC-01/05-01/08-631-Red, para. 62.

been reached from the evidence before it.”³⁵

26. Consequently, the Appellant cannot attempt to litigate an issue when the correct forum for raising prejudice was the Pre-Trial Chamber. The Appellant presents a *de novo* ground of prejudice, which has never been raised before, for the Appeals Chamber to review. This is not permitted, not least because this would effectively deny the right to appellate review of the issue (for whichever party might wish to appeal in that regard) as there is no avenue for review of decisions made by the Appeals Chamber.

27. The Appellant’s claim that it “was of course absolutely essential for the Defence to obtain Mr. Al-Senussi’s instructions”³⁶ and that the “Chamber failed to take into account that the Defence’s allegations could have been further substantiated through the Defence being allowed to take instructions [...] in a privileged and confidential environment [...] both in relation to unwillingness and inability, to receive information from the accused himself as to his treatment in detention and whether his rights were being observed in the national proceedings”³⁷ were allegations that could have been advanced before the Pre-Trial Chamber. The Appellant cannot criticise the Chamber for failing to consider arguments that were not made. Raising them for the first time on appeal is not an appropriate use of the appellate jurisdiction. The ground of appeal ought to be summarily dismissed.

³⁵ *Prosecutor v. Bemba*, “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’”, 2 December 2009, ICC-01/05-01/08-631-Red, para. 62; *Prosecutor v. 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’”, ICC-01/04-01/10-283, 14 July 2011, para. 1.

³⁶ Appeal, para. 34

³⁷ Appeal, para. 35.

2. *Access to counsel in Libya*

28. The submissions of the Appellant regarding the Pre-Trial Chamber's approach to the evidence concerning the issue of access to counsel in Libya are comprised essentially of four complaints: (a) that the Pre-Trial Chamber erred by failing to accept the admittedly unsubstantiated allegations of the Appellant and placed excessive weight upon evidence emanating from Human Rights Watch;³⁸ (b) that it reversed the burden of proof;³⁹ (c) that it contradicted its approach in the *Gaddafi* case;⁴⁰ and (d) that it breached the applicable legal standards, in both Libyan law and international human rights law.⁴¹

a) **Alleged error in Pre-Trial Chamber's assessment of the evidence**

29. The Chamber found that the Defence's assertions as to Mr. Al-Senussi's legal representation and treatment in Libya were "generic" and "without any tangible proof".⁴² Although the Appellant is unable to dispute this conclusion, it argues that the Pre-Trial Chamber should have accepted its arguments nonetheless.⁴³

30. Clearly the Appellant's submissions do not come close to indicating a "patently incorrect conclusion of fact". The Pre-Trial Chamber engaged in a plainly reasonable analysis in this regard, noting the legal protections in Libyan domestic law concerning the legal representation of an accused person,⁴⁴ as well as – vitally – the fundamental importance of the transition from the accusation stage to subsequent steps in the criminal process.⁴⁵ As the Libyan Government has noted on multiple occasions, and as the Pre Trial Chamber correctly recognized, the trial will not commence unless Mr. Al-Senussi has legal

³⁸ Appeal, paras. 35, 36, 109,

³⁹ Appeal, paras. 35, 47, 53, 70-73, 107, 108.

⁴⁰ Appeal, paras. 53(iii), 73.

⁴¹ Appeal, paras. 50-69.

⁴² Appeal, para. 35, referring to Admissibility Decision, para. 239.

⁴³ See, for example, Appeal, paras. 35.

⁴⁴ Admissibility Decision, paras. 203, 206.

⁴⁵ Admissibility Decision, paras. 204-206.

representation in Libya.⁴⁶

31. The Appellant asks the Appeals Chamber to overturn factual findings based on nothing more than speculation as to what the Defence's instructions might be if it had them, and in the face of clear, independent evidence to the contrary.⁴⁷ The latter includes a report from Human Rights Watch.
32. The Appellant also attempts to argue that the Pre-Trial Chamber erred in relying on the above-mentioned Human Rights Watch report.⁴⁸ This amounts to asserting that the Pre-Trial Chamber should have ignored evidence of which it is in possession. The Appellant fails to articulate which evidence was to be preferred and why. They appear to suggest that the Pre-Trial Chamber ought to have ignored the evidence, in favour of that which *might* later be provided by the Appellant. This argument concerns the amount of weight ascribed to a particular piece of evidence by the Pre-Trial Chamber – a paradigmatic example of the arena in which the discretion of the first instance tribunal must be accorded considerable, and in this case decisive, weight. Patently, the Defence argument must be rejected.

b) Burden of proof and access to information

33. The Appellant also contends that the Pre-Trial Chamber's approach to the evidence in effect reversed the burden of proof.⁴⁹ The aspects of the Pre-Trial Chamber's analysis to which the Appellant refers in particular are: (i) not requiring Libya to disprove [Mr. Al-Senussi's allegations as to due process] because they had not been properly substantiated";⁵⁰ and (ii) "finding that Libya's burden had been discharged because the Defence had not insisted on the

⁴⁶ Admissibility Decision, para. 206.

⁴⁷ Appeal, para. 35.

⁴⁸ Appeal, para. 36, referring to Admissibility Decision, paras. 235-240.

⁴⁹ Appeal, paras. 35, 70.

⁵⁰ Appeal, para. 53

proceedings being suspended".⁵¹ It is submitted that the Appellant's submissions are wrong in principle for the following reasons.

34. First, the benefit of not bearing the burden of proof does not, and cannot, extend to acceptance of unsubstantiated assertions or to an expectation of a suspension of proceedings in the speculative hope of obtaining evidence to bolster those submissions.

35. As regards the burden of proof, the Pre-Trial Chamber made clear that:

*"[A]lthough Libya carries the burden of proof, any factual allegation raised by any party or participant must be sufficiently substantiated in order to be considered properly raised."*⁵²

36. Clearly, by the Appellant's own implicit admission, its arguments were not sufficiently substantiated. Indeed, they were not substantiated at all. The Pre-Trial Chamber has previously described the burden of proof as follows:

*[T]he challenging State is required to substantiate all aspects of its allegations to the extent required by the concrete circumstances of the case. The principle of complementarity expresses a preference for national investigations and prosecutions but does not relieve a State, in general, from substantiating all requirements set forth by the law when seeking to successfully challenge the admissibility of a case.*⁵³

[...]

⁵¹ Appeal, para. 47.

⁵² Admissibility Decision, para. 208, emphasis added.

⁵³ Gaddafi Admissibility Decision, para. 52, with internal references to Appeals Chamber, 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-01/09-01/11-307 (OA), para. 62; 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, para. 9; Pre-Trial Chamber I, Transcript of Hearing, 10 October 2012, ICC-01/11-01/11-T-3-Red-ENG, p. 64 line 18 to p. 65, line 1.

*an evidentiary debate on the State's unwillingness or inability will be meaningful only when doubts arise with regard to the genuineness of the domestic investigations or prosecutions.*⁵⁴

37. The preference for domestic proceedings reflects the fact that the mere launching of an ICC investigation does not, *of itself*, have any impact upon the legal validity of sovereign acts of a state: *only the Chamber's determination of a case as admissible before the ICC does so*. It also reflects the Appeals Chamber's finding that "states have the primary responsibility to exercise criminal jurisdiction"⁵⁵ and the general principle of international law that the sovereign acts of a State within its domestic jurisdiction are presumed to be valid unless otherwise established.⁵⁶

38. Once the state has demonstrated the existence of a domestic criminal process, that must carry considerable weight – even if the burden of proof lies with the state in relation to the admissibility challenge as a whole. In this regard, the Pre-Trial Chamber was undoubtedly correct to hold that:

[T]he two limbs of the admissibility test, while distinct, are nonetheless intimately and inextricably linked. Therefore, evidence put forward to substantiate the assertion of ongoing proceedings covering the same case that is before the Court may also be relevant to demonstrate their genuineness. Indeed, evidence related, inter alia, to the appropriateness of the investigative measures, the amount and type of resources allocated to the investigation, as well as the scope of the investigative powers of the persons in charge of the investigation are relevant for both limbs since such aspects, which are significant to the question of whether there is no situation of "inactivity" at the national level, are also relevant indicators of the State's willingness and ability genuinely to carry out the concerned proceedings.

39. Not only does this demonstrate the errors in the submissions of the Appellant as

⁵⁴ Gaddafi Admissibility Decision, para. 53.

⁵⁵ Kenya Admissibility Decision, Appeals Chamber, para. 36

⁵⁶ See Bin Cheng, *General Principles Of Law As Applied By International Courts & Tribunals* 305 (1953).

to the burden of proof, it also shows that the evidentiary analysis in respect of the first limb of the admissibility assessment (whether the domestic jurisdiction is investigating or prosecuting *the same case* as the ICC) may provide further support for its conclusions as to willingness and ability.

40. The Appellant points to paragraph 221 of the Pre-Trial Chamber's judgment in support of the claim that the Chamber reversed the burden of proof.⁵⁷ In this paragraph, the Chamber stated that it "...will *take into account* only those irregularities that may constitute relevant *indicators* of one or more of the scenarios described in article 17(2) or (3) of the Statute, and that are *sufficiently* substantiated by the evidence and *information* placed before the Chamber".⁵⁸

41. The Chamber merely reiterated the obvious: that parties wishing to raise issues relevant to the Admissibility Challenge bore an evidential burden to raise sufficiently relevant and probative allegations before Libya had an obligation to disprove them.⁵⁹ Evidential burdens are not inconsistent with legal burdens of proof or otherwise undermining of due process.⁶⁰ The suggestion in paragraph 71 of the Appeal, that this placed an obligation on the "Defence to prove that irregularities have occurred" and removed the burden on "Libya to establish that the requirements of article 17(2) and (3) have been satisfied" is a distortion of the Chamber's approach and should be rejected as being plainly without merit.

⁵⁷ Appeal, para. 71

⁵⁸ Admissibility Decision, para. 221 [[emphasis added].

⁵⁹ Admissibility Decision, para. 208

⁶⁰ DPP, ex parte Kebeline and Others, R. v. [1999] UKHL 43: 'An "evidential" burden requires only that the accused must adduce sufficient evidence to raise an issue before it has to be determined as one of the facts in the case. The prosecution does not need to lead any evidence about it, so the accused needs to do this if he wishes to put the point in issue. But if it is put in issue, the burden of proof remains with the prosecution.'; See further Glanville Williams, *The Proof of Guilt* (3rd Ed., Stevens & Sons, 1963) 185-186; Attorney General's Reference (No. 4 of 2002) [2004] UKHL 43, para. 1, per Lord Bingham: 'An evidential burden is not a burden of proof. It is a burden of raising, on the evidence of the case, an issue as to the matter in question fit for consideration by the tribunal of fact. If an issue is properly raised, it is for the prosecutor to prove, beyond reasonable doubt, that that ground of [acquittal] does not benefit the defendant.'

42. The Appellant also offers an alternative argument to its submissions concerning the burden of proof which, it asserts, leads to the same outcome: acceptance by the Chamber of its unsupported assertions concerning the Libyan legal process. The Appellant contends that, even if it is wrong in respect of the burden of proof, it is “improper for the applicant to be penalised when the information it requires is in the State’s control”.⁶¹ In support of this, the Appellant asserts that the approach taken should be the same as that of the Inter-American Court of Human Rights and the European Court of Human Rights⁶²

43. The notion that the issue involves ‘penalisation’ or that the Appellant is the ‘applicant’ once again reflects the misconception held by the Appellant as to the nature of the admissibility proceedings. In no sense is Mr. Al-Senussi the applicant in respect of the Pre-Trial Chamber’s deliberations on the admissibility challenge. It is the Libyan state that triggered the challenge, and whose rights will be thereby determined.

44. Furthermore ignoring the burden of proof in favour of purported expedience, in this regard, would entail presumptions, first, that the Libyan Government was withholding information, and second, that the Defence’s arguments are correct. It is a distraction from the legal principle at stake. Accepting this argument would allow the ICC to exercise jurisdiction on the illusory basis of mere expedience, without regard to legal principle.

c) Alleged contradiction with *Gaddafi* Admissibility Decision

45. The Appellant alleges that the “findings in Mr. Al-Senussi’s case were wholly inconsistent with its findings in the *Gaddafi* Admissibility Decision”.⁶³ The Appellant’s argument appears to be premised on the broad generalisation that because “the case against Mr Gaddafi may significantly overlap with the case in

⁶¹ Appeal, para. 45. See also para. 46.

⁶² Appeal, para. 45.

⁶³ Appeal, paras. 53(iii), 73.

relation to Mr Al-Senussi”, the Chamber must have erred because it did not reach the same conclusions on every issue.⁶⁴ . Plainly, this presumptive approach has no merit.⁶⁵ Libya’s response, outlined below, must be read in the light of Judge Christine Van den Wyngaert’s apposite summary – that the admissibility proceedings in this case were an assessment of Libya’s ability to carry out the proceedings “against Mr Al-Senussi *specifically*”.⁶⁶

46. The Chamber properly considered all relevant considerations, including the fact that the “case against Mr Al-Senussi cannot proceed further [than the Accusation Chamber] without a lawyer to represent him at trial”.⁶⁷ The Chamber correctly acknowledged that Mr Al-Senussi was entitled to a lawyer under Article 106 of Libya’s Criminal Code and accepted Libya’s indication that it “is expected that the execution of a formal power of attorney will be” signed in the “very near future”.⁶⁸ As discussed above, these pivotal findings were consonant with the fairness requirements underpinning international human rights and domestic law. As correctly concluded, Mr Al-Senussi’s lack of legal representation did not present any insuperable difficulty to the progress of the proceedings or the fairness of the overall process. The Appellant’s claim that the Chamber’s approach to Mr Al-Senussi’s case was “speculative”⁶⁹ is wholly without merit. The Appellant fails to show any error in these findings or the overall conclusion reached.

47. In contrast, the Chamber made a finding in the Gaddafi Admissibility Challenge that Libya was not able “to secure the transfer of Mr. Gadaffi’s custody from his place of detention under the Zintan militia into State authority and “attempts to

⁶⁴ Appeal, para. 73.

⁶⁵ Example, Appeal, para. 74; decision, 208 citing Libya submissions of 26 September 2013, para. 28.

⁶⁶ Declaration of Judge Christine Van den Wyngaert, ICC-01/11-01/11-466-Anx, 11 October 2013, para. 1 [emphasis added].

⁶⁷ Admissibility Decision, paras. 230-233.

⁶⁸ Admissibility Decision, paras. 230-233.

⁶⁹ Defence Appeal, para. 89.

secure representation for Mr. Gadaffi have seemingly failed”.⁷⁰ The Chamber found that, at that time, Libya was still only in the “process of approaching the Bar Associations of Tunisia and Egypt in order to obtain suitably qualified and experienced counsel”.⁷¹ The Appellant’s claim that “there is no reason that the evidence in Mr. Al-Senussi’s case, which is no different, provides any basis to conclude that there is sufficient evidence to show that Mr. Al-Senussi will benefit from legal representation at some future date” ignores the distinctions between the two cases that were found by the Chamber. Plainly, the Chamber’s findings in each case were distinct, distinguishable and based on the specificities of each case.

48. Finally, the Appellant erroneously claims that the Chamber reversed the burden of proof by stating that it “has no reason to put into question the information provided by Libya [that potential lawyers had indicated a willingness to defend Mr. Al-Senussi] in this regard”.⁷² The Defence advances this claim on the basis that Libya provided an update of the position on 26 September 2013, informing the parties and the Chamber that members of Mr. Al-Senussi’s tribe were willing to represent him and the “Defence had no opportunity to respond to these assertions from Libya and was not heard in respect of them”.⁷³ Whilst it is correct, that Libya provided up-dated information – which the final submissions were designed to allow and which the Challenge demanded - the Defence had ample opportunity and time to seek to reply, if they so wished. The Defence failed to do so and ought not to be permitted to challenge the Decision on the basis that it failed to raise a complaint or opposing argument at the appropriate time. Again, this cannot be dismissed as a technicality – the effect of accepting the Defendant’s argument, after it had failed to seek to reply earlier, would be to unjustifiably remove the possibility of an appeal (regardless of which party

⁷⁰ Gaddafi Admissibility Decision, paras. 213 and 215.

⁷¹ Gaddafi Admissibility Decision, para. 213.

⁷² Appeal, para. 78.

⁷³ Appeal, para. 88 and Libya Submissions of 26 September 2013, paras. 9, 28.

might wish to invoke this right).

d) Substance of right to legal representation: lack of breach and irreversible “prejudicial impact”

49. The Appellant advances two (related) reasons to support the allegation that Mr. Al-Senussi had been irretrievably prejudiced and this was sufficient for an adverse finding in accordance with the provisions of article 17. The Appellant contends, first, that the Chamber erred in failing to find a “violation” of “due process rights” on the basis of the evidence concerning Mr. Al-Senussi’s access to counsel during investigation and accusation. It is also alleged that the Chamber erred in not finding a violation of Article 106 of the Libyan Criminal Procedure Code.⁷⁴

50. There is no adequate indication of whether the Appellant alleges an error of fact, law or procedure. This ground should therefore be summarily dismissed.

51. If, despite the Appellant’s failure to identify the relevant error, the Appeals Chamber considers the substance of these submissions, they should be dismissed as lacking in merit. The Government does not deny that the right to a legal representative is a fundamental right.⁷⁵ However, even if the Chamber found that Mr. Al-Senussi was denied legal representation during the investigation or accusation phase of the domestic proceedings, the Appellant’s submission that this ‘*must demonstrate*’,⁷⁶ and is ‘*reason alone*’ to find Libya unwilling and unable,⁷⁷ is wrong in principle and unsustainable on the basis of the specificities of the Libyan judicial process.

⁷⁴ Appeal, paras. 50-69.

⁷⁵ *Prosecutor v. Delalić, Mucić, Delić and Landžo*, Case No.IT-96-21-T, Decision on Zdravko Mucić’s Motion for the Exclusion of Evidence, 2 September 1997, para. 51.

⁷⁶ Appeal, para. 55

⁷⁷ Appeal, para. 51

52. First, the absence of legal representation during the investigation or the accusation phase of judicial proceedings does not give rise to an automatic violation of “well-established international human rights and due process standards”⁷⁸ law (or Article 106 of the Libyan Criminal Procedure Code). Second, even if did amount to a “flagrant breach of his [Mr Al-Senussi’s] most fundamental rights”⁷⁹, the Chamber was correct to find that no prejudice arises that “cannot now be remedied and reversed” and reasonably did not find that this amounts to “a reason alone to find that Libya is unwilling and unable to try Mr. Al-Senussi in accordance with Libyan law and having regard to well-established international human rights and due process standards”.⁸⁰ Therefore, the Appellant fails to demonstrate any relevant error on the part of the Pre-Trial Chamber or how such an error would have altered its decision either substantially or at all.⁸¹

(1) Defining the “Right to Legal Representation” during the Pre-Trial Phase

53. All persons accused of a crime have the right to the assistance of a lawyer and this is a fundamental procedural guarantee.⁸² The right extends to access to a legal representative *as and when necessary*. Indeed, the most pertinent role of the lawyer is to help to safeguard the right of an accused *not* to incriminate him or herself. However, this guarantee must be seen in light of the mischief it is designed to protect against. It must be viewed in a practical manner and any assessment of a violation must take into account whether a lawyer was present during investigative questioning, whether the accused *consequently* incriminated

⁷⁸ Appeal, para. 51.

⁷⁹ Appeal, para. 51.

⁸⁰ Appeal, para. 50 and 51.

⁸¹ *Prosecutor v. Katanga*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, 25 September 2009, para. 37.

⁸² See, for example, Article 14 of the ICCPR.

him or herself *and* whether such gave rise to irretrievable prejudice.⁸³ This is clear from the “relevant provisions” of Article 14 of the International Covenant on Civil and Political Rights (‘ICCPR’),⁸⁴ and Article 7 of the African Charter on Human and Peoples’ Rights (‘AfCHR’),⁸⁵ which the Appellant marshals in support of its own argument.

54. Whilst purporting to rely upon the abstract wording of the ICCPR, AfCHR and Statute, the Appellant avoids analysing the precise nature of the right or its application to Libya’s judicial process. In sum, even if Mr. Al-Senussi had been deliberately deprived of legal assistance during the investigative and accusation stage, this alone does not demonstrate the prejudice required to demonstrate a violation of any international human rights standards. As will be further discussed below, any evidence obtained in breach of the privilege against self incrimination may be excluded at the subsequent trial and may not cause any, let alone irretrievable, prejudice. This ground of appeal is therefore deficient and ought to be summarily dismissed.⁸⁶

55. However, if the Appeals Chamber decides to consider the substance of this ground, as noted above, international human rights law does not dictate that a trial is irretrievably prejudiced by the absence of a lawyer at the early pre-trial

⁸³ European Court of Human Rights, *Murray v. the United Kingdom*, Judgment of 8 February 1996, Reports of Judgments and Decisions 1996-I, para. 66; See also *Averill v. United Kingdom*, no. 36408/97, ECHR 2000-VI, para. 60; *Magee v. the United Kingdom*, no. 28135/95, ECHR 2000-VI, para. 44; *Salduz v. Turkey* [GC], no. 36391/02, judgment of 27 November 2008, paras. 50-62; *Dayanan v. Turkey*, no. 7377/03, judgment of 13 October 2009, paras. 30-34; *Boz v. Turkey*, no. 2039/04, Judgment of 9 February 2010, paras. 33-36; and *Adamkiewicz v. Poland*, no. 54729/00, judgment of 2 March 2010, paras. 82-92.

⁸⁴ Appeal, para. 58; International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 article 14.

⁸⁵ Appeal, para. 59; African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (‘African Charter’) article 7.

⁸⁶ Appeal, paras. 57-60. In addition, it must be noted that ‘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 precision, how this error would have materially affected the impugned decision’: *Prosecutor v. Joseph Kony et al.*, 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”, ICC-02/04-01/05-408, 16 September 2009, para. 48.

stages. The right is designed to protect against real, not illusory or abstract mischief. Accordingly, the right to have a lawyer present and whether sufficient prejudice arises so as to amount to a violation is a question of fact and degree depending upon the particular stage of the proceedings and the procedure being followed, the nature of the accused's participation in the process and the use to which any evidence arising is used *at trial*. This requires an assessment of the specificities of the relevant system and process, an analysis eschewed by the Appellant. Even if Mr. Al-Senussi had made incriminatory statements in the absence of a lawyer, these may be excluded at any future trial pursuant to Article 304 of the Libyan Code of Criminal Procedure.⁸⁷ Prejudice must be judged *in situ*, not asserted in the abstract.

56. Prejudice cannot automatically be presumed. Even when legal representation is improperly denied at the pre-trial stage, resulting incriminatory statements may still be admissible at trial as evidence against the accused. It will depend upon the overall process, including such factors as whether and how the applicant requested a lawyer, the nature of the confessions obtained and whether sufficient safeguards were present during the overall process.⁸⁸ The focus of concern is whether the evidence obtained in breach of the right has an effect on the accused's conviction or sentence.⁸⁹ An individual's fair trial rights may be protected by the exclusion at trial of the evidence obtained.⁹⁰ In this regard, the Appellant's claim that the provision of legal assistance "[...]at the eleventh-hour cannot 'cure' a violation of the right to counsel at the earlier stages" is incorrect.⁹¹ It will depend upon the circumstances that eventually prevail *at trial*.

⁸⁷ Pursuant to article 304 and 309 of the Libyan Code of Criminal Procedure. On this point, see below at paras 62 -70..

⁸⁸ See, for example, *Latimer v. United Kingdom*, Application No. 12141/04, 31 May 2005) <<http://echr.ketse.com/doc/12141.04-en-20050531/view/>>

⁸⁹ *Gäfgen v. Germany* [Judgment] [ECtHR], App No. 22978/05, (2010), para. 178

⁹⁰ *Gäfgen v. Germany* [Judgment] [ECtHR], App No. 22978/05, (2010)

⁹¹ Appeal, para. 66-69.

57. The authorities relied upon by the Appellant (*John Murray v United Kingdom*; *Ocalan v Turkey* and *Magee v United Kingdom*⁹²) in support of their contention that a violation in pre-trial automatically taints the whole trial, do not advance their argument, let alone show that the Chamber erred. In each instance, it was the *use* of the fruits of the violation at trial that gave rise to the unfairness, not the mere fact of the denial of legal representation or the fact that incriminatory evidence or inferences were alleged to have been the product of such denial. None of the cases cited, or logic, supports the proposition that once legal representation is denied, it alone gives rise to prejudice, let alone irretrievable prejudice.

58. The Appellant's claim that the Chamber erred by failing to recognise that a violation of the right to counsel at the pre-trial stage "would have a prejudicial impact on the proceedings, which cannot be reversed and remedied"⁹³ is plainly wrong in law and wholly without merit.⁹⁴

⁹² Appeal, para. 68 and fns. 108-110.

⁹³ Appeal, para. 53.

⁹⁴ National or municipal law also supports the correctness of the Chamber's approach to the issue and further demonstrates the falsity of the Appellant's claim that the Chamber erred in not concluding that '[t]he right to legal representation is an indispensable and obligatory requirement in *any* criminal case...' (Defence Appeal, para. 57 [emphasis added]). For example: The Japanese penal code does not mandate the appointment of a legal representative until after an indictment has been preferred (Japanese Code of Criminal Procedure ("刑事訴訟法")); See also: Article 39: US Department of State, 'Japan: Country Reports on Human Rights Practices' 31 March 2003 <<http://www.state.gov/j/drl/rls/hrrpt/2002/18246.htm>> last accessed 13 November 2003). Consequently, the *Daiyo Kangoku* phase - a pre-trial detention stage - is conducted in the absence of a legal representative, even where confessions are elicited (Amnesty International, 'Annual Report 2011: Japan' <<http://www.amnesty.org/en/region/japan/report-2011>> last accessed 17 November 2013). The evidence may be used at trial (John Haffner, Tomas Casas Klett and Jean-Pierre Lehmann, *Japan's Open Future: An Agenda for Global Citizenship* (Anthem Press, 2009) 160).⁹⁴ In Canada, although the Supreme Court, has acknowledged the right under the Canadian Charter of Rights and Freedoms to instruct counsel without delay, they have also observed that, in general, suspects do *not* have the right to have a legal representative present during custodial interrogations: 'Section 10(b) of the Charter [of Rights and Freedoms] does not mandate the presence of defence counsel throughout a custodial interrogation. Precedent is against this interpretation and the language of s. 10(b) does not appear to contemplate this requirement. Moreover, the purpose of s. 10(b) does not demand the continued presence of counsel throughout the interview process' (R. c. Sinclair [2010] 2 R.C.S. [311] <<http://www.canlii.org/en/ca/scc/doc/2010/2010scc35/2010scc35.pdf>> last accessed 12 November 2013; Referring to the Constitution Act 1982 c.11 (UK), Canadian Charter of Rights and Freedoms <<http://laws-lois.justice.gc.ca/eng/Const/page-15.html#h-38>> last accessed 13 November 2013). In sum, the right is not

59. Moreover, the Appellant fails to demonstrate that the Chamber erred in its approach to the facts of Mr. Al-Senussi's case and its determination of admissibility. First, the Appellant failed to argue during the proceedings that legal representation *was* critical, or raise even a *prima facie* case to show that Mr. Al-Senussi was subject to such treatment or otherwise prejudiced by the lack of legal representation. Even though the Appellant is correct that legal representation may be "critical when an accused is being interrogated"⁹⁵ to "assist the accused, to ensure his rights are protected, and to seek to prevent abuse and mistreatment, particularly if inflicted to obtain a confession",⁹⁶ there was no evidence adduced during the proceedings that might have raised these issues for consideration, let alone required proof to the contrary.

60. The Chamber was undoubtedly correct, to only "take into account only those irregularities that may constitute relevant indicators of one or more of the scenarios described in article 17(2) or (3) of the Statute, and that are sufficiently substantiated by the evidence and information placed before the Chamber".⁹⁷ There was no such evidence and the Chamber was correct not to engage in speculation concerning the overall impact of the lack of legal representation and correct not to draw adverse inferences concerning Libya's willingness or ability to try Mr. Al-Senussi.

so broad as to necessitate a legal representative's presence for a police interview (R. c. Sinclair [2010] 2 R.C.S. [311] <<http://www.canlii.org/en/ca/scc/doc/2010/2010scc35/2010scc35.pdf>> last accessed 12 November 2013). By way of justification, the Supreme Court opined that a rule requiring the police to retreat: 'would not strike the proper balance between the public interest in the investigation of crimes and the suspect's interest in being left alone (R. c. Sinclair [2010] 2 R.C.S. [313] <<http://www.canlii.org/en/ca/scc/doc/2010/2010scc35/2010scc35.pdf>> last accessed 12 November 2013)).⁹⁴

⁹⁵ Appeal, para. 60.

⁹⁶ Appeal, para. 60: See for example: UN ICCPR Human Rights Committee, Views adopted by the Committee at its 106th Session, Communication No. 2120/2011, (15 October-2 November 2012), para. 11.2. See, further, the UN Human Rights Committee's general comment No. 32, para. 41; communications No. 330/1988, *Berry v. Jamaica*, Views adopted on 4 July 1994, para. 11.7; No. 1033/2001, *Singarasa v. Sri Lanka*, Views adopted on 21 July 2004, para. 7.4; No. 1769/2008, *Bondar v. Uzbekistan*, Views adopted on 25 March 2011, para. 7.6.

⁹⁷ Admissibility Decision, para. 71; see below at paras 83 and following.

61. Second, had the Appellant raised the issue during the first instance proceedings, arguing that the obtaining of incriminatory statements in violation of the right to legal representation had irretrievably prejudiced Mr. Al-Senussi and this alone ought to lead to a finding of unwillingness and inability, Libya would have relied upon Article 304 of the Libyan Code of Criminal Procedure, which provides exclusionary safeguards in furtherance of an accused's overall fair trial rights.⁹⁸ The Article expressly provides for exclusion of evidence *at trial* where it is obtained through a violation of procedure, mandating that "[t]he breach of any disposition of law concerning substantial procedures gives rise to the nullity of the procedure".⁹⁹ The existence of this rule highlights the correctness of the Chamber's approach to the issue and the erroneous critique of it by the Appellant.¹⁰⁰

(2) Article 106 of the Libyan Code of Criminal Procedure

62. The Appellant alleges that the Chamber erred in not recognising that Libya violated Article 106 of the Libyan Code of Criminal Procedure, and "failed to consider and decide whether this violation was sufficient to find that Libya was not bringing Mr. Al-Senussi to justice in accordance with the provisions of Article 17(2)(c)."¹⁰¹ As noted above, it is unclear whether the Defence alleges an error of fact, law or procedure. This ground should therefore be summarily dismissed.

63. If the Appeals Chamber considers this ground, it should be dismissed as lacking in merit. The premise of the Appellant's submissions is wrong. The Libyan Code of Criminal Procedure provides for counsel at trial. As the Chamber correctly concluded, the Code permits pre-trial proceedings to be conducted in

⁹⁸ The Libyan Code of Criminal Procedure, Article 304 <http://www.icc-cpi.int/iccdocs/doc/doc1444332.pdf>.

⁹⁹ Libyan Code of Criminal Procedure, Article 304.

¹⁰⁰ Appeal, paras. 34, 64.

¹⁰¹ Appeal, paras. 53-69.

the absence of legal representation.

64. As stated by the Appellant, the Pre-Trial Chamber noted the existence of Article 106,¹⁰² and that an interview occurred during investigation.¹⁰³ However, the Appellant then criticizes the Pre-Trial Chamber for not “connecting these two facts” to “make the obvious and logical finding that Libya had acted in violation of Mr. Al-Senussi’s due process rights by interrogating without permitting him to have a lawyer of his choosing”.¹⁰⁴ The Appellant claims that this error was “plainly so fundamental” a violation of due process rights that it “*must* demonstrate that Libya is not treating Mr. Al-Senussi fairly and justly”¹⁰⁵ such that the Chamber erred by not finding that Libya was not bringing Mr. Al-Senussi to justice in accordance with the provisions of Article 17(2)(c).

65. Contrary to the Appellant’s misconception,¹⁰⁶ Article 106 states, *inter alia*, that,

*[t]he Investigating Judge cannot, interrogate the accused, or confront him with another accused or a witness without having summoned the counsel if there is any. The accused must declare the name of his counsel through a declaration submitted to the registry or to the prison warden. Such declaration may be submitted through his counsel. The counsel cannot speak without authorization of the judge, and if they are not allowed to do so it must be written in the minute.*¹⁰⁷

66. It is therefore clear that the accused may be interrogated without counsel being present. Any alleged violation must be seen in this context.

¹⁰² Admissibility Decision, paras. 227, 233; Appeal, para. 54.

¹⁰³ Admissibility Decision, paras. 96, 230; Appeal, para. 54.

¹⁰⁴ Appeal, para. 54.

¹⁰⁵ Appeal, para. 55.

¹⁰⁶ The Appellant’s - presumably paraphrased – view of Article 106 features in para. 52, which asserts that: “Article 106 of Libya’s Criminal Procedure Code provides that “during the investigation phase of the case, a suspect has the right to appoint a lawyer to attend interviews with the Prosecutor-General and the Military Prosecutor and during confrontation of the defendant with witnesses by the Prosecutor-General”.

¹⁰⁷ Libyan Code of Criminal Procedure, Article 106.

67. However, as correctly found by the Pre-Trial Chamber, “upon completion of the proceedings before the Accusation Chamber, the case against Mr Al-Senussi cannot proceed further without a lawyer to represent him at trial.”¹⁰⁸ Furthermore, if the proceedings were to continue then the ‘...the trial verdict would be quashed on appeal.’¹⁰⁹ The Chamber correctly enumerated Libya’s domestic law: an accused can be investigated without a legal representative in the pre-trial phase, but it is obligatory to have one at trial and at that time denial gives rise to the assumption of prejudice that is now prematurely alleged by the Defence.

68. Further, even if there has been a violation, the Chamber’s finding that “...it is not just any alleged departure from, or violation of, national law that may form a ground for a finding of unwillingness or inability”¹¹⁰ is highly apposite to this issue. As argued above, even if the Chamber had found a violation the Appellant has failed to demonstrate that the Decision of the Pre-Trial Chamber would be substantially different, or altered at all.¹¹¹ Article 304 of the Libyan Code of Criminal Procedure, expressly mandates that “[t]he breach of any disposition of law concerning substantial procedures gives rise to the nullity of the procedure”.¹¹² In other words, there is a presumption that any violation will be appropriately remedied.

69. Therefore, in light of this, the stage of the proceedings, coupled with the human rights principles expounded above, the Pre-Trial Chamber made no error in not finding a violation of Article 106 of the Libyan Code of Criminal Procedure.

¹⁰⁸ Admissibility Decision, paras. 233 and 206

¹⁰⁹ Admissibility Decision, para. 206.

¹¹⁰ Admissibility Decision, para. 221.

¹¹¹ *Prosecutor v. Katanga*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, 25 September 2009, para. 37.

¹¹² Libyan Code of Criminal Procedure, Article 304 < <http://www.icc-cpi.int/iccdocs/doc/doc1444332.pdf> >

3. *Other issues concerning due process in Libya*

70. In further support of its first ground of appeal, the Appellant points to “several critical legal and factual errors [by the Pre-Trial Chamber] in reaching its overall conclusion that Libya is not unwilling and unable”. The Appellant argues as follows:

*No reasonable chamber could have found on the evidence and in the circumstances in Mr. Al-Senussi’s particular case that he is being treated fairly and will receive a fair and independent trial in Libya. Even if he was to be appointed a lawyer by the court, this would not establish that Libya has been and is willing and able to try him. This is because Mr Al-Senussi’s basic due process and fair trial rights have not and will not be protected so that it could be concluded that he is being brought to justice in independent and impartial proceedings.*¹¹³

71. The Appellant submits further that:

*The Defence relied on a comprehensive body of evidence that showed that the case was admissible before the ICC. The Defence submits that the Pre-Trial Chamber has failed to appreciate the significance of this evidence, when considered as a whole, and has erred in giving it no weight. The Chamber has instead selected aspects of the evidence piecemeal and sought to dismiss without proper analysis and justification the overwhelming case which shows that Mr. Al-Senussi is being treated unfairly, in violation of Libyan law and international law, and will be convicted and sentenced to death in proceedings that profess to be legitimate but which in reality fall well below any acceptable standard.*¹¹⁴

¹¹³ Appeal, para. 92. See also the claim at para. 65 of the Appeal, that the Pre-Trial Chamber “failed to address the fact that prolonged detention incommunicado, which has already occurred can in itself amount to inhumane treatment”. The submissions apply *mutatis mutandis*. Further, there was no evidence before the Chamber that Mr Al-Senussi was being held incommunicado. Logically, the Chamber cannot have erred in not considering or finding such a state in the absence of evidence.

¹¹⁴ Appeal, para. 93.

72. The particular errors are then listed, at paragraph 94, as follows: (i) substantial and compelling evidence was completely overlooked; (ii) in its assessment of the evidence, the Chamber failed to have regard to international standards and it placed undue weight on irrelevant factors; (iii) the Chamber erred in its findings about Mr. Al-Senussi's treatment in detention and in finding that his due process rights had been guaranteed; (iv) the Chamber's findings on impartiality and independence were defective; and (v) its finding about Mr Al-Senussi's unlawful rendition from Mauritania were in error.

73. The Government opposes the Appellant's arguments in their entirety for two reasons. First, the purported errors of fact identified by the Appellant are informed by an incorrect interpretation and application of the relevant law. The Appellant appears to be inviting the Appeals Chamber to adopt an alternative legal framework to that adopted by the Pre-Trial Chamber, without making any submissions, or at least any fully argued submissions, as to the validity of that alternative framework. Accordingly, on this basis alone the Appellant's submissions should be rejected in their entirety. Secondly, even if the Appeals Chamber were to accept the approach implicitly proposed by the Appellant, none of the five alleged errors amount to a clear error of fact or an error of law on the part of the Pre-Trial Chamber that would permit interference by the Appeals Chamber.

a) The Appellant is in error by implicitly proposing an alternative legal framework to that applied correctly by the Pre-Trial Chamber

74. The purported errors identified by the Appellant are grounded in an incorrect interpretation of the legal framework applicable to an assessment of "unwillingness". This is particularly apparent in the Appellant's submission that:

Even if he was to be appointed a lawyer by the court, this would not establish that Libya has been and is willing and able to try him. This is because Mr Al-

*Senussi's basic due process and fair trial rights have not and will not be protected so that it could be concluded that he is being brought to justice in independent and impartial proceedings.*¹¹⁵

75. This reveals a fundamental error in the Appellant's submissions. The Appellant falls into error by effectively equating a purported lack of fairness or due process *per se* with "unwillingness". In doing so, the Appellant ignores the cumulative requirements of article 17(2)(c) that "the proceedings were not or a not being conducted independently or impartially, and, they were or are being conducted in a manner which, in the circumstances, is consistent with an intent to bring the person concerned to justice."

76. Furthermore, the Appellant is mistaken in its submissions regarding the role and impact of the direction in the chapeau of article 17(2) that the Chamber has taken with "regard to the principles of due process recognized by international law" when determining whether the conditions in article 17(2)(c) are satisfied. The Appellant frames the parameters of analysis for the Appeals Chamber incorrectly:

*Whether any reasonable chamber could find in light of this wide-ranging body of evidence that Libya has discharged its burden of showing that the proceedings are being conducted independently, impartially and fairly and with the intention of bringing Mr Al-Senussi to justice. [...] Bringing an accused to justice must entail treating him humanely and fairly and conducting fair proceedings – these requirements are integral to the definition of "justice" as a matter of international law. The Chamber is thus required to determine whether Libya is conducting fair investigative and prosecutorial proceedings taking into account the fair trial and due process requirements that are recognised under international law. This view is re-enforced by the Chamber's duty under Article 21(3), which provides that the Chamber's application and interpretation of the law "must be consistent with internationally recognized human rights."*¹¹⁶

¹¹⁵ Appeal, para. 92.

¹¹⁶ Appeal, para. 97.

77. In effect, the Appellant is inviting the Appeals Chamber to apply a “due process” analysis to the admissibility provisions, which is contrary to the text, context and object and purpose of article 17(2). This results in the Defence placing great significance on particular factual assertions and accusing the Chamber of acting unreasonably in failing to give those considerations the same significance. In this regard there is a merging of submissions regarding errors of fact and law, which are dispositive and self-defeating.

78. As noted, the Appellant’s invitation to the Court to adopt such an approach is contrary to the object and purpose of the Statute, as revealed in the drafting history and the overarching concern by negotiating States that a determination of admissibility by the Court not become a judgment on the fairness of the national system *per se*.¹¹⁷ As has been submitted throughout the admissibility proceedings relating to both this case and the case against Mr. Saif Al-Islam Gaddafi by both the Government and the Office of the Prosecutor, the Court “should not function as a court of appeal on national decisions based on alleged domestic deviations from applicable human rights norms” and “cannot find a State unwilling on the sole ground that the national proceedings violate due process, but must also find a violation of one of the three subparagraphs in Article 17(2)”.¹¹⁸ The Court was not designed to be a human rights court with responsibility for harmonising standards or enforcing an agreed ideal that is confined to certain parts of the world.

79. In outlining the purported errors of fact, and stating that the Pre-Trial Chamber

¹¹⁷ In particular, a proposal from Italy that would have specifically made the lack of due process a ground for admissibility was rejected since, according to the Coordinator of the Working Group, “many delegations believed that procedural fairness should not be a ground for defining complementarity”. J. Holmes, “The Principle of Complementarity” in Roy S. Lee, *The International Criminal Court: The Making of the ICC Statute: Issues, Negotiations, Results* (1999), p. 50 ; E. Carnero Rojo, “The Role of Fair Trial Considerations in the Complementarity Regime of the International Criminal Court: From ‘No Peace without Justice’ to ‘No Peace with Victor’s Justice’?”; 18 *Leiden Jnl Int’l L.* (2005), pp. 848-849.

¹¹⁸ Admissibility Decision, para. 186, referring to Prosecutor’s Response, para. 71.

has been piecemeal in its consideration of the material before it, the Appellant completely ignores the legal framework set out by the Pre-Trial Chamber for the consideration of the facts before it. It also fails to give any regard to the Pre-Trial Chamber's consideration of "genuineness" and its identification of the circumstances in which considerations of "genuineness" become relevant. The Pre-Trial Chamber set out this framework at paragraph 208 of the Impugned Decision:

As observed above, the Chamber recalls that Libya, as the State challenging the admissibility of the case against Mr Al-Senussi, is required to substantiate the Admissibility Challenge to the extent required by the concrete circumstances of the case, and that an evidentiary debate on Libya's unwillingness or inability will only be meaningful when doubts arise as to the genuineness of the proceedings. In this regard, the Chamber emphasises that, although Libya carries the burden of proof, any factual allegation raised by any party or participant must be sufficiently substantiated in order to be considered properly raised.

80. Furthermore, the Appellant's purported errors of fact are grounded in a failure to engage with, or a misguided rejection of, the Pre-Trial Chamber's entirely reasonable position that:

The two limbs of the admissibility test, while distinct, are nonetheless intimately and inextricably linked. Therefore, evidence put forward to substantiate the assertion of ongoing proceedings covering the same case that is before the Court may also be relevant to demonstrate their genuineness. Indeed, evidence related, inter alia, to the appropriateness of the investigative measures, the amount and type of resources allocated to the investigation, as well as the scope of the investigative powers of the persons in charge of the investigation are relevant for both limbs, since such aspects, which are significant to the question of whether there is no situation of "inactivity" at the national level, are

also relevant indicators of the State's willingness and ability genuinely to carry out the concerned proceedings."¹¹⁹

81. This position informed the Pre-Trial Chamber's entirely reasonable approach to the evidence and the weight to be given to particular types of evidence. The Appellant has failed to show how the Chamber's adoption of this approach is incorrect, beyond making generalised statements regarding the Pre-Trial Chamber's purported failure to take into account evidence described variously as "overwhelming" and "compelling".

82. Finally, the Appellant fails to engage with the Chamber's position that:

*The Chamber will take into account only those irregularities that may constitute relevant indicators of one or more of the scenarios described in article 17(2) or (3) of the Statute, and that are sufficiently substantiated by the evidence and information placed before the Chamber.*¹²⁰

83. Again, the Appellant has failed to show how the Chamber fell into error by adopting this approach to the evidence. Instead, the Appellant presents a list of purported factual errors, which are informed by the incorrect legal test and which, even applying the correct test, do not amount to clear errors of fact, justifying appellate intervention.

b) Failure to identify any clear error of fact that would permit appellate intervention

84. The requisite standard of appellate review is set out above.¹²¹ In relation to errors of fact, the Appeals Chamber has previously set out a standard of reasonableness, which dictates that:

¹¹⁹ Admissibility Decision, para. 210.

¹²⁰ Admissibility Decision, para. 221.

¹²¹ See *infra*, paras. 3-6.

*The Appeals Chamber will not interfere with a Pre-Trial or Trial Chamber's evaluation of the evidence just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case of a clear error, namely where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it. In the absence of any clear error on the part of the Pre-Trial Chamber, the Appeals Chamber defers to the Pre-Trial Chamber.*¹²²

85. Thus, a different appreciation of the evidence is insufficient. Rather, the Appellant must point to a "clear error" by the Pre-Trial Chamber, which has materially affected its decision. The Appellant has failed to identify such an error or errors and it has also failed to show how the purported errors would have materially affected the Pre-Trial Chamber's decision. Rather, the appellant simply repeats assertions (often of a very broad and purely speculative nature), which were ventilated and considered at first instance, without showing how those generalised assertions support a finding of unwillingness on the part of the Government within the correct meaning of article 17(2). Contrary to the Defence submissions, the Pre-Trial Chamber considered the substance of these assertions and did so within the parameters of the appropriate legal framework and against the evidence presented by the Government, as set out in its fully reasoned and reasonable decision. Each one of the purported errors identified by the Appellant will now be dealt with in turn.

(1) The Appellant has failed to show that substantial and compelling evidence was overlooked by the Chamber

86. Contrary to the Appellant's submissions, the Pre-Trial Chamber considered all the evidence placed before it by the parties, relevant to its assessment of Libya's willingness, as is clear from its précis of that evidence at pages 109 to 130 of its decision. Far from failing to give any weight to, or assess reasonably, each piece

¹²² The was set out by the Appeals Chamber with regard to the review of appeals judgments on interim release but it applies equally to purported errors in the appreciation of evidence in the determination of the admissibility of the case: ICC-01/04-01/10-283OA, para. 17.

of material identified by the Appellant at paragraph 96 of the Document Support of Appeal, the Chamber considered each of the matters raised by the Defence.

87. Furthermore, the Appellant makes inaccurate factual submissions and attempts to elevate inflammatory speculation to the level of “substantial and compelling” evidence. For example, the comment that Mr Al-Senussi “will be convicted and sentenced to death in proceedings that profess to be legitimate but which in reality fall well below any acceptable standard” is not supported by the material presented by the Appellant at first instance and simply unsustainable in the light of the evidence presented by the Libyan Government in the course of the proceedings at first instance both with regard to the first and second limbs of the admissibility assessment. No reasonable Pre-Trial Chamber could have adopted the approach to the evidence or the law advanced by the Appellant, which amounts at times to a presumption against admissibility by reason of the purported due process violations.

88. In addition, the reference to judges and prosecutors “including in Mr Al-Senussi’s case” being under threat and attack and a member of the prosecution team in Al-Senussi’s case being abducted, overstates the factual reality. The only submission of the Appellant that relates specifically to the case against Mr. Al-Senussi is the alleged “abduction” of Taha Bara.¹²³ Rather than being abducted or being under attack or threat by reason of his involvement in the Al-Senussi case (or, more generally, his position in the Attorney-General’s office), it appears that Mr. Bara was arrested along with Khoms Congressman Akram Al-Janin and the Investment Undersecretary at the Oil Ministry following a disturbance at a villa in Tripoli’s Zenata area.¹²⁴ Mr Bara has since been released.¹²⁵ It is entirely inappropriate for the Appellant to extrapolate from this incident that “it is

¹²³ Defence Response, para. 97.

¹²⁴ <http://www.libyaherald.com/2013/06/16/taha-bara-released/>

¹²⁵ <http://www.libyaherald.com/2013/06/16/taha-bara-released/>

inconceivable that any judges would be able to do anything other than convict and order Mr Al-Senussi's execution given the consequences for their own position and indeed their own safety and lives". To date, the key investigators, prosecutors and judges involved in the proceedings against Mr Al-Senussi have been able to continue their work without incident. To suggest that they will not be able to do anything other than convict and execute Mr Al-Senussi *by reason of* threats to them is entirely without foundation.

89. In any event, the Pre-Trial Chamber dealt with this issue expressly and concluded that it was unable to determine "whether there is any link with his involvement in the proceedings against Mr Al-Senussi" and further that "no conclusion can therefore be drawn from the alleged events, and neither the proposed interpretation of the Defence nor Libya's counter-reading of the same facts can be upheld on the information before the Chamber."¹²⁶ In the light of this conclusion, it cannot be said that the Chamber has failed to give this issue proper regard or that there is in fact "overwhelming evidence" of threats to judicial authorities, which has a direct bearing upon the case. Again, the Defence has failed to point to any error on the part of the Pre-Trial Chamber.

90. Similarly, the Appellant's submissions regarding the degree of influence of militia groups on the running of Al-Habda prison are wholly without merit, as addressed by the Government at first instance, and considered by the Pre-Trial Chamber.¹²⁷ The Pre-Trial Chamber gave proper consideration to this issue, including due consideration of the material provided by the Defence on an *ex parte* basis and reached a reasonable assessment of that evidence. Indeed, it seems that the very document provided by the Defence "made it clear" that proceedings against individuals being held at Al-Habda prison, including Mr.

¹²⁶ Impugned Decision, para. 275.

¹²⁷ Libya's Consolidated Reply, paras. 126-133; Libya's Response to Additional Submissions and Addendum, paras. 32-2; Admissibility Decision, paras. 264-5.

Al-Senussi had not been impeded or precluded by the alleged militia control.¹²⁸ Accordingly, the Appellant failed to “properly raise” this issue or show how the alleged lack of government control has impacted upon the proceedings relating to Mr. Al-Senussi. The Pre Trial Chamber’s conclusion on this issue was an entirely reasonable one in all the circumstances and the Appellant has failed to show any relevant error on the part of the Pre Trial Chamber.

91. The Appellant’s submissions regarding Mr Al-Senussi’s treatment in prison are equally speculative and no reasonable trier of fact could have found them established.¹²⁹ Further, the Appellant’s comments regarding the Pre-Trial Chamber’s reliance on Human Rights Watch’s report of its visit with Mr AL-Senussi are without merit. To imply that that Mr Al-Senussi may have been subjected to ill treatment given that HRW only reported what Mr Al-Senussi said “without commenting on whether they believed he was telling the whole truth or was able to do so given that he was in detention” is untenable. This submission ignores the reality that “Prison authorities permitted Human Rights Watch to interview Sanussi privately, with no prison staff or other officials in the room.”¹³⁰ The Appellant fails to establish any error on the part of the Pre-Trial Chamber.

92. In sum, the Appellant attempts to re-argue its case at first instance.. This includes frequent references to the “serious deficiencies in the national proceedings against Mr. Al-Senussi” without substantiating them in any way beyond repeating its submissions relating to Mr. Al-Senussi’s legal representation.¹³¹ The Appellant’s submissions evince a failure to appreciate the applicable legal framework and amount to an invitation to the Appeals Chamber to act in a role akin to that of a human rights’ review court, which is

¹²⁸ Admissibility Decision, para. 265.

¹²⁹ Appeal, page 43.

¹³⁰ <http://www.hrw.org/news/2013/04/17/libya-ensure-abdallah-sanussi-access-lawyer>

¹³¹ Appeal, page 46.

not permitted by the Statute. Moreover, the Appellant merely urges the Appeals Chamber to come to a different conclusion to that reached by the Pre-Trial Chamber and therefore fails to show that the conclusion could not have reasonably been reached from the evidence before it. The Pre-Trial Chamber's treatment of the material raised by the defence amounts to no more than a different appreciation of the facts as informed by the correct legal approach adopted by the Pre-Trial Chamber and, as such, does not give rise to an arguable ground of appeal. The submissions should therefore be dismissed.¹³²

(2) The Appellant fails to show any defects in the Chamber's legal and factual analysis of the evidence

93. The Appellant's submissions at paragraphs 99-103 that the Chamber "did not at any stage identify and consider in its Decision any of the standards of due process recognised under international law" are circular and, again, based on an incorrect understanding of the applicable law. The Government repeats its submissions above as to the correctness of the approach taken by the Pre-Trial Chamber and the Appellant's fundamental misunderstanding of the applicable legal framework and the proper role of the ICC. Furthermore, the Appellant fails to show any relevant error, which would warrant intervention by the Appeals Chamber.

(3) The Appellant's submissions regarding the significance of the progress of the proceedings and the hearing of 19 September 2013 are without foundation

94. The Appellant's submissions regarding the progress of the proceedings are repetitive and circular. Again, the Appellant's submission that the Chamber erred in placing "heavy reliance" on the progress of the proceedings reveals a misunderstanding of the applicable law. Further and alternatively, there is no basis to the contention that the Pre-Trial Chamber's consideration of the

¹³² ICC-01/04-01/10-283OA, para. 17.

progress in the proceedings amounts to a clear error of fact on the part of the Pre-Trial Chamber. Rather, the Pre-Trial Chamber reached an entirely reasonable conclusion regarding the significant, positive developments in the complex proceedings relating to Mr Al-Senussi and his 37 co-defendants.

95. Furthermore, the Appellant's contention that "all of the evidence about the hearing on 19 September 2013 consists of mere assertions by Libya" and that "there is no independent evidence to verify whether the proceedings were conducted "adequately"¹³³ is entirely without foundation. In its filing of 26 September 2013, the Government provided extracts from the Accusation Dossier as well as the minutes of the Accusation Chamber (translated as "Indictment Chamber") hearing held on 19 September 2013, and the note of a decision to allow defence teams to view the accusation file.¹³⁴ Moreover, the proceedings were held in front of members of the local and international press, who reported upon the substance and format of the proceedings.¹³⁵

96. Similarly, the Appellant's sweeping assertion that there is "compelling evidence which shows that the hearing was a complete shambles" is made without foundation and is misleading. The only material presented in support of this statement is one report relating principally to the alleged abduction of the nephew of the legal representative of Mr Saif Al-Islam Gaddafi, who was not present at the Court in Tripoli on the day of the hearing. There is nothing beyond mere suspicion, even on the part of the lawyer herself, that the alleged abduction was linked to her representation of Mr. Gaddafi.¹³⁶ With regard to the lawyers present in Tripoli, the report states that "a group of relatives of some of Gaddafi's victims attempted to attack one defence lawyer as he left a heavily

¹³³ Libya's Response to Defence Additional Submissions and Addendum,

¹³⁴ Libya's Response to Additional Submissions and Addendum, para. 7 and following.

¹³⁵ For example: <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/10319521/Saif-Gaddafi-resurfaces-as-Libyan-war-crimes-trial-begins.html>;

<http://www.theguardian.com/world/2013/sep/19/gaddafi-son-pm-trial>

¹³⁶ <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/10356314/Saif-Gaddafis-lawyer-concerned-for-her-safety-after-kidnap-of-nephew.html>

guarded court in Tripoli” and provides no further comment about the *attempted* attack. Indeed, it appears that the tight security measures set in place by the Government to ensure the protection of all participants in the proceedings were effective. The existence of protesters outside the Court on the day of the hearing was referred to in Libya’s filing on 29 September 2013.¹³⁷ Far from supporting any suggestion that the proceedings were a “shambles”, the existence of the protesters shows that the rule of law in Libya is such that these protesters could exercise their lawful right to protest outside the prison (objecting to the fact that the charges did not appear to address the alleged massacre at Abu-Salim in 1996).¹³⁸

(4) The Appellant’s submissions regarding treatment in detention and the alleged violation of Mr Al-Senussi’s due process rights are repetitive and without merit

97. The Appellant’s submissions at paragraphs 107-11 are repetitive and, once again, reflective of a misunderstanding of the applicable legal framework and the appropriate role for the Court. The Appellant fails to identify any relevant error of fact or law on the part of the Pre-Trial Chamber, which would warrant the Appeals Chamber overturning the Chamber’s conclusion that Libya is willing to prosecute Mr Al-Senussi. Rather, the submissions amount to a repetition of first instance arguments and generalised assertions regarding the fairness of the proceedings and the risks purportedly faced by Mr Al-Senussi.¹³⁹

98. In addition, the Appellant fails to provide any support for the contention that a higher level of scrutiny is required in cases involving the potential application of

¹³⁷ Response to Additional Submissions and Addendum, para. 33

¹³⁸ <http://www.libyaherald.com/2013/09/19/43193/#axzz2fu8YPfel>; <http://www.tripolipost.com/articledetail.asp?c=1&i=10652>; <http://uk.reuters.com/video/2013/09/19/a-day-of-reckoning-for-gaddafis-son-and?videoId=273820786&feedType=VideoRSS&feedName=MOSTPOPULAR&videoChannel=2603>; <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/10321188/Saif-Gaddafi-asks-for-trial-to-be-heard-in-Zintan-rather-than-Tripoli.html>

¹³⁹ E.g., – reference to “trumped up” proceedings against Al-Senussi’s daughter and her treatment post release and that this amounts to “clear evidence that Mr Al Senussi faced the same perilous dangers, and could never be released from prison.”

the death penalty beyond making that the blanket assertion that it does and that the Pre-Trial Chamber failed to do so. This is insufficient as a ground for appellate review. In any event, there is simply no legal basis for the Appellant's submission. As the Government submitted at first instance, the negotiating history shows that the Statute was intended to reflect differing legal cultures, including divergent views regarding penalties. This is reflected in article 80 of the Statute.¹⁴⁰ Again, the Court was not designed to be a human rights court with responsibility for harmonising standards and enforcing an agreed ideal that is confined to certain parts of the world. This is precisely what the Appellant proposes by suggesting that the Pre-Trial Chamber erred in not applying a higher level of scrutiny to its assessment of the admissibility of this case.¹⁴¹

(5) The Appellant has failed to show how the Pre-Trial Chamber erred with regard to the evidence before it concerning the alleged "unlawful rendition" of Mr Al-Senussi from Mauritania

99. The Appellant has failed to show that the Pre-Trial Chamber has erred in law or in fact with regard to its treatment of the material before it relating to Mr Al-Senussi's extradition from Mauritania. The Appellant provides no legal basis for the purported relevance of the lawfulness or otherwise of Mr Al-Senussi's extradition. Indeed, for the first time on appeal, it is suggested that its relevance relates to the assessment of willingness. Previously, the issue had been presented as being relevant to an assessment of Libya's "ability".¹⁴² Irrespective of how this issue is framed, the Government submits, as it has done so in previous filings,¹⁴³ that it is simply not relevant to the admissibility determination in any way.

¹⁴⁰ Carsten Stahn, "Libya, the International Criminal Court and Complementarity: A Test for 'Shared Responsibility'" (2012) JICJ 1page 22.

¹⁴¹ Libya's Consolidated Reply, para. 121

¹⁴² Defence Response to Admissibility Challenge, para. 71.

¹⁴³ ICC-01/11-01/11-310, 10 April 2013, para. 19.

100. With regard to the Appellant's reference to the parallel litigation relating to Libya's and Mauritania's alleged unlawful conduct, the Government notes the decision of the Pre-Trial Chamber on 13 November 2013, rejecting the Appellant's application for leave to appeal against the Pre-Trial Chamber's rejection of the application to refer Mauritania to the Security Council.¹⁴⁴

(6) Stability and security in Libya

101. The Appellant's submission that the Chamber failed to "give any weight to the real impediments created by the fragile state of security in Libya as it impacted directly on Mr Al-Senussi's case"¹⁴⁵ is not supported by the examples provided. The Appellant fails to identify any pertinent error of law or fact on the part of the Pre-Trial Chamber concerning its determination that Libya is able to carry out proceedings against Mr Al-Senussi. Accordingly, there is no basis for appellant interference with the Pre-Trial Chamber's determination that Libya is willing and able to carry out proceedings against Mr Al-Senussi.

(a) No error regarding Pre-Trial Chamber's consideration of government control over detention facilities

102. The Appellant's submissions regarding the alleged involvement of militia in the running of the prison do not rise above generalised and speculative assertions that the militia "may be able to influence the treatment of Mr. Al-Senussi and the conduct of his proceedings which are being held at the prison" and that "there is nothing to suggest that the militia are doing anything other than backing Mr Al-Senussi's prosecution so that he can be sentenced to death". Accordingly, any assertion that the Pre-Trial Chamber has "misappreciated" this

¹⁴⁴ ICC-01/11-01/11-477.

¹⁴⁵ Appeal, para. 123.

evidence such as to amount to a clear error of fact is unsustainable and must be rejected. Asserting simply that the mere presence of the militia and their purported influence “makes a mockery of fair and just proceedings” and “overshadows the pretence of Government control and normality” is not only inaccurate¹⁴⁶ but reveals the serious misunderstanding of the requirements of article 17 and the appellate jurisdiction, which permeates the Appellant’s submissions.

103. The Appellant’s submissions regarding the Pre-Trial Chamber’s assessment of material relating to control over other detention facilities fail to identify any error by the Pre-Trial Chamber in its consideration of Libya’s ability. The Pre-Trial Chamber gave proper consideration to the key differences between the Al-Senussi and Gaddafi cases and, in particular, gave proper regard to the substantial investigative material that was presented with regard to Mr Al-Senussi’s case. In these circumstances, it cannot possibly be said that the Chamber’s finding is “unsustainable”. In asking the Appeals Chamber to make such a finding, the Appellant is effectively attempting to re-litigate by inviting the court to consider the question of control of detention facilities in a vacuum, without giving any consideration as to how the question of control had any real, logistical affect on Libya’s ability to carry out the proceedings against Mr Al-Senussi. There is no basis for such an approach.

104. Rather, the approach taken by the Pre-Trial Chamber, which recognises that “the two limbs of the admissibility test, while distinct, are nonetheless intimately and inextricably linked”, allows for evidence in relation to one limb to support findings in relation to another in determining the actual reality of Libya’s ability to proceed against Mr Al-Senussi. This is an entirely reasonable approach, consistent with the text and object and purpose of article 17(3). Accordingly, the Appellant has failed to show how the Pre-Trial Chamber has

¹⁴⁶ Libya’s Consolidated Reply, paras. 130-132.

erred in any way in its consideration of this issue within the context of its determination of Libya's ability to conduct the proceedings.

(b) No error regarding the Pre-Trial Chamber's consideration of security for judicial authorities and organs or its consideration of witness protection

105. Similarly, the Appellant has failed to show any error in the Pre-Trial Chamber's consideration of the impact of security concerns on Libya's ability to carry out its proceedings either with regard to the impact upon judicial authorities or with regard to adequacy of witness protection measures. The Appellant relies exclusively upon the Pre-Trial Chamber's findings in the Gaddafi case to support its contention that the Pre-Trial Chamber has made an error in its determination of Libya's ability to carry out proceedings in relation to Mr Al-Senussi. Again, this completely ignores the Chamber's reasoned and rational approach to the question and its acknowledgement of the intimate link between its findings with regard to the first limb of the admissibility assessment and the progress made in the case against Mr Al-Senussi and the consideration of Libya's ability. The Pre-Trial Chamber's conclusions regarding the differences between the material presented in the *Gaddafi* case with regard to the first limb of the admissibility assessment provides an entirely reasonable justification for the distinction that the Chamber sought to draw with regard to Libya's satisfaction of the second limb in the *Al-Senussi* case.

106. As argued above, the Appellant's submissions regarding the "serious risk" to judges and judicial officials and the purported danger that judges "will feel unable independently to assess the evidence against Mr Al-Senussi" does not rise above the level of pure speculation.¹⁴⁷ Equally, the Government is unable to comment upon the Appellant's undefined assertions regarding the alleged risks posed to defence witnesses, which are apparently documented in an *ex*

¹⁴⁷ *Infra*, paras 87-91.

parte filing. However, the Government notes the Pre-Trial Chamber's findings regarding the investigative material provided by the Government includes exculpatory material.¹⁴⁸ This shows, contrary to the Appellant's approach, that the Pre-Trial Chamber carefully considered, weighed and distinguished all the relevant evidentiary material and correctly concluded that the investigation and prosecution of Mr Al-Senussi is entirely legitimate.

107. The Appellant provides no substantive legal or factual support for its submissions. The Pre-Trial Chamber was acutely aware of the security issues in Libya but nonetheless found, applying the correct legal principles, that Libya is able to carry out proceedings in relation to Mr Al-Senussi. This is clear from its detailed consideration of the evidence before it, as set out in paragraphs 272-281 and the Pre-Trial Chamber's view that "the existence of serious security concerns in Libya is an issue relevant to the final determination on Libya's ability to conduct its proceedings against Mr Al-Senussi" and that it "will therefore take this fact into account, together with all the other circumstances, in its final conclusion on the matter."¹⁴⁹

4. *Conclusion on Ground 1*

108. The Appellant has failed to demonstrate that the Chamber erred in fact or law in its determination of the impact of the absence of direct interactions between Mr Al-Senussi and his ICC counsel. The Appellant's account of the applicable legal framework conflates admissibility proceedings with criminal proceedings. In the absence of submissions or evidence to suggest otherwise, it was wholly reasonable for the Chamber to find "that the Defence's ability to raise certain factual matters *may* have been prejudiced by the absence of direct contacts with Mr. Al-Senussi", but that this did not result in the admissibility of

¹⁴⁸ Admissibility Decision, paras. 161 and 211.

¹⁴⁹ Admissibility Decision, para. 281.

the case before the ICC.¹⁵⁰ It is wholly misconceived to suggest that the Pre-Trial Chamber's entirely logical and reasonable conclusion was the result of biased deliberation.

109. The Appellant has also failed to demonstrate a factual or legal error that materially affected the Admissibility Decision in its analysis of the legal representation of Mr. Al-Senussi in Libya. It was entirely reasonable, and within the Pre-Trial Chamber's discretion to find that this issue "holds the potential to become a fatal obstacle to the progress of the case"¹⁵¹ but to decline to find irretrievable prejudice. Consonant with the applicable domestic and international law, the Chamber reasonably concluded that the critical issue was, not whether there had been delay in obtaining counsel for the accused but whether this situation persists throughout the whole proceedings and whether counsel was present at trial.¹⁵² The Chamber's approach to the question of prejudice was eminently reasonable. No reasonable tribunal could have found irretrievable prejudice on the basis alleged by the Defence, let alone then concluded that it was dispositive of the question of Libya's willingness or ability to try Mr Al-Senussi. This is equally true of the Pre-Trial Chamber's analysis of the issues raised as alleged errors by the Appellant concerning due process and stability in Libya more generally.

110. Finally, the Chamber properly identified its task in evaluating the proceedings being conducted by Libya as examining "factual circumstances with a view to ultimately discerning the State's intent as concerns its ongoing domestic proceedings against the specific individual".¹⁵³ The conclusion reached by the Pre-Trial Chamber was that Libya intended to bring Mr. Al-Senussi to justice, albeit in difficult circumstances. In doing so, the Pre-Trial Chamber

¹⁵⁰ Admissibility Decision, paras. 29, 219 [emphasis added].

¹⁵¹ Admissibility Decision, para. 307.

¹⁵² Admissibility Decision, para. 232, citing Libya submissions of 26 September 2013, para. 28.

¹⁵³ Admissibility Decision, para. 223.

permitted Libya a margin of appreciation, which the admissibility provisions permit, and did not import into its assessment a due process type analysis of the kind the Appellant suggests ought to override the threshold tests contained in Article 17. The Appellant has failed to show that the Pre-Trial Chamber was wrong in law in approaching its task in this way and/or that it committed any clear errors of fact that would warrant appellate interference. The Chamber approached its assessment of the material placed before it carefully and thoroughly and the purported factual errors identified by the Appellant amount to no more than the expression of a difference of opinion regarding the conclusions to be drawn from the primary facts. As such, the Appeals Chamber should defer to the Pre-Trial Chamber's factual conclusions. Accordingly, this ground of appeal should be rejected in its entirety.

Ground 2: New evidence

111. The Appellant seeks admission of new evidence concerning Libya's compliance with its obligations under international human rights law.¹⁵⁴

112. Whilst the Libyan Government appreciates that, *in principle*, it may on occasion be necessary to file material *ex parte*, it is deeply regrettable that this should arise in the adjudication of an admissibility challenge in which the right of participation of the state is of central importance given that it is the "triggering force and main actor in [admissibility] proceedings".¹⁵⁵ Not only does the *ex parte* status of the material prevent the Libyan Government from making any submissions on its substance, it also – of course – precludes any chance of addressing the issue of whether the material should be admitted before the Appeals Chamber in the first place. It is vital, therefore, that the Libyan Government's submissions be understood in this context. It would be entirely unfair to allow new evidence to play any part in overturning the

¹⁵⁴ Appeal, paras. 137.

¹⁵⁵ ICC-01/11-01/11-191, para. 8.

Admissibility Decision or referring it the Pre-Trial Chamber, as requested by the Defence, without disclosure of the evidence to the Libyan government and the other parties in the proceedings. The Chamber will also, no doubt, be mindful of both the impact upon perceptions of the Court in Libya, and the undesirable precedent set, by allowing admission of secret evidence for consideration in what may be perceived as the international community's judgment of the progress of post-revolutionary Libya.

113. Notwithstanding any other limitations that ought to be placed upon the admission of evidence in this way, clearly it can be admitted only if it is relevant and if the Appellant demonstrates due diligence.

114. The Appellant urges the Appeals Chamber to be "guided by the jurisprudence of the *ad hoc* International Tribunals" on this issue.¹⁵⁶ At a minimum therefore, the Appeals Chamber should consider whether the party tendering the evidence has shown that it sought to make appropriate use of all mechanisms of protection and compulsion, available under the Statute and the Rules, to bring evidence before the Pre-Trial Chamber. If the evidence was available at the first instance, or could have been discovered through the exercise of due diligence, the Appeals Chamber may still allow it to be admitted on appeal providing the moving party establishes that its exclusion *would* amount to a miscarriage of justice.¹⁵⁷

115. Therefore, it is plainly insufficient to vaguely assert that, the evidence "was not previously available" or that "the information only became available

¹⁵⁶ Appeal, para, 140.

¹⁵⁷ *Prosecutor v. Haradinaj et al*, "Decision on Lahi Brahima's Request to Present Additional Evidence Under Rule 115", para. 11, 3 March 2006, IT-04-84-AR65.2; *Prosecutor v. Blaškić*, "Decision on Evidence, p.3, 31 October 2003, No. IT-95-14-A, p.3; *Prosecutor v. Radislav Krstić*, "Decision on Applications for Admission of Additional Evidence on Appeal", p.4; 5 August 2003, Case No. IT-98-33-A.

after the Admissibility Decision”,¹⁵⁸ or that “it has been extremely difficult to obtain certain [*sic.*] of the new evidence due to fears expressed by persons in Libya for their safety” or “other practical impediments...due to communication problems”¹⁵⁹ especially in light of the suggestion that “it is vital that this new evidence is taken into account” in determining both willingness and ability.¹⁶⁰ Regulation 62(10)(b) requires the Appellant to demonstrate “the reasons, if relevant, why the evidence was not adduced” before the Pre-Trial Chamber. This requires more than general assertions about security concerns.

116. In sum, the Defence’s attempts to reduce the requirements under Regulation 62(1)(a) and (b) to a mere assertion of relevance threaten due process. On this basis alone, the Appellant’s request for new material should be dismissed.

117. Further, the requirement that new evidence be relevant to the matters in issue before the Appeals Chamber must be understood on the basis of the *corrective* nature of the Appeals Chamber’s jurisdiction.¹⁶¹ As noted above, the Appeals Chamber’s task is to determine whether the Admissibility Decision exhibits any error in its analysis of the law and facts – not to make another decision on the same issue, but at a later date. Therefore the scope of the appeal is restricted to assessment *as if at the time of the Pre-Trial’s Chamber’s decision*. If the Appeals Chamber were to approach its task as a general update on the same topic adjudicated upon by the Pre-Trial Chamber, the effect would be to displace the first instance jurisdiction of the Pre-Trial Chamber – and, in effect, to circumvent any appellate review.

118. For this very reason, the Libyan Government has not sought to adduce new material which would be relevant by way of update to the topics that the

¹⁵⁸ Appeal, para. 137.

¹⁵⁹ Appeal, para. 155.

¹⁶⁰ *Ibid.*

¹⁶¹ Decision on the “Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber’s Decision on Admissibility” ICC-01/09-01/11-234, para. 11.

Admissibility Decision addressed, or which are relevant to admissibility more generally. Such evidence could include, for example, considerable progress in securing legal representation for Mr. Al-Senussi in the domestic proceedings. Whilst it is submitted that admission as evidence of the material now proposed by the Defence would impermissibly revise and expand the nature of appellate jurisdiction at the ICC, if the Chamber were to adopt such a course of action, fairness would require that the Libyan Government be given the opportunity to furnish the Appeals Chamber with further evidence.

119. Notwithstanding this, the Appellant is vague as to the relevance of the material of which it seeks admission, asserting that the material concerns the period “before and during the accusation stage of the case”.¹⁶² The fact that the material relates to “before [...] the accusation stage” says nothing about its relevance. The key date, in this regard, is not the commencement of the accusation stage in Libya but rather, as noted above, the date of the Admissibility Decision. The Appellant has, therefore, failed to plead the relevance of the material of which it seeks admission. This alone means that the request for admission of new evidence must be rejected.

120. Still less has the Defence demonstrated how the material could or would have affected the Admissibility Decision. The claim by the Appellant concerning alleged mistreatment in detention – notwithstanding the absence of evidentiary support – does not automatically equate to having “a decisive impact on the outcome of the decision”.¹⁶³ The Appellant fails to articulate the nature of the mistreatment, those responsible or any other issue that might show it is true, let alone allow the Libyan government to take action to prevent it to secure Mr. Al-Senussi’s health and rights, alleged to be critically undermined.

121. The Pre-Trial Chamber’s analysis of the considerable amount of evidence

¹⁶² Appeal, para. 137.

¹⁶³ Appeal, para. 158.

before it on this issue has been addressed above. As argued, the Pre-Trial Chamber clearly considered all of the evidence before it by the parties.¹⁶⁴ Even if the material that the Appellant now submits were relevant, it has given no indication whatsoever of how it relates to the comprehensive analysis conducted by the Pre-Trial Chamber or why it would have impacted upon it to a sufficient extent, given the clear evidentiary support for the Pre-Trial Chamber's decision.

Ground 3: The 'same case'

122. The Appellant asserts that the Chamber erred in concluding that Libya was investigating the same person for substantially the same conduct as in the case before the ICC for two reasons:

- a. It is alleged that the Chamber acted improperly by relying upon redacted witness statements and interviews supplied by Libya to discern the contours of the case against Mr Al-Senussi.¹⁶⁵
- b. It is suggested that the Chamber erred in finding that the evidence showed that Libya is investigating the same conduct as that in the ICC case, in particular in respect of the crime of persecution as a crime against humanity.¹⁶⁶

123. Libya submits that this ground of appeal should be rejected summarily due to inadequate pleading. Alternatively, this ground of appeal should be rejected on the merits as the Appellant has failed to demonstrate that the Chamber erred in fact or law, let alone that any purported error materially impacted the Impugned Decision. It was entirely reasonable for the Chamber to place reliance on the partially redacted versions of witness statements submitted by Libya in determining whether the 'same case' was under investigation in Libya and at the ICC. Likewise, the Chamber's affirmative conclusion on this

¹⁶⁴ See, for example, Admissibility Decision, pp. 109-130.

¹⁶⁵ Appeal, para. 162.

¹⁶⁶ Appeal, para. 162.

issue was wholly reasonable in light of the array of evidence presented by Libya setting out the contours of its investigation and the close correlation between the domestic and ICC investigations (including in relation to the crime of persecution).

1. The Appellant failed to identify the nature of the Pre-Trial Chamber's purported errors

124. At the outset, it is unclear whether the Appellant alleges an error of fact, law or procedure in either of its two sub-grounds on the 'same case' issue. While the heading to Ground 3 labels the error as being one "in law and fact", nowhere in the Appellant's submissions in support of this ground of appeal is there any attempt to identify whether or not an error of law, an error of fact or a procedural error has occurred. As the Appellant has failed to particularise whether this ground of appeal is said to be based on an erroneous interpretation of law, a patently incorrect conclusion of fact or a decision so unfair or unreasonable so as to constitute an abuse of discretion, this ground of appeal contains no submissions as to whether the test for any of these different types of errors has been met. This ground of appeal should therefore be summarily dismissed due to inadequate pleading.

125. If the Appeals Chamber nevertheless considers this ground, it should be dismissed as lacking in merit for the following reasons.

2. The Pre-Trial Chamber's reliance upon redacted statements was entirely appropriate

a) The Pre-Trial Chamber did not rely "almost exclusively" on redacted statements in any event

126. The Appellant argues that the redacted statements served as the "primary

basis” for the Chamber distinguishing its finding with respect to the ‘same case’ in the Al-Senussi proceedings from that in the Gaddafi proceedings.¹⁶⁷ It asserts that the Chamber relied “almost exclusively” on certain of the redacted witness statements (in particular those at Annexes 8, 10, 11, 12 and 16 which are the statements of ‘insider’ witnesses) and rejected “much of the other evidence submitted by Libya which had also been relied on by Libya in Saif Al-Islam Gaddafi’s case¹⁶⁸” in reaching a conclusion on the first limb of the admissibility assessment.

127. Even this preliminary submission, which serves as the foundation for the Appellant’s substantive complaint as to the impropriety of reliance on redacted witness statements, is incorrect and misleading. A careful reading of the Admissibility Decision makes clear that the Chamber did not rely almost exclusively on redacted statements when determining that Libya is investigating the same case as that before the ICC. Rather, the Chamber carefully weighed all of the evidence presented to it by Libya and provided detailed reasons – running to 88 paragraphs – giving reasons for its evaluation of each piece of evidence¹⁶⁹ and its synthesis of all the materials taken together when deciding on the ‘same case’ issue.¹⁷⁰ The Chamber divided up the array of evidential materials into three categories for analysis: (i) documents prepared by the Libyan authorities for the specific purpose of substantiating the Admissibility Challenge in the proceedings before the Court,¹⁷¹ (ii) items of evidence collected by the judicial authorities as part of their domestic investigations,¹⁷² and (iii) other materials not falling within the two previous categories.¹⁷³ The second category of documents was further sub-divided into witness statements,¹⁷⁴ flight

¹⁶⁷ Appeal, para. 164.

¹⁶⁸ Appeal, para. 164.

¹⁶⁹ Admissibility Decision, paras. 83 – 157.

¹⁷⁰ Admissibility Decision, paras. 158 – 168.

¹⁷¹ Admissibility Decision, paras. 83 – 100.

¹⁷² Admissibility Decision, paras. 100 – 148.

¹⁷³ Admissibility Decision, paras. 149 – 157.

¹⁷⁴ Admissibility Decision, 107-135.

documents,¹⁷⁵ medical documents,¹⁷⁶ written orders¹⁷⁷ and intercepts.¹⁷⁸

128. Quite apart from the statements, the Pre-Trial Chamber took into account, and assigned evidential weight to, an array of different materials shedding light on the scope and subject matter of Libya's proceedings against Mr Al-Senussi. These included:

- a. letters to the ICC Focal Point, Mr El-Gehani and a transcript of a speech delivered by Mr Al-Senussi in Benghazi in the first days of demonstrations in which Mr Al-Senussi called on his followers "to be ready to destroy these filthy groups altogether" (e.g. Annex 4 to the Admissibility Challenge);¹⁷⁹
- b. medical reports showing the infliction of gunshot wounds to demonstrators in February 2011 in Benghazi (eg. Annexes 18, 25 and 27 to the Admissibility Challenge);¹⁸⁰
- c. written orders by Mr Al-Senussi requesting weapons and ammunition for the military intelligence department in Libya during the 2011 revolution (eg. Annex 19 to the Admissibility Challenge);¹⁸¹
- d. a decision by the Attorney General of 1 May 2011 to progress the investigation of crimes by Gaddafi battalions against civilian demonstrators on 18 February 2011 (eg. Annex 7 to the Admissibility Challenge);¹⁸² and
- e. the minutes of the 19 September 2013 Accusation Chamber hearing showing the progress of the domestic proceedings against Mr Al-Senussi (eg. Annexes A and B to Libya's Final Submissions).¹⁸³

¹⁷⁵ Admissibility Decision, 137-138.

¹⁷⁶ Admissibility Decision, paras. 139-143.

¹⁷⁷ Admissibility Decision, paras. 144-145.

¹⁷⁸ Admissibility Decision, paras. 146-148.

¹⁷⁹ Admissibility Decision, para. 98.

¹⁸⁰ Admissibility Decision, paras. 141-143.

¹⁸¹ Admissibility Decision, paras. 144-146.

¹⁸² Admissibility Decision, para. 154.

¹⁸³ Admissibility Decision, paras. 156-157.

129. Indeed, apart from the redacted statements, the Pre-Trial Chamber also attributed evidential weight to other documentary materials which were acknowledged in both the Al-Senussi and the Gaddafi admissibility proceedings as being relevant to the scope and scale of the case under investigation in Libya such as:

- a. flight documents showing flights operating in February 2011 in Libya carrying armed and uniformed individuals and weapons and showing the mobilization of militias and equipment by air (eg. Annexes 5, 6 and 7 to Libya's submissions of 23 January 2013);¹⁸⁴
- b. transcripts of the intercepts of a collection of telephone communications between Mr Gaddafi and Al-Tayeb Al-Safi and Al-Baghdadi Al-Mahmoudi in March 2011 dealing with the activities and roles of members of the former Gaddafi regime as part of the repression of the civilian demonstrations, including Mr Al-Senussi's expected presence at a meeting where "the situation will be assessed and [Mr Gaddafi] will be given the solution" (eg. Annex 17 to Libya's Submissions of 23 January 2013);¹⁸⁵
- c. a Memorandum by the Prosecutor General dated 13 January 2013 showing that crimes were committed by members of the Gaddafi regime as part of a "systematic general policy" (eg. Annex 11 to Libya's Submissions of 23 January 2013).¹⁸⁶

130. It is therefore clear that, even setting aside all of the witness statements and witness interviews, the Pre-Trial Chamber's views as to the scope and scale of the domestic investigation took into account at least 13 other individual pieces of evidence submitted by Libya.¹⁸⁷ Moreover, the Chamber took the time and

¹⁸⁴ Admissibility Decision, paras. 137-138.

¹⁸⁵ Admissibility Decision, paras. 146-148.

¹⁸⁶ Admissibility Decision, para. 151-152.

¹⁸⁷ Eg. Annexes 4, 7, 18, 19, 25, 27 to the Admissibility Challenge; Annexes A & B Libya's Final Submissions; and Annexes 5, 6, 7, 11 and 17 to 23 January 2013 submissions.

trouble to state explicitly that, although “separate analysis of each discrete item of evidence” was included therein, and except for those pieces of evidence “deemed irrelevant or lacking any probative value”, the Chamber made its determination “on the basis of the entirety of the evidence presented, considered as a whole”.¹⁸⁸ There is therefore simply no basis for asserting that the redacted statements formed the “almost exclusive” or “primary basis” for the Court’s reasoned decision on the first limb of the admissibility assessment.

b) To the extent that the Pre-Trial Chamber did rely on redacted statements, this reliance was fair and appropriate

131. The Appellant complains that the Chamber’s reliance on redacted statements was “grossly unfair” because “without having the names of the witnesses, the Defence could not make proper inquiries about the legitimacy of the statements”.¹⁸⁹ This inability to conduct “proper and meaningful investigations” of the statements (including by taking instructions from Mr Al-Senussi on them), is said to run the risk of the evidence being “a complete fabrication [...] such evidence could plainly not be relied on to find the case inadmissible”.¹⁹⁰

132. The Appellant’s argument is misleading and demonstrates a wholesale misunderstanding of the admissibility assessment. First, the only details that were redacted from the witness statements were the names and other information which could be used to identify the witness. One can see from a cursory review of the redacted statements that in fact only a very small amount of information has been redacted. This is because the Libyan Government, in the interests of maximum disclosure to the defence, sought to limit its redactions to the greatest extent possible while still maintaining the security of the witnesses

¹⁸⁸ Admissibility Decision, para. 81.

¹⁸⁹ Appeal, para. 165.

¹⁹⁰ Appeal, paras. 165-166.

who have assisted its investigation. The Appellant fails to show that the Pre-Trial Chamber's conclusion that: the redactions were "proportionate" as they do "not affect the comprehension of the material at issues and, therefore, the ability of the parties and participants to provide meaningful observations on the Admissibility Challenge" was an incorrect assessment of the import of the redactions or the actual role of the parties with regard to their analysis of the contents of the statements.¹⁹¹ In short, there is no basis at all for the suggestion that the limited identifying redactions could adversely impact the reliability of the statements such that they could be said to be a complete fabrication or that the Appellant was deprived of material relevant to its assessment of the Admissibility Challenge.

133. Second, the Defence attempts, by way of appeal, to transform admissibility proceedings into a criminal trial, scrutinizing the reliability and credibility of each and every witness testimony. However, even if there were particular concerns as to the reliability of a particular statement, such issues are matters which must be judicially determined during the actual trial (or accusation) phase of the proceedings. They do not impinge upon the question of whether or not the domestic investigation relates to the same case as that before the ICC (i.e. the first limb of the admissibility test). Nor do they relate to the willingness or ability of a State for the purposes of the second limb of the complementarity assessment. The Pre-Trial Chamber was entirely right to observe in this regard in the Gaddafi Admissibility Decision that:

Indeed, the Chamber is not called to determine whether such evidence is strong enough to establish the criminal responsibility of Mr Gaddafi but, instead, whether Libya is taking steps to investigate Mr Gaddafi's responsibility in relation to the same case. The Chamber's finding as to the latter would not be

¹⁹¹ Admissibility Decision, para. 104.

*negated by the fact that, upon scrutiny, the evidence may be insufficient to support a conviction by the domestic authorities.*¹⁹²

134. The Appellant also asserts that the Chamber acted improperly in relying upon redacted summaries as there were not “sufficient and compelling reasons to withhold this information from the Defence”¹⁹³ particularly given that the proceedings have now reached the accusation stage. The security situation in Libya is well known and has been dealt with in detailed submissions on a number of occasions by the Government and the Defence as well as by the Pre-Trial Chamber in the Impugned Decision. As confidentiality is the main form of protection for witnesses during the investigative phase of proceedings in Libya, the Chamber’s rulings that redactions of the identities of witnesses is the “least intrusive measure that can be taken to mitigate the risk” to witness safety identified by the Government and that “the national authorities are best placed to assess whether and what type of protective measures are required in the context of their own domestic investigations” were appropriate and reasonable.¹⁹⁴ The defence team for Mr Al-Senussi has never sought to challenge the applicability of this finding that identifying features of witnesses are redacted at any stage during the admissibility proceedings pertaining to Mr Al-Senussi. In these circumstances, the Appellant should be precluded from raising the issue on appeal.

135. The Appellant finally suggests that even though the Chamber expressly noted that it based its findings only on those parts of the statements that were unredacted, the Chamber acted improperly as the Defence was denied the opportunity of reading the statements in full and this made “certain of the allegations in the statements” “difficult to follow” as it is not clear which part of

¹⁹² Gaddafi Admissibility Decision, para. 122.

¹⁹³ Appeal, para. 167.

¹⁹⁴ Decision on Libya’s Proposed Redactions, 7 February 2013, ICC-01/11-01/11-271-Red, para. 12.

a partially redacted page the Chamber is referring to in its findings.¹⁹⁵ This argument is wholly without merit. The Chamber was crystal clear in the Impugned Decision that it “exclusively considered the items of evidence relied upon by Libya in the version that was made available to the defence of Mr Al-Senussi, the Prosecutor and the OPCV” and that “any information that was submitted by Libya only on an *ex parte* basis has been disregarded by the Chamber”.¹⁹⁶ Where a partially redacted page is referred to in the Impugned Decision, it is only the un-redacted part of that page which is relied upon by the Chamber.

136. The Pre-Trial Chamber was plainly correct when it concluded that no possible prejudice to the Defence could arise from this course of action by a professional bench of judges. Indeed, it is noteworthy that the Defence did not complain of an inability to comprehend some of the allegations made in the redacted statements in its response to the Admissibility Challenge filed with the Pre-Trial Chamber.¹⁹⁷ This argument is made for the first time on appeal and should be rejected for that reason alone.

137. The national proceedings did progress to the Accusation Stage a few days prior to the Chamber’s decision on admissibility. As a result, the Government was in the process of having the Accusation Chamber dossier translated in order that it be provided to the Court (and the Defence) in unredacted form at the time that the admissibility decision was handed down.¹⁹⁸ Consequently, the Chamber did not take into account the redacted material and it cannot be said that any prejudice arose to the defence from not having the opportunity to make submissions on the unredacted statements. The Appellant’s arguments are

¹⁹⁵ Appeal, para. 168.

¹⁹⁶ Admissibility Decision, para. 105.

¹⁹⁷ See: Al-Senussi Response to Libyan Admissibility Challenge, 14 June 2013, ICC-01/11-01/11-356, paras. 41, 47-51.

¹⁹⁸ ICC-01/11-01/11-455, paras. 4, 6-7.

therefore without merit and do not justify any appellate intervention.

3. *The Trial Chamber's finding that Libya was investigating the same conduct as that under investigation before the ICC was wholly reasonable in light of the evidence*

a) **The Trial Chamber adopted a consistent approach to that applied in the Gaddafi Admissibility proceedings**

138. The Appellant argues that the Pre-Trial Chamber fell into error by departing from its findings in the Gaddafi admissibility decision where it had held that there were only discrete aspects of the evidence presented which related to the conduct of Mr Gaddafi as alleged before the ICC. These aspects included “instances of mobilization of militias and equipment by air, the assembly and mobilization of military forces at Abraq airport, certain events in Benghazi on 17 February 2011 and the arrest of journalists and activists”.¹⁹⁹ The Appellant argues that as the Chamber had stated that there was overlapping evidence in both cases and because, in the Appellant’s view, the alleged conduct in the two cases “in essence” is the same in that it related to crimes against civilian demonstrators “across Libya, including in Benghazi” in February 2011, there is no basis for a different finding as to the ‘same case’ being under investigation in the Al-Senussi proceedings.²⁰⁰ In the Appellant’s view, “the case before the ICC [in both proceedings] clearly involves conduct and incidents that are spread across the whole country, and thus the Libyan domestic proceedings cannot be said to cover the ‘same case’ [in the Al-Senussi proceedings] if Libya’s evidence is limited to certain locations, mainly in Benghazi”.²⁰¹

139. This is an extraordinary argument which reveals a misunderstanding of the proper test for ‘same case’, and which misconstrues the contents of the

¹⁹⁹ Appeal, para. 173.

²⁰⁰ Appeal, paras. 173-175.

²⁰¹ Appeal, para. 176.

Arrest Warrant against Mr Al-Senussi. It invites the Appeals Chamber to turn complementarity on its head by holding a sovereign State to an even higher threshold of matching factual ‘incidents’ and ‘events’ than those particularized in the Article 58 decision (said to constitute the acts for which the suspect bears individual criminal responsibility). Instead of using the ‘incidents’ and ‘events’ outlined in the Article 58 Decision in respect of a particular suspect as a “relevant indicator that the case subject to said proceedings is indeed the same as the one before the Court” (as the Pre-Trial Chamber has held),²⁰² the Appellant suggests that the Pre-Trial Chamber should instead require the State to prove the relevant conduct as outlined in the Arrest Warrant in respect of *all* co-suspects in challenging admissibility for a particular suspect. This is nonsensical and runs counter to the object and purpose of the admissibility provisions and the overall statutory regime.

140. The Chamber’s approach to this issue is the only reasonable one to take. It correctly found that:

- a. The first limb of the admissibility assessment requires that the domestic case match “the person’s alleged criminal responsibility for the conduct that is the subject of the criminal proceedings against him or her before the Court”;²⁰³
- b. Cases “differ significantly in the description of the factual parameters of the conduct alleged in the proceedings against each individual suspect or accused ... different cases cannot be considered to be necessarily equal in terms of how broad or narrow the alleged conduct is construed”;²⁰⁴
- c. “what is in all cases required at every phase of the proceedings before the Court is that the alleged criminal conduct be sufficiently described with respect to precise temporal, geographic and

²⁰² Admissibility Decision, para. 79.

²⁰³ Admissibility Decision, para. 74.

²⁰⁴ Admissibility Decision, para. 75.

material parameters, but not that such conduct be invariably composed of one or more ‘incidents’ of a pre-determined breadth”;²⁰⁵

- d. The “‘incidents’ and ‘events’ [in the Article 58 Decision] do not represent unique manifestations of Mr Al-Senussi’s criminal conduct, but rather are illustrative and non-exhaustive samples of discrete criminal acts that substantiate the evidentiary threshold of ‘reasonable grounds to believe’ that Mr Al-Senussi is criminally responsible for the direct and indirect commission of the crimes of murder and persecution perpetrated against civilian demonstrators and political dissidents to the Gaddafi regime in Benghazi from 15 until at least 20 February 2011”;²⁰⁶
- e. Mr Al-Senussi’s alleged criminal conduct as described in the Warrant of Arrest has confined temporal [crimes allegedly committed during the repression of the demonstrations in Benghazi that took place from 15 February 2011 until at least 20 February 2011], geographic [Crimes allegedly committed in Benghazi, Libya], and material [Killings and inhumane acts depriving the civilian population of its fundamental rights on political grounds, allegedly committed by Mr Al-Senussi, directly or through the Security Forces, against real or perceived political dissidents to the Gaddafi regime as part of a State policy to repress, by any means, the revolution against the Gaddafi regime] parameters”.²⁰⁷

141. There is simply no rational basis for these findings to be overturned in favour of a test which requires a sovereign state to not only investigate a suspect for the same conduct for which that suspect is being investigated at the ICC but

²⁰⁵ Admissibility Decision, para. 75.

²⁰⁶ Admissibility Decision, para. 76.

²⁰⁷ Admissibility Decision, para. 77.

also to investigate that suspect for the same conduct for which his co-suspects may be under investigation at the ICC. The Arrest Warrant in Mr Al-Senussi's case is very clear – he is being investigated for criminal acts taking place in Benghazi from 15 to 20 February 2011,²⁰⁸ not the criminal acts taking place across Libya from 15 to 28 February 2011 which pertain to Mr Gaddafi only.

142. There was an abundance of material before the Court upon which the Pre-Trial Chamber was able to properly conclude that the Libyan investigation matched the ICC investigation as set out in the Arrest Warrant pertaining to Mr Al-Senussi. This material included not only the 13 individual documentary materials discussed above in sub-ground (i)²⁰⁹ but also at least 18 detailed and probative redacted witness statements attesting to these crimes and Mr Al-Senussi's part in them which the Pre-Trial Chamber reasonably attributed weight to in its admissibility determination.²¹⁰

b) The Trial Chamber's findings in relation to persecution were correct

143. The Appellant argues that Pre-Trial Chamber erred in not finding that conduct underlying persecution was not able to form the basis of any charges against Mr Al-Senussi under national law.²¹¹ In the Appellant's view, it is not sufficient that Libyan law allows for the fact that the crimes were inflicted on civilians because of their political opposition to Gaddafi's regime to be taken into account during the sentencing stage in Libya.²¹² It asserts that the Pre-Trial Chamber's finding means that "Libya could, for example, charge Mr Al-Senussi with the murder of one person who was in Benghazi on 17 February 2011 and

²⁰⁸ Al-Senussi Arrest Warrant, pages 4-6.

²⁰⁹ Eg. Annexes 4, 7, 18, 19, 25, 27 to the Admissibility Challenge; Annexes A & B Libya's Final Submissions; and Annexes 5, 6, 7, 11 and 17 to 23 January 2013 submissions.

²¹⁰ Admissibility Decision, paras. 158-166. See for example, Annexes 16 to 23 January 2013 submissions; Annexes 5, 6, 8, 9, 10, 11, 12, 14, 15, 16, 17, 20, 21, 22, 23, 24, 26 to Admissibility Challenge.

²¹¹ Appeal, paras. 177-178.

²¹² Appeal, paras., 177, 179.

assert that a trial on the basis of this single charge was sufficient to cover the ICC's charges for murder as a crime against humanity".²¹³ Finally, the Appellant argues that Articles 27 and 28 of the Libyan Criminal Code do "not refer to any aggravating factors, let alone include any reference to discrimination on political, racial, national, ethnic, cultural, religious or gender grounds" (i.e. the defining feature of the crime against humanity of persecution).²¹⁴

144. These arguments fail to take into account the fundamental point that the drafters of the Rome Statute deliberately chose not to distinguish between ordinary crimes and international crimes. Indeed, as the Pre-Trial Chamber in the Gaddafi admissibility proceedings recognized,²¹⁵ article 20(3) of the Statute allows for a successful *ne bis in idem* challenge whenever a person "has been tried by another court for conduct also proscribed by article 6, 7, 8 or 8 bis". This provision therefore may be contrasted against the corresponding articles in the ICTY and ICTR Statutes,²¹⁶ which expressly permit those tribunals to try a person for international crimes in case they have only been convicted of ordinary domestic crimes at the national level. Accordingly, the drafters of the Rome Statute carefully considered the matter and expressly determined²¹⁷ that the ICC was not to require the same legal characterisation of the crime in order to satisfy the *ne bis in idem* principle. The focus is instead on the alleged conduct for which a person has been tried in a domestic court rather than its legal characterization.

145. Following this approach, the Pre-Trial Chamber correctly found in the Al-Senussi admissibility proceedings that the fact that the crimes proposed targeted a particular group of individuals by reason of the identity of the group:

²¹³ Appeal, para. 182.

²¹⁴ Appeal, para. 183.

²¹⁵ Gaddafi Admissibility Challenge, paras. 85-88.

²¹⁶ Article 10 (2) of the Statute of the ICTY and article 9 (2) of the Statute of the ICTR.

²¹⁷ See discussion of *travaux préparatoires* in Gaddafi Admissibility Decision, para. 87.

*is an aggravating factor which is taken into account in sentencing under articles 27 and 28 of the Libyan Criminal Code” [and accordingly,] ... the national provisions with which Libya contemplates charging Mr Al-Senussi, together with the provisions under articles 27 and 28 of the Libyan Criminal Code, sufficiently capture Mr Al-Senussi’s commission, between 15 and at least 20 February 2011 in Benghazi, of murders and inhuman acts severely depriving civilians of fundamental rights contrary to international law, by reason of their political identity, as alleged in the proceedings before the Court.*²¹⁸

146. The broad discretion which the Judge enjoys in Libya pursuant to articles 27 and 28 of the Criminal Code enable the judge to order the penalty he or she deems appropriate depending “on the gravity of the crime and the tendency of the criminal to commit a crime”.²¹⁹ Under article 28 of the Libyan Criminal Code, the “gravity” of the crime may be established by the “nature of the act and the means used to commit” it – i.e. “its *purpose*, place of occurrence, time, and *all the related circumstances; the gravity of damage or danger resulting from the act and the extent of criminal intent...*”). Likewise, the tendency of a criminal to commit the crime may be indicated by the “motive” for the crime, the “ethics” of the criminal, the behavior of the criminal at the time of the offence” and the “personal, family and social conditions” of the criminal. A plain reading of these broad factors which may be taken into account by the sentencing judge indicates that they would clearly incorporate discrimination on political, racial, national, ethnic, cultural, religious or gender grounds (i.e. the features of persecution as an international crime) as being an aggravating feature when determining sentence.

147. As noted, the Pre-trial Chamber’s focus on conduct rather than legal characterisation is consistent with the *travaux préparatoires* to the Rome Statute,

²¹⁸ Admissibility Decision, para. 166.

²¹⁹ See Annex A to ICC-01/11-01/11-273 for translations of Articles 27 and 28 of the Libyan Criminal Code.

the deference to sovereign states' legal systems intended by the concept of complementarity. It is also consistent with the view of critical scholars who put forward a sentence based theory of complementarity.²²⁰ It also coincides with the positive complementarity approach to admissibility properly recognised by the Pre-Trial Chamber in its conclusion to its Al-Senussi Admissibility Decision whereby pursuant to article 19(10) of the Statute the Prosecutor may request a review of a decision of inadmissibility in the event that new facts arisen which negate the basis on which the case was previously found inadmissible. Using this model, there is no basis whatsoever for concern that Libya could "charge Mr Al-Senussi with the murder of one person who was in Benghazi on 17 February 2011 and assert that a trial on the basis of this single charge was sufficient to cover the ICC's charges for murder as a crime against humanity".²²¹

4. *Conclusion on Ground 3*

148. For all the reasons outlined above, Libya submits that this ground of appeal should be rejected outright. It is both inadequately pleaded and fails to demonstrate that the Chamber has made any error either of law or fact, let alone that any such purported error materially impacted the Impugned Decision. It was entirely reasonable for the Chamber to place reliance on the partially redacted versions of witness statements submitted by Libya in determining whether the 'same case' was under investigation in Libya and at the ICC. Likewise, the Chamber's affirmative conclusion on this issue was wholly reasonable in light of the array of evidence presented by Libya setting out the contours of its investigation and the close correlation between the domestic and ICC investigations (including in relation to the crime of persecution).

²²⁰ See for example, Heller, KJ, "A sentence based theory of complementarity", *Harvard International Law Journal* (2012), Volume 53(1): 85-133 at 107-130.

²²¹ Cf. Appeal, para. 182.

Request for an oral hearing

149. The Appellant's request should be dismissed. The proposition that this "appeal cannot be decided without hearing from the parties in an oral hearing where the key issues in dispute can be ventilated and scrutinised"²²² is wholly unsustainable. The Defence fails to anchor this submission with any reference to the detail or substance of the appeal. It remains at the level of assertion devoid of reasoning.

150. The attempt by the Appellant to rely upon Libya's request for an oral hearing in the Gaddafi case and the claim that it would therefore be "disingenuous for Libya to oppose an oral hearing in Mr. Al-Senussi's case"²²³ entirely misses the point being advanced by Libya in those separate proceedings. The ruling in Mr. Gaddafi's case was that the case was admissible at the ICC. As such, this represented a significant qualification of Libya's sovereign right to conduct criminal proceedings against a well-known leadership figure suspected of crimes against the Libya people. Hence the Libyan Government described the Decision as of "historic importance for the Libyan people".²²⁴ Given this qualification, it is important to provide the Libyan people with the fullest understanding of, and engagement with, the process. Accordingly, as noted by 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".²²⁵ As correctly recognised by the Pre-Trial Chamber with regard to many issues in the two cases, it is sensible and fair, not disingenuous, to arrive at different conclusions in each.

²²² Appeal, para. 186.

²²³ Appeal, para. 188.

²²⁴ Gaddafi Appeal, para. 196.

²²⁵ Gaddafi Appeal,, para. 197.

151. As argued throughout this Response, on numerous occasions the Defence has chosen to avoid addressing the Chamber's actual reasoning and findings. The Defence ought not to be permitted to benefit from this approach. Holding an oral hearing as a means of giving the "parties a chance to reply and to clarify and support their respective positions",²²⁶ when the Defence are entitled to request a written reply is premature. It is submitted that the better approach is for the Appellant to justify the merits of a reply in the usual way, providing each party and the Appellate Chamber with adequate information for its necessity and allowing the issues to be decided efficiently and fairly. The application for an oral hearing should be dismissed.

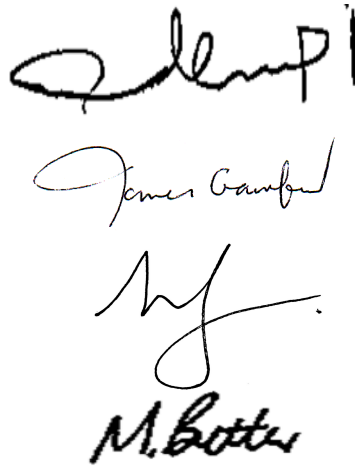
III. RELIEF REQUESTED

152. For the reasons set out above, the Libyan Government respectfully submits that the Appeals Chamber should:

- A. Reject the application for admission of new evidence before the Appeals Chamber; and
- B. Refuse the application for oral hearing;
- C. Uphold the "Decision on the admissibility of the case against Abdullah Al-Senussi" and make no order for his surrender to the Court.

²²⁶ Gaddafi Appeal,, para. 189.

Respectfully submitted:



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Dated this 26th day of November 2013
At London, United Kingdom