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No.: ICC-01/11-01/11
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THE APPEALS CHAMBER

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

SITUATION IN LIBYA

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

Public with Public Annexes A, B and C

Corrigendum to Prosecution's 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'"

Source: Office of the Prosecutor

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Introduction

1. On 11 October 2013, Pre-Trial Chamber I found the case against Abdullah Al-Senussi ("Al-Senussi") inadmissible before the Court under Article 17(1)(a) of the Statute. The Chamber found that Libya was investigating Al-Senussi for substantially the same conduct as alleged in the proceedings before the Court and that Libya did not appear unwilling or unable to carry out his proceedings within the terms of Article 17(2) and (3).
2. On 17 October and 4 November 2013, the Defence for Al-Senussi ("the Appellant") appealed the decision. The Appellant argues that the Chamber erred in fact and in law when it found that Libya was investigating the same case and was not unwilling and unable pursuant to Article 17(1)(a), 17(2)(c) and 17(3).
3. The Appeal should be dismissed. In its challenge against Al-Senussi's case, Libya provided more comprehensive supporting material than in its challenge against the case of Saif Al-Islam Gaddafi. As a result, the Chamber was able to identify the contours of the Libyan case against Al-Senussi and find that Libya was investigating him for substantially the same conduct as the International Criminal Court ("ICC"). Further, and contrary to the Appellant's assertion, an inquiry into the admissibility of a case is not primarily an inquiry into the fairness of the proceedings. The Court needs only to determine whether Libya is taking genuine investigative steps, within the terms of Article 17(2) and (3), to ascertain the criminal responsibility of Al-Senussi. It is not the role of the Court to assess the compatibility of Libya's domestic criminal procedure with the guarantees envisaged in the Rome Statute and in international human rights instruments generally. However, in the event that national proceedings infringe the most fundamental procedural rights and guarantees to such a

degree that the national efforts can no longer be held to be consistent with the object and purpose of the Statute and Article 21(3) of the Statute, the Court should consider matters of fairness as a corollary to its admissibility determination. Such a threshold is not met in the instant case. The Chamber reasonably concluded that, in light of the facts before it, Libya is not unwilling and unable within the terms of Article 17(2) and (3) to carry out the proceedings against Al-Senussi at this point in time.

Procedural Background

4. On 26 February 2011, the Security Council of the United Nations adopted Resolution 1970, referring the situation in Libya since 15 February 2011 to the Prosecutor of the Court.¹
5. On 27 June 2011, following the Prosecutor's request,² the Chamber issued a warrant of arrest against Al-Senussi for the crimes against humanity of murder and persecution committed in Benghazi, Libya, from 15 February 2011 until at least 20 February 2011, in violation of Article 7(l)(a) and (h).³
6. On 2 April 2013, Libya challenged the admissibility of the case against Al-Senussi before the Court in accordance with Articles 17(l)(a) and 19(2)(b) ("Admissibility Challenge").⁴ Libya also notified the Chamber of the exercise of its right pursuant to Article 95 and postponed Al-Senussi's surrender request.⁵

¹ S/RES/1970 (2011).

² ICC-01/11-4-Red.

³ ICC-01/11-01/11-4.

⁴ ICC-01/11-01/11-307-Red2.

⁵ *Ibid*, para.5.

7. On 24 April 2013, the Prosecution responded to the Admissibility Challenge ("Prosecution Response").⁶
8. On 14 June 2013, the Appellant submitted its observations on the Admissibility Challenge ("Defence Observations")⁷ and so did the OPCV.⁸ Also on 14 June, the Prosecution filed its additional observations on the Admissibility Challenge ("Prosecution Additional Observations").⁹
9. On 26 August 2013, the Appellant filed its "Additional Submissions",¹⁰ and on 5 September 2013, the Appellant filed its "Addendum and Urgent Application".¹¹
10. On 26 September 2013, Libya filed its "Final Submissions"¹² following the Chamber's decision granting Libya an extension of time.¹³
11. On 11 October 2013, the Chamber found the case against the Appellant inadmissible before the Court under Article 17(1)(a) ("Decision").¹⁴
12. On 17 October 2013, the Appellant filed its notice of appeal against the Decision and requested suspensive effect of the Decision.¹⁵
13. On 4 November 2013, the Appellant filed its document in support of the appeal against the Decision ("Appeal").¹⁶ On 7 November 2013, the

⁶ ICC-01/11-01/11-321- Red.

⁷ ICC-01/11-01/11-356.

⁸ ICC-01/11-01/11-353-Red.

⁹ ICC-01/11-01/11-355.

¹⁰ ICC-01/11-01/11-418.

¹¹ ICC-01/11-01/11-432.

¹² ICC-01/11-01/11-455.

¹³ ICC-01/11-01/11-441.

¹⁴ ICC-01/11-01/11-466-Red.

¹⁵ ICC-01/11-01/11-468-RedOA6.

¹⁶ ICC-01/11-01/11-474OA6.

Appellant requested leave to file a consolidated reply to all the responses to its request for suspensive effect.¹⁷

14. On 22 November 2013, the Appeals Chamber rejected both the Appellant's requests for suspensive effect and to reply.¹⁸

Submissions

15. The Appellant submits that the Chamber erred in law and in fact in finding that Al-Senussi's case is inadmissible before the ICC. The Appellant advances three grounds of appeal. Firstly, the Appellant submits that the Chamber erred in fact and in law when it found that Libya was not unwilling and unable under Article 17(2) and (3). The Appellant identifies four specific sub-errors within this ground. Secondly, the Appellant requests the admission of *ex parte* material and a photograph of Al-Senussi as additional evidence. Thirdly, the Appellant argues that the Chamber erred in finding that the first limb of the admissibility test was met, namely, that Libya was investigating the same case as the ICC.
16. The Prosecution will address the three grounds in turn.

First Ground: the Pre-Trial Chamber did not err in finding that Libya is not unwilling or unable under Article 17(1)(a), 17(2)(c), and 17(3)

17. The Appellant argues that the Pre-Trial Chamber erred in its legal analysis, assessment of the evidence, and reasoning in not finding Libya unable and unwilling under Article 17(1)(a), 17(2)(c), and 17(3).¹⁹ Most of the Appellant's submissions are premised on the Chamber's purportedly erroneous interpretation of Article 17(2)(c), and its reversal of the burden of proof. The

¹⁷ ICC-01/11-01/11-475OA6.

¹⁸ ICC-01/11-01/11-480OA6.

¹⁹ Appeal, para.13.

Prosecution will first address these two arguments and, second, it will respond to the four specific errors that, according to the Appellant, both individually and cumulatively provide grounds for the Appeals Chamber to reverse the Decision.²⁰

A. General arguments: Due Process and Burden of Proof

(a) The Pre-Trial Chamber applied Article 17(2) having regard to the principles of due process

18. The crux of the Appellant's arguments is that Libya should have been found unwilling pursuant to Article 17(2)(c) because the proceedings against Al-Senussi did not accord with international standards of due process.²¹ The Appellant therefore conflates the chapeau requirement of Article 17(2) and the criteria set out in Article 17(2)(c), namely, that proceedings are conducted "independently or impartially", and "in a manner which, in the circumstances, is consistent with an intent to bring the person concerned to justice."
19. As the Prosecution submitted before the Pre-Trial Chamber, this interpretation of Article 17(2)(c) is not correct;²² an inquiry into admissibility is not an inquiry into the fairness of the national proceedings *per se*, but rather one aimed at determining whether there is a viable and genuine national effort to bring the perpetrators of the crimes that the Court is examining to justice.

²⁰ Appeal, para.15.

²¹ Appeal, paras.97-99,100-102.

²² Prosecution Response, paras.71,73. ICC-01/11-01/11-167, paras.27-32.

(i) *Article 17(2)'s chapeau and "principles of due process recognized by international law"*

20. Article 17 should be interpreted as requiring that the State with jurisdiction must establish a genuine willingness and ability, but it need not also establish that its domestic procedural protections comport with the ICC Statute and Rules of Procedure and Evidence or with certain human rights instruments. The Rome Statute was not intended, and ought not to be read, as an international instrument that binds States to adopt particular processes. Indeed, it expressly recognizes and respects the multiplicity of legal systems.²³ Thus, the Court cannot reject an admissibility challenge, despite the willingness and ability of the State and the identity of the case, *solely* on the ground that attributes of the State's domestic procedures are not fully consistent with those of other legal systems, including that established by the Rome Statute, or with international instruments of human rights.
21. Both the negotiating history of the Statute and the opinion of commentators support this view. During the negotiations leading to the adoption of the Rome Statute, most delegates were concerned with sham or ineffective proceedings and thought that the problem of overly-harsh national proceedings was one that could be taken up with a human rights body, not the ICC.²⁴ Indeed, an overarching concern by negotiating States was that a determination of admissibility of a case by the Court should not become a judgment on the fairness and efficiency of the national system.²⁵ The view expressed repeatedly was that the ICC should not function as a court of

²³ Preamble, Articles 88, 89, 93.

²⁴ D. Robinson, "Three Theories of Complementarity: Charge, Sentence, or Process?", *Harvard International Law Journal*, Vol.53, 2012, p.175, ft.52.

²⁵ J. Holmes, "The Principle of Complementarity" in R. Lee, *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (1999), pp.49-50; see also pp.53-54 (Hereinafter, "Holmes, in Lee").

appeal on national decisions based on alleged domestic deviations from applicable human rights norms.²⁶

22. Had the drafters intended “genuinely” in Article 17(1)(a) to require States to provide defendants with due process, they would have done so explicitly by including a specific paragraph to that effect (as they did to define unwillingness and inability).²⁷ However, the drafting history of Article 17 indicates the contrary: one proposal from Italy related to the definition of “unwillingness” that would have specifically made the lack of due process a ground for admissibility²⁸ 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.”²⁹
23. The phrase was moved from Article 17(2)(c) to the chapeau to introduce an element of objectivity to all the criteria of unwillingness³⁰ and to reduce the subjectivity inherent in any assessment of the intent of the domestic authorities, thereby limiting the Court’s intervention in domestic proceedings.³¹ Further, some authors have also noted that since all of the subparagraphs are linked to the purpose of shielding the person concerned from criminal responsibility, or inconsistency with the intent to bring the

²⁶ *Ibid*, pp.49-50; see also pp.51-56; 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’?”, *Leiden Journal of International Law*, Vol.18, No.4, 2005, pp.852-854 (Hereinafter, “Carnero Rojo”); J. Holmes, “Complementarity: National Courts versus the ICC” in A. Cassese, P. Gaeta, J. Jones, *The Rome Statute of the International Criminal Court: A Commentary* (2002), pp.672-679.

²⁷ K. J. Heller, “The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process”, *Criminal Law Forum*, Vol.17, No.3, 2006, p.265. Hereinafter, “Heller”.

²⁸ Draft Proposal by Italy, UN Doc. A/AC.249/1997/WG.3/IP.4, 5 August 1997: “In deciding on issues of admissibility under this article, the Court shall consider whether...(ii) the said investigations or proceedings have been or are impartial or independent, or were or are designed to shield the accused from international criminal responsibility or were or are conducted with full respect for the fundamental rights of the accused; (iii) the case was, or is, diligently prosecuted.”

²⁹ Holmes, in Lee, p.50.

³⁰ *Ibid*, p.54. This was because “some delegations believed that paragraph 2 of [Article 17] gave the Court too broad a discretion in determining unwillingness and no objective criteria on which the Court should base its determinations.” See p.53.

³¹ Carnero Rojo, p.853.

person concerned to justice, violations of due process that make the accused *easier* to convict cannot satisfy Article 17(2).³²

24. Finally, the Court cannot find a State unwilling on the sole ground that the national proceedings violate due process.³³ The chapeau explains how the Court should determine whether one or more of the sub-paragraphs of Article 17(2) are satisfied, namely, with regard to the principles of international due process. The chapeau and the three subparagraphs are conjunctive: the Court can only find a State unwilling if the national proceedings both violate international due process and satisfy one of the three conditions specified in Article 17(2).³⁴

(ii) Article 17(2)(c) and proceedings not independent or impartial, and inconsistent with an intent to bring the person to justice

25. Similarly, but contrary to the Appellant's submissions,³⁵ the two requirements set out in Article 17(2)(c) are cumulative, meaning that both requirements must be satisfied for a case to be admissible:³⁶ a case is admissible under Article 17(2)(c) only if a national proceeding lacks independence or impartiality *and* is "being conducted in a manner which, in the circumstances, is inconsistent with the intent to bring the person concerned to justice."

26. The Rome Statute provides no definition of the three requirements. Authors have identified different criteria or indicators that may assist the Chambers in inferring whether these requirements are met.³⁷ For example, the degree of

³² Heller, pp.262-263. See also Carnero Rojo, p.853.

³³ Heller, pp.262-263.

³⁴ *Ibid.*

³⁵ Appeal, para.98.

³⁶ Heller, p.261.

³⁷ Commentators have indicated that the Chamber should consider, as far as possible, objective factors. Cryer, Friman, Robinson and Wilmschurst, *An Introduction to International Criminal Law and Procedure*, 2nd ed.

independence of the judiciary, of prosecutors and of investigating agencies and their appointment and selection procedures may provide guidance to determine “independently.”³⁸ The rapport and common objectives between state authorities and suspect perpetrators, as well as linkages between judges and perpetrators, are relevant factors to determine “impartially.”³⁹ Politically motivated statements made by judges involved in the proceedings at hand may also be a relevant factor.⁴⁰

27. Furthermore, some authors have indicated that the second cumulative requirement, namely that domestic proceedings are not being conducted “in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice”, is another formulation of the general rule set out in sub-paragraph (a), that is, “the purpose of shielding the person concerned from criminal responsibility.”⁴¹ In the same vein, others have noted that the terms are synonymous with the intent to obtain a conviction⁴² and, as with the rest of scenarios envisaged in Article 17(2), Article 17(2)(c) cannot apply to a national proceeding designed to make the accused *easier* to convict because such a proceeding, though unfair, is not inconsistent with

(2010), p.156. See also J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions* (2008), pp.299-309.

³⁸ Office of the Prosecutor, *Informal Expert Paper: The Principle of Complementarity in Practice* (2003), Anx.4; see also Stigen, *The Relationship between the International Criminal Court and National Jurisdictions* (2008), pp.300-305,308-309 (“OTP Informal Expert Paper”); N. Jurdi, *The International Criminal Court and National Courts: A Contentious Relationship* (2011), pp.47-48.

³⁹ OTP Informal Expert Paper, Anx.4; see also J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions* (2008), pp.305-306.

⁴⁰ J. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (2008), p.147.

⁴¹ Carnero Rojo, p.853. Importantly, Rojo indicates that a similar conclusion was reached during the 3rd session of the ASP in September 2004. The Special Working Group on the Crime of Aggression discussed a report from the previous summer, considering that 17(2)(c) “might be interpreted to give jurisdiction to the Court in situations in which a “victorious” state would prosecute individuals without due regard to their rights”. But the majority of states at the meeting agreed that the Court would not have jurisdiction over such situations, “arguing that the Court was never conceived as a court of appeals for national jurisdictions”: see *ibid*, pp.853-854.

⁴² Heller, pp.261-262.

the intent to bring the defendant to justice.⁴³ Other authors have, however, indicated that this parameter should refer “not solely to the ascertainment of guilt and subsequent punishment, but rather to an impartial assessment of the position and role of the accused consistent with the general principles governing the interpretation of a treaty.”⁴⁴

28. The Appeals Chamber’s jurisprudence may be of assistance to establish this second criterion. The Appeals Chamber held in the *Kenya* cases that the challenging State needed to show that “steps directed at *ascertaining whether those suspects are responsible for that conduct*” were taken.⁴⁵ Although the Appeals Chamber addressed in that case whether there was a domestic investigation (first limb of the admissibility test), the Prosecution submits that those terms also entail some qualitative assessment of the measures adopted. Hence, the Chamber must determine whether the steps taken are consistent with those that diligent domestic authorities would ordinarily adopt in light of the circumstances of that case. For example, different types of evidence would need to be gathered (witness evidence, documentary material), corroboration would be, if possible, sought, and exculpatory material would be considered. However, this qualitative assessment should not become a judgment of the quality and efficiency of the domestic proceedings, and should be limited to the confined purpose of the admissibility determination.⁴⁶

⁴³ J. Pichon, “The Principle of the Complementarity in the Cases of the Sudanese Nationals Ahmad Harun and Ali Kushayb before the International Criminal Court”, *International Criminal Law Review*, Vol.8, No.1, 2008, pp.193-194; Heller, pp.261-262.

⁴⁴ F. Gioia, “State Sovereignty, Jurisdiction, and ‘Modern’ International Law: The Principle of Complementarity in the International Criminal Court”, *Leiden Journal of International Law*, Vol.19, No.4, 2006, p.1111.

⁴⁵ ICC-01/09-01/11-307OA, para.41. Emphasis added.

⁴⁶ In this regard it is worth noting a discussion that arose during the negotiations of the Statute: some delegations expressed their concern that the Court was not to assume jurisdiction simply because the national authorities were proceeding more slowly (or less efficiently) than other States or the Court itself in handling similar cases. The critical factor to these delegations was whether there was a defect in the approach taken by

(iii) *The role of Article 21(3)*

29. The fact that an inquiry into admissibility is not primarily an inquiry into the fairness of the national proceedings does not however imply that the Court must turn a blind eye to clear and conclusive evidence demonstrating that the national proceedings completely lack fairness. Where the national investigation or proceedings lack fundamental procedural rights and guarantees to such a degree that the national efforts can no longer be held to be consistent with the object and purpose of the Statute and Article 21(3), requiring the application and interpretation of law to “be consistent with internationally recognized human rights”, the Court should consider matters of fairness as a corollary to its admissibility determination.⁴⁷ In this connection, the Appeals Chamber has observed in *Lubanga* that “[h]uman rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provisions must be interpreted and, more importantly, applied in accordance with internationally recognized human rights; first and foremost, in the context of the Statute, the right to a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety.”⁴⁸
30. However, the Court should apply this principle with care, and only declare a case admissible on the grounds that due process rights have been violated in those instances where, due to the complete absence of even the minimum

the State which inevitably, if left to its conclusion, would result in a travesty of justice. A. Cassese, *The Rome Statute of the International Criminal Court, Volume I* (Oxford University Press, 2002), pp.673-4 .

⁴⁷ Rule 51 of the Rules of Procedure and Evidence provides that a State may choose to bring to the attention of the Court, when the latter is considering admissibility questions, information “showing that its courts meet internationally recognized norms and standards for the independence and impartial prosecution of similar conduct”. It is argued that this seems to require an impartial assessment of the role of the accused. See F. Gioia, “State Sovereignty, Jurisdiction, and ‘Modern’ International Law: The Principle of Complementarity in the International Criminal Court”, *Leiden Journal of International Law*, Vol.19, No.4, 2006, p.1111.

⁴⁸ ICC-01/04-01/06-772 OA4, para.37.

and most basic requirements of fairness and impartiality, the national efforts can only be viewed as a travesty of justice.⁴⁹

(iv) The Decision

31. The Chamber's Decision is correctly underpinned by the purpose of admissibility proceedings, namely to ascertain whether there are genuine domestic proceedings, and not to rule on the fairness of such proceedings *per se*. Contrary to the Appellant's submission, the Chamber interpreted and applied Article 17(2) having regard to internationally recognized due process standards and in a manner consistent with internationally recognized human rights.
32. First, the Chamber assessed the applicable legislative framework and took note of the rights and guarantees afforded to suspect persons throughout Libyan proceedings⁵⁰, as well as the characteristics of those proceedings in instances where the suspect person faces the death penalty.⁵¹ The Chamber similarly noted that Libya had ratified a number of relevant human rights instruments.⁵²
33. Second, the Chamber assessed whether the proceedings against Al-Senussi accorded with that legal framework and whether the envisaged rights were provided to him. The Chamber correctly noted that Article 17(2) must be read cumulatively and that "alleged violations of the accused's procedural rights are not *per se* grounds for a finding of unwillingness or inability...

⁴⁹ The Prosecution submits that scenarios akin to abuse of process would call for the Chamber to consider issues of fairness as a corollary of its admissibility determination: "[w]here the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed." ICC-01/04-01/06-772 OA4, paras.37,39; ICC-01/04-01/06-844 OA8, para.10.

⁵⁰ Decision, paras.203,206.

⁵¹ Decision, para.205.

⁵² Decision, para.203.

[and] must be linked to one of the scenarios... [under] article 17(2) and (3)."⁵³

In this context, the Chamber indicated that "certain violations of the procedural rights of the accused may be relevant to the assessment of the independence and impartiality of the national proceedings that the Chamber is required to make, having regard to the principles of due process [...] under article 17(2)(c)"; while recalling that any such assessment must be coupled with a finding that the proceedings, in the circumstances, are inconsistent with the intent to bring the person to justice.⁵⁴

34. The Chamber then noted that Al-Senussi had not been provided with a lawyer, notwithstanding his entitlement under Article 106 of Libya's Criminal Procedure Code ("CPC") to benefit from legal representation.⁵⁵ It further recalled that, upon completion of the proceedings before the Accusation Chamber, the case cannot proceed without a lawyer to represent Al-Senussi at trial.⁵⁶ The Chamber identified these facts as relevant considerations for its determination under Article 17(2)(c) and (3), and indicated that it would consider them, together with all the other relevant circumstances, in coming to its admissibility determination.⁵⁷
35. Nonetheless, recalling the cumulative requirement of a finding under Article 17(2), the Chamber went on to find that Al-Senussi's lack of legal assistance at the investigation stage was not linked to any indication of Libya's lack of intent to bring him to justice, noting, rather, that Al-Senussi's right was primarily prejudiced by the security situation.⁵⁸

⁵³ Decision, para.235.

⁵⁴ *Ibid.*

⁵⁵ Decision, para.233.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ Decision, para.292.

36. Third, the Chamber further took note of the Appellant's (and OPCV's) allegations with respect to the systemic lack of independence and impartiality of the Libyan judicial system and concluded that the information provided did not demonstrate, alone or in combination with other relevant factors, that Libya was unwilling within the meaning of Article 17(2)(c).⁵⁹
37. Fourth, the Chamber indicated that evidence related to the first limb of the admissibility test may also be relevant in demonstrating the genuineness of the proceedings.⁶⁰ In particular, the Chamber considered: (i) that adequate investigative steps have been taken by the Prosecutor-General's investigative team including, *inter alia*, witnesses' interviews and obtaining documentary evidence; (ii) that multiple lines of investigation have been followed to ascertain relevant facts to establish Al-Senussi's alleged criminal responsibility; and (iii) that, during interviews, witnesses were asked to provide information of a potential exculpatory nature, to comment on information given by other witnesses or on items of documentary evidence, and to clarify portions of their own interviews, while victims were also requested to provide documentary evidence in support of their assertions.⁶¹
38. Finally, the Chamber concluded that the two cumulative requirements in order to render the case admissible under Article 17(2)(c) were not met. The Chamber did not provide any ruling on the impartiality or independence of the proceedings, however, it noted that, in light of the investigative steps taken and the fact that security challenges are primarily at fault for Al-

⁵⁹ Decision, para.258.

⁶⁰ Decision, para.210.

⁶¹ Decision, para.211 referring to para.161.

Senussi's lack of counsel, Al-Senussi's proceedings were not inconsistent with Libya's intent to bring him to justice.⁶²

39. The Decision is correct and the Appellant has failed to show any error which, by itself or in combination with other relevant factors, would cause a reversal of the Decision.

(b) Burden of proof

40. The Appellant further argues that the Chamber reversed the burden of proof and required the Appellant to show Libya's unwillingness and inability rather than requiring Libya to provide evidence of the genuineness of its proceedings.⁶³
41. While the concrete allegations put forward by the Appellant will be addressed below, the Prosecution notes that the Chamber correctly set out the applicable burden of proof: the Chamber stated that the challenging State "is required to substantiate all aspects of its allegations to the extent required by the concrete circumstances of the case."⁶⁴ Thus, the Chamber found that Libya has the burden to prove the two limbs of an admissibility determination, namely, that its domestic case covers the same person and substantially the same conduct, and that Libya is not unwilling and unable to genuinely carry out Al-Senussi's proceedings.⁶⁵ This finding is consistent with the Appeals Chamber's jurisprudence.⁶⁶

⁶² Decision, para.292.

⁶³ Appeal, paras.35,70-73,107-108.

⁶⁴ Decision, paras.27,208 referring to ICC-01/11-01/11-344-Red ("Gaddafi Admissibility Decision"), para.52.

⁶⁵ The Chamber did not rule on the applicable standard of proof. The Prosecution has argued before the Pre-Trial Chamber that the applicable standard should be "a balance of probabilities". See ICC-01/11-01/11-321, paras.16-20. See also ICC-01/05-01/08-802, para.203.

⁶⁶ ICC-01/09-01/11-307OA, para.62.

42. However, the fact that Libya carries the burden of proof does not mean that the Appellant is relieved from substantiating its assertions if it disputes the arguments advanced by Libya. To the contrary, and as the Chamber correctly noted: “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.”⁶⁷
43. This finding does not entail a reversal of Libya’s burden of proof; rather it reflects the correct approach whereby the party advancing an argument needs to substantiate his or her submissions with supporting evidence.

B. The Pre-Trial Chamber’s alleged four specific errors regarding unwillingness and inability

(a) The Pre-Trial Chamber did not err when it issued the Decision without the legal visit having taken place

44. The Appellant argues that the Chamber erred in concluding that the case was inadmissible notwithstanding the fact that Al-Senussi had no contact with his counsel appointed to represent him in proceedings before the Court. According to the Appellant, the Chamber erred: (i) when it failed to consider the lack of a legal visit⁶⁸ and reversed the burden of proof,⁶⁹ and (ii) when it relied on the Appellant’s request to urgently rule on the admissibility of the case.⁷⁰

⁶⁷ Decision, para.208. The Appellant’s arguments in paras.45-47 of the Appeal and the jurisprudence relied upon support the Chamber’s position that Libya has the burden of proof of the two limbs of the admissibility determination.

⁶⁸ Appeal, paras.34-36,38-39.

⁶⁹ Appeal, para.35 referring to Decision, para.239.

⁷⁰ Appeal, paras.34,37,42-43,48.

(i) *The Pre-Trial Chamber considered the lack of a legal visit*

45. The Appellant is incorrect when it argues that the Chamber did not consider that counsel had not received instructions from Al-Senussi.⁷¹ As the Appellant itself cites,⁷² the Chamber was mindful that counsel was not able to verify the conditions under which Al-Senussi was detained and interrogated⁷³ and noted that “the Defence ability to properly raise certain issues of fact may have been prejudiced by this absence of direct contacts with Mr Al-Senussi.”⁷⁴ The Chamber then indicated that it would take this factor into account for the purposes of its analysis.⁷⁵
46. The Chamber did precisely this when it considered the Appellant’s submissions as to whether Al-Senussi’s rights had been infringed while in detention, notwithstanding that those allegations had not been substantiated.⁷⁶ The Chamber went on to note that Libya had addressed most of the Appellant’s arguments.⁷⁷ In particular, the Chamber referred to an official letter from the Libyan Prosecutor-General indicating that Al-Senussi had been confronted with the testimony of witnesses, Libya’s assertion that Al-Senussi had received regular medical check-ups, a medical report dated September 2012,⁷⁸ as well as a HRW report indicating, *inter alia*, that Al-Senussi had told HRW representatives in a private 30 minute visit that his conditions of custody were reasonable and did not indicate that he was subject to abuse. He indicated that he had not been provided with a

⁷¹ Appeal, paras.35-36.

⁷² Appeal, para.33.

⁷³ Decision, fn.551.

⁷⁴ Decision, paras.29,219.

⁷⁵ Decision, fn.551.

⁷⁶ Decision, para.239. Defence Observations, para.139. A cursory review of the Appellant’s submissions indicates that the only evidence adduced to argue that Al-Senussi had been assaulted while in detention was a 5 September 2012 post on Twitter from a journalist who overheard a person leaving the room where Al-Senussi was supposedly held saying that he had hit him on his head. See Defence Observations, para.139, see fn.221 referring to ICC-01/11-01/11-216-Anx3.3.

⁷⁷ Decision, para.240.

⁷⁸ Decision, para.240, see fns.557-559.

lawyer, although he was brought before a judge each month, who extended his detention.⁷⁹

47. Thus, the Chamber was correct when it found that the Appellant had not successfully rebutted Libya's submissions as to Al-Senussi's conditions of detention.⁸⁰ The Appellant, however, appears to submit that due to Al-Senussi's lack of contact with counsel in proceedings before the Court, it should be relieved from substantiating its submissions.⁸¹ This is not correct, and the Appellant still needs to prove its arguments when it seeks to rebut Libya's assertions.⁸² Nor does the lack of legal visit lead to the positive conclusion that Al-Senussi's rights had been violated in the Libyan proceedings. Similarly, the lack of legal visit is not, in itself, sufficient to cast doubt on Libya's counter-assertions.⁸³

48. Therefore, the Chamber's ruling that Libya's burden of proof cannot be interpreted as an obligation to disprove the Appellant's "doubts" as to the detention conditions of Al-Senussi was correct.⁸⁴

(ii) The Appellant requested the Chamber to rule on the admissibility of the case on an urgent basis

49. The Appellant argues that the Chamber incorrectly relied on the fact that the Appellant had requested a ruling on the admissibility of the case on an urgent basis and had never indicated that the legal visit was a pre-condition

⁷⁹ Decision, fn.606 referring to ICC-01/11-01/11-252-Conf-Anx3; Annex 2 to the Admissibility Challenge; Libya, Human Rights Watch, "Libya: Ensure Abdallah Sanussi Access to Lawyer" (available at <http://www.hrw.org/news/2013/04/17/libya-ensure-abdallah-sanussiaccess-lawyer>). Hereinafter "HRW Report".

⁸⁰ Admissibility Challenge, paras.191-193; Reply, paras.123-133; Final Submissions, paras.19-20,32-35.

⁸¹ Appeal, para.35 referring to Decision, para.239.

⁸² Decision, para.208.

⁸³ Appeal, para.33 referring to Decision, fn.551.

⁸⁴ Decision, para.239.

to submitting observations.⁸⁵ According to the Appellant, it asked the Chamber to rule on the admissibility of the case because it “proceeded on the basis” that the Chamber would find the case admissible due to counsel’s lack of contact with Al-Senussi.⁸⁶ Similarly, the Appellant now argues that the Appeals Chamber should not decide this appeal without a legal visit.⁸⁷

50. A review of the relevant filings indicates that the Appellant had asked the Chamber to proceed expeditiously and to rule on the admissibility of the case on an urgent basis without any reference to the need for a legal visit.⁸⁸ In the latest Addendum and Urgent Application, the Appellant requested the Chamber to find the case admissible so that Al-Senussi would be transferred to The Hague and the purported violations of his fundamental rights would be put to an end.⁸⁹ The Appellant never put into question its ability to take procedural steps or make submissions on behalf of Al-Senussi in the absence of specific instructions.⁹⁰
51. Therefore, the Appellant should have been aware that a ruling on the admissibility of the case would entail a comprehensive assessment of the relevant and available evidence to determine whether the requisites of Article 17 were met. Admissibility proceedings seek to determine the competent jurisdiction and are not foreseen as intervening mechanisms to interrupt purported violations of rights at the domestic level.

⁸⁵ Appeal, para.37, referring to Decision, para.29.

⁸⁶ Appeal, para.42.

⁸⁷ Appeal, para.48.

⁸⁸ Decision, para.29, fn.57 referring to ICC-01/11-01/11-320, para.1, where the Appellant sought to have the Pre-Trial Chamber “issue a decision on the conduct of proceedings, including a scheduling order” to expedite the proceedings shortly after Libya filed its Challenge, and ICC-01/11-01/11-432, paras.3,24,26 where the Appellant filed an Addendum and Urgent Application asking the Chamber to “urgently rule on the [admissibility] application”, again, with no reference to the non-executed legal visit. The Appellant also asked the Chamber to reduce the time limit for Libya to file its Final Submissions on the grounds that Al-Senussi’s daughter had been abducted after her release from detention and that “highlight[ed] the serious level of insecurity in the prisons in Libya and that the Libyan authorities are unable to provide for the safety of detainees like Mr. Al-Senussi.” ICC-01/11-01/11-432, para.25.

⁸⁹ ICC-01/11-01/11-432, paras.3,8,24-26.

⁹⁰ Decision, para.29. The Chamber noted that, unlike in the Gaddafi case, counsel did not ask the Chamber to postpone the filing of its submissions until the visit of Al-Senussi took place. See Decision, fn.57.

52. Moreover, the Appellant did not argue before the Pre-Trial Chamber that the case was admissible on the sole ground that the legal visit had yet to take place. Rather, it referred to this factor as additional evidence in support of its argument as to Libya's inability and unwillingness.⁹¹
53. In light of the above, the Chamber's decision to rule on the admissibility of the case, in the absence of a legal visit by counsel is reasonable. The Chamber reasonably concluded that the Appellant considered the record complete and drew the necessary inferences from the fact that the legal visit had not taken place.⁹²

(b) The Pre-Trial Chamber adequately considered the lack of legal representation in the Libyan proceedings

54. The Appellant submits that the Chamber erred when it failed to find that Article 106 of the Libyan CPC (that affords the right to counsel to accused persons)⁹³ had been violated and that, as a result, Libya was unwilling under Article 17(2)(c). Further, the Appellant also claims that Libya did not show how it would guarantee that Al-Senussi is provided with a lawyer, thus rendering Libya unable under Article 17(3).

(i) The lack of legal representation and Article 17(2)(c)

55. The crux of the Appellant's submissions is that Article 106 of Libya's CPC was infringed because Al-Senussi had been interrogated and confronted with witnesses without the presence of a lawyer, despite the fact that he had

⁹¹ A contrario Appeal, para.38. Defence Observations, para.128 and Additional Submissions, para.19.

⁹² Decision, paras.29,219 and fn.551.

⁹³ See ICC-01/11-01/11-158-AnxB: Article 106 is translated by Libya as "[i]n any other case except Flagrate delicto, and in case of haste or fear of evidence loss, investigator may not interrogate any accused or confront him with other accused persons or witnesses except after summoning his lawyer to appear, if any, and the accused shall announce the name of his lawyer with a report in submitted to the clerk office or prison warden, his lawyer may handle such statement or announcement. The lawyer may not speak unless permitted by the magistrate, and if not permitted this should be established in the minutes."

asked for one.⁹⁴ The Appellant argues that on these grounds alone Libya should have been found unwilling under Article 17(2)(c).⁹⁵ Libya provides a different interpretation of this provision and indicates, albeit in the Gaddafi admissibility proceedings, that a suspect person can be interrogated without a lawyer if a counsel has not been appointed yet.⁹⁶ Libya did not indicate whether interrogation is still possible when the suspect has expressly asked for a lawyer, as appears to be the case.⁹⁷

56. Irrespective of the proper interpretation of Article 106, the Chamber noted that counsel had not been appointed to Al-Senussi, despite his entitlement under Article 106, and indicated that this was a relevant factor that it would consider for the purposes of its determination under Article 17(2) and (3).⁹⁸ Nonetheless, in its final conclusion under this provision, the Chamber, recalling the cumulative requirement of a finding under Article 17(2), went on to find that the deprivation of Al-Senussi's right to legal assistance at the investigation stage was not linked to any indication of Libya's lack of intent to bring him to justice, noting rather that it was primarily prejudiced by the security situation.⁹⁹

⁹⁴ Appeal, paras.62-63. See also Appeal, para.96, first bullet point.

⁹⁵ Appeal, paras.51,54. The Appellant's arguments on Libya's inability under Article 17(3) are addressed in sub-heading (d), below.

⁹⁶ ICC-01/11-01/11-293, para.54; ICC-01/11-01/11-258, para.97. In contrast, Libya noted that the need for a lawyer is essential at trial, and that the Accusation Chamber will necessarily appoint one before proceeding to trial if the accused remains without legal representation at that stage. See Admissibility Challenge, paras.146, 149 (referring to Articles 162 and 187 of the Libyan CPC – see ICC-01/11-01/11-158-AnxB) referred to in Decision, para.206. See also Libya Final Submissions, para.9. If the trial proceedings continue without a lawyer, or without allowing the defence enough time to prepare its case, the final verdict will be quashed. See Admissibility Challenge, para.149 (referring to Articles 304 and 305 of the Libyan CPC – see ICC-01/11-01/11-158-AnxB), referred to in Decision, para.206. These provisions refer, in general terms, to the annulment of a verdict if the provisions related to the procedural law or constitution of the Court are violated.

⁹⁷ See HRW Report. See also translation of Article 106 of the CPC above at fn.93. With respect to the English translation of Article 106 provided by Libya, the Prosecution notes that the reference to “if any” in Arabic [which reads “إذا كان واحداً”] can also be translated as “if one exists or if there is one”. Hence, the provision could be read that the suspect person has a right to counsel, if there is one available. Nonetheless, the Prosecution defers to Libya, or an expert on Libyan law, on the proper interpretation of these terms.

⁹⁸ Decision, para.233.

⁹⁹ Decision, para.292.

57. The Appellant further argues that the interrogation of a suspect person without a lawyer, when he or she has requested one, violates international human rights instruments to which Libya is a party.¹⁰⁰
58. As outlined above, it is not the role of the Court to assess the compatibility of Libya's domestic criminal procedure with the Rome Statute and international human rights instruments generally.¹⁰¹ Nor does the Court have to determine whether there is an internationally recognised human right to counsel during questioning.¹⁰² Rather, only where national proceedings lack fundamental procedural rights and guarantees to such a degree that the national efforts can no longer be held to be consistent with the object and purpose of the Statute and Article 21(3), should the Court consider matters of fairness as a corollary to its admissibility determination.¹⁰³
59. Considering the information before the Chamber, the threshold is not met in this case, particularly in light of the rights and guarantees afforded by the Libyan legal framework: the trial cannot proceed without a lawyer for the accused,¹⁰⁴ defence counsel may ask for time to prepare his/her defence,¹⁰⁵ the trial judge will have discretion to evaluate the probative value and weight of the evidence presented,¹⁰⁶ and the appeals chamber is required to

¹⁰⁰ Appeal, paras.57-60,64-68. The Prosecution will address the Appellant's submissions on being held incommunicado below in paras.83-85.

¹⁰¹ See above, paras.20-24.

¹⁰² The Prosecution notes the extensive jurisprudence of the European Court of Human Rights ("ECtHR") and the Human Rights Committee relied upon by the Appellant in submitting that the right to legal assistance arises at an early stage in proceedings, particularly in cases involving the death penalty (see Appeal, paras.66-69). While the Prosecution endorses the findings of these decisions, it also notes that the jurisprudence outlines certain caveats to the right to counsel. The ECtHR, for example, has held that the right to a lawyer in the initial stages of an investigation may be subject to restriction "for good cause", the relevant question being "whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing" (*Magee v United Kingdom*, ECtHR, Application No 28135/95, Judgment, 6 June 2000, para.41).

¹⁰³ See above paras.29-30.

¹⁰⁴ Decision, para.233.

¹⁰⁵ It appears that other domestic proceedings have been suspended for that purpose. See Decision, para.254.

¹⁰⁶ Article 275 CPC. The English translation is attached as Annex B. Original Arabic can be found at ICC-01/11-01/11-460-AnxA.

intervene with a more stringent procedure in cases of conviction with the death penalty.¹⁰⁷

60. Hence, in light of the above, the Chamber's decision was reasonable in not finding Libya unwilling under Article 17(2)(c) because Al-Senussi had not been provided with counsel in the domestic proceedings to date.¹⁰⁸

(ii) The lack of legal representation and Article 17(3)

61. Contrary to the Appellant's assertions, the Chamber did not reverse the burden of proof; it simply required Libya to demonstrate that it was able to provide Al-Senussi with a lawyer.¹⁰⁹ In particular, the Chamber noted that security concerns had impeded the appointment of counsel but that, at this time, the Chamber could not conclude that Libya would be unable to adequately address these concerns and provide Al-Senussi with counsel.¹¹⁰ The Chamber was mindful that legal representation is a necessary precondition for the continuation of the judicial proceedings,¹¹¹ and noted Libya's submissions stating that a lawyer would be appointed in the near future at the order of the Accusation Chamber and that members of Al-Senussi's tribe were willing to represent him.¹¹²

¹⁰⁷ Admissibility Challenge, para.134.

¹⁰⁸ The Prosecution, however, notes that it is unclear whether defence counsel is required in the proceedings before the Accusation Chamber. While in the Gaddafi admissibility proceedings, Libya indicated that counsel was necessary (ICC-01/11-01/11-258, paras.96-97; ICC-01/11-01/11-293, para.54; ICC-01/11-01/11-454-Red, para.47. See Appeal, paras.55-56), in its Admissibility Challenge in the Al-Senussi proceedings, Libya appears to indicate that counsel is only mandatory for trial and after the charges have been confirmed (Admissibility Challenge, paras.146,149). It appears that on 24 October 2013, the charges against both Al-Senussi and Gaddafi were confirmed and that the Accusation Chamber issued an order to appoint a lawyer to those defendants without legal representation. See video downloaded from YouTube in Arabic (available at <http://www.youtube.com/watch?v=5WsQ0gaBVEM>). Prosecutor Al-Sadik Al-Sour indicated that the Accusation Chamber ordered the Prosecution office to liaise with the public defence department to appoint a defence team for Saif Al-Islam and Al-Senussi (2m40 to 2m53). The Accusation Chamber committed the case to trial and the main charges were confirmed and the dossier was referred to the president of Tripoli Criminal Court to determine the date of the trial (3m05 to 3m27).

¹⁰⁹ Appeal, paras.70-73.

¹¹⁰ Decision, para.308.

¹¹¹ Decision, paras.233,308.

¹¹² Decision, para.308 referring to Final Submissions, para.28.

62. In light of the facts of this case, the Chamber's reliance on Libya's assertions that it would overcome the impediment of legal representation, and its finding on Libya's lack of inability "to otherwise carry out the proceedings" pursuant to Article 17(3), are reasonable considering that the Libyan authorities have been found to have custody over the Appellant.¹¹³ The Prosecution however reiterates its prior submissions that, notwithstanding that the admissibility of a case must be determined in light of the facts at the time of the admissibility proceedings, it would have been desirable to require Libya to provide further evidence to support its assertion that the impediment of lack of legal representation due to security challenges could be overcome.¹¹⁴
63. Finally, and contrary to the Appellant's submissions, the Chamber's conclusion is not contradictory to that in the Gaddafi Admissibility Decision, in which the Chamber found a similar undertaking by Libya to provide counsel to Mr Gaddafi insufficient.¹¹⁵ The facts underlying the two cases are notably different: while Al-Senussi was found to be in the custody of the Libyan Government authorities, Gaddafi was found to be in the custody of the Zintan militia.¹¹⁶ Against this backdrop, the different outcomes in the two decisions are reasonable.

¹¹³ Decision, para.294. See also Decision, paras.264-265.

¹¹⁴ Prosecution Additional Observations, para.24 quoted by the Appellant in Appeal, para.90. See ICC-01/01-01/09-307OA, para.62 that requires the challenging State to "provide the Court with evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case". Although this finding was made with respect to the first limb of an admissibility determination, the Prosecution submits that it would similarly apply to the second limb.

¹¹⁵ Appeal, paras.86-88 referring to Gaddafi Admissibility Decision, paras.212-213.

¹¹⁶ The Chamber pointed out this distinction: Decision, para.308.

(c) The Pre-Trial Chamber reasonably concluded that Al-Senussi's proceedings are not inconsistent with an intent to bring him to justice

64. The Appellant argues that the Chamber failed to address or give any weight to a body of evidence that would indicate that the "conditions for holding a fair, impartial and independent trial in Libya simply do not exist."¹¹⁷ The Appellant advances an error of fact but, as the Prosecution develops below, it does not show how the Chamber erred in its assessment of the evidence or how the findings made therefrom were unreasonable.¹¹⁸

(i) Libya's lack of independence and impartiality

65. The Appellant argues that the Chamber erroneously dismissed the statements made by members of the current and previous Libyan Government assuming Al-Senussi's guilt.¹¹⁹ Similarly, the Appellant submits that the Chamber erred when it did not consider the impact of the kidnapping of Al-Senussi's daughter.¹²⁰

66. However, the Chamber adequately addressed the factors which had a bearing on Al-Senussi's case. First, the Chamber did not dispute the fact that relevant authorities must respect the presumption of innocence in their public statements and refrain from prejudging the outcome of a trial. The Chamber simply indicated that the statements referred to by the Appellant – by themselves or in combination with other factors – did not indicate that the Libyan proceedings were conducted in a manner inconsistent with the

¹¹⁷ Appeal, paras.95-96. The Prosecution has already dealt with the Appellant's arguments with respect to international standards of due process advanced in paras.97-98 of his Appeal. See above, paras.20-24.

¹¹⁸ The Prosecution will address the arguments related to security issues and lack of witness protection programs while responding to its fourth sub-error, see paras.103-112.

¹¹⁹ Appeal, paras.112-113 referring to Decision, para.241.

¹²⁰ Appeal, para.116 referring to Decision, para.242.

intent to bring Al-Senussi to justice under Article 17(2)(c).¹²¹ This conclusion is reasonable, in particular in light of the fact that the statements are not attributed to members of the judiciary involved in Al-Senussi's proceedings.¹²²

67. Second, the kidnapping of Al-Senussi's daughter appears to have no bearing on the scenarios under Article 17(2) and (3) in Al-Senussi's case.¹²³ Hence, the Chamber's disregard of this fact is reasonable. In any event, in so far as this event is related to the precarious security situation in Libya, the Chamber indicated that it would consider this fact in its admissibility determination.¹²⁴
68. The Appellant further argues that the Chamber erred when it did not demand a higher standard of due process from the domestic proceedings in light of the potential application of the death penalty in Al-Senussi's case.¹²⁵ The Appellant also submits that the Chamber afforded a more favourable treatment to the materials provided by Libya rather than those advanced by the Appellant.¹²⁶
69. The Appellant's submissions in this regard are similarly misplaced. First, the fact that the Chamber did not expressly endorse the Appellant's argument as to a higher level of scrutiny constitutes no error.¹²⁷ As noted above, the role of the Court in admissibility assessments is not to determine the adequacy of domestic legislation and proceedings in light of international human rights instruments, but to indicate which jurisdiction is competent to investigate or

¹²¹ Decision, para.241. The Chamber determined elsewhere in the Decision that the manner in which the proceedings were being conducted (in light of the quantity and quality of investigative measures taken) was not inconsistent with the intent to bring Al-Senussi to justice. See also Decision, para.292 referring to Decision, paras.161, 211.

¹²² Decision, para.241.

¹²³ ICC-01/09-01/11-307OA, para.40.

¹²⁴ Decision, para.281.

¹²⁵ Appeal, paras.114-115 referring to Decision, para.220.

¹²⁶ Appeal, paras.117-119 referring to Decision, paras.248-258.

¹²⁷ Appeal, paras.114-115 referring to Defence Observations, paras.157-162.

try a case in light of the requirements set out in Article 17. Moreover, the Chamber interpreted Article 17(2) in a manner consistent with internationally recognized principles of due process when it: (i) assessed the rights afforded to accused persons in the different stages of the Libyan proceedings;¹²⁸ (ii) noted that a more stringent proceeding on appeal is required in cases of conviction with the death penalty;¹²⁹ and (iii) assessed the quality and quantity of investigative steps that were taken in Al-Senussi's case.¹³⁰

70. Finally, and contrary to the Appellant's submissions,¹³¹ the Chamber fairly assessed the information provided by the Appellant and by Libya without bias. The Chamber first noted that the Appellant's arguments are characterised by two systemic aspects, namely, that judges presiding over the cases of former officials of Gaddafi's regime had taken part in the "special courts" of Gaddafi's era, and that the Libyan "Political Isolation Law", which recently entered into force, has been considered discriminatory against former Gaddafi-era officials.¹³² The Chamber then noted the Libyan arguments, which sought to satisfy its burden of proof and rebut the Appellant's arguments. In particular, Libya indicated that the independence and impartiality of the judiciary are enshrined in the Libyan legislative framework¹³³ and that the "special courts" were not presided over by ordinary judicial officers reporting to the Ministry of Justice, but by officers appointed by Muammar Gaddafi's security apparatus.¹³⁴ Moreover, the

¹²⁸ Decision, para.203, fns.474-475. See also Decision, para.206.

¹²⁹ Decision, para.205.

¹³⁰ Decision, paras.161,211.

¹³¹ Appeal, paras.117-119 referring to Decision, paras.248-258.

¹³² Decision, para.246.

¹³³ Decision, para.248 referring to Annex G of ICC-01/11-01/11-130. See also Libya's additional submissions which are addressed by the Chamber in the Decision, paras.249-250,252-256. It is worth noting that the Chamber also considered the fact that the 19 September hearing had been suspended to allow some defence teams time to review the accusation file. See Decision, para.256.

¹³⁴ Decision, para.248 referring to Admissibility Challenge, para.140.

Supreme Court found the application of the People's Court procedures to criminal cases unconstitutional on 23 December 2012.¹³⁵

71. The Chamber's assessment of the evidence is correct and the Chamber's ensuing conclusion, that the information provided by the Appellant – and the OPCV – did not reveal a systemic lack of independence or impartiality in the Libyan judiciary rendering Libya unwilling pursuant to Article 17(2)(c), is reasonable.¹³⁶

(ii) Role of militias in Al-Hadba prison

72. The Appellant also argues that militia groups are heavily involved in running the Al-Hadba prison and that any court sitting in this prison cannot be regarded as free and independent from the influence of the militia.¹³⁷ The Appellant however failed to show how the presence of militia personnel in Al-Hadba prison, even if accepted, impacts on any of the scenarios under Article 17(2) in Al-Senussi's case during the admissibility proceedings before the Pre-Trial Chamber.¹³⁸

(iii) The Pre-Trial Chamber's assessment of Al-Senussi's due process rights

73. The Appellant submits that the Chamber failed to consider that Al-Senussi's due process rights have been violated.¹³⁹ In particular, the Appellant indicates, *inter alia*, that Al-Senussi has not been provided with counsel,¹⁴⁰ has been mistreated,¹⁴¹ held *incommunicado*, and has received no visit from his counsel who represented him before the Court.¹⁴² The Appellant further

¹³⁵ Decision, para.251 referring to Admissibility Challenge, para.142 and ICC-01/11-01/11-258-Anx8.

¹³⁶ Decision, para.258.

¹³⁷ Appeal, para.96, fourth bullet point.

¹³⁸ ICC-01/04-01/07-1497OA8, para.56; ICC-02/11-01/11-436-Red, para.23.

¹³⁹ Appeal, paras.96, eighth bullet point, 105.

¹⁴⁰ Appeal, para.96, seventh and eighth bullet point.

¹⁴¹ Appeal, para.96, sixth bullet point.

¹⁴² Appeal, para.103.

argues that the Chamber erroneously placed considerable weight on Libya having “progressed” the case to the Accusation Chamber, with the hearing on 19 September 2013 being conducted without incident.¹⁴³ Because of all the above, the Appellant argues that Al-Senussi’s proceedings are unfair and inconsistent with an intent to bring him to justice within the terms of Article 17(2)(c).¹⁴⁴

74. The Appellant’s arguments are premised on an erroneous understanding of the admissibility provisions and, in particular, of Article 17(2)(c). As noted above, the infringement of Al-Senussi’s due process rights is not a self-standing ground to find Libya unwilling or unable; any such infringement needs to fall within one of the scenarios set out in Article 17(2) and (3).¹⁴⁵
75. Further, the Appellant’s arguments constitute a misguided disagreement with the Chamber’s assessment of the evidence. First, and as indicated above, the Chamber took into consideration the fact that Al-Senussi had no lawyer in the Libyan proceedings despite the fact that he is afforded this right under Libyan law.¹⁴⁶ Second, and as also noted above, the Chamber was also mindful that counsel for Al-Senussi who represented him in ICC proceedings was not able to raise all factual allegations due to the lack of a legal visit.¹⁴⁷ However, as the Chamber correctly noted, the lack of such a visit does not necessarily mean that Al-Senussi’s rights in the Libyan proceedings were violated.¹⁴⁸
76. Third, the Chamber did consider the Appellant’s allegations as to the purported violations of Al-Senussi’s procedural rights. The Chamber

¹⁴³ Appeal, para.104 referring to Decision, para.303.

¹⁴⁴ Appeal, paras.96,98,103,105,111.

¹⁴⁵ See above, para.24. See also Decision, para.235.

¹⁴⁶ Decision, para.233.

¹⁴⁷ Decision, paras.29,219.

¹⁴⁸ Decision, fn.551.

correctly noted that any alleged violation would not amount *per se* to a finding of unwillingness and inability and that the purported violation needed to be linked to one of the scenarios under Article 17(2) and (3) in Al-Senussi's case.¹⁴⁹ While the Chamber indicated that certain violations could be relevant to the Chamber's assessment as to the independence and impartiality of the national proceedings, it recalled that any such assessment must be coupled with a finding that the proceedings, in the circumstances, are inconsistent with the intent to bring the person to justice.¹⁵⁰

77. The Chamber then noted that the core of the Appellant's argument was that Libya had not sufficiently demonstrated that the violations of Al-Senussi's fundamental rights had not occurred.¹⁵¹ The only supporting evidence of these purported violations, however, was a 5 September 2012 post on Twitter from a journalist who overheard a person leaving the room where Al-Senussi was supposedly held, saying that he had hit Al-Senussi on his head.¹⁵²

78. In light of the above, the Chamber's conclusion that the Appellant's submissions were "generic assertions without any tangible proof" is reasonable.¹⁵³ Similarly, the Chamber's conclusion that Libya's burden of proof cannot be interpreted as an obligation to disprove any possible "doubts" raised by the opposing party is also reasonable.¹⁵⁴ As noted above,¹⁵⁵ this finding does not constitute a reversal of the burden of proof,

¹⁴⁹ Decision, para.235.

¹⁵⁰ Decision, para.235.

¹⁵¹ Decision, para.238. In particular the Appellant had argued before the Chamber that "[i]t is unclear" whether and under which conditions the Appellant had been brought before a judge, whether he had been tortured or subject to degrading treatment, whether he had been informed of his right to silence, whether he had been informed of his right to review the investigative materials, and whether his health problems had been adequately monitored. Defence Observations, para.139.

¹⁵² Defence Observations, para.139, see fn.221 referring to ICC-01/11-01/11-216-Anx3.3. The Prosecution will address in Ground 2 the arguments related to the Appellant's photo.

¹⁵³ Decision, para.239.

¹⁵⁴ Decision, para.239.

¹⁵⁵ Appeal, paras.107-108 referring to Decision, paras.238-239.

but the application of a basic evidentiary principle requiring that the party advancing an argument provide supporting evidence to substantiate it.

79. Further, the Chamber correctly noted that Libya had addressed most of the Appellant's concerns. Contrary to the Appellant's assertions,¹⁵⁶ the Chamber not only referred to the HRW Report, but also relied on a letter provided by the Prosecutor-General's office and assertions and medical records submitted by Libya.¹⁵⁷ These documents indicate that Al-Senussi did not complain of being subject to physical abuse and had been treated reasonably, that he had been brought before a judge once per month to review his detention (which had been extended each time), that he had been confronted with the evidence of witnesses as established by Libyan law, and that he had been provided medical check-ups.¹⁵⁸

80. In sum, the Chamber reasonably concluded that "the information available to it does not indicate that the domestic proceedings against Mr Al-Senussi are tainted by departures from, or violations of, the Libyan national law such that they would support, in accordance with article 17 of the Statute, a finding of unwillingness or inability on the part of Libya to carry out the proceedings against Mr Al-Senussi."¹⁵⁹

81. The Chamber further found that Al-Senussi's proceedings did not appear inconsistent with Libya's intent to bring him to justice under Article 17(2)(c). The Chamber noted that the lack of counsel is primarily due to security

¹⁵⁶ Appeal, para.110 referring to Decision, para.240.

¹⁵⁷ Decision, para.240.

¹⁵⁸ Note that the interview between HRW representatives and Al-Senussi lasted for 30 minutes and was held without government or prison officials. Al-Senussi indicated that he was not allowed to exercise and that he had not been provided with a lawyer although he had requested one, nor did he know the precise charges against him. It should be noted that the Appellant criticizes the Chamber's reliance on a HRW Report (Appeal, para.96, sixth bullet point) while he himself relies on this report to argue that Al-Senussi has asked for a lawyer (Appeal, paras.53,96, eighth bullet point).

¹⁵⁹ Decision, para.243.

issues.¹⁶⁰ Further, and contrary to the Appellant's submissions,¹⁶¹ the Chamber did not "rel[y] heavily" on the progress of the case to the Accusation Chamber. The Chamber relied on the quality and quantity of the investigative steps taken to ascertain Al-Senussi's criminal responsibility to conclude that the proceedings were not conducted on a manner inconsistent with the intent to bring him to justice.¹⁶²

82. In conclusion, the Chamber's assessment is in compliance with the Appeals Chamber's jurisprudence stating that the challenging State needs to demonstrate "the taking of steps directed at ascertaining whether those suspects were responsible for that conduct".¹⁶³ As noted above, the Chamber must determine whether the steps taken are consistent with those ordinarily adopted by diligent domestic authorities, in light of the circumstances of that concrete case.¹⁶⁴

(iv) Incommunicado

83. The Appellant submits that Al-Senussi has been subject to *incommunicado* detention in Al-Hadba Prison since his transfer from Mauritania in September 2012.¹⁶⁵ The Appellant argues that Al-Senussi has been detained, "without a lawyer throughout his proceedings, cut-off from his family"¹⁶⁶ and at risk of mistreatment and interrogation,¹⁶⁷ and that this constitutes "essentially incommunicado imprisonment".¹⁶⁸

¹⁶⁰ Decision, para.292.

¹⁶¹ Appeal, para.26.

¹⁶² Decision, para.292 referring to paras.161,211.

¹⁶³ ICC-01/09-01/11-307OA, para.41. See above para. 28.

¹⁶⁴ See above para. 28.

¹⁶⁵ Defence Observations, para.132.

¹⁶⁶ Appeal, para.103.

¹⁶⁷ Appeal, paras. 65, 96, first bullet point. See also Defence Observations, para.132.

¹⁶⁸ Appeal, para.96, first bullet point.

84. The material before the Chamber does not support this conclusion. According to ECtHR's jurisprudence, *incommunicado* detention exists where a detainee is denied access to judicial officers, legal counsel, doctors, and relatives or friends, resulting in an absence of "any realistic possibility of [the detainee] being brought before a court to test the legality of the detention."¹⁶⁹
85. On the basis of the material presented, although there have been restrictions in the conditions of Al-Senussi's detention,¹⁷⁰ it does not appear that he was subjected to *incommunicado* detention. Al-Senussi has been in contact with certain family members,¹⁷¹ and with international organizations, such as HRW and Amnesty International.¹⁷² During interviews with these independent international bodies, Al-Senussi was able to speak privately and express his concerns about his situation.¹⁷³ Libya has also provided medical records from September 2012, indicating that he has been visited by a doctor.¹⁷⁴ Further, during his interviews with HRW and Amnesty International, Al-Senussi stated that he has been taken before a judge "once a month to review his detention order".¹⁷⁵ Further hearings before judicial officers have occurred, including Al-Senussi's recent attendance before the Accusation Chamber.¹⁷⁶

¹⁶⁹ *Aksoy v Turkey*, ECtHR, Application No 21987/93, Judgment, 18 December 1996, para.84.

¹⁷⁰ See HRW Report.

¹⁷¹ ICC-01/11-01/11-307-Red2, at para.178, stating Anoud Al-Senussi visited her father on 12 February 2013, as later documented by the Libya Herald; see Libya Herald, "Exclusive: Interview with Abdullah Senussi's imprisoned daughter", 2 March 2013 (available at <http://www.libyaherald.com/2013/03/02/exclusive-interview-with-abdullah-senussis-imprisoned-daughter/#axzz215V1ShFk>). See also HRW Report, stating that, "Sanussi also complained about limited family visits. He said he had received only one family visit during his almost eight months in detention, by his daughter Anoud".

¹⁷² HRW Report; Amnesty International, "Libya must surrender Saif al-Islam al-Gaddafi to International Criminal Court", 18 September 2013 (available at <http://www.amnesty.org/en/news/libya-must-surrender-saif-al-islam-al-gaddafi-international-criminal-court-2013-09-18>). Hereinafter "Amnesty International Report".

¹⁷³ HRW Report; Amnesty International Report.

¹⁷⁴ Decision, para.240, fn.606. See also ICC-01/11-01/11-252-Conf-Anx3.

¹⁷⁵ Amnesty International Report. This statement is also supported by the report of Human Rights Watch which states that, during his private interview, Mr Al-Senussi "said that he has been taken before a judge about once a month to review his detention. Each time the judge has extended the detention". See HRW Report.

¹⁷⁶ Decision, paras.156,214-215,303, citing Libya Herald, "Abdullah Senussi charged in Tripoli court; Saif still in Zintan", 19 September 2013 (available at <http://www.libyaherald.com/2013/09/19/43193/#axzz2ICEJV9g7>

(v) *Evidence of unlawful rendition from Mauritania*

86. The Appellant argues that the Chamber erred when it rejected the arguments that Al-Senussi's unlawful rendition from Mauritania to Libya showed that Libya was unwilling and unable to try him.¹⁷⁷ The Appellant reiterates the submissions before the Pre-Trial Chamber that "[i]t is inconceivable that in these circumstances Libya would require anything other than a conviction."¹⁷⁸

87. The Chamber dismissed the Appellant's arguments by stating that "the alleged modalities of Mr Al-Senussi's transfer to Libya, irrespective of whether they are true, do not demonstrate, or otherwise indicate, the existence of one of the scenarios envisaged under article 17(2) or (3) of the Statute".¹⁷⁹ This conclusion is sound. The transfer of Al-Senussi to Libya has no bearing on any of the situations described in Article 17(2) and (3). Moreover, the transfer does not mean that Al-Senussi will be convicted.¹⁸⁰

(vi) *Additional allegations*

88. The Appellant further argues that the Chamber should have considered certain facts, such as deficiencies in the availability and the implementation of due process protections in Libyan trials,¹⁸¹ reports of deaths and torture in detention centres,¹⁸² the fact that Al-Senussi was guarded by victims and that there is public pressure to execute him.¹⁸³ The Appellant fails, however, to

), and The Tripoli Post, "Seif Gaddafi Misses Tripoli Hearing But Attends Another Court in Zintan", 20 September 2013 (available at <http://www.tripolipost.com/articledetail.asp?c=1&i=10652>). See also ICC-01/11-01/11-455, paras.5-9,33.

¹⁷⁷ Appeal, para.120 referring to Decision, para.236.

¹⁷⁸ Appeal, para.121.

¹⁷⁹ Decision, para.236.

¹⁸⁰ A contrario, Appeal, para.121. As the Appellant notes (Appeal, para.122) this matter is the subject of separate appeal proceedings.

¹⁸¹ Appeal, para.96, eight bullet point.

¹⁸² Appeal, para.96, sixth bullet point.

¹⁸³ Appeal, para.103.

indicate how these facts, even if accepted, by themselves or assessed together with other factors, impact on the requirements of Article 17(2) and (3) with respect to Al-Senussi's case.

89. Furthermore, the Chamber addressed the Appellant's arguments related to systemic deficiencies in the Libyan judiciary and reasonably concluded that those factors did not render Libya unable under Article 17(3) in Al-Senussi's case.¹⁸⁴ The Chamber also took into consideration Libya's security challenges in its determination of the admissibility of the case.¹⁸⁵
90. Finally, the Appellant's submission that it was not allowed to respond to Libya's Final Submissions is misplaced.¹⁸⁶ The Chamber decided on 12 September 2013 that no further submissions by the parties and participants would be allowed after Libya's final submissions "unless otherwise decided".¹⁸⁷ The Appellant could have sought leave to submit additional observations if it considered that Libya's Final Submissions required further response. It chose not to make such a request.

(d) The Pre-Trial Chamber's findings with respect to Article 17(3)

91. The Appellant argues that the Chamber erred when it concluded that Libya was not unable to carry out Al-Senussi's proceedings under Article 17(3). In particular, the Appellant submits that the Chamber erroneously weighed the following facts: (i) the lack of governmental control over detention facilities; (ii) the lack of security for judicial authorities and organs; and (iii) the lack of security for witnesses.

¹⁸⁴ Decision, para.258. See also paras.297,301.

¹⁸⁵ Decision, para.281.

¹⁸⁶ Appeal, para.106.

¹⁸⁷ ICC-01/11-01/11-441, para.13: "Finally, the Chamber wishes to clarify that, unless otherwise decided, no further submissions by the parties and participants will be allowed after Libya's final submissions of 26 September 2013."

92. At the outset, it should be noted that the Appellant's understanding of the relevance of these factors is misplaced. As the Chamber correctly noted, these factors are relevant so long as they have a bearing on the case against Al-Senussi.¹⁸⁸ The Appellant's submissions further disregard that an admissibility determination considers the facts as they exist at the time of the admissibility proceedings.¹⁸⁹

(i) Lack of governmental control over detention facilities

93. The Appellant disputes the Chamber's finding that Libya "is currently in a position to exercise sufficient control over the detention facilities in which Mr Al-Senussi is being held".¹⁹⁰ The Appellant submits that the Chamber erroneously assessed the evidence before it,¹⁹¹ including the fact that militia groups participate in the running of Al-Hadba prison and have free access to it.¹⁹² Moreover, the Appellant argues that the Chamber's finding is inconsistent with the Gaddafi Admissibility Decision.¹⁹³

94. The Appellant's submissions on these issues should be dismissed. The Chamber first considered whether the involvement of militia groups in Al-Hadba prison would render Libya unable to obtain Al-Senussi under Article 17(3);¹⁹⁴ and second, it assessed whether the fact that Libya's control does not extend to all detention centres throughout the country is relevant to determine Libya's ability to gather the necessary evidence under Article 17(3) in Al-Senussi's case.¹⁹⁵

¹⁸⁸ Decision, paras.261-262.

¹⁸⁹ ICC-01/04-01/07-1497OA8, para.56; ICC-02/11-01/11-436-Red, para.23.

¹⁹⁰ Appeal, para.124, referring to Decision, para.264.

¹⁹¹ Appeal, paras.125-126, referring to Decision, para.265 and fn.606.

¹⁹² Appeal, para.124.

¹⁹³ Appeal, paras.127-128.

¹⁹⁴ Decision, paras.264-265.

¹⁹⁵ Decision, paras.266-270.

95. On the first issue, the Chamber considered all the evidence before it and relied on several pieces of evidence in order to determine whether the presence of militia in Al-Hadba has a bearing on the scenarios under Article 17(3) in Al-Senussi's case. In particular, the Chamber relied on an official letter from the Libyan Prosecutor-General confirming Al-Senussi's detention; a letter from the Prosecutor-General's office that informs the Court that Al-Senussi has been interviewed and confronted with witnesses and the HRW Report, whose representatives met with Al-Senussi and who indicated, *inter alia*, that the visit was facilitated by Justice Minister Salah Marghani and the acting head of Al-Hadba, which was administered by the judicial police under the authority of the Justice Ministry.¹⁹⁶
96. Notably, the Chamber considered the statements submitted *ex parte* by the Appellant and concluded that this material did not support the Appellant's assertion that the militia controls Al-Hadba. To the contrary, it indicated that judicial proceedings against persons held in Al-Hadba are currently ongoing and the proceedings are not precluded by the alleged militia control over the detention centre.¹⁹⁷
97. On the second issue, the Chamber considered the deteriorating overall security situation in Libya, together with the fact that certain detention centres have yet to be placed under the authority of the Ministry of Justice, and the absence of effective protection programmes for witnesses.¹⁹⁸ The Chamber also considered additional factors, such as (a) the fact that the necessary amount of evidence to carry out Al-Senussi's proceedings has

¹⁹⁶ Decision, fn.606, referring to ICC-01/11-01/11-252-Conf-Anx3; Annex 2 to the Admissibility Challenge; HRW Report.

¹⁹⁷ Decision, para.265, referring to Confidential Ex Parte Annex C to Defence Observations. See also, para.264.

¹⁹⁸ Decision, para.297. See also, Decision, paras.267-270.

been collected, including witnesses' and victims' statements;¹⁹⁹ (b) that the proceedings have progressed to the Accusation Chamber;²⁰⁰ (c) that there is no indication that the collection of evidence has ceased or will cease due to unaddressed security concerns for witnesses in Al-Senussi's case;²⁰¹ (d) that witnesses interviewed are in detention centres where the Libyan government exercises control;²⁰² and (e) that other former officials of Gaddafi's regime are subject to ongoing proceedings, whether in the same case as Al-Senussi or in others.²⁰³

98. In light of all these factors, the Chamber reasonably concluded that Libya was not unable to obtain the necessary evidence to carry out the proceedings against Al-Senussi.²⁰⁴ First, the term "necessary" in Article 17(3) does not require that *any* evidence cannot be gathered (or that all possible evidence needs to be gathered),²⁰⁵ but that sufficient evidence and testimony cannot be obtained to conduct a genuine criminal proceeding.²⁰⁶ This does not appear to be the case in the instant proceedings considering the quality and quantity of evidence gathered and the concrete and progressive investigative steps taken.²⁰⁷

99. Second, the Chamber's reasoning indicates that, while not engaging in speculative assessments as to the outcome of possible future events,²⁰⁸ the Chamber remained vigilant to obstacles, established on the basis of concrete

¹⁹⁹ Decision, para.298. See also paras.161,211.

²⁰⁰ Decision, para.299.

²⁰¹ Decision, para.298.

²⁰² Decision, para.300.

²⁰³ Decision, para.299.

²⁰⁴ Decision, para.301.

²⁰⁵ Decision, para.298.

²⁰⁶ J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions* (2008), p.326. Thus, evidence which is not strictly needed in order to reach sufficiently qualified decisions should not be considered to be "necessary". See also Holmes, in Lee, pp.48-49, which refers to "key evidence or testimony".

²⁰⁷ Decision, paras.298 (referring to paras.161 and 211) and 299.

²⁰⁸ ICC-02/04-01/05-377, para.51.

evidence, which might establish a foreseeable risk that national proceedings against Al-Senussi cannot in fact be carried out. This position is consistent with the Appeals Chamber's jurisprudence stating that the admissibility of a case needs to be determined on the basis of the facts as they exist at the time of the admissibility proceedings.²⁰⁹

100. The Appellant further argues that the Chamber's finding is inconsistent with the Gaddafi Admissibility Decision where the Chamber found that the government's lack of control over certain detention centres was an impediment to Libya obtaining the necessary evidence, thus rendering Libya unable under Article 17(3).²¹⁰

101. However, in the Gaddafi Admissibility Decision, the Chamber appears to refer to the impossibility of interviewing two witnesses as an example of a much broader pattern demonstrating that the authorities are unable to exercise control,²¹¹ which in turn appears to have impacted on the lack of evidence presented in support of this challenge. In any event, given that the Chamber found Libya unable based on other various factors,²¹² this purported error, in and of itself, would have no impact on the Chamber's overall conclusion that Libya was unable to obtain the necessary testimony, or that it was unable under the other scenarios of Article 17(3), in the Gaddafi case.

²⁰⁹ ICC-01/04-01/07-1497OA8, para.56; ICC-02/11-01/11-436-Red, para.23. A contrario Appeal, para.128. Moreover, the Appellant's submissions also appear to reiterate its erroneous interpretation of Article 17(2)(c) whereby any violation of due process or issues of unfairness automatically entail unwillingness. See for example Appeal, para.126.

²¹⁰ Appeal, para.127, first bullet point, referring to Gaddafi Admissibility Decision, paras.209-211, in particular para.210. The Appellant argues that the Chamber made this finding in Gaddafi Admissibility Decision without regard to the lack of evidence gathered in that case.

²¹¹ Gaddafi Admissibility Decision, para.210. See, for example, ICC-01/11-01/11-281-Red2, paras.67-73.

²¹² Gaddafi Admissibility Decision, para.211 where the Chamber also considered the lack of specific protection programmes to determine Libya's inability to obtain the necessary evidence and testimony, and paras.206-208 and 212-214 where the Chamber concluded that Libya was unable to obtain the accused, and to otherwise carry out the proceedings, respectively.

102. The Appellant also adds that the Chamber's finding in the Decision should apply to Gaddafi, because Gaddafi and Al-Senussi are being investigated in Libya as a joint case.²¹³ However, as developed below,²¹⁴ the fact that Libya has obtained the necessary evidence in Al-Senussi's case regardless of the security situation does not mean that the same reasoning should apply to the Gaddafi case, even if they are being jointly tried in Libya.²¹⁵ The situation and relevant facts to each accused person are different,²¹⁶ and the evidence presented by Libya to support the two admissibility challenges similarly differs.²¹⁷

(ii) Lack of security for judicial authorities and organs

103. The Appellant argues that the Chamber erred when it did not give decisive weight to the lack of security for judicial authorities and organs.²¹⁸ According to the Appellant, the Chamber was wrong to imply that it was necessary to show that members of the judiciary involved in Al-Senussi's case needed to have been threatened or attacked due to their involvement in that case.²¹⁹ Finally, the Appellant argues that the Chamber was inconsistent with its findings in the Gaddafi Admissibility Decision.²²⁰

104. The Appellant again fails to show an error in the Chamber's reasoning. First, the Chamber correctly noted that Libya's overall poor security situation does not automatically amount to total or substantial collapse or unavailability of

²¹³ Appeal, para.127, second bullet point.

²¹⁴ See below, paras.137-140.

²¹⁵ A contrario Appeal, para.127, second bullet point.

²¹⁶ For example, the Chamber found that Gaddafi is currently under the custody of the Zintan militia. Gaddafi Admissibility Decision, paras.206-208.

²¹⁷ Gaddafi Admissibility Decision, para.135. See also Decision, para.297, where the Chamber notes that "Libya did not satisfactorily demonstrate that it had collected more than a few sparse items of evidence as part of its investigation against Mr Gaddafi".

²¹⁸ Appeal, para.129. See also Appeal, para.96, third bullet point.

²¹⁹ Appeal, para.131 referring to Decision, paras.273-275.

²²⁰ Appeal, para.130 referring to Gaddafi Admissibility Decision, paras.205,211-214. See also Appeal, para.96 third bullet point.

Libya's judicial system so that Libya is unable to carry out the proceedings against Al-Senussi within the meaning of Article 17(3).²²¹ There needs to be a causal nexus between the collapse or unavailability *and* the three scenarios described in Article 17(3)²²² with respect to Al-Senussi's case at the time of the admissibility proceedings.²²³ In any event, the Chamber noted that it would take into consideration the existence of serious security concerns in its final determination of the admissibility of the case, together with all other relevant circumstances.²²⁴

105. The Chamber further dismissed the Appellant's submissions regarding the abduction of the Deputy Prosecutor involved in Al-Senussi's case²²⁵ which appeared not to be related to his role within that case.²²⁶ Moreover, and as noted above,²²⁷ the Chamber correctly gave no decisive weight to the abductions of Al-Senussi's daughter²²⁸ and of the Libyan Prime Minister Ali Zeidan, who was released shortly afterwards.²²⁹ These events appear unrelated to the proceedings against Al-Senussi and, at this stage, do not impede the progress of his proceedings within the terms of Article 17(3). Judge Van den Wyngaert confirmed in her Declaration, which is referred to by the Appellant, that she would have preferred to require further observations on how Mr Zeidan's abduction would impact on Libya's ability to carry out Al-Senussi's criminal proceedings. However, she reiterated that "on the basis of the record as it stands today, the case against Mr Al-Senussi

²²¹ Decision, paras.261,281.

²²² Heller, p.264.

²²³ As noted above, the admissibility of a case needs to be determined on the basis of the facts as they exist at the time of the admissibility proceedings. See ICC-01/04-01/07-1497 OA8, para.56; ICC-02/11-01/11-436-Red, para.23.

²²⁴ Decision, para.281.

²²⁵ Decision, para.275.

²²⁶ See Decision, fn.628 referring to Libya Herald, "Taha Bara released", 16 June 2013 (available at <http://www.libyaherald.com/2013/06/16/taha-bara-released/#axzz2kXLvTHcG>). Note that Mr Bara was subsequently released.

²²⁷ See above para. 67.

²²⁸ Appeal, para.96, fourth bullet point.

²²⁹ Appeal, para.96, fifth bullet point.

is inadmissible” and that “generalised security concerns in Libya, even those which lead to a substantial collapse of the national judicial system, only become dispositive under article 17(3) of the Statute if Libya is unable to proceed against Al-Senussi ‘due to’ these concerns.”²³⁰ The Chamber’s conclusion is therefore reasonable.

106. In sum, the Chamber did consider the general deteriorating security situation in Libya, together with other factors,²³¹ and concluded that it did not result in Libya’s inability to obtain the evidence and testimony that is necessary for the proceedings against Al-Senussi.²³² The Chamber relied on, *inter alia*, the quantity and quality of the evidence gathered and the concrete and progressive investigative steps taken in the case.²³³ The Chamber’s conclusion is, in light of these facts, reasonable.

107. Second, the Appellant argues that if the Chamber found the Libyan judicial system “unavailable” for Gaddafi, the Chamber should have similarly found Libya “unavailable” for Al-Senussi.²³⁴ This is not correct. As noted above, Article 17(3) requires a causal nexus between “total or substantial collapse” or “unavailability” *and* the three scenarios set out in that provision. Moreover, an admissibility determination is case-specific, being the component elements of the case, the person and the conduct.²³⁵ Thus, security issues need to have an impact on Al-Senussi’s case. Hence, and considering the different facts underpinning Gaddafi’s case, namely, that sufficient evidence was not provided²³⁶ and that Gaddafi was not under the

²³⁰ ICC-01/11-01/11-466-Anx.

²³¹ Decision, paras.297-301. See also, para.281.

²³² Decision, para.301.

²³³ Decision, paras.298-299.

²³⁴ Appeal, para.130.

²³⁵ ICC-01/09-01/11-307OA, para.40.

²³⁶ Gaddafi Admissibility Decision, para.135.

custody of the Libyan authorities,²³⁷ the Chamber correctly found that security factors had an impact on that case, while they did not in Al-Senussi's, since the necessary evidence had been gathered.²³⁸

(iii) Lack of security for witnesses

108. The Appellant argues that the Chamber erred when it did not afford decisive weight to the lack of security for witnesses.²³⁹ The Appellant fails to demonstrate, again, a factual error in the Chamber's findings. First and as noted above,²⁴⁰ the Chamber considered the absence of effective protection programmes for witnesses *jointly* with other factors and concluded that "[t]aking into account all the relevant circumstances" and "in the concrete circumstances of the present case" this does not result in Libya's inability to obtain the evidence and testimony that is necessary for the proceedings against Al-Senussi.²⁴¹

109. The Chamber's decision is consistent with the need to determine the admissibility of a case on the basis of the facts, as they exist, at the time of the admissibility proceedings.²⁴² At the time of the proceedings before the Pre-Trial Chamber, the case had not reached the trial stage, and it was therefore difficult to predict the impact that the current lack of clarity as to the existence and effective functioning of a witness protection program in Libya could have on the presentation of the necessary evidence in subsequent proceedings. At that stage there was no list of prospective Defence witnesses, nor was there an assessment of their need for protective measures. Moreover, Libya indicated that this obstacle could be removed at

²³⁷ Gaddafi Admissibility Decision, paras.206-208.

²³⁸ Decision, paras.160-163.

²³⁹ Appeal, para.132 referring to Decision, para.283. Appeal, para.96, ninth bullet point.

²⁴⁰ See above, paras.97,106.

²⁴¹ Decision, para.301.

²⁴² ICC-01/04-01/07-1497 OA8, para.56; ICC-02/11-01/11-436-Red, para.23.

trial: the trial judge has discretion to afford protective measures at trial, and Libyan legislation appears to permit the presentation of witness statements made before a notary.²⁴³ The Prosecution, however, notes that it would have been advisable for Libya to have provided supporting material of its assertions regarding the application of the purported protective measures in its Courts.

110. Second, the Appellant states that the Chamber only considered the need to obtain prosecution evidence.²⁴⁴ The Appellant's reading of Article 17(3) is erroneous. The term "*necessary* evidence and testimony" has been interpreted as the evidence necessary to carry out genuine proceedings,²⁴⁵ which – as the Chamber noted – need not comprise all possible evidence.²⁴⁶

111. The Chamber nevertheless considered the quantity and quality of investigative steps taken and, as noted above, observed, *inter alia*, that "multiple lines of investigation ha[d] been followed" and "that during interviews, witnesses were asked to provide information of a potential exculpatory nature".²⁴⁷

112. Third, and contrary to the Appellant's submissions,²⁴⁸ the Decision is not inconsistent with the Gaddafi Admissibility Decision. In the Gaddafi Admissibility Decision, the Chamber considered the lack of specific witness protection programmes together with the lack of control over certain detention facilities and the impact that these facts had on the sparse items of

²⁴³ Admissibility Challenge, para.177. Reply, para.142. Libya has also indicated that projects are being implemented with international assistance to improve the security in courts. See Admissibility Challenge, para.187.

²⁴⁴ Appeal, para.134.

²⁴⁵ J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions* (2008), p.326. See also Holmes, in Lee, which refers to "key evidence or testimony".

²⁴⁶ Decision, para.298.

²⁴⁷ Decision, para.211. See also para.161.

²⁴⁸ Appeal, paras.133-134, referring to Decision, paras.286-287 and 296-301.

evidence gathered in that case.²⁴⁹ As the facts underpinning the two cases differ, the Chamber correctly reached different conclusions.

Second Ground: the Appellant's request to submit new evidence

113. The Appellant seeks to introduce new evidence which only became available after the Decision and could not therefore have been submitted to the Pre-Trial Chamber.²⁵⁰ According to the Appellant, certain of the incidents referred to in the new evidence only occurred around the time of, or after, the Decision.²⁵¹ The Appellant argues that this new evidence provides information, in particular, about Al-Senussi's mistreatment before and after the hearing on 19 September 2013 through which the authorities have sought to obtain confessions.²⁵²

114. The Prosecution will address the evidence the Appellant seeks to introduce in two parts: (a) the facts that occurred *after* the Decision; and (b) the facts that occurred *before* the Decision but for which supporting evidence only became available to the Appellant after the Decision.

A. Facts that occurred after the Decision

115. To the extent that the Appellant's request to introduce new information concerns events that occurred *after* the Decision,²⁵³ the Prosecution opposes such request on the grounds that it contravenes the corrective nature of the appellate process and circumvents the statutory framework of the admissibility proceedings.

²⁴⁹ Gaddafi Admissibility Decision, paras.209-211.

²⁵⁰ Appeal, para.137.

²⁵¹ Appeal, para.154.

²⁵² Appeal, para.137.

²⁵³ Appeal, para.154.

116. First, and as the Appeals Chamber has repeatedly stated, its review of interlocutory decisions is “corrective in nature and not *de novo*”.²⁵⁴ For that purpose, new facts should not, in principle, result in a *de novo* consideration of the admissibility challenge during appellate proceedings. This principle has been further reiterated by the Appeals Chamber in the *Kenya* cases when it held that: “[a]s a corrective measure, the scope of proceedings on appeal is determined by the scope of the relevant proceedings before the Pre-Trial Chamber.”²⁵⁵ In that case the Appeals Chamber specifically found that “[t]he instant proceedings before the Pre-Trial Chamber concluded with the issuance of the Impugned [Admissibility] Decision. Facts which postdate the Impugned Decision fall beyond the possible scope of the proceedings before the Pre-Trial Chamber and therefore beyond the scope of the proceedings on appeal.”²⁵⁶ As a result of the above, the Appeals Chamber concluded that “events which fall outside the scope of the relevant pre-trial or trial proceedings fall outside the scope of the appeal concerning those proceedings and should be rejected *in limine*.”²⁵⁷

117. Thus, events that postdate the Decision fall outside the scope of appellate review and, therefore, a request to present them should be rejected *in limine* without further examination of its merits.

118. Second, and notwithstanding the above, the request to present information about events that postdate the Decision should also be rejected on the ground that it circumvents the legal framework of the admissibility proceedings at the Court. Recognising that the facts underpinning a challenge of the admissibility of a case often evolve,²⁵⁸ a determination on

²⁵⁴ See for instance, ICC-02/05-03/09-295 OA2, para.20.

²⁵⁵ ICC-01/09-02/11-202 OA, para.12 and ICC-01/09-01/11-234 OA, para.13.

²⁵⁶ ICC-01/09-02/11-202OA, para.12 and ICC-01/09-01/11-234OA, para.13.

²⁵⁷ ICC-01/09-02/11-202OA, para.9 and ICC-01/09-01/11-234OA, para.10.

²⁵⁸ ICC-01/04-01/07-1497OA8, para.56.

admissibility must nevertheless be made based on a defined set of facts – those that exist at the time of the admissibility proceedings before the Pre-Trial Chamber.²⁵⁹ Otherwise, such determination would not be sustainable but could be subject to continuing reconsideration as facts and circumstances change. The Court’s function under Article 17 is to determine whether a case *is* inadmissible (based on the facts existing at the time of the Admissibility Decision) and not whether the case *was* (or *will be*) inadmissible in light of a different set of facts and circumstances.²⁶⁰

119. As a result, new facts that postdate the issuance of the Decision do not form part of the factual situation on the basis of which the admissibility of the case is established.

120. For all of the above, the Appellant’s request to consider such new evidence should be rejected.

B. Facts that occurred before the Decision but of which the Appellant became aware after the Decision

121. By contrast, the facts that occurred before the Decision, but only became known to the Appellant after, may be admitted within prescribed conditions. As the Prosecution submitted before the Appeals Chamber,²⁶¹ according to international practice additional evidence on appeal should only be admitted if: (a) it was not available at trial to duly diligent counsel; (b) it is relevant and credible; and (c) it could have been a decisive factor in the decision.²⁶²

²⁵⁹ ICC-01/04-01/07-1497OA8, para.56; ICC-01/09-01/11-234OA, para.10; ICC-01/09-02/11-202OA, para.9.

²⁶⁰ ICC-01/04-01/07-1497OA8, para.56.

²⁶¹ ICC-01/04-01/06-2969 OA, paras.38-39.

²⁶² ICC-01/11-01/11-460, para.19 referring to Archbold, *International Criminal Courts*, 3rd ed. (2009), pp.1460-1461; see also L. Bianchi and I. Onsea, “Additional Evidence on Appeal, Review Proceedings, and

122. The new evidence which the Appellant seeks to introduce consists of three annexes.²⁶³ Only one of them (Annex 3) is accessible to the Prosecution.

(a) Annexes 1 and 2

123. The Appellant submits that Annexes 1 and 2 can only be provided to the Appeals Chamber on a confidential and *ex parte* basis due to serious security concerns and risks explained in those annexes.²⁶⁴ The Prosecution is therefore unable to assess the information contained therein, evaluate whether it meets the test for admission of new evidence, or verify whether it indeed serves to prove the issues raised by the Appellant.

124. Should the Appeals Chamber wish to admit the annexes into the record of the case, the Prosecution requests the Appeals Chamber to first order the Appellant to provide a redacted version of the annexes, or explain their content in a summary form, to enable the parties to provide observations. Given that the parties had no access to these two annexes, their immediate admission into evidence would violate the principles underlying the adversarial nature of the proceedings.²⁶⁵

(b) Annex 3

125. The Appellant indicates that Annex 3 is a photograph taken at Al-Senussi's hearing on 3 October 2013,²⁶⁶ which shows "the substantial amount of weight he has lost and bruising to his face".²⁶⁷ According to the Appellant, this photograph constitutes proof of "Al-Senussi's mistreatment after the hearing

the Remedy of Reconsideration" in K. Khan, C. Buisman and C. Gosnell, *Principles of Evidence in International Criminal Justice* (2010), p.726.

²⁶³ Two confidential and *ex parte* annexes (Annexes 1 and 2) and one public annex (Annex 3).

²⁶⁴ Appeal, para.152.

²⁶⁵ See for instance, ICC-01/04-01/07-476OA2, para.63; ICC-01/04-01/07-475OA, para.73.

²⁶⁶ Appeal, para.152.

²⁶⁷ Appeal, para.110, fifth bullet point.

on 19 September 2013 in which the authorities have been seeking to obtain confessions from Mr. Al-Senussi.”²⁶⁸

126. The Appellant claims that the photograph “shows that Mr. Al-Senussi is not being treated humanely and fairly and in a manner consistent with bringing him to justice. It also shows that Libya is unable genuinely to carry out the proceedings against him. It is thus directly relevant to the very issues being considered by the Appeals Chamber in Ground 1 of the appeal.”²⁶⁹

127. The requirements for admission of evidence on appeal have not been met in relation to Annex 3. First, the photograph provided in Annex 3 is not authenticated in any way and can therefore not be safely relied on. Second, the photograph is not conclusive in demonstrating that Al-Senussi was mistreated before and following the hearing on 19 September 2013 and that the alleged mistreatment was inflicted on him by Libyan authorities. Notably, it is even unclear whether the colouration in his face demonstrates bruising.²⁷⁰ Third and in light of the above, the photograph would have not been a decisive factor in the Decision, had it been available to the Pre-Trial Chamber. Although it relates to the Appellant’s submissions on Al-Senussi’s alleged mistreatment while in detention, the photograph would not modify the Chamber’s conclusion that Libya was not unwilling with respect to Al-Senussi’s proceedings.²⁷¹

128. As a result, the Appellant has failed to demonstrate that Annex 3 meets the threshold for admission of new evidence on appeal and the Appellant’s request under its Second Ground of Appeal must be rejected.

²⁶⁸ Appeal, para.137.

²⁶⁹ Appeal, para.137.

²⁷⁰ Appeal, para.110, fifth bullet point.

²⁷¹ Decision, paras.243,292.

Third Ground: the Pre-Trial Chamber did not err in concluding that Libya was investigating and prosecuting the same case as before the ICC

129. The Appellant submits that the Chamber erred in its finding that Libya was investigating Al-Senussi for substantially the same conduct as the case before the ICC. First, the Appellant asserts that the Chamber erred in relying on redacted witness statements; second, that the Chamber erred in finding that the “contours” of the case were discernible from the evidence submitted by Libya, and that Libya is investigating the same case, despite the fact that the crime of persecution is not envisaged in Libyan law.

130. As developed below, there is no error in the Chamber’s determinations.

A. The Pre-Trial Chamber correctly relied on witness statements

131. The Appellant asserts that the Pre-Trial Chamber erred when it accorded significant weight to redacted witness statements.²⁷² The Appellant further argues that without having the names of the witnesses it could not make proper inquiries about the legitimacy of the statements and was, therefore, substantially prejudiced.²⁷³ Further, the Appellant argues that the redactions were not proportionate and that the redacted statements are not comprehensible.²⁷⁴

132. First, the Chamber considered the witness statements jointly with other materials presented by Libya.²⁷⁵ Second, the right to disclosure is not absolute,²⁷⁶ and the redactions are proportionate and strictly limited to names or other identifying information of the witnesses in the domestic

²⁷² Appeal, para.164.

²⁷³ Appeal, para.165.

²⁷⁴ Appeal, paras.167-168, referring to Decision, paras.102-104.

²⁷⁵ Decision, paras.161-162.

²⁷⁶ ICC-01/04-01/07-475OA, para.62; ICC-01/04-01/06-1486OA13, paras.46-47.

proceedings.²⁷⁷ The Chamber balanced all the interests at stake²⁷⁸ and, in particular, it considered (1) that redaction of the identities is the least intrusive measure that can be taken to mitigate the risk identified by Libya; (2) the limited scope and purpose of the admissibility proceedings; and (3) the fact that discrete redaction of the identities of the witnesses does not affect the comprehension of the material and therefore the ability of the [Defence] to provide a meaningful response.²⁷⁹

133. Notably, for the purpose of its determination of admissibility, the Chamber exclusively relied upon evidence contained in the version of the statements that was made available to the Appellant, the Prosecution, and the OPCV. Other information that had been submitted on an *ex parte* basis was not taken into consideration by the Pre-Trial Chamber.²⁸⁰

134. Third, the Appellant argues that had it known the witnesses' identities, it would have investigated them because they may be 'a complete fabrication' or "'trumped up' evidence [relied on] to launch sham proceedings".²⁸¹ The Appellant thus appears to consider that the identity of the witnesses is necessary to ascertain the genuineness of the investigative steps, which is the second step of any admissibility determination. It never placed this argument before the Pre-Trial Chamber. Moreover, the Appellant's enquiry into the genuineness can still be conducted without contacting the witnesses interviewed by Libya. The Appellant ignores that an admissibility

²⁷⁷ Decision, paras.103-104.

²⁷⁸ ICC-01/11-01/11-271-Red, paras.12,14,17,18.

²⁷⁹ ICC-01/11-01/11-271-Red, para.12. The Chamber explained that it had authorized Libya to redact the identities, or identifying information, of witnesses from the statements presented in its challenge to Gaddafi's case. Following the same rationale, Libya applied the same redactions in Al-Senussi's case, which were permitted by the Chamber, see ICC-01/11-01/11-325, para.3. See Decision, para.103.

²⁸⁰ Decision, para.105.

²⁸¹ Appeal, para.165.

determination is a limited enquiry and not a full-fledged assessment on the merits of the domestic case.²⁸²

135. Finally, had the Appellant considered the redacted information to be so essential, it should have requested its lifting prior to the filing of its Observations. However, the Appellant never indicated before the Pre-Trial Chamber that it wished to investigate further the source of the statements.²⁸³ The Appellant, therefore, cannot expect the Pre-Trial Chamber to consider arguments that were not made before it.

B. The Pre-Trial Chamber correctly found that Libya's proceedings cover the same case

136. The Appellant argues that the Chamber erred in finding that the Libyan case covers substantially the same conduct as the ICC case and identifies three alleged sub-errors in support of its submission, to which the Prosecution will respond in turn.

(a) The contours of the Libyan case are discernible

137. The Appellant argues that the material provided by Libya in the Challenge only permits the Chamber to establish that the Libyan case covers some "aspects" of the proceedings before the ICC.²⁸⁴ Thus, as it found in the Gaddafi Admissibility Decision, the Chamber should have found that the

²⁸² As the Chamber found: "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 negated by the fact that, upon scrutiny, the evidence may be insufficient to support a conviction by the domestic authorities." Decision, para.66(vii).

²⁸³ Defence Observations, paras.40 - 41.

²⁸⁴ Appeal, paras.170,173-174.

evidence submitted by Libya did not permit it to establish the “contours” of the Libyan case.²⁸⁵

138. The Appellant’s submissions are without merit as Libya provided additional and more comprehensive supporting evidence in Al-Senussi’s Challenge with respect to the material submitted in Gaddafi’s Challenge. In Gaddafi’s Challenge, Libya provided three witness statements, summaries of witness statements, intercepts and documentary evidence;²⁸⁶ in Al-Senussi’s, Libya provided further sixteen witnesses statements, as well as additional documentary evidence (death certificates, medical notes and military orders), which were not provided in Gaddafi’s Challenge.²⁸⁷

139. Furthermore, the temporal and geographical parameters of Gaddafi’s alleged conduct described in the warrants of arrest and Article 58 Decision is broader than Al-Senussi’s. Whereas the Chamber decided to issue an arrest warrant against Gaddafi for his alleged responsibility for the crimes against humanity of murder and persecution “committed across Libya from 15 February 2011 until at least 28 February 2011”,²⁸⁸ it decided to issue an arrest warrant against Al-Senussi for his alleged responsibility for crimes against humanity “committed *in Benghazi* from 15 February 2011 until at least 20 February 2011”.²⁸⁹ In light of the different temporal and geographical scope in the two cases, even if the same evidence had been submitted in the two challenges, a different outcome in the two admissibility decisions would not necessarily constitute error.

²⁸⁵ Gaddafi Decision, para.135.

²⁸⁶ Gaddafi Decision, para.114.

²⁸⁷ Decision, paras.107,112.

²⁸⁸ ICC-01/11-01/11-1, p.41; ICC-01/11-01/11-3, p.6.

²⁸⁹ ICC-01/11-01/11-1, p.41; ICC-01/11-01/11-4, p.6 (emphasis added).

140. Finally, from even a cursory review of the two admissibility decisions, it is clear that the “aspects” in relation to which the Chamber found that Libya had taken investigative steps are different in the two cases.²⁹⁰

(b) The Pre-Trial Chamber’s definition of substantially the same conduct

141. The Appellant argues that several incidents in Benghazi and elsewhere in the country, which are identified in the Article 58 Decision, are not covered in the evidence collected by Libya. Thus, according to the Appellant, the case in Libya is not the same as the ICC case.²⁹¹

142. The Appellant’s submissions are misplaced.²⁹² Al-Senussi’s criminal responsibility before the ICC is limited to acts of murder and persecution committed in Benghazi from 15 February until at least 20 February 2011. Thus, the factual allegations underpinning Al-Senussi’s charges in Libyan proceedings do not need to cover acts elsewhere in the country for the case to be inadmissible. However, and for the purposes of the contextual elements, the Chamber did note that attacks against civilians were carried out elsewhere in the country.²⁹³

143. The Prosecution has submitted in the appeal proceedings against the Gaddafi Admissibility Decision its interpretation of the notion “substantially

²⁹⁰ Compare Gaddafi Admissibility Decision, para.134 and Decision, para.162.

²⁹¹ Appeal, para.176.

²⁹² The Chamber identified the relevant conduct as set out in the Warrant of Arrest read in conjunction with the Article 58 Decision as: “the individual criminal responsibility of Mr Al-Senussi for killings and acts of persecution by reason of their (real or perceived) political opposition to the Gaddafi regime carried out on many civilian demonstrators and political dissidents, allegedly committed directly or through the Security Forces during the repression of the demonstrations taking place in Benghazi from 15 February 2011 until at least 20 February 2011 and as part of a policy designed at the highest level of the Libyan State machinery to deter and quell, by any means, the revolution against the Gaddafi regime occurring throughout Libya”. Decision, para.71. See also para.163.

²⁹³ Decision, para.162(i), (iv), (vi), (vii).

the same conduct”.²⁹⁴ In particular, the Prosecution has indicated that use of the term “substantially” should not be understood to qualify “sameness” to mean that the *idem* in question (conduct) need *not* be the same. Rather, “substantially” serves to explain in relation to what “sameness” attaches, namely, to the substance of the criminal behavior. Thus, a case will be “substantially the same” if any differences in the underlying facts and circumstances are minor, such that the facts and circumstances may be described as essentially the same because they are inextricably linked together in time, space and by their subject-matter.²⁹⁵

144. The Chamber’s interpretation of the same person/same conduct test in this Decision, although it departed from prior and consistent jurisprudence of other Pre-Trial Chambers which have defined a case as being incident-specific,²⁹⁶ is reasonable and compatible with the Prosecution’s interpretation²⁹⁷ and with the earlier case-law. The determination of the relevant conduct requires a case-by-case determination and will depend on the factual parameters of each case.²⁹⁸ Those parameters are defined by subject-matter (criminal acts) that occurs in one or several locations during a certain period of time. Therefore, to render a case inadmissible before the Court it is necessary that the facts and circumstances of the domestic proceedings and of those before the ICC are inextricably linked together in

²⁹⁴ ICC-01/11-01/11-384OA4, paras.51-72.

²⁹⁵ The Prosecution has submitted that the *ne bis in idem* jurisprudence may be of guidance to determine what “substantially the same conduct” means, given the close interlink between *ne bis in idem* and complementarity provisions, their common function in determining forum allocation and the similarity in the inquiry regarding whether the two cases are indeed “the same”, and what “same” means in this context. See ICC-01/11-01/11-384, paras.54-64.

²⁹⁶ See authorities cited in fn.126 of the Gaddafi Admissibility Decision.

²⁹⁷ Prosecution Additional Observations, paras.13-18; Decision, paras.75,77.

²⁹⁸ Decision, para.74.

time, space and by their subject-matter.²⁹⁹ This requirement is met in this case.³⁰⁰

(c) The Pre-Trial Chamber's findings on persecution are correct

145. The Appellant argues that the Chamber erred when it considered that the crime of persecution was adequately captured in Libyan law. The Chamber noted that this "factual aspect of the allegations [on the crime of persecution] against Mr Al-Senussi before the Court is not an element of any of the crimes with which it is currently envisaged that Mr Al-Senussi could be charged at the domestic level."³⁰¹ Nevertheless, the Chamber found that this was not fatal to Libya's application because Libyan law permits certain factual aspects of the crime of persecution, in particular, targeting of a particular group of individuals by reason of the identity of the group, to be taken into account as an aggravating factor in sentencing under Articles 27 and 28 of the Libyan Penal Code.³⁰² However, according to the Appellant, this fact is not sufficient to show that Libya is investigating and prosecuting the same case as that before the ICC.³⁰³

(i) Crime Labelling

146. The Prosecution has previously submitted that there is no requirement that the crimes charged in the national proceedings have the same "label" as the ones before this Court.³⁰⁴ The Statute does not set out to regulate how States may choose to incorporate crimes within the jurisdiction of the Court into their national legal system. There is no requirement under the Statute, for example, for States to adopt legislation incorporating the crimes listed in

²⁹⁹ ICC-01/11-01/11-384OA4, para.64. See Decision, paras.75,77.

³⁰⁰ Decision, paras.163-165.

³⁰¹ Appeal, para.177 referring to Decision, para.166.

³⁰² Decision, para.166.

³⁰³ Appeal, paras.179-180.

³⁰⁴ ICC-01/11-01/11-167-Red, paras.23-26.

Articles 6 through 8 into national law.³⁰⁵ Therefore, there may be discrepancies in the way a particular act is criminalized under the Rome Statute and under national law.

147. At the same time, other provisions of national law may also impact on the admissibility of a particular case. These include the availability of defences or other grounds for excluding criminal responsibility not permissible under the Rome Statute, the existence of significant discrepancies or lacunae in available modes of liability that might fatally affect the theory of the national prosecution, or the existence of immunities or special procedural rules based on official capacity that could impede prosecution. The assessment of complementarity, therefore, cannot be based on a rigid approach that examines only whether the conduct concerned is criminalized as an ordinary or international crime. Instead, the Chamber will need to examine a range of factors, on a case-by-case basis, in order for it to be able to determine how national law would shape the contours of the proceedings at hand.

148. The test developed by the Appeals Chamber requires the Court to be satisfied that the case at the national level would be substantially the same as the ICC's.³⁰⁶ The term "substantially" also denotes that the conduct needs be the same *in substance*,³⁰⁷ bearing in mind such factors as those described above.³⁰⁸ The national authorities are not necessarily required to charge the suspect under the exact same legal qualification.³⁰⁹

³⁰⁵ Even amongst States Parties, there is wide disparity in how they have chosen to legislate in relation to crimes within the jurisdiction of the Court: some have directly incorporated ICC crimes as international offences under national law, others have applied or modified existing war crimes legislation, while others still have adopted an ordinary crimes approach.

³⁰⁶ ICC-01/09-02/11-274OA, para.39.

³⁰⁷ ICC-01/11-01/11-130-Red, paras.86-87.

³⁰⁸ Trial Chamber III, in the context of admissibility proceedings in the *Bemba* case, considered as a preliminary matter whether the cases before the ICC and at the national level were the same, by reference to a similar test. It observed that they were "save that the charges are inevitably different (given the particular crimes within the ICC's jurisdiction: Article 5 of the Statute) and the evidence has developed and changed as a

149. Even in States that have incorporated the international crimes into domestic statutes, in any given case the national prosecutor may make a strategic decision, based on the available evidence, not to charge an international crime, and instead charge only domestic crimes such as murder or assault. A national prosecution for grave domestic crimes might therefore be sufficient to preclude this Court from ruling a case admissible, subject to the considerations set out above as to the impact of such charging on the contours of the case.³¹⁰

(ii) The Pre-Trial Chamber's findings on persecution

150. The Chamber found that the discriminatory intent is sufficiently captured in the Libyan legislation.³¹¹ This finding is correct in light of the facts of this case. First, a Libyan judge has an obligation pursuant to Article 28 of the

result of the investigation by the OTP. The conduct and underlying offences (murder, rape, pillage etc) are the same, as are many of the central events that are relied on.” ICC-01/05-01/08-802, para.218.

³⁰⁹ The Prosecution notes that the ICTR Trial and Appeals Chambers in the *Bagaragaza* case did not permit the referral of that case because the domestic jurisdiction did not foresee the crime of genocide, and *Bagaragaza*, would instead be tried for homicide which would not capture the protected values of the crime of genocide. However, reliance on the *Bagaragaza* decision overlooks important distinctions in the two Tribunals’ founding Statutes: under Article 8 of the ICTR Statute, that Tribunal is granted primacy over national courts with the power to request a State defer competence over any case falling within the Tribunal’s jurisdiction, in contrast to the complementarity regime under the Rome Statute. Moreover, the label attached to the crime matters at the ICTR as the Tribunal may still try a person who has been tried before a national court for “acts constituting serious violations of international humanitarian law” if the acts for which he or she was tried were “categorized as an ordinary crime”. See Article 9(2)(a). In contrast, Article 20(3) does not permit a second trial before the ICC when a person has already been tried for the same conduct by another court, which indicates that legal qualification is not determinative. Compare formulation in article 20(2) which refers to ‘crime’ not ‘conduct’. See *The Prosecutor v. Michel Bagaragaza*, Case No. ICTR-05-86-AR11bis, Decision on Rule 11bis Appeal, 30 August 2006, para.17. See also R. Rastan, “Situation and Case: Defining the Parameters” in C. Stahn and M. M. El Zeidy, *The International Criminal Court and Complementarity: From Theory to Practice* (2011), pp.449-453. On the other hand, the Referral Bench of the ICTY (notwithstanding the fact that Article 10(2)(a) of its Statute is the same as Article 9(2)(a) of the ICTR Statute) permitted the referral of the *Ademi and Norac* case to Croatia, although its legislation did not expressly foresee command responsibility, because it was satisfied that other domestic law provisions appeared to cover most of the aspects of the doctrine of command responsibility. See *Prosecutor v. Rahim Ademi and Mirko Norac*, Case No. IT-04-78-PT, Decision for Referral to the Authorities of the Republic of Croatia pursuant to Rule 11bis, 14 September 2005, para.45: “Given the factual circumstances alleged in the present case and the options available under Croatian law to cover the alleged conduct of the accused, however, the Referral Bench does not regard this possible and limited difference in the law as an obstacle to the referral proposed by the Motion”.

³¹⁰ See above, para.147.

³¹¹ Decision, para.166.

Libyan Penal Code to consider the aggravating circumstances,³¹² including the nature and type of act, its objective and other relevant factors, as well as the motives for committing the crime.³¹³ The Chamber correctly concluded that this broad language would encapsulate any discriminatory intent thus adequately reflecting the gravity of the offence of persecution.

151. Further, in the Libyan system there are no separate “sentencing proceedings.” The domestic proceedings consist of four phases: investigation, accusation, trial, and appeal.³¹⁴ It would therefore appear that factual allegations relevant to the elements of crimes as well as aggravating factors are fully aired and examined during the trial proceedings which conclude with a judgement which captures all relevant criminal elements, including aggravating factors. The Court should, nonetheless, remain vigilant as the domestic proceedings progress to ascertain whether facts indicative of the discriminatory intent are presented during the trial.

The Appellant’s request for an oral hearing

152. The Appellant requests that the Appeals Chamber hold an oral hearing on the merits of the appeal pursuant to Rule 156(3).³¹⁵ The Appellant asserts that the written submissions and evidence are voluminous and cover so many divergent and complex issues that it “is simply impossible for the present issues to be fully explored and considered in the absence of an oral hearing.”³¹⁶

³¹² Article 28 of the Libyan Penal Code in its original Arabic version uses the phrase “الْقاضي سيجل” which is translated into “the judge shall”. See Annex C.

³¹³ Ibid.

³¹⁴ Admissibility Challenge, para.128.

³¹⁵ Appeal, para.186.

³¹⁶ Appeal, para.189.

153. The Appellant further submits that, unlike Gaddafi's Defence, Al-Senussi's Defence did not present orally its arguments before the Pre-Trial Chamber.³¹⁷ Furthermore, the Appellant argues that an oral hearing will permit the new evidence, whose admission is sought by the Appellant under the Second Ground, to be heard and examined by the Appeals Chamber and will enable the parties to make submissions on the basis of this evidence.³¹⁸

154. Rule 156(3) sets out the general rule that proceedings for appeals filed under Rule 154 shall be conducted in writing. An oral hearing will only occur where cogent reasons are presented for the Appeals Chamber to exercise its discretion to depart from this general rule.³¹⁹ Further, the complexity of the issues under appeal, in and of itself, does not make a hearing necessary as long as the parties have been given sufficient opportunity to address the issues comprehensively and exhaustively in their written submissions.³²⁰ The Appeals Chamber has similarly rejected previous requests for oral hearings in appeals filed under Rule 154 based on the purported importance of the issues,³²¹ their novelty, complexity and precedential impact.³²²

155. The Prosecution notes that the Appellant has had sufficient opportunity to address the relevant matters before the Appeals Chamber in written form. Moreover, the fact that the majority of the new evidence which the Appellant seeks to present is confidential and not accessible to the parties and participants only puts into question the utility of an oral hearing to examine that evidence. Further, the fact that Gaddafi's Defence was afforded an opportunity to present orally its arguments before the Pre-Trial Chamber is irrelevant to the instant request before the Appeals Chamber. Al-Senussi's

³¹⁷ Appeal, para.190.

³¹⁸ Appeal, para.191.

³¹⁹ ICC-01/05-01/08-962-Corr, para.25; ICC-01/09-01/11-271OA, para.10; ICC-01/09-02/11-251OA, para.10.

³²⁰ ICC-01/09-01/11-271OA, para.11.

³²¹ ICC-01/04-01/06-2582OA18, para.27.

³²² ICC-01/09-01/11-271, para.11.

Defence has also been given ample opportunities before the Pre-Trial Chamber to present submissions and additional evidence and has never requested an oral hearing before that Chamber, which is the primary forum for the appraisal of the evidence.³²³ As described above,³²⁴ the intervention of the Appeals Chamber is corrective in nature³²⁵ and will not interfere with the Chamber's assessment of the evidence unless there is a clear error.³²⁶

156. Finally, should the Appeals Chamber have questions and concerns, the Chamber could avail itself of Regulation 28 of the Regulations of the Court to seek clarification or request additional details by way of written submissions.³²⁷

157. For all the aforementioned reasons, the Appellant's request for an oral hearing should be rejected.

³²³ ICC-01/04-01/07-572OA6, para.25.

³²⁴ See above, para.116.

³²⁵ ICC-02/05-03/09-295OA2, para.20.

³²⁶ ICC-01/04-01/10-283OA, paras.1,17; ICC-01/09-01/11-307OA, para.56.

³²⁷ ICC-01/09-01/11-271OA, para.12; ICC-01/09-02/11-251OA, para.12.

Conclusion

158. For all the foregoing reasons, the Prosecution requests that the Appeal be rejected.



Fatou Bensouda
Prosecutor

Dated this 27th day of November 2013

At The Hague, The Netherlands