

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 4 June 2012

PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernandez de Gurmendi, Presiding Judge
Judge Hans-Peter Kaul
Judge Christine Van den Wyngaert

SITUATION IN LIBYA

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

**Public redacted version of ICC-01/04-01/10-166
with Public Annex A**

**Observations on behalf of victims on the Government of Libya's Application
pursuant to Article 19 of the Rome Statute**

Source: Office of Public Counsel for Victims

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

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I. PROCEDURAL HISTORY

1. On 27 June 2011, Pre-Trial Chamber I (the “Chamber”) issued the “Decision on the ‘Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi’” (the “Article 58 Decision”),¹ issuing warrants of arrest against Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi for their alleged responsibility under article 25(3)(a) of the Rome Statute for crimes against humanity committed across Libya in February 2011.

2. On 1 May 2012, the Government of Libya filed an Application pursuant to article 19 of the Rome Statute, whereby it requested the Chamber to: (i) postpone execution of the Surrender Request pursuant to article 95 of the Rome Statute and (ii) declare the case inadmissible and quash the Surrender Request (the “Admissibility Challenge”).²

3. On 4 May 2012, the Chamber issued the “Decision on the Conduct of the Proceedings Following the ‘Application on behalf of the Government of Libya pursuant to Article 19 of the Statute’” whereby it decided, *inter alia*, to : (i) appoint, for the purpose of the admissibility proceedings, Paolina Massidda from the Office of Public Counsel for Victims (the “OPCV” or the “Office”) as legal representative of victims who have already communicated with the Court in relation to the case, (ii) instruct the Registrar to provide the OPCV with information about victims who have communicated with the Court, as well as with any necessary assistance to contact the victim applicants as soon as possible and (iii) invite the Prosecutor, the

¹ See the “Decision on the ‘Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi’” (Pre-Trial Chamber I), No. ICC-01/11-01/11-1, 27 June 2011 (the “Article 58 Decision”).

² See the “Application on behalf of the Government of Libya pursuant to Article 19 of the Statute”, No. ICC-01/11-01/11-130-Red, 1 May 2012, paras. 107 and 108 (the “Admissibility Challenge”).

OPCD, the Security Council and the OPCV to submit observations on the Admissibility Challenge, if any, no later than 4 June 2012.³

4. On 7 May 2012, the Principal Counsel of the OPCV filed a “Request to access documents in relation to the Challenge to the Jurisdiction of the Court by the Government of Libya” requesting access to certain confidential documents concerning the Admissibility Challenge.⁴

5. On 15 May 2012, the Chamber issued the “Decision on the OPCV ‘Request to access documents in relation to the Challenge to the Jurisdiction of the Court by the Government of Libya’”, granting access to the OPCV to documents ICC-01/11-01/11-130-Conf, ICC-01/11-01/11-130-Conf-AnxC, ICC-01/11-01/11-130-Conf-AnxD, ICC-01/11-01/11-130-Conf-AnxE, ICC-01/11-01/11-130-Conf-AnxF and ICC-01/11-01/11-130-Conf-AnXI.⁵

6. On 18 May 2012, the Defence requested the Chamber, (i) to “report the non-compliance of the Libyan authorities to the Security Council”; (ii) to “stay the Chamber’s consideration of the admissibility proceedings”; and (iii) to “draw adverse inferences” concerning Libya in relation to the pending admissibility challenge (the “Defence Request”).⁶

³ See the “Decision on the Conduct of the Proceedings Following the ‘Application on behalf of the Government of Libya pursuant to Article 19 of the Statute’” (Pre-Trial Chamber I), No. ICC-01/11-01/11-134, 4 May 2012, par. 13. See also the “Notification of appointment of the Office of Public Counsel for Victims as legal representative of victim applicants in relation to the Admissibility Challenge pursuant to Article 19 of the Rome Statute”, No. ICC-01/01-01/11-161, 30 May 2012.

⁴ See the “Request to access documents in relation to the Challenge to the Jurisdiction of the Court by the Government of Libya”, No. ICC-01/11-01/11-138, 8 May 2012 (dated 7 May 2012).

⁵ See the “Decision on the OPCV ‘Request to access documents in relation to the Challenge to the Jurisdiction of the Court by the Government of Libya’” (Pre-Trial Chamber I), No. ICC-01/11-01/11-147, 15 May 2012.

⁶ See the “Public Redacted Version of the ‘Defence Request’”, No. ICC-01/11-01/11-152-Red, 18 May 2012, para. 91.

7. On 23 May 2012, Ms. Mishana Hosseinioun submitted an application for leave to submit observations to the Pre-Trial Chamber in the admissibility proceedings.⁷

8. On 28 May 2012, the Libyan Government filed a compilation of the provisions of Libyan law referred to in its Admissibility Challenge together with an English translation thereof.⁸

9. On 30 May 2012, the Libyan Government responded to the Defence Request.⁹

10. On 31 May 2012, the Defence filed an "Urgent Request for Extension of Time"¹⁰, requesting the Pre-Trial Chamber to delay the deadline for the Defence to respond to the Admissibility Challenge challenge, *"until at least two working days after the Defence returns to The Hague upon the conclusion of a successful (privileged) visit with Mr. Gaddafi."*¹¹ This request was granted by the Chamber on 1 June 2012.¹²

11. On 1 June 2012, the Chamber issued its "Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Rome Statute"¹³ deciding that *"Libya may postpone the execution of the*

⁷ See the "Application on behalf of Mishana Hosseinioun for Leave to Submit Observations to the Pre-Trial Chamber in the Admissibility proceedings", No. ICC-01/11-01/11-156, 23 May 2012.

⁸ See the "Libyan Government's filing of compilation of Libyan law referred to in its admissibility challenge", No. ICC-01/11-01/11-158, 28 May 2012.

⁹ See the "Libyan Government Response to Defence Request", No. ICC-01/11-01/11-160, 30 May 2012.

¹⁰ See the "Public Redacted Version of the 'Urgent Request for Extension of Time'", No. ICC-01/11-01/11-162-Red, 31 May 2012.

¹¹ *Idem*, par. 17.

¹² See the "Decision on the OPCD's 'Urgent Request for Extension of Time'" (Pre-Trial Chamber I), No. ICC-01/11-01/11-165, 1 June 2012.

¹³ See the "Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Rome Statute" (Pre-Trial Chamber I), No. ICC-01/11-01/11-163, 1 June 2012.

request for surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Statute until such time that the Chamber has ruled on the Admissibility Challenge.”¹⁴

12. The Principal Counsel of the Office hereby files her submissions on behalf of victim-applicants in this case and generally on behalf of victims who have communicated with the Court in relation to the case in accordance with the decision of the Pre-Trial Chamber dated 4 May 2012.¹⁵

13. This submission is filed confidential since it contains information which refers to documents classified confidential by the Libyan Government. However, a public redacted version is filed simultaneously.

II. LEGAL SUBMISSIONS

A. Legal Standard

14. Pursuant to article 17(1) of the Rome Statute:

“The Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution”.

Article 19(2) of the Rome Statute provides, in relevant part, as follows:

“Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by: [...] (b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted”.

15. Accordingly, there exists a precondition for the applicability of articles 17(1) and 19(2) of the Rome Statute, namely the existence of *“ongoing investigations or*

¹⁴ *Idem*, p. 16.

¹⁵ See the “Decision on the Conduct of the Proceedings Following the ‘Application on behalf of the Government of Libya pursuant to Article 19 of the Statute’”, *supra* note 3.

prosecutions” at the national level.¹⁶ The term “investigation” has been defined as “the taking of steps directed at ascertaining whether this individual is responsible for that conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses”.¹⁷ The Appeals Chamber has also clarified the required breadth of such national investigations: they must cover the same “case”, namely the same individual and substantially the same conduct as alleged in the proceedings before the ICC.¹⁸ The evidence provided by a State in support of an admissibility challenge must be of a “sufficient degree of specificity and probative value” that demonstrates that it is indeed investigating the case.¹⁹

16. As to the scope of the present proceedings, the Chamber has clearly determined that the admissibility challenge lodged by Libya must be understood as to concern only the case against Mr. Gaddafi.²⁰ In this regard, the admissibility test as applied by the relevant practice of the Court requires that (i) the same person is being genuinely investigated by the national jurisdiction and (ii) national

¹⁶ See the “Judgment on the Appeal of Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case” (Appeals Chamber), No. ICC-01/04-01/07-1497, 25 September 2009, para. 7.

¹⁷ See the “Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’” (Appeals Chamber), No. ICC-01/09-02/11-274, 30 August 2011, par. 1.

¹⁸ *Idem*. See also the “Decision on the evidence and information provided by the Prosecution for the issuance of a warrant for arrest for Mathieu Ngudjolo Chui” (Pre-Trial Chamber I), No. ICC-01/04-02/07-3 and No. ICC-01/04-01/07-262, 6 July 2007, para. 21 (“it is a *conditio sine qua non* for such finding that national proceedings encompass both the person and the conduct which is the subject of the case before the Court”), the “Decision on the Prosecution Application under Article 58(7) of the Statute” (Pre-Trial Chamber I), No. ICC-02/05-01/07-1-Corr, 15 May 2007, para. 24 and the “Decision concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo” (Pre-Trial Chamber I), No. ICC-01/04-01/06-8-Corr, 24 February 2006, para. 31, p. 20.

¹⁹ See the “Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’” (Appeals Chamber), No. ICC-01/09-02/11-274, 30 August 2011, para. 2.

²⁰ See the “Decision on the Conduct of the Proceedings Following the ‘Application on behalf of the Government of Libya pursuant to Article 19 of the Statute’”, *supra* note 3, para. 8.

investigations cover substantially the same conduct as alleged in the proceedings before the ICC.²¹

B. *The same person/same conduct test*

17. In its Admissibility Challenge, the Libyan Government indicates that multiple investigations are currently underway against Mr. Gaddafi. It submits that a first investigation was launched into allegations of corruption and financial crimes on 19 November 2011.²² Furthermore, it asserts that on 17 December 2011, a second inquiry was opened by the Prosecutor-General in relation to “*all crimes committed by Mr. Gaddafi during the revolution*”.²³ The Admissibility Challenge describes, in various sections, the specific investigative steps which have been undertaken against the suspect, which include witness interviews and analyses of intercept evidence.²⁴

18. To support these contentions, the Libyan Government annexed to its Admissibility Challenge an undated report [REDACTED].²⁵ It is submitted that this report alone does not constitute sufficient evidence to establish the existence of a national investigation against Mr. Gaddafi, as is required by the legal texts of the Court. Indeed, the vagueness of said contentions coupled with the fact that none of the alleged crimes committed are defined precisely in said report does not enable a clear assessment as to whether Mr. Gaddafi is been investigated/charged nationally with the crimes contained in the warrant of arrest issued by the Chamber.²⁶ Moreover, there exists no evidence in the Admissibility Challenge that the suspect has either been interviewed or confronted with any of the allegations against him.

²¹ See the “Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’” (Appeals Chamber), *supra* note 19, par. 39.

²² See the Admissibility Challenge, *supra* note 2, para. 42.

²³ *Idem*, para. 44.

²⁴ *Ibid.*, paras. 39-67.

²⁵ See the Admissibility Challenge, *supra* note 2, Annex C.

²⁶ See the Article 58 Decision, *supra* note 1. See also *infra*, paragraph 20.

It is even unclear from the Admissibility Challenge whether Mr. Gaddafi was adequately informed of these allegations and whether he was allowed to appear before a national court following his arrest.

19. In a similar context, the Appeals Chamber ruled that:

*“a statement by a Government that it is actively investigating is not determinative. In such a case the Government must support its statement with tangible proof to demonstrate that it is actually carrying out relevant investigations’. In other words, there must be evidence with probative value”.*²⁷

20. The only direct evidence disclosed by the Libyan Government can be found in annex D to the Admissibility Challenge, [REDACTED].²⁸ The said annex contains [REDACTED].²⁹ [REDACTED]. The genuineness of the investigations emphasised by the Libyan Government must, in these circumstances, be seriously doubted.

21. The requirement of “genuineness” provided for in article 17(1) of the Rome Statute concerns whether a State as a whole is “willing and able genuinely to carry out the investigation or prosecution”. In the *Lubanga* case, Pre-Trial Chamber I alluded to this important dimension.³⁰ The meaning of the term “genuine” is potentially twofold:³¹ firstly, when focusing on the States’ “unwillingness” or “inability”, it suggests that “genuinely” would be an implied reference to the tests set out in

²⁷ See the “Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’”, para. 62 (footnotes omitted).

²⁸ See the Admissibility Challenge, *supra* note 2, Annex D.

²⁹ *Idem.*

³⁰ See the “Decision concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo”, *supra* note 18, para. 32, p. 20. In this sense, see also WILLIAMS (S. A.) and SCHABAS (W. A.), “Issues of Admissibility”, in TRIFFTERER (O.) (ed.), *Commentary on the Rome Statute of the International Criminal Court- Observers’ Notes, Article by Article*, Verlag C.H. Beck, 2008, p. 617.

³¹ EL ZEIDY (M. M.), *The Principle of Complementarity in International Criminal Law; Origin, Development and Practice*, Martinus Nijhoff Publishers, 2008, p. 165.

article 17(2) of the Rome Statute;³² secondly, and in the alternative, it qualifies the last part of the sentence “*the genuineness of investigations or prosecutions*”. The prevailing view relates to the second interpretation³³ according to which, in essence, in article 17(1)(b) of the Rome Statute, the terms are more clearly separated. Accordingly, where the State is genuinely willing to take certain steps, but those steps are insufficient for an investigation or prosecution to be qualified as “genuine”, the case would still be admissible under article 17 of the Rome Statute.

22. The evidence and statements presented by the Libyan Government casts doubt on whether a genuine investigation against Mr. Gaddafi is ongoing. It is indeed impossible to assert that genuine investigations are ongoing based on the mere statements by senior officials as contended by the Libyan Government. The initial threshold for the inadmissibility analysis under article 17(1)(a) of the Rome Statute has therefore not been reached.

23. Moreover, when an admissibility challenge is brought by a State in relation to a specific case, the Court needs to ascertain whether national investigations encompass the conduct which is the subject of the proceeding before the Court.³⁴ This is so because the defining elements of a case under articles 17 and 19 of the Rome Statute are the individual and the alleged conduct.³⁵ Therefore, if the conduct

³² WILLIAMS (S. A.) and SCHABAS (W. A.), *op. cit.*, *supra* note 30, p. 617.

³³ EL ZEIDY (M. M.), *op. cit.*, *supra* note 31, p. 165. See also OFFICE OF THE PROSECUTOR, *Informal Expert Paper “The principle of complementarity in practice”*, 2003, p. 8, contained in the “Annex A to the Defence Reply to Prosecution Response to Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a)”, No. ICC-01/04-01/07-1008-AnxA, 30 March 2009.

³⁴ See the “Decision on the Prosecution Application under Article 58(7) of the Statute”, *supra* note 18, para. 24. See also the “Decision concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo”, *supra* note 18, para. 31, p. 20 and the “Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’”, *supra* note 17, paras. 39 and 46.

³⁵ See the “Decision on the Prosecutor’s Application for a Warrant of Arrest”, *supra* note 18, paras. 30-40, pp. 20-24. See also the “Decision on the Prosecution Application under Article 58(7) of the Statute”, *supra* note 18, para. 24 and the “Decision on the Prosecutor’s Application for a Warrant

has not been investigated by the national jurisdiction, there is no legal basis for the Court to find the case inadmissible.³⁶

24. Article 17(1) of the Rome Statute establishes a rule for resolving conflicts of jurisdiction between the Court on the one hand, and national legal systems on the other hand. In the context of the Kenyan situation, the Appeals Chamber ruled that in order for such a conflict to arise, national investigations must, at a minimum, cover “*substantially the same conduct*”.³⁷ The Appeals Chamber did not however examine this condition closely, as it found that there was no investigation ongoing.³⁸ The fundamental question which now arises is whether the term “conduct” must be interpreted as “incident-specific” and whether the term “substantial” must be understood to require the investigation of all of the factual incidents contemplated by the Pre-Trial Chamber in its article 58 Decision.³⁹ In other words, are national authorities bound to inquire into exactly the same acts, taking into account parameters such as time and location, or, can a State simply investigate similar crimes.

25. It is submitted that the “same conduct test” requires States to investigate the same incidents as alleged in the proceedings before the ICC to meet the inadmissibility threshold. One commentator has opined that article 17(1) of the Rome Statute is the corollary of the *ne bis in idem* rule provided for in article 21 of the same text.⁴⁰ Thus, the investigation concerning the alleged conduct of an individual at the national level for (a) specific event(s) does not preclude the

of Arrest against Jean-Pierre Bemba Gombo” (Pre-Trial Chamber III), No. ICC-01/05-01/08-14-tENG, 10 June 2008, para. 21.

³⁶ See the “Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’”, *supra* note 19, para. 43.

³⁷ *Idem*, para. 41.

³⁸ *Ibid.*, para. 43.

³⁹ See the Article 58 Decision, *supra* note 1.

⁴⁰ RASTAN (R.), “Situation and case: defining the parameters”, in STAHN (C.) & EL ZEIDY (M. M.) (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, Cambridge University Press, 2011, p. 441.

investigation of other incidents by the Court. This is consistent with the Appeals Chamber's view according to which article 17 operates as a norm for resolving conflict between different jurisdictions.⁴¹ Indeed, there is no possibility for such a conflict to arise when distinct and separate incidents are considered by several judicial bodies. It follows that for a State to successfully challenge the admissibility of a case before the International Criminal Court, it must provide sufficient evidence that its national investigations cover all of the incidents that are under consideration by the ICC. The State can only decide not to investigate incidents that, when considered together, do not satisfy the gravity threshold provided for in article 17(1)(d) of the Rome Statute.

C. *Libya is not investigating the specific incidents forming the basis for the arrest warrant against Mr. Gaddafi*

26. Contrary to the Libyan Government's assertions, the alleged State investigation does not cover "*all of the factual incidents described in the ICC Article 58 decision*".⁴² In its Article 58 Decision, the Pre-Trial Chamber found reasonable grounds to believe that the specific elements of the alleged crimes against humanity have been met.⁴³ The Chamber held that there are reasonable grounds to believe that a systematic and widespread attack was launched on a civilian population in furtherance of a State policy.⁴⁴ Specific reference to twenty three incidents informed the Chamber's conclusion that there are reasonable grounds to believe that they constitute crimes against humanity of murder.⁴⁵ In finding there are reasonable grounds to believe that the crime against humanity of persecution has been committed, the Chamber referred to not less than nineteen other

⁴¹ See the "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'", *supra* note 19, para. 36.

⁴² See the Admissibility Challenge, *supra* note 2, para. 46.

⁴³ See the Article 58 Decision, *supra* note 1, paras. 13-90 and 96.

⁴⁴ *Idem*, paras. 37.

⁴⁵ *Ibid.*, paras. 36-39.

incidents.⁴⁶ The Admissibility Challenge does not refer to the investigative steps that have been undertaken in relation to each of these incidents, it only reveals that Mr. Gaddafi is being investigated for “*all crimes committed [...] during the revolution ... starting from February 2011*”.⁴⁷ This general and vague formulation lacks the specificity of a clear time period; locations or incidences. It suggests that the Libyan investigation relates simply to a number of crimes punishable under the Libyan Criminal Code. It does not indicate that the specific incidents forming the basis of the warrant of arrest, nor the proceedings before the Court, are actually being investigated.

27. This lack of specificity has been condemned by the Appeals Chamber:

“The meaning of the words ‘case is being investigated’ in article 17 (1) (a) of the Statute must therefore be understood in the context to which it is applied. For the purpose of proceedings relating to the initiation of an investigation into a situation (articles 15 and 53 (1) of the Statute), the contours of the likely cases will often be relatively vague because the investigations of the Prosecutor are at their initial stages. The same is true for preliminary admissibility challenges under article 18 of the Statute. Often, no individual suspects will have been identified at this stage, nor will the exact conduct nor its legal classification be clear. [...]

*In contrast, article 19 of the Statute relates to the admissibility of concrete cases. The cases are defined by the warrant of arrest or summons to appear issued under article 58, or the charges brought by the Prosecutor and confirmed by the Pre-Trial Chamber under article 61”.*⁴⁸

28. Moreover, the Libyan Government provided some details about the possible charges against Mr. Gaddafi⁴⁹ and short summaries of the evidence given by a number of witnesses.⁵⁰ However, the general nature of such information does not enable a conclusive assessment of whether the specific incidents in this case are

⁴⁶ *Ibid.*, paras. 43-62.

⁴⁷ See the Admissibility Challenge, *supra* note 2, para. 44.

⁴⁸ See the “Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’”, *supra* note 19, para. 38-39 (we underline).

⁴⁹ See the Admissibility Challenge, *supra* note 2, Annex I.

⁵⁰ *Idem*, Annex C.

being investigated by national authorities. Since the Libyan Government bears the burden of proof, it is expected to present direct and specific evidence of the steps undertaken in respect of each of the allegations under consideration by the Court. The Government has thus far failed to do so and until it is able to do so, the case against Mr. Gaddafi is admissible before the Court.

D. Concerns regarding Libya's ability to conduct genuine investigations

29. Article 17(1)(a) of the Rome Statute provides that a case being investigated or prosecuted by a State is inadmissible before the Court, *"unless the State is unwilling or unable genuinely to carry out the investigation or prosecution"*. Article 17(3) stipulates that : *"[i]n order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings"*. At this stage and in light of the recent developments in Libya, it seems particularly relevant to address the various factors that are likely to hinder Libya's capacity to genuinely investigate the present case.

30. The lack of substantive criminal legislation, the current security situation and the failure of the relevant authorities to secure the transfer of the suspect are strong indicators that the Libyan Government is unable to genuinely investigate and prosecute Mr. Gaddafi.

31. The ability of a State to conduct genuine investigations primarily depends on the domestic legal framework for such investigations. For a State to conduct genuine legal proceeding within the meaning of article 17 of the Rome Statute, it must either enact a domestic criminal legislation that allows for the prosecution of the criminal conduct punishable under the Rome Statute, or give direct effect to the Rome Statute. In the absence of such domestic legal framework, the Court may

decide that a case is admissible because “of the ‘incapacity’ of the national jurisdictions to provide justice in the case”.⁵¹

32. As correctly pointed out by the Libyan Government, charging Mr. Gaddafi with “ordinary crimes” may be deemed sufficient to meet the complementarity test. A State may well choose to prosecute the constituent elements of crimes defined in the Rome Statute, rather than the crimes themselves.⁵² However, in the latter case, the State must have criminal legislation encompassing all the material elements of the crimes alleged in the specific case before the International Criminal Court. In other words, domestic law must provide for adequate penalties for the whole criminal conduct that is under consideration by the Court. Thus, in the present instance, Libya is required to establish that its national legal system allows for the prosecution of all of the contemplated incidents as attributed to Mr. Gaddafi by the Pre-Trial Chamber in its Article 58 Decision.⁵³

33. It is submitted that the Libyan Criminal Code of 1953 does not empower national authorities to carry out effective and comprehensive investigations into the crimes against humanity of murder and persecution. The Libyan Government indicated that it is likely to charge Mr. Gaddafi with: intentional murder; torture; incitement to civil war; indiscriminate killings; misuse of authority against individuals; arresting people without just cause; and the unjustified deprivation of personal liberty under articles 368, 435, 293, 296, 431, 433, 434 of the Libyan Criminal Code.⁵⁴ But the Office contends that the scope of these crimes is considerably narrower than the elements of the crimes under article 7 of the Rome Statute.

⁵¹ BURKE-WHITE (W. W.), “Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo”, *Leiden Journal of International Law*, vol. 18, 2005, p. 581 (footnotes omitted)

⁵² *Idem*.

⁵³ See the Article 58 Decision, *supra* note 1.

⁵⁴ See the Admissibility Challenge, *supra* note 2, paras. 75 and 84.

34. For instance, four of the crimes under national law apply only to acts committed by public officers, namely: torture, power abuse against individuals, arrest of people without cause and restraint of personal liberty without justification.⁵⁵ This detail is not insignificant given the fact that the suspect in this case is alleged to have exercised control over the State apparatus as “*a de facto Prime Minister*”.⁵⁶ Whether Mr. Gaddafi could qualify as a public officer within the Libyan legal system is therefore crucial in the assessment of the admissibility of this case. Likewise, the crime of torture provided for in article 435 is limited to acts committed against criminal suspects by a public officer.⁵⁷ Moreover, the Office notes that the translation provided by the Libyan Government of article 296 of the Libyan Criminal Code 1953⁵⁸, does not reflect the fact said article explicitly excludes the acts of random killing constituting assault against State security which may be relevant in the present case.⁵⁹ In the same vein, the translation provided by the

⁵⁵ See articles 431, 433, 434 and 435 of the Libyan Criminal Code which respectively read as follows in English (translation by the OPCV):

Article 431: Abuse of Power Against an Individual

The punishment of imprisonment and a fine not exceeding one hundred and fifty pounds shall apply to any public officer who uses violence against individuals in the exercise of his or her function as an offence to dignity, or a way that may cause them physical pain.

Article 433: Arrest of People without Cause

Any public officer who, in excess of the limits of his or her powers, arrests a person shall be punished by imprisonment.

Article 434: Restrain of Personal Liberty without Justification

Any public officer entrusted with managing a prison, or a place dedicated to the enforcement of a preventative measure, who admits a person without an order of the competent authorities or disobeys an order to releasing a person, or unduly extends the sentence or preventive measure shall be punished by imprisonment and a fine not exceeding fifty pounds.

Article 435: Torture of Prisoners

Any public officer who orders the torture of prisoners or tortures them himself or herself shall be sentenced to three to ten years of imprisonment.

The Office attaches in Annex A a table comparing the translation provided by the Libyan Government and the OPCV translation.

⁵⁶ See the “Warrant of Arrest for Saif Al-Islam Gaddafi” (Pre-Trial Chamber I), No. ICC-01/11-14, 27 June 2011, p. 5. See also the Article 58 Decision, *supra* note 1, para. 96.

⁵⁷ See the OPCV translation of the relevant articles, *supra* note 55. See also Annex A.

⁵⁸ See the “Libyan Government’s filing of compilation of Libyan law referred to in its admissibility challenge”, *supra* note 8 and especially Annex A, p. 2, namely: “*The penalty of imprisonment for a period not less than ten years shall be applied to any one who intends killing by acts endangering the public safety otherwise assault against the welfare of the state.*

If such act resulted in the death of one or more persons, the penalty shall be capital punishment.”

⁵⁹ See the OPCV translation of article 296, *supra* note 55. See also Annex A.

Libyan Government of article 431 of the Libyan Criminal Code 1953⁶⁰, does not necessarily reflect the fact that the acts contemplated are limited to those committed by public officers in the exercise of their functions.⁶¹

35. The OPCV notes the existence of a draft Decree put to the National Transitional Council (the “NTC”) on 10 April 2012 which aims at incorporating articles 6, 7, 8, 25, 28 and 77 of the Rome Statute.⁶² However, since said Decree has not yet been approved by the NTC’s legal committee⁶³, the Libyan Government cannot rely on it at this point in time. Indeed, the Appeals Chamber already established that “[g]enerally speaking, the admissibility of a case must be determined on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge”.⁶⁴ Incidentally, the Office additionally notes that the Libyan Government also relies on the possibility that said draft will not be adopted.⁶⁵

36. Central to assessing the Libyan Prosecutor’s ability to conduct genuine investigations is also the issue of territorial security and control. Secure access across different regions, keeping in mind the security of witnesses and victims, are important when assessing the capacity of the national authorities to obtain the necessary testimony and evidence for an investigation or prosecution. Inability to obtain the necessary evidence and testimony is contemplated by article 17(3) of the Rome Statute. This form of inability is particularly relevant in the Libyan context given the considerable difficulties currently faced by the transitional Government;

⁶⁰ See the “Libyan Government’s filing of compilation of Libyan law referred to in its admissibility challenge”, *supra* note 8 and especially Annex A, p. 1: “The punishment of imprisonment and a fine not exceeding one hundred and fifty pounds shall apply to any public officer who uses violence against individuals during exercising their jobs or by a demeaning manner, or a way that may cause them physical pain.”

⁶¹ See the OPCV translation of article 431, *supra* note 55. See also Annex A.

⁶² *Idem*, par. 84 and Annex J.

⁶³ *Idem* and Annex K.

⁶⁴ See the “Judgment on the Appeal of Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case”, *supra* note 16, para. 56.

⁶⁵ See the Admissibility Challenge, *supra* note 2, para. 86.

the latter acknowledging itself having to face important post-conflict security challenges.⁶⁶

37. The overall current security situation in Libya is described in several UN reports. Recent accounts indicate a worsened security situation involving local armed disputes breaking out across the country. On 25 January 2012, Mr. Ian Martin, the Secretary-General's Special Representative and head of the UN Support Mission in Libya (UNSMIL) reported:

"The former regime may have been toppled, but the harsh reality is that the Libyan people continue to have to live with its deep-rooted legacy; weak, at times absent, state institutions, coupled with the long absence of political parties and civil society organizations, which render the country's transition more difficult".⁶⁷

38. Mr. Martin's more recent reporting to the UN Security Council on 10 May 2012 cited some local conflicts which had turned into armed conflicts that *"tested the reach and authority of the government security apparatus and ability to impose the rule of law"*.⁶⁸ On 26 March 2012 a 5-day conflict started involving Tibu and Arab brigades in Sabha south west Libya, resulting in 147 dead and 500 wounded. On 1 April 2012 in western Libyan towns of Zuwarah and Al Jamil and Riqdaline clashes, reportedly involving heavy weapons fighting, led to 48 people losing their lives. The Government responded rapidly to enforce a cease fire. On 21 April 2012 fightings opposing members of the Kufra's Tabu Tribe and national army which had been deployed to area to secure the cease fire were reported. A 48-hour ceasefire was broken and uses heavy weaponry was reported. Finally, Mr. Martin reported that one other source of dispute against the Libyan transitional Government has come from discontent amongst the armed brigades; from

⁶⁶ See the Admissibility Challenge, *supra* note 2, para. 9.

⁶⁷ See UN NEWS CENTRE, "Libya facing challenging transition, but authorities striving to succeed – UN", available at the following address:

<http://www.un.org/apps/news/story.asp?Cr1=&NewsID=41040&Cr=libya>.

⁶⁸ See United Nations Webcasts, Ian Martin Reporting to the UN Security council 10 May 2012, available at the following address: <http://www.unmultimedia.org/tv/webcast/2012/05/security-council-meeting-the-situation-in-libya-english-5.html>.

perceived inequities in the treatment of war wounded and the decision to suspend payments to former fighters while procedures are put in place for dispersal of funds.⁶⁹

39. The state of the national judicial system needs also to be scrutinised when assessing the abilities of the Libyan authorities to conduct genuine investigation and/or prosecution pursuant to article 17(3) of the Rome Statute. Therefore, the Office contends that in order for a finding of ‘inability’ there must have been either a total or substantial collapse of the national judicial system, or in the alternative, the national judicial system must be unavailable.

40. The Rome Statute does not contain further definition of the requirements for the total or substantial collapse of a judicial system. The *travaux préparatoires* having presided to the adoption of the Rome Statute, tend to indicate that the collapse of a State’s national judicial system should be decided pertaining to the presence of the following elements: the extent to which the State was exercising effective control over its territory; the existence of a functioning law enforcement mechanism; whether the state was able to secure the accused or the necessary evidence; and whether the extent and scope of the crimes committed were such that national jurisdiction can not adequately address them.⁷⁰ The term in its context supports the interpretation that a collapse will be considered “substantial” if it is of such intensity that it affects a significant or considerable part of the domestic justice system. Furthermore, a degree of intensity that is sufficient to paralyse the system in fulfilling its functions in relation to investigation prosecution, trial and execution of sentences is required. Collapse suggests a lack of judicial infrastructure as well

⁶⁹ *Idem*.

⁷⁰ See HOLMES (J. T.), “The Principle of Complementarity”, in LEE (R. S.) (ed.), *The International Criminal Court - The Making of the Rome Statute: Issues, Negotiations, Results*, Kluwer Law International, 1999, pp. 49 and 50.

as of trained and equipped personnel responsible for carrying out the different phases of the domestic proceedings.⁷¹

41. On 2 March 2012, the Human Rights Council used the term “collapsed” in describing the Libyan judicial system in the aftermath of the uprising:

*“The judicial system is not functioning effectively, and suffers from the legacy of its past, when it was used as a tool of repression. At the time of the uprisings in February 2011, Libya had a parallel judicial system [...] Lawyers, judges, activists and other Libyans interlocutors told the Commission that [...] the system [...] lacked any independence and credibility in political cases. It is therefore unsurprising that the judicial system collapsed in the aftermath of the conflict and continues to suffer from a lack of trust by victims seeking redress and the Libyan public at large”.*⁷²

42. Other reports conclude that the judicial system is “not functioning”⁷³ with an absence of suitably qualified staff across the system including judges, the office of the prosecutor, lawyers, and the Bar Associations.⁷⁴ One finding of the International Federation for Human Rights was that courts were not functioning due to their partial destruction during the conflict, difficulties in ensuring the safety of judges and prosecutors, and difficulties in meeting accused persons held in the prisons under the control of armed militias.⁷⁵

⁷¹ EL ZEIDY (M.M.), *op. cit.*, *supra* note 31, p. 226. See also OFFICE OF THE PROSECUTOR, *op. cit.*, *supra* note 31, pp. 15 and 31.

⁷² HUMAN RIGHTS COUNCIL, *Report of the International Commission of Inquiry on Libya*, Nineteenth Session, U.N. Doc. A/HRC/19/68, 2 March 2012, para. 41. This report is available at the following address:
http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A_HRC_19_68_en.doc.

⁷³ See the *Report of the Independent Civil Society Fact-Finding Mission to Libya*, January 2012, paras. 141-143. This report is available at the following address:
http://www.pchrgaza.org/files/2012/FFM_Libya-Report.pdf.

⁷⁴ *Idem*.

⁷⁵ INTERNATIONAL FEDERATION FOR HUMAN RIGHTS, *Preliminary note on Libya Mission*, 2 February 2012, p. 4. This document is available at the following address:
<http://www.fidh.org/Preliminary-note-on-Libya-Mission>.

43. Moreover, the description of the system as recent as March 2012 indicates some limited progress but the systemic problem of insufficient trained personnel:

*"The interim Government is gradually restoring the judiciary by reopening courts and recalling judges, but there still exists a lack of trained staff such as prosecutors, judicial police and forensic investigators [...] Detainees often have limited or no access to families and legal counsel and are unable to challenge the legality of their detention or to lodge complaints about torture and ill-treatment".*⁷⁶

44. Security concerns also present a major hurdle to the restoration of the justice system:

*"The majority of courts in the country are not fully operational owing to the lack of adequate security at court premises and the continued absence from work of judges and administrative staff".*⁷⁷

45. Accordingly, the extent of the collapse of the judicial system in Libya may preclude an adequate investigation and, if appropriate, prosecution of the suspect.

46. In addition, the inability of the State to secure the transfer of the suspect to the Libyan authorities is directly linked to the context of the collapse of the State's system of governance, including the judicial system.

47. Serious doubts remain as to the ability of the Libyan authorities to obtain custody of the suspect. Indeed, Mr. Gaddafi remains in the custody of the Zintan Brigades in the town of Zintan in Libya. To date, the NTC has failed to secure his transfer into the custody of the State authorities.⁷⁸

48. Press reports indicate that attempted negotiations to secure Mr. Gaddafi's transfer have failed on more than one occasion. It has been suggested that Zintan

⁷⁶ HUMAN RIGHTS COUNCIL, *op. cit.*, *supra* note 72, para. 124.

⁷⁷ See the *Report of the Secretary General on the United Nations Support Mission in Libya*, U.N. Doc. S/2011/727, 22 November 2011, para. 27. This report is available at the following address: <http://www.un.org/Docs/sc/sgrep11.htm>

⁷⁸ See also the "Libyan Government Response to Defence Request", *supra* note 9, para. 20.

fighters believe the Government cannot secure Mr. Gaddafi and worry that he would escape if moved to Tripoli.⁷⁹ An alleged (and anonymous) NTC member told other press agency, that the rebels considered the *"interim government incapable of conducting a secure trial for Saif al-Islam"* and *"unable to prevent him from fleeing Libya in the same way that other members of the regime have."*⁸⁰

49. Last but not least, it has to be noted that the Libyan Government has not shown that its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conducts, as prescribed by rule 51 of the Rules of Procedure and Evidence.

III. SPECIFIC VIEWS AND CONCERNS OF VICTIMS

50. The Office has prepared a written explanation in English and in Arabic (information sheet) on the admissibility proceedings together with a questionnaire in order to gather the views and concerns of victims for the purposes of Article 19 proceedings in the most efficient and fast way.

51. The applications for participation in the proceedings transmitted to the Office by the Registry in compliance with Pre-Trial Chamber I's decision on the conduct of Article 19 proceedings relate to individuals already represented by counsels and therefore the Principal Counsel deemed it appropriate to contact said persons through their legal representatives in order to avoid security concerns and to facilitate the flow of information preserving the trust relationship between the victims and their lawyer.

⁷⁹ ALJAZEERA, "Moreno-Ocampo: Gaddafi son will face justice", 18 April 2012. This article is available at the following address:

http://mc.aljazeera.net/?name=aj_standard_en&i=8788&guid=2012418153350244576&showonly=1.

⁸⁰ RADIO NETHERLANDS WORLDWIDE, "Zintan resists Gaddafi son transfer", 18 April 2012. This article is available at the following address: <http://www.rnw.nl/international-justice/article/zintan-resists-gaddafi-son-transfer>.

52. The Office has received two contributions by one legal representative on behalf of victim a/18000/11 who expressed the view that the victim does not trust the fairness and transparency of the Libyan judicial system.⁸¹ The Office has also received a contribution by another legal representative, representing victims a/15000/12, a/15001/12, a/15002/12, a/15003/12, a/15004/12 and a/15005/12 who mainly submits that the victims he represents do not trust the Libyan judicial system. Moreover, said victims wishes the scope of the investigation to be widen in order to include other conducts and they believe that the national jurisdiction will be unable and/or unwilling to do so.

53. The Office was also able to collect views from other victims through local or international organisations. They voiced several concerns and they all favour an international trial since, according to them, it is the only way for the world to know what happened to them and to ensure impartiality of the proceedings. Indeed, victims have doubts as to the ability of the Libyan authorities to genuinely investigate and prosecute the alleged perpetrators of crimes committed during the period of the so-called revolution, and as to the impartiality of national courts and their ability to properly administer Justice.

54. Victims also argued that the case should not be tried in Libya because it entails serious crimes for which the national jurisdictions are not equipped to deal with. Moreover, they expressed concerns as to the possibility of participating in an effective way in the national proceedings, since they consider that the national legislation does not provide enough guarantees for their participation and for subsequent reparations. Finally, victims believe that national authorities cannot provide for the security of victims who will participate in the national proceedings and therefore, most of them will not be encouraged to participate.

⁸¹ [REDACTED]

55. The Office has moreover received unsolicited contribution from victims' organisations operating in Libya. These organisations, which are in contact with victims on a daily basis, echoed the same concerns expressed above.⁸² In particular, they submit that Libya, at this point in time, lacks the capacity and ability to investigate and prosecute those responsible for having committed crimes during the period concerned.

FOR THE FOREGOING REASONS the Principal Counsel of the OPCV, acting as Legal Representative of victims for the purpose of Article 19 proceedings, respectfully requests the Pre-Trial Chamber to reject the Admissibility Challenge and to find that, for the time being, the case is admissible before the International Criminal Court.

A handwritten signature in black ink, reading "Paolina Massidda", with a horizontal line underneath the name.

Paolina Massidda
Principal Counsel

Dated this 4th day of June 2012

At The Hague, The Netherlands

⁸² See *supra* paras. 52 to 54.