



Original: English

No.: ICC-01/11-01/11

Date: 23 January 2013

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 and Redacted

**Libyan Government's further submissions on issues related to the admissibility of
the case against Saif Al-Islam Gaddafi**

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I. INTRODUCTION

1. Libya makes this submission in accordance with the Pre-Trial Chamber's 7 December 2012 *Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi* ("Decision").¹
2. The evidence submitted pursuant to this Decision supplements that contained in the 1 May 2012 Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute ("Application of Libya")² which sets out the grounds for challenging the admissibility of the case against Mr. Gaddafi.
3. Libya notes that following the 7 July 2012 elections, and the hearings before the Chamber at The Hague on 9-10 October 2012, the cabinet of the new Government took the oath of office on 14 November 2012, following approval of its members by the General National Congress. The new Minister of Justice of Libya is Mr. Salah el-Marghani. He is a prominent human rights defender who has received an award from Human Rights Watch for his work. With the establishment of the new Government and the appointment of the Minister of Justice, Libya welcomes the opportunity to further advance and strengthen the earlier cooperation with the Court rendered by the National Transitional Council.
4. In order to fully comply with the Chamber's Decision, counsel for Libya respectfully request an extension of the usual 20 page limit for submissions, pursuant to Regulation 37 of the Regulations of Court. This request is made on an exceptional basis due to the need to provide complete answers to the numerous, detailed, and wide-ranging questions posed by the Pre-trial Chamber in its Decision. Counsel for Libya additionally note that the present filing is

¹ ICC-01/11-01/11-239.

² See Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute (1 May 2012), ICC-01/11-01/11-130.

connected to the original Admissibility Challenge and that under Regulation 38(c) such filings are subject to a 100 page, rather than a 20 page, limit.

II. APPLICABLE LAW

5. In addition to its submissions on applicable law made in its Admissibility Challenge, Libya makes the following clarifications in response to the Decision:

A. Presumption in favour of national proceedings

6. The Appeals Chamber has clarified that the object and purpose of complementarity is to put an end to impunity while “safeguarding the *primacy* of domestic proceedings”.³ It has further clarified that “Article 17 (1) (a) to (c) of the Statute does indeed favour national jurisdictions” to “the extent that there actually are, or have been, investigations and/or prosecutions at the national level”.⁴

7. Accordingly, evidence in admissibility proceedings falls to be assessed on the basis of a legal presumption in favour of the primacy of national proceedings, in accordance with the Statute of the ICC. While an applicant State must submit evidence of national proceedings that is sufficiently particularised and detailed, and of sufficient probative value, a legal test or standard of proof that is too onerous and exacting would be inconsistent with the presumption in favour of national proceedings.

B. Two-step test for admissibility

³ Appeals Chamber, *Katanga*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, para. 85.

⁴ Appeals Chamber, *Ruto et al.*, Judgment on the Appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, ICC-01/09-02/11-274, para. 43.

8. The Decision of the Appeals Chamber confirms that Article 17(1)(a) sets out a two-step test according to which an admissibility challenge shall determine:

- (i) *whether, at the time of the proceedings in respect of an admissibility challenge, there is an ongoing investigation or prosecution of the case at the national level; and*
- (ii) *if there is a domestic investigation or prosecution, whether the State is unwilling or unable to genuinely carry out such investigation or prosecution.*⁵

9. Each element of this two-step test as well as the corresponding burden and standard of proof will be considered in turn.

1. *Existence of an investigation or prosecution at the national level*

10. The “burden of proof” is a procedural matter, whereas the “standard of proof” is a substantive matter. The standard of proof differs for the first and second steps of the admissibility test.

a. Burden of proof

11. With respect to the first step, the Decision maintains, in line with established jurisprudence, that an applicant State “bears the burden of proof to show that the case is inadmissible”.⁶ In this narrow sense, the burden of proof remains the same irrespective of whether the applicant is a State or an accused person.⁷

⁵ Decision, para. 6.

⁶ Decision, para. 8, *See also Prosecutor v Muthaura et al.*, “Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’”, ICC-01/09-02/11-274, para. 36.

of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’”, ICC-01/09-02/11-274, para. 2.

⁷ The Court has also found that an accused person also bears the burden, in this regard, if he/she launches a challenge to the admissibility of the case. *See Prosecutor v. Gombo*, “Decision on the Admissibility and Abuse of Process Challenges” 24 June 2010 ICC-01/05-01/08-802.

12. This follows the principle of *actori incumbit probatio*: that a party alleging a fact bears the burden to prove it.⁸ The “fact” here is the existence of a case at the national level, and its establishment render the case inadmissible pursuant to Article 17(1)(a).

b. Standard of proof

13. Since the issue “is one of admissibility before a particular forum, rather than the objective and subjective elements of a particular crime, the appropriate burden is a balance of probabilities, rather than any higher standard such as ‘proof beyond a reasonable doubt’”.⁹ Trial Chamber III, in *Bemba*, even rejected the Prosecution’s argument that the applicable standard was “clear and convincing evidence”, approving instead the lower “balance of probabilities” standard.¹⁰

State

14. With regard to the first limb of Article 17(1)(a), the Appeals Chamber has simply required that State:

*If a State challenges the admissibility of a case, it must provide the Court with evidence with a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case. It is not sufficient merely to assert that investigations are ongoing.*¹¹

15. This approach means simply that the State’s application must be underpinned by something more than mere assertion. The Appeals Chamber noted Kenya as having “reported that ‘[t]he Commissioner of Police has confirmed for the purposes of providing the most up-to-date information for this Reply that the six suspects are currently being exhaustively investigated by the CID/DPP team’

⁸ *Prosecutor v. Gombo*, “Decision on the Admissibility and Abuse of Process Challenges” 24 June 2010 ICC-01/05-01/08-802, para. 203

⁹ See ICC-01/04-01/07-1008-AnxA 30-03-2009: *Informal expert paper: The principle of complementarity in practice*, para. 52 (available at: <http://www.icc-cpi.int/iccdocs/doc/doc654724.PDF>)

¹⁰ *Prosecutor v. Gombo*, Decision on the Admissibility and Abuse of Process Challenges (24 June 2010), ICC-01/05-01/08-802, para. 203.

¹¹ *Prosecutor v. Muthaura et al.*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’ (20 September 2011), ICC-01/09-02/11-274, paras. 2, 61.

and listed the specific ‘investigative actions [...] in progress’.¹² The Appeals Chamber approved the Pre-Trial Chamber’s finding that “these assertions in themselves [were] insufficient to establish that an investigation was ongoing and required proof that Kenya was taking specific steps to investigate the three suspects”.¹³

16. Indeed, the Appeals Chamber in that case clarified that the level of evidence that it required, in this regard, was simply the minimum required for “judicial” analysis: that which would ensure that courts did not “base their decisions on impulse, intuition and conjecture or on mere sympathy or emotion”.¹⁴ It did not suggest a particularly onerous standard.

17. The relationship between the Court and applicant States is akin to the relationship between States (or States and international organisations) in proceedings before international courts and tribunals in civil matters. This is so regardless of whether the State concerned is a signatory or party to the Rome Statute, or not. The “balance of probabilities” standard – otherwise referred to as the “preponderance of evidence” – is consistent with the general practice of international courts and tribunals in analagous proceedings involve disputes between States.¹⁵ It means simply that “the evidence adduced by one party on the basis of reasonable probability weighs heavier than the evidence produced

¹² *Prosecutor v Muthaura et al.*, “Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’”, ICC-01/09-02/11-274, para. 60.

¹³ *Prosecutor v Muthaura et al.*, “Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’”, ICC-01/09-02/11-274, para. 61.

¹⁴ *Prosecutor v Muthaura et al.*, “Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’”, ICC-01/09-02/11-274, para. 61; Situation of Uganda, “Judgment on the appeals of the Defence against the decisions entitled ‘Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06’”, 23 February 2009, ICC-02/04-179 (OA) and ICC-02/04-01/05-371 (OA 2), para.36.

¹⁵ See Rüdiger Wolfrum, “International Courts and Tribunals, Evidence”, para. 77, *Max Planck Encyclopedia of Public International Law* (available at: http://www.mpepil.com/sample_article?id=/epil/entries/law-9780199231690-e26).

by the other side.”¹⁶

18. As considered in more detail below, the precise standard of proof in a civil matter may vary depending upon the gravity and consequences of the matters in issue.¹⁷ As will be seen, a higher standard of proof is imposed where a party States making claims of a serious character, such as allegations of bad faith or failure to comply with a fundamental obligation. For the first part of article 17(1)(a), however, the requirement is simply to establish on the “balance of probabilities” that the State is exercising jurisdiction, consistent with its sovereign rights and obligations. The fact that this determination does not merit a heightened standard of proof becomes even clearer in light of the obvious fact that the alternative is the exercise of jurisdiction by an international jurisdiction which explicitly recognises that “States have the primary responsibility to exercise criminal jurisdiction”.¹⁸

2. Unwillingness or inability to genuinely carry out a investigation or prosecution at the national level

a. Burden of proof

19. With respect to the second step, the burden of proof lies with the party alleging that the State is unwilling or unable to genuinely carry out investigations.¹⁹ It might be suggested that it may not necessarily be clear which party is “alleging a fact” (the “fact” in this regard, could either be that the State is carrying out genuine criminal processes, or that it is not doing so). However, as noted in an ICC Informal Expert Paper, the allocation of the burden of proof may often depend, in effect, upon the party alleging bad faith, or departing most

¹⁶ *Id.*, para. 76.

¹⁷ See, for example, Robert Kolb, *General Principles of Procedural Law In The Statute Of The International Court Of Justice*, p. 793. See also *infra*, discussion of standard of proof applicable to the second part of Article 17(1)(a).

¹⁸ *Prosecutor v Muthaura et al.*, “Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’”, ICC-01/09-02/11-274, para. 36.

¹⁹ See *Application of Libya*, , para. 92.

significantly from the *status quo*.²⁰ The principle of complementarity clearly means that exercise of criminal jurisdiction at the national level is the *status quo*.²¹

20. It is a general principle of international law that the sovereign acts of a State within its domestic jurisdiction are presumed to be valid unless otherwise established.²² It is plain, therefore, that the burden of proof as regards the second element of article 17(1)(a) lies with the party (whether OPCD, Prosecution, or the OPCV), asserting that an investigation or prosecution at the national level is not genuine. Any other approach would be inconsistent with both the Statute as well as the general principles of general international law.

b. Standard of proof

21. As noted above, the standard of proof applied in civil matters can vary. The International Court of Justice (“ICJ”) requires proof at a “level of certainty appropriate to the seriousness of the allegation.”²³

22. At the high end of the spectrum, “claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive”.²⁴ In the *Corfu Channel* case, the ICJ rejected evidence “falling short of conclusive evidence” and instead required a “high degree of certainty.”²⁵ Use of this standard was prompted by the UK’s allegation that certain minefields had been laid with the connivance of the Albanian government. Judge Shahabuddeen has expressed the view that “the standard of proof varies with the character of the particular issue of fact [and a] higher than ordinary standard may, for example,

²⁰ See ICC-01/04-01/07-1008-AnxA 30-03-2009: *Informal expert paper: The principle of complementarity in practice*, fn. 17; Annex 5 (available at: <http://www.icc-cpi.int/iccdocs/doc/doc654724.PDF>).

²¹ See *supra*, “Presumption in favour of national proceedings”. See also Kenya Admissibility Decision, Appeals Chamber, para. 36: “States have the primary responsibility to exercise criminal jurisdiction”.

²² See Bin Cheng, *General Principles Of Law As Applied By International Courts & Tribunals* 305 (1953).

²³ *Case Concerning Application of the Genocide Convention* (Bosnia and Herzegovina v. Yugoslavia) (2007) ICJ, para. 210.

²⁴ *Case Concerning Application of the Genocide Convention* (Bosnia and Herzegovina v. Yugoslavia) (2007) ICJ, para. 209.

²⁵ *Corfu Channel Case* (UK. v. Albania), (1949) ICJ, p. 17.

be required in the case of a charge of exceptional gravity against a State”.²⁶

23. Similarly, allegations of bad faith (such as fraud, bribery, corruption, etc.), require an even higher threshold of proof. The Iran-US Claims Tribunal, for example has held that “if reasonable doubts remain, such an allegation [of bribery] cannot be deemed to be established”.²⁷ Another Iran-US Claims Tribunal decision held that allegations of forgery “must be proven with a higher degree of probability [...] the proper standard of proof [being] “clear and convincing evidence””.²⁸ The Eritrea-Ethiopia Claims Commission similarly held that the evidentiary “bar should be set very high” – requiring “clear and convincing evidence” – because of the “seriousness” and “gravity” of the allegations.²⁹

24. A finding of lack of genuineness, amounts to a finding, at the very least, that is equivalent to a claim of bad faith, especially when it follows a finding that there *is a national proceeding*. This is particularly clear in light of the fact that, as has been made clear on numerous occasions, the ICC is not a human rights court. An allegation that a State has failed to exercise jurisdiction over crimes within the jurisdiction of the Court is comparable to the Applicant’s claim in the *Case Concerning Application of the Genocide Convention*, “that the Respondent has breached its undertakings to prevent genocide and to *punish and extradite* persons charged with genocide”.³⁰ In that case, and with regard to that allegation, the ICJ required “proof at a high level of certainty appropriate to the seriousness of the allegation”.³¹

25. Another significant exception to the general “preponderance of evidence” standard relevant to admissibility determinations is in proceedings concerning

²⁶ *Maritime Delimitation and Territorial Questions case (Qatar v. Bahrain)* (1995) ICJ 6, 63 (dissenting opinion of Judge Shahabuddeen).

²⁷ *Oil Field of Texas, Inc v Islamic Republic of Iran*, Award No 258-43-1 (8 October 1986), 12 Iran-US CTR 308, para. 25.

²⁸ *Dadras International et al and the Islamic Republic of Iran et al*, Award No 567-213/215-3 (7 November 1995), 31 Iran-US CTR 127, para. 162.

²⁹ *Prisoners of War Eritrea’s Claim 17, Partial Award* (1 July 2003), paras. 45–47.

³⁰ *Case Concerning Application of the Genocide Convention* ICJ (2007), para. 210

³¹ *Case Concerning Application of the Genocide Convention* ICJ (2007), para. 210 (emphasis added).

the issue of jurisdiction: “International courts and tribunals have to establish their jurisdiction beyond reasonable doubt.”³² It is submitted that the same applies to admissibility requirements under the ICC Statute, because admissibility, in the context of the ICC, amounts to a determination that the Court may exercise jurisdiction over a particular case. The test should be even more exacting insofar as, unlike most other international courts and tribunals, jurisdiction is being exercised *to the exclusion of the State*, bearing in mind further that States have the primary obligation to exercise jurisdiction. State consent to be bound by the complementarity provisions must thus be interpreted strictly, consistent with the Statute’s presumption in favour of the primacy of national proceedings.

26. For the reasons outlined above, the burden on the party challenging the exercise of national jurisdiction in the context of an admissibility proceeding is necessarily a very high one.

3. Same conduct test

27. The investigation must cover “substantially the same conduct”³³ but not *exactly* the same conduct. Nothing in the Statute requires States to “mirror” the ICC Prosecutor’s case. Such an onerous standard would unreasonably defeat national jurisdiction, not least because States ordinarily do not have access to the Prosecutor’s investigative material. Further, such an onerous standard would be wholly unnecessary to put an end to impunity, consistent with the object and purpose of the Statute. It would also be manifestly inconsistent with the presumption in favour of the primacy of national proceedings as outlined above.

³² *Ethiopia v South Africa; Liberia v South Africa*, ICJ (1962) 319, 473 (dissenting opinions of Judges Spencer & Fitzmaurice); or at the very least more than preponderant: see *Fisheries Jurisdiction Case (Spain v Canada)*, ICJ (1998) 432, 38. Judge Shahabuddeen has also expressed the view that the standard is higher than “preponderant”: dissenting opinion of Judge Shahabuddeen, *Maritime Delimitation and Territorial Questions Case (Qatar v Bahrain)*, ICJ (1995), 63-64..

³³ 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’, Muthaura and others (ICC-01/09-02/11-274), Appeals Chamber, 30 August 2011, para. 39.

4. Assessment of ability in transitional contexts

28. A State may challenge admissibility “only once”, unless there are “exceptional circumstances” justifying a second challenge.³⁴ A finding of inadmissibility however, may be challenged on multiple occasions as the national proceedings progress from the investigative, accusatory, prosecution, and appeal stages. In this regard, Libya notes the reference in the Chamber’s Decision to the Prosecutor’s obligation under Article 53(2)(b) of the Statute to “assess on an on-going basis the admissibility of the case”.³⁵ This one-sided process militates against a rush to judgment in favour of admissibility, especially in the context of a post-conflict democratic transition and the fact that judicial capacity-building must be given a reasonable opportunity to succeed over time. Furthermore, assessment of ability “should reflect appropriate deference to national systems as well as the fact that the ICC is not an international court of appeal, nor is it a human rights body designed to monitor all imperfections of legal systems.”³⁶

III. APPLICATION FOR EX PARTE SUBMISSION OF EVIDENCE

29. In its 7 December 2012 Decision³⁷ concerning Mr. Gaddafi the Pre-Trial Chamber requested Libya to make available sample investigative materials. Libya has made such samples available (as set out in Annexes 4 to 7 and 15 to 17), prior to the accusatory phase of proceedings on an exceptional basis as a demonstration of its genuine commitment to fully cooperate with the Court in these admissibility proceedings. Libya requests however that this material be treated as being submitted to the Chamber on an *ex parte* basis. This is necessitated by the strict non-disclosure requirements of investigative material prior to the accusatory phase of proceedings under Article 59 of the Libyan

³⁴ ICC Statute, Art. 19(4).

³⁵ Decision, para. 50.

³⁶ See ICC-01/04-01/07-1008-AnxA 30-03-2009: *Informal expert paper: The principle of complementarity in practice*, para. 52 (emphasis added) (available at: <http://www.icc-cpi.int/iccdocs/doc/doc654724.PDF>)

³⁷ ICC-01/11-01/11-239, paragraphs 10-12.

Code of Criminal Procedure (as set forth in the Application of Libya), and for obvious reasons of confidentiality.³⁸

30. Article 59 requires non-disclosure of investigative material under threat of criminal punishment. It provides that:

Investigation procedures and their results shall be considered confidential.

Investigators, prosecution members and their assistants of clerks and experts who are related to the investigation or attend to their profession or post shall undertake not to disclose same. Anyone who breaches this provision shall be punished in accordance with Article 236 of the Penal Code.

31. As set forth in the annexed Statement of the Libyan Minister of Justice, the object and purpose of Article 59 is to avoid prejudice to further or on-going investigations – including the protection of witnesses, victims, and their families – and, given the highly sensitive context of the case against Mr. Gaddafi, the protection of national security information.³⁹ Article 59 also operates in practice to protect other individuals who may be falsely or wrongly implicated in crimes during the investigation, and to protect those individuals for whom there may be insufficient evidence to bring criminal charges in the future but who are mentioned in investigative materials.

32. In addition to the penal sanctions under Article 59, there is a real and substantial risk that premature or inappropriate disclosure of such confidential and sensitive information could be used by Gaddafi-regime loyalists or others to undermine national criminal proceedings. Such actions that might be taken include the destruction of evidence, threatening witnesses and their families, harming or assassinating the Prosecutor-General's professional staff, and facilitating prison escapes or carrying out terrorist bombings to foment chaos

³⁸ Application of Libya, para. 39.

³⁹ Annex 1, Public, Ministry of Justice letter relating to confidentiality issues, 20 January 2013

and jeopardize national security in the context of a delicate democratic transition.

33. Libya's request for *ex parte* submission makes an exception for the Office of the Prosecutor. Libya notes the reference in the Chamber's Decision to the Prosecutor's obligation under Article 53(2)(b) of the Statute to "assess on an on-going basis the admissibility of the case".⁴⁰ Thus, the exception to Article 59 of its Code of Criminal Procedure is intended to facilitate the Prosecutor's on-going ability to assess issues of admissibility parallel to the proceedings before the Chamber.
34. Perhaps most importantly, the provision of such material to the Prosecutor on an exceptional basis is intended to assist the expeditious resolution of the Admissibility Challenge, since the Prosecutor is in a unique position to be able to compare the evidence in the possession of her office with that gathered by the Libyan authorities in the national investigation. Libya has not had any access to the investigative materials of the ICC Prosecutor, and does not anticipate reciprocal disclosure. For this reason, Libya's assessment of the "same conduct" test is necessarily limited to the Article 58 Decision of 27 June 2011 whereas the ICC Prosecutor's assessment of this issue will be a more informed one.
35. Libya hereby confirms that if its request for *ex parte* submission of investigative material is accepted, the Chamber may, if deemed necessary, subsequently receive a more complete set of investigative materials in addition to the evidential samples annexed to this submission for the purpose of the admissibility determination. Counsel for Libya anticipate that this could be done within six weeks of the date of this submission. Alternatively, the Pre-Trial Chamber is invited to send a representative or a delegation to Tripoli to assess for itself the full investigative case file relating to Mr. Gaddafi.

⁴⁰ Decision, para. 50.

Applicable law

36. The Chamber may grant Libya's request for *ex parte* submission pursuant to its broad authority under Rule 58(2), to "decide on the procedure to be followed" including "appropriate measures for the proper conduct of the proceedings."
37. Although inapplicable to admissibility proceedings, Rule 81(2) on pre-confirmation disclosure offers a useful point of departure for determining whether the current request for *ex parte* submission is an "appropriate measure" within the meaning of Rule 58(2):

Where material or information is in the possession or control of the Prosecutor which must be disclosed in accordance with the Statute, but disclosure may prejudice further or ongoing investigations, the Prosecutor may apply to the Chamber dealing with the matter for a ruling as to whether the material or information must be disclosed to the defence. The matter shall be heard on an ex parte basis by the Chamber. However, the Prosecutor may not introduce such material or information into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused.

38. The Appeals Chamber has held that in criminal proceedings "it may be permissible to withhold the disclosure of certain information from the Defence prior to the hearing to confirm the charges that could not be withheld prior to the trial."⁴¹
39. In contrast to Rule 81(2), the disclosure of evidence is obviously a less exacting obligation in the context of admissibility rather than criminal proceedings:

⁴¹ Appeals Chamber, *Prosecutor v Katanga and Ngudjolo*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", ICC-01/04-01/07-475, 13 May 2008, para. 68.

*a case could be made for a comparatively flexible approach to normal rules of evidence in admissibility assessments, since the dispute does not pertain to the guilt or innocence of the person, but simply to deciding the appropriate forum.*⁴²

Accordingly, given that Libya's disclosure of investigative material in circumstances that are not expressly envisaged by Article 59 of its Code of Criminal Procedure will "prejudice further or on-going investigations", the Chamber should accord Libya the same automatic right to an *ex parte* hearing under Rule 58(2) as that contained under Rule 81(2).

40. Although Rule 81(2) provides some guidance, there are other broader provisions allowing non-disclosure in criminal proceedings, including in particular provisions applying specifically to States. The drafters of the Statute clearly recognized the need to accommodate the legitimate rights and interests of States in ICC proceedings. In this regard, Article 68(6) of the Statute provides that during trial proceedings: "A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information." Article 72(1) of the Statute is broader still and applies protective measures "in any case where the disclosure of the information or documents of a State would, *in the opinion of that State*, prejudice its national security interests."⁴³

41. Therefore, *a fortiori*, in admissibility proceedings, States should be given a broader right to request *ex parte* submission of "confidential or sensitive information", including national security information. This situation pertains if, "in the opinion of that State", disclosure would "prejudice its national security interests."

⁴² Informal Expert Paper: The principle of complementarity in practice, ICC-01/04-01/07-1008-AnxA 30-03-2009, para. 51 (available at: <http://www.icc-cpi.int/iccdocs/doc/doc654724.PDF>).

⁴³ Emphasis added.

Procedural safeguards in ex parte proceedings

42. In granting Libya's request for *ex parte* submission of evidence, the Chamber may counterbalance any potential prejudice to other parties by the adoption of certain procedural safeguards. In particular, the Chamber may exercise its inquisitorial powers to ensure that the *ex parte* evidence is properly assessed in the admissibility determination. In *Lubanga*, the Trial Chamber held that non-disclosure of exculpatory evidence by the Prosecutor at trial under Article 54(3)(e) may be justified provided that "[t]he ultimate responsibility for securing justice and ensuring fairness has been given to the Chamber" by putting the evidence "before the judges in its original form and in its entirety."⁴⁴

43. The Chamber in *Lubanga* invoked the jurisprudence of the European Court of Human Rights in *Rowe and Davis v UK*,⁴⁵ and concurred that while fair trial guarantees in criminal proceedings:

*generally requires the prosecution to disclose to the defence all relevant evidence for or against the accused, considerations of national security or the protection of vulnerable witnesses may, in certain circumstances, justify an exception to this rule. The court decided that any departure from the principles of open adversarial justice must, however, be strictly necessary, and the consequent handicap imposed on the defence must be adequately counterbalanced by procedural safeguards, to protect the rights of the accused.*⁴⁶

44. It bears emphasis that in other cases, the European Court of Human Rights has gone so far as to hold that even at the criminal trial, "the use of Statements made by anonymous witnesses to found a conviction is not under all circumstances

⁴⁴ *Prosecutor v Lubango*, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, ICC-01704-01/06 (13 June 2008), para. 88.

⁴⁵ ECtHR, *Rowe and Davis v United Kingdom*, no 28901/95, Judgment of 16 February 2000.

⁴⁶ *Id.*, para. 82.

incompatible with the [European] Convention [on Human Rights].”⁴⁷ The Court explained that “principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.”⁴⁸ The right to a fair trial can be complied with “if it is established that the handicaps under which the defence laboured were sufficiently counterbalanced by the procedures followed by the judicial authorities.”⁴⁹

45. If such protective measures are justified in the more exacting context of criminal trials, *a fortiori* they should apply to admissibility proceedings, and do so more broadly than in criminal proceedings. Thus, in acceding to Libya’s request for *ex parte* submission of evidence, any potential prejudice to a party may be “sufficiently counterbalanced by the procedures followed by the judicial authorities” including the examination of evidence by the Pre-Trial Chamber and further submissions or hearings if necessary.

46. Libya also wishes to clarify that should the Pre-Trial Chamber determine that *ex parte* submission of such materials is not sufficient to allow the defence to provide an adequate response on admissibility issues, then it is willing to prepare narrative summaries of such investigative materials and, where possible, redacted versions of such materials.

⁴⁷ *Van Mechelen v. The Netherlands*, para. 52; see also *Kostovski v The Netherlands*, paras. 42-42 and *Doorsen v The Netherlands*, paras. 69-70.

⁴⁸ *Doorsen v The Netherlands*, para. 70.

⁴⁹ *Doorsen v The Netherlands*, para. 72.

IV. SUBMISSIONS

A. Issues related to the status of domestic proceedings

47. Libya is mindful of the Chamber's guidance that "a decision on the admissibility of the case must be based on the circumstances prevailing at the time of its issuance".⁵⁰

Progress of the investigation

48. Libya confirms that following the filing of its Admissibility challenge on 1 May 2012, the Libyan criminal investigation in the case of Saif Al-Islam Gaddafi has continued to progress and is now nearing the stage of being transferred to the Chambre D'Accusation. As highlighted at the hearing before the Pre-trial Chamber on 9 – 10 October 2012,⁵¹ the investigation of Saif Al-Islam Gaddafi was significantly affected by the extradition of Abdullah Al-Senussi from Mauritania. In particular, this led to the need to extend the duration of the investigative period in Saif Al-Islam Gaddafi's case. During this extended investigative period, the prosecution authorities in Libya have had the opportunity to add significantly to the body of evidence relied upon for their investigation of Saif Al-Islam Gaddafi, in many respects.⁵² Out of the approximately fifty witnesses interviewed in total for the investigation, eight have been interviewed by the prosecution team since 1 May 2012, with the final interview taking place on 16 December 2012.⁵³ Libya has not provided the date of every single witness interview in this further submission as requested by the Pre-Trial Chamber in its Decision.⁵⁴ However, in the event that it is thought necessary for the Pre-Trial Chamber to scrutinize the investigative case file in

⁵⁰ "Decision on the OPCD requests in relation to the hearing on the admissibility of the case", ICC-01/11-01/11-212, para. 9; reiterated in "Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi", ICC-01/11-01/11-239, para. 14.

⁵¹ Transcript of 9 October 2012, T. 11, Transcript of 10 October 2012, TT. 52, 63.

⁵² Annex 2, Public –Attorney General's office relating to progress of investigation, 15 January 2013.

⁵³ Public – Ministry of Justice letter relating to contours of investigation, 21 January 2013.

⁵⁴ ICC-01/11-01/11-239, paragraph 17.

full in order to determine admissibility, it is invited to send a representative or a delegation to visit Tripoli to be able to do so in person.

49. In the period since 1 May 2012, testimonies regarding the actions of Saif Al-Islam Gaddafi have been obtained from individuals who previously operated at the highest civilian and military levels of the Gaddafi regime. These individuals include [Redacted].⁵⁵ Mr. Gaddafi himself has also been interviewed on a number of occasions since 1 May 2012 (the last occasion being on 13 November 2012),⁵⁶ and has been confronted with witnesses who have given testimonies in his case during such interviews.⁵⁷ Evidence other than witness testimonies has also been obtained during this period – including documents establishing that international charter flights were arranged in February and March 2011 by former members of the Gaddafi regime in order to bring African mercenaries to Libya to participate in efforts to crush the uprising.⁵⁸ As the documents themselves indicate, these witness interviews and other documentary evidence have been conducted and/or obtained by members of the investigative team within the prosecutor's office.

50. The Pre-Trial Chamber has requested particular information relating to Libya's progress in taking witness statements of [REDACTED].⁵⁹ It has not yet been possible for the Libyan prosecution authorities to conduct interviews with these two individuals, as they are presently being held in detention facilities which are not yet under the control of the Libyan Government. However, the Libyan Ministry of Justice is in the process of arranging the transfer of control over such detention facilities (and their detainees) to the Libyan Government. As soon as this transfer is achieved, prosecution officials will interview these two

⁵⁵ Annex 4, Confidential and Ex Parte.

⁵⁶ Annex 3, Public – Ministry of Justice letter relating to contours of investigation, 21 January 2013

⁵⁷ Annex 2, Public – Attorney General's office relating to progress of investigation, 15 January 2013

⁵⁸ Annex 5, Confidential and Ex Parte; Annex 6, Confidential and Ex Parte; Annex 7, Confidential and Ex Parte.

⁵⁹ ICC-01/11-01/11-239, paragraph 15.

individuals in order to obtain further evidence for the Saif Al-Islam Gaddafi case.

Collation of interviews in the present case

51. The Pre-Trial Chamber has inquired in its Decision as to whether the witness testimonies referred to by way of summary in Libya's 1 May 2012 Admissibility Challenge were collected by members of the office of the Prosecutor-General responsible for the case of Saif Al-Islam Gaddafi, or were received from "committees of volunteers".⁶⁰ Libya is able to confirm that all of the witness summaries referred to in the 1 May 2012 Admissibility Challenge, together with all of the other testimonies in the Saif Al-Islam Gaddafi investigative file, have been prepared by members of the Ministry of Justice prosecution team assigned to the Saif Al-Islam Gaddafi case.⁶¹ Although earlier witness testimonies were gathered by commissions of volunteers prior to the fall of the Gaddafi regime, none of these form part of the investigative file in Mr. Gaddafi's case. In every instance where a witness was interviewed at an earlier time by a commission of volunteers, such witnesses have since been re-interviewed by members of the prosecution team prior to their forming part of Mr. Gaddafi's case file. Because no witness statements prepared by volunteers form part of the national criminal proceedings in relation to Mr. Gaddafi, it is unnecessary to consider the admissibility of such volunteer statements under Libyan Law as requested by the Pre-Trial Chamber in its Decision.⁶²

Witness interview procedure

52. The procedure for prosecution team interviews is that a private meeting is scheduled, to be attended by the witness and prosecution lawyers (other people are not permitted to be present at such meetings). The witness is then asked to swear an oath that he or she will tell the truth in answering the questions posed

⁶⁰ ICC-01/11-01/11-239, paragraphs 16-17.

⁶¹ Annex 2, Public –Attorney General's office relating to progress of investigation, 15 January 2013

⁶² ICC-01/11-01/11-239, paragraph 17.

by members of the prosecution team. The questions asked of the witness and the witness' answers to these questions are then written down, and each page of the witness testimony is sealed by the witness with their signature and/or fingerprint, as well as the signature of the attending representative/s of the prosecution team.⁶³ The accuracy of witness testimonies which might be contested by the suspect are verified through a process under Libyan law known as confrontation (Article 106 of the Criminal Procedure Code). During this process the accused person in the investigation (i.e. Mr. Gaddafi) is presented with each witness whose account differs from that given by him, and is given the opportunity to refute the testimony of that witness in front of one or more member of the prosecution investigative team.⁶⁴

Intercept evidence

53. With respect to the issue of intercept evidence,⁶⁵ the Libyan Government is able to confirm that all recordings of telephone calls (which were made upon the order of Muammar Gaddafi prior to the fall of his regime) were found by rebel fighters and others in Bab al-Azizia (the Gaddafi family's former compound), in the Madar and Libyana telecommunications offices, and elsewhere during the chaos which ensued after the fall of Tripoli in August 2011 and thereafter. In the course of the prosecution's investigation of the Saif Al-Islam Gaddafi case, it has obtained such intercepts either directly from the individuals who obtained them in 2011, or from individuals who subsequently received the intercepts from the persons who found them.

54. The contents of the intercepts have been authenticated through the process of confrontation with the accused and also through the testimony of other witnesses who have listened to the recordings and confirmed that the voices heard are those of certain former Gaddafi regime officials. Transcripts of the

⁶³ Annex 2, Public –Attorney General's office relating to progress of investigation, 15 January 2013

⁶⁴ Annex 2, Public –Attorney General's office relating to progress of investigation, 15 January 2013

⁶⁵ ICC-01/11-01/11-239, paragraphs 18-19.

intercepts were prepared by volunteer lawyers and subsequently given to the prosecutor's office. If the intercepts are ultimately to be relied upon as evidence in a future trial of Mr. Gaddafi, then the prosecutor's office will prepare their own transcripts of the intercepts. Before the Chambre D'Accusation, the intercepts will be presented in electronic format only (rather than with accompanying transcripts). In accordance with Libyan law, it is for the Chambre D'Accusation to determine the extent to which intercept evidence is sought to be relied upon during Mr. Gaddafi's trial.

55. The admissibility of these intercepts (which were collected pursuant to instructions given by Muammar Gaddafi and Abdullah Al-Senussi, rather than being authorized by an investigating judge, as per the usual procedure under Libyan law), is a matter which will be determined by the trial court at the appropriate time.⁶⁶

Detention orders

56. The Pre-Trial Chamber has requested further clarification on the legal status of the extensions of remand for Mr. Gaddafi, as provided in the Application of Libya.⁶⁷ It is correct that the extensions of remand referred to in the admissibility challenge (dated 21.11.11, 04.01.12, 18.02.12, 02.04.12) were authorized by the Prosecutor-General rather than by a court. Since filing the Admissibility Challenge, clarification has been sought on this issue and it is understood that exceptionally – pursuant to Peoples' Courts procedures⁶⁸ – it

⁶⁶ Annex 2, Public –Attorney General's office relating to progress of investigation, 15 January 2013

⁶⁷ Application of Libya, para. 21.

⁶⁸ Note: The People's Courts were established by Law No 5 of 1988. They were abolished by Law No 7 of 2004 however, article 2 of that law preserved the Prosecutor's powers to apply the procedures of the People's Courts. According to the 23 December 2012 Supreme Court decision, Article 2 of the 2004 law on the abolition of the People's Court States that "the powers and authorities which were assigned to the people's court and people's prosecution office by Law No 5/1988 shall be assigned to the specialised and ad hoc courts and prosecutions". This meant that the incidences which fall under the jurisdiction of the People's Prosecution were able to be dealt by the public prosecution in substitute of the people's prosecution office with regard to the powers and authorities assigned to the latter under article 19 of law 5/1988. Article 19 stipulated that "People's prosecution office shall have all the powers and regulations

was permissible for a Prosecutor to extend periods of detention beyond the initial thirty (30) days envisaged by Article 176 of the Libyan Criminal Procedure Code without additional court approval. Although this practice was deemed unconstitutional by the Libyan Supreme Court on 23 December 2012, the Libyan Supreme Court specifically held that its Decision did not affect the validity of any previous applications of the People's Court procedures.⁶⁹ This means that each occasion on which the Prosecutor extended Saif Al-Islam's detention without judicial supervision prior to 23 December 2012 remained valid under Libyan law.

57. In any event, since 30 October 2012 the Prosecutor has sought court approval for all extensions of Saif Al-Islam Gaddafi's period of detention in full compliance with the procedures set out in Articles 177 of the Libyan Criminal Procedure Code.⁷⁰ The current extension of detention order for Mr. Gaddafi was granted following a hearing by three judges of the South Tripoli Court on 13 December 2012. A new application for extension of detention is expected to be made before a Court on 30 January 2013.

58. The Pre-Trial Chamber has additionally requested information regarding the alleged omission of the factual and legal basis for Mr. Gaddafi's detention from the extension of detention orders.⁷¹ This request for information appears to be based on criticisms made by the OPCD during the 9-10 October 2012 hearing, which related to the alleged omission of information from these extension orders and alleged failure to serve copies of these extension orders on Saif Al-Islam Gaddafi. These criticisms were apparently premised on the requirements of articles 108 and 109 of the Libyan Criminal Procedure Code, which the OPCD

provided by law to the magistrate, public prosecution and indictment chamber". The application of People's Court procedures was deemed unconstitutional by the Supreme Court on 23 December 2012.

⁶⁹ Annex 8, Public – Supreme Court of Libya Decision, 23 December 2012, page 5.

⁷⁰ Annex 9, Public – Extension of Detention Order 30 October 2012; Annex 10, Public – Extension of Detention Order 13 December 2012.

⁷¹ ICC-01/11-01/11-239, paragraph 22.

has suggested apply to extension of detention orders. In fact, these provisions of the Criminal Procedure Code apply only to the original detention order issued in ordinary cases when a person is detained at the instigation of the prosecutor after a crime has been committed. In Mr. Gaddafi's case, there was no original detention order issued by the Prosecutor because he was captured in combat by rebel forces in the process of the commission of acts that amount to a crime. In such circumstances there was no need for the Prosecutor's office to issue a detention order under articles 108 and 109 of the Criminal Procedure Code in order to have a lawful initial period of detention. Mr. Gaddafi's initial detention was lawfully extended two days after his capture by the prosecutor's issue of an extension of detention order on 21 November 2012. This fully complied with the requirements of article 176 of the Criminal Procedure Code.⁷²

Case number⁷³

59. As outlined in the 9-10 October 2012 hearing, case numbers in Libyan criminal proceedings are not made final until the charges in a particular case have been confirmed by the Chambre D'Accusation.⁷⁴ Saif Al-Islam's case is presently assigned case number 229/2012. The current plan for his case, which has been put forward by the four representatives of the Attorney-General's Investigation Committee, is that case 229/2012 will be joined with case number 630/2012. The accused in case number 630/2012 are Al-Baghdadi, Ali-Al Mahmoudi, Abdullah Al-Senussi, Abdul Hafiz Al-Zalitny, Mohamed Abdul Kasim Al-Ziwy, Mohamed Abu Bakr Aldib, Mohamed Al-Sherif, Hossni Al-Wahishi, Al Sadik Al Kabir and Jebriel Ak-Kadiki. It is envisaged by the Investigation Committee that as the crimes in cases 229/2012 and 630/2012 are inter-related, it would be more appropriate for the preservation of evidence, for the purpose of ascertaining the

⁷² Please note also articles 122 and 123 of the Libyan Criminal Procedure Code which provide for similar procedures to articles 176 and 177 in cases with a judge as opposed to a prosecutor is tasked with investigating the case. In the case of Saif Al-Islam where the Prosecutor-General is managing the case, the appropriate procedures to apply are those in articles 176 and 177.

⁷³ ICC-01/11-01/11-239, paragraphs 23-24.

⁷⁴ Transcript, 10 October 2012, page 54.

truth, and for ensuring just and consistent sentences, for the trials to be heard together before the same court.⁷⁵ Although this is the recommendation of the Attorney-General's Investigative Committee, it will be a matter for the Chambre D'Accusation to make the final determination as to whether the two cases are to be joined, and the conditions that may apply. If the two cases are to be joined, it is likely that a new case number will be assigned to the newly joined case.

Timeline of proceedings⁷⁶

60. As outlined in the Libyan Government's observations filed on 15 January 2013,⁷⁷ the investigative stage of proceedings in the Saif Al-Islam Gaddafi case is now nearing its completion. It is expected that the case will be transferred to the Chambre d'Accusation for pre-trial proceedings within the next four weeks. It is a matter for the Chambre d'Accusation to determine how long it will need to carefully examine the case file in order to ensure that: (a) the investigation has been properly conducted; (b) the charges put forward by the prosecutor are adequately supported by evidence; and (c) all the necessary conditions are in place for the trial to proceed fairly (including that defence counsel has been appointed). The best estimate of the Libyan Government is that the Chambre d'Accusation's examination of the case is likely to take approximately three months. Under Libyan law it is not possible for the trial to commence before the case has been approved by the Chambre d'Accusation and a lawyer has been appointed to represent Mr. Gaddafi.⁷⁸

61. If the Chambre d'Accusation approves the case for trial and a defence lawyer has only just been appointed to the case at the time when it is referred to the trial chamber, it will be necessary for the start of the trial to be adjourned until he or

⁷⁵ Annex 11, Public – Attorney-General Memorandum regarding joinder of cases, 13 January 2013

⁷⁶ ICC-01/11-01/11-239, paragraph 25.

⁷⁷ ICC-01/11-01/11-251, paragraph 4.

⁷⁸ Annex 12, Public – Ministry of Justice letter regarding appointment of defence counsel, 17 January 2013; Annex 13, Public – Attorney-General Letter regarding defence counsel, 10 January 2013; Annex 14, Public – President of Supreme Judicial Council Letter regarding Chambre d'Accusation, 14 January 2013.

she has had a reasonable period of time in which to adequately prepare the case on behalf of Mr. Gaddafi. It is up to the defence lawyer in question to request an appropriate amount of time for such preparatory work.

B. Issues related to the subject-matter of the domestic investigation

62. The Chamber has requested further information regarding the subject matter of the domestic investigation, including additional information as to:

- a. The conduct of Mr Gaddafi that is under investigation by the domestic authorities;
- b. the anticipated contours of the case at the national level;
- c. the geographical scope of the alleged investigation; and
- d. whether investigative steps have been taken throughout Libya or whether they have been limited to specific locations.⁷⁹

63. As outlined at the hearing on 9-10 October 2012, the subject matter of the Libyan investigation of Saif Al-Islam Gaddafi is much broader than the ICC's investigation.⁸⁰ This is because, beyond the investigation of crimes against the person or 'blood crimes' (the Libyan equivalents of the underlying acts of murder and persecution as the basis for crimes against humanity), the Libyan investigation also includes an array of financial crimes. In addition, even with respect to crimes against the person, the Libyan investigation has a broader temporal and geographic scope than the ICC investigation.

64. With respect to timing, the *ratione temporis* of the ICC investigation is limited to incidents occurring between 15 and 28 February 2011. By contrast, the Libyan 'blood crimes' investigation relates to events occurring within these dates and beyond, in the period from 11 February 2011 to the fall of the Gaddafi regime in

⁷⁹ ICC-01/11-01/11-239, paragraphs 26-29.

⁸⁰ Transcript of 9 October 2012, page 21.

October 2011. The Libyan financial crimes investigation is even broader than this, dating back to approximately 2006 and encompassing the period until October 2011. By way of example, the Libyan case file includes evidence of the summary execution of three unarmed persons who had been arrested at the roundabout outside the Gaddafi compound (Bab al-Aziza) during Ramadan in 2011 (i.e. in the period between 31 July and 30 August 2011) on the direct orders of Mr. Gaddafi. The killings were allegedly carried out in the presence of Mr. Gaddafi.⁸¹ It additionally includes allegations of Mr. Gaddafi: (a) personally distributing weapons in the area of Abu Salim in Tripoli on 18, 19 and 20 August 2011; (b) ordering the killing of four protestors (including one injured protestor) with their hands tied at Bab al-Aziza on 22 August 2011; and (c) ordering cars and houses to be set on fire in Bani Walid on 19 September 2011.

65. The geographic scope of events under investigation in Libya is also broader in several significant respects than the *ratione loci* of the ICC investigation. At the ICC, the crimes forming the subject matter of the investigation are restricted to events and acts taking place in Benghazi, Tripoli and Misrata. In Libya, the blood crimes which are under investigation include the incidents described in the ICC investigation within Benghazi, Tripoli and Misrata (and nearby cities) but also include crimes taking place in Bani Walid as well as other parts of Libya. In the course of its investigation, the prosecution team has been required to take investigative steps throughout Libya – including within Alzawia, Zawara and Bani Walid - in order to ensure that the country-wide allegations against Mr. Gaddafi are properly investigated and evidenced.

66. The Libyan Government is mindful of the Chamber's indication that a "mere assurance that the national ongoing investigation covers the same conduct as the case before the Court cannot be deemed sufficient to discharge its burden of proof", and that Libya is required to "substantiate its claim" by providing

⁸¹ Annex 15, Confidential and Ex Parte.

concrete and tangible documentary evidence.⁸² Libya is able to provide documentary substantiation of the matters outlined above in a variety of forms.

67. One such form of evidence is an official communication from the Minister of Justice. In this communication he addresses the contours of the investigation based on a recent briefing received from the Attorney- General's office, and certifies that the incidents of factual incidents of murder and persecution referred to in paragraphs 36 to 65 of the ICC's Article 58 Decision are included within the scope of the criminal investigation relating to Mr. Gaddafi. In that same communication, the Minister of Justice also confirms that the allegations pertaining to the individual criminal responsibility of Mr. Gaddafi that are cited in the ICC's Article 58 Decision (ie. paragraphs 75-78 and 80-83) are covered by evidence gathered in the Libyan criminal investigation of Mr. Gaddafi.⁸³

68. Another piece of evidence establishing the contours of the national proceedings is a proposal from the four members of the Attorney-General's Investigation Committee. This confirms that various former members of the regime implemented a systematic policy headed by Mr. Gaddafi to carry out a set of serious crimes such as mass killings, random killings, looting, sabotage, rape and to spread discord and fragmentation of national unity.⁸⁴ It further confirms that these crimes were executed by the various former members of the Gaddafi regime through their various roles in that regime.⁸⁵

69. Apart from this material originating from the highest levels of the Libyan Government, there are numerous examples of documentary evidence - of the type specifically identified by the Chamber in its Decision⁸⁶ - which it is

⁸² ICC-01/11-01/11-239, paragraph 28.

⁸³ Annex 3, Public – Ministry of Justice letter relating to contours of investigation, 21 January 2013.

⁸⁴ Annex 11, Public – Attorney-General Memorandum regarding joinder of cases, 13 January 2013.

⁸⁵ Annex 11, Public – Attorney-General Memorandum regarding joinder of cases, 13 January 2013.

⁸⁶ ICC-01/11-01/11-239, paragraphs 10-12.

envisaged would ultimately be utilized by the trial court in Mr. Gaddafi's case to evidence the Libyan Government's claims (subject to its approval for such use by the Chambre D'Accusation).

70. As Libya is constrained by its provisions of national law upholding the secrecy of its investigations, and due to its concern to prevent prejudice to the investigation and to protect witnesses and uphold national security, Libya has provided samples of this kind of evidence to the Chamber in this submission on an *ex parte* basis. This is an exceptional measure adopted to indicate its willingness and desire to comply fully with the ICC's orders, even if provision of this information at the present stage of the case is not explicitly envisaged by Article 59 of the Libyan Procedural Code and may give rise to issues thereunder. These sample pieces of evidence include witness testimonies, transcripts of intercepts and documents containing charter flight information. The materials which have been submitted to the Court on an *ex parte* basis with this filing are offered as limited and indicative examples of the many pieces of documentary evidence which are contained within the investigative case file in Tripoli relating to Mr. Gaddafi. If the Chamber feels that it is necessary to conduct a fuller inspection and assessment of the entirety of the evidence gathered to date, in order to assist in its assessment of Libya's admissibility challenge, it is respectfully invited to either (a) allow the Libyan Government an additional six weeks to prepare copies of the investigative materials (together with English translations) so that they can be lodged with the court, or (b) send a representative or a delegation to Tripoli to view the entire case file.

71. The representative pieces of evidence which have been submitted to the Pre-Trial Chamber on an *ex parte* basis in the present submission provide substantial documentary proof of the Libyan Government's assurances that its national investigation covers: (1) the same factual incidents charged as murder and

persecution before the ICC; and (2) the same allegations of individual conduct by Mr. Gaddafi which have formed the basis for his alleged participation in crimes by the ICC.

72. For example, these sample pieces of evidence deal with the factual allegations contained in various paragraphs of the Article 58 Decision, including but not limited to paragraph 43 (arrest of representative of victims of Abu Salim massacre);⁸⁷ paragraph 44 (order to arrest [and to kill] Idriss Al-Mismari);⁸⁸ paragraph 50 (shooting with live ammunition at protestors in Benghazi on 17 February 2011);⁸⁹ paragraph 52 (hitting protestors with sticks in Benghazi on 16 February 2011);⁹⁰ and paragraph 53 (shooting at demonstrators with Kalashnikovs near Juliyana Bridge in Benghazi on 17 February 2011).⁹¹

73. These examples also deal with many of the particular contributions to the common plan which the ICC Prosecutor alleges in relation to Mr. Gaddafi as summarized in paragraph 80 of the Article 58 Decision (i.e. that Mr. Gaddafi: (a) supported and contributed to the plan to deter and crush, by all means, the civilian demonstrations against the regime in early 2011;⁹² (b) used his powers and authority to ensure implementation of the plan;⁹³ (c) ordered the recruitment of mercenaries and mobilized militias and troops;⁹⁴ (d) ordered the imprisonment and elimination of political dissidents;⁹⁵ and (e) provided resources to the Security Forces.⁹⁶

⁸⁷ Annex 16, Confidential and Ex Parte.

⁸⁸ Annex 16, Confidential and Ex Parte.

⁸⁹ Annex 16, Confidential and Ex Parte.

⁹⁰ Annex 16, Confidential and Ex Parte.

⁹¹ Annex 16, Confidential and Ex Parte.

⁹² Annex 16, Confidential and Ex Parte; Annex 17, Confidential and Ex Parte.

⁹³ Annex 16, Confidential and Ex Parte; Annex 17, Confidential and Ex Parte.

⁹⁴ Annex 15, Confidential and Ex Parte; Annex 16, Confidential and Ex Parte; Annex 17, Confidential and Ex Parte.

⁹⁵ Annex 15, Confidential and Ex Parte; Annex 16, Confidential and Ex Parte; Annex 17, Confidential and Ex Parte.

⁹⁶ Annex 15, Confidential and Ex Parte; Annex 16, Confidential and Ex Parte.

C. Issues of Libyan national law

People's Court procedures

74. The Pre-Trial Chamber has requested further information from Libya as to whether or not the trial of Saif Al-Islam Gaddafi will be governed by Peoples' Court procedures.⁹⁷ At the time of the 9-10 October 2012 hearing there was some uncertainty as to whether the ordinary procedures set out in the Libyan Criminal Procedure Code would apply to the trial (as per the original intention of the Ministry of Justice as described in the text of the Application of Libya), or whether the prosecutor would seek to apply the People's Court's procedures (as was implied in page 6 of the Prosecutor's report attached as Annex C to the Admissibility Challenge).⁹⁸

75. As indicated in the course of the admissibility hearing, this important issue of whether or not Peoples' Court procedures should be applied to the trials of former Gaddafi regime officials was successfully challenged before the Libyan Supreme Court.⁹⁹ The Supreme Court delivered its judgment on 23 December 2012, which ruled that the application of the Peoples' Court procedures to criminal cases was unconstitutional. The panel of 17 senior judges examined the issue with great care and found that the prosecutor's ability to apply procedures of the Peoples' Court (an ability which had been preserved by statute in 2004 even after the courts themselves were abolished) was unconstitutional.¹⁰⁰ The

⁹⁷ ICC-01/11-01/11, 239, paragraphs 30-31.

⁹⁸ Transcript of 10 October 2012, pages 63-64.

⁹⁹ Transcript of 10 October 2012, page 47.

¹⁰⁰ Note: The Peoples Courts were established by Law No 5 of 1988. They were abolished by Law No 7 of 2004 however, article 2 of that law preserved the Prosecutor's powers to apply the procedures of the Peoples' Courts in certain circumstances. According to the 23 December 2012 Supreme Court decision, Article 2 of the 2004 law on the abolition of the Peoples' Court States that "the powers and authorities which were assigned to the people's court and people's prosecution office by Law No 5/1988 shall be assigned to the specialised and ad hoc courts and prosecutions". This means that the incidences which fall under the jurisdiction of the People's Prosecution may be dealt by the public prosecution in substitute of the people's prosecution office with regard to the powers and authorities assigned to the latter under article 19 of law 5/1988. Article 19 stipulates that "People's prosecution office shall have all

procedure followed and the judgment given demonstrate the independence and impartiality of Libya's judiciary, Libya's commitment to uphold the principle of fair trials for all, and the ability of its judiciary to deliver fair trials.

76. The Supreme Court held, in a unanimous decision, that the application of People's Court procedures by the prosecutor established "discrimination among persons in submission to law, violates the principle of equality, undermines the personal freedom, breaches the regulations of fair trial which renders it in violation of the well-established constitutional rules in this regard".¹⁰¹ The Court reached this finding despite the high public importance and political sensitivity in cases to which the prosecutor sought to apply People's Court procedures (i.e. cases of former Gaddafi era officials). It ruled that : "there is no room for pleading that crimes viewed by the People's Court had special gravity and political considerations, since the type of crime and degree of gravity do not justify the laws' violation of the constitutional rules which are superior to them".¹⁰²

77. The effect of this judgment is that People's Court procedures may not be applied in the future to any case (including that of Mr. Gaddafi). However, People's Court procedures which were applied in all cases prior to the decision of the Supreme Court on 23 December 2012 remain valid as they had not, at that time, been found to be unconstitutional. As the Supreme Court has clarified on this issue: "judiciary should judge the unconstitutionality of the appealed text without affecting the validity of the procedures taken thereunder".¹⁰³

Law on international crimes

the powers and regulations provided by law to the magistrate, public prosecution and indictment chamber".

¹⁰¹ Annex 8, Public – Supreme Court of Libya Decision, 23 December 2012.

¹⁰² Annex 8, Public – Supreme Court of Libya Decision, 23 December 2012.

¹⁰³ Annex 8, Public – Supreme Court of Libya Decision, 23 December 2012.

78. As outlined in the Application of Libya,¹⁰⁴ prior to the July 2012 elections the legislative committee of the National Transitional Council (the “NTC”) submitted a law reform proposal (including a draft bill) to the NTC designed to incorporate international crimes, as defined in the Rome Statute, into Libyan law. The effect of this bill, once enacted into law, would be that Mr. Gaddafi could be charged with the crimes against humanity of murder and persecution (i.e. the same legal categorization of crimes alleged before the ICC).

79. Since the July 2012 election, the NTC has been replaced by a permanent legislative body, the General National Congress (the “GNC”). All of the work of the NTC which remained incomplete as at the date of the transfer of powers to the GNC was transferred to the GNC. This included the law reform proposal and draft bill on international crimes referred to above.

80. Given the array of pressing issues currently being faced by Libya and the GNC, it is unfortunate but not entirely surprising that the international crimes bill has not yet been debated or adopted by that body. However, it remains on the agenda of the GNC, and it is anticipated by the Libyan Government that the international crimes bill will be considered and adopted by the GNC in due course. If the bill is enacted into Libyan law prior to the conclusion of the proceedings in the Chambre D’Accusation in the Gaddafi case, and if crimes against humanity charges based on the new legislation are approved by that Chamber, the trial proceedings in his case will relate to counts of murder and persecution charged as crimes against humanity.

General update on offences with which Saif Al-Islam Gaddafi might be charged

81. It will be recalled that in its 1 May 2012 Admissibility Challenge, Libya provided a list of ‘ordinary crimes’ under the Libyan Criminal Code which the prosecutor

¹⁰⁴ ICC-01/11-01/11-130, paragraphs 84-85.

was likely – at that time - to apply to the case of Mr. Gaddafi.¹⁰⁵ Since the filing of the Government’s Admissibility Challenge, the investigation of Mr. Gaddafi has developed and the list of charges now likely to apply to the case has also evolved. The definitive list of charges which will be applied at Mr. Gaddafi’s trial will be determined following careful scrutiny of the evidence in the case by the Chambre d’Accusation.

82. The current list of charges includes both ‘ordinary crimes’ under the Libyan criminal code and an offence under Law No 7 of 1988 (crimes under Sharia law). The charges now under consideration – in addition to the original charges provided on 1 May 2012 pursuant to articles 368 (intentional murder), 435 (torture), 293 (incitement to civil war), 296 (indiscriminate or ‘random’ killings), 431 (misuse of authority against individuals), 433 (arresting people without just cause) and 434 (unjustified deprivation of personal liberty) of the Libyan Criminal Code – are contained in articles 195 (insulting constitutional authorities), 202 (devastation, rapine and carnage), 203 (civil war), 211 (conspiracy), 217 (attacks upon the political rights of a Libyan subject), 297 (arson), 362 (spreading disease among plants and livestock), 294 (concealment of a corpse), 322 (aiding members of a criminal association), 429 (use of force to compel another) and 432 (search of persons) of the Criminal Code as well as in the Sharia law governing retaliation and Diya compensation for killings pursuant to Law No 7 of 1988.¹⁰⁶

83. It is to be emphasized that regardless of the number of additional charges that have been – or may yet be - added to the Libyan criminal case file pertaining to Mr. Gaddafi, the central allegations in the national criminal proceedings remain the same as those in the ICC case – i.e. acts of murder, abductions, arrests and torture of dissidents during the 2011 revolution. These core allegations (and

¹⁰⁵ ICC-01/11-01/11-130, paragraphs 75 and 84 referring to Annex I.

¹⁰⁶ A compilation of these additional provisions of Libyan law (with accompanying translations) will be filed as soon as possible.

corollative charges under national law) will remain common to both investigations, regardless of the exact combination of additional charges to be pursued. These charges are the central focus and subject of the evidence that has been gathered over the many months of the Libyan criminal investigation.

Offences with which Mr. Gaddafi might be charged – issue of ‘public officer’

84. The Pre-Trial Chamber has requested clarification as to whether Mr. Gaddafi would qualify as a public officer within the Libyan legal system for the purposes of various Libyan criminal charges (eg. articles 435 (torture of prisoners), 431 (abuse of authority against individuals) and 433 (arrest of people without cause) and 434 (restraint of personal liberty without justification).¹⁰⁷

85. The Libyan Government has since sought clarification on this issue from the Attorney-General’s office. It is able to confirm that the public officer aspect of these charges is a requisite element of the crime. However, this will not impact on the applicability of these provisions to Mr. Gaddafi’s case. This is because, notwithstanding the fact that Mr. Gaddafi (like his father) did not have a *de jure* public function in Libya prior to the 2011 revolution, he was in effect acting as the *de facto* Prime Minister of Libya and as such was *de facto* the second highest authority in the country. Libyan law recognizes the concepts of *de jure* and *de facto* authority, and although it is a constituent element of articles 435, 431, 433 and 434 to establish that the accused was a public officer, this requirement can be satisfied in Mr. Gaddafi’s case if there is sufficient evidence presented at trial of his *de facto* authority. The criminal investigation of Mr. Gaddafi includes significant and compelling evidence on his *de facto* position as a senior public official. This is a matter on which evidence will be led at trial in order to prove this element of the crimes charged.

Offences with which Mr. Gaddafi might be charged – issue of random killings

¹⁰⁷ ICC-01/11-01/11-239, paragraphs 33-35.

86. Additional information is sought by the Pre-Trial Chamber as to whether the exclusion of acts constituting an attack on State safety contained in article 296 (indiscriminate/random killings) is relevant to the Libyan proceedings pertaining to Mr. Gaddafi.¹⁰⁸ Libya is able to confirm that this provision will apply to the acts of Mr. Gaddafi during the 2011 revolution. This is because the evidence indicates that he possessed the intention to kill, and pursuant to this intention he undertook acts against which endangered public safety. These acts were not acts against the safety of the State because they were directed towards unarmed protestors rather than State officials.

Offences with which Mr. Gaddafi might be charged – issue of persecution

87. The issue of persecution has been queried by Chamber on the basis that it was not clear on the face of the Application of Libya whether and how the ICC crime of persecution (i.e. severe deprivation of fundamental rights by reason of the identity of a group or collectivity in terms of, *inter alia*, political affiliation) can also be a crime under Libyan Law.¹⁰⁹ Although there is no provision under Libyan law that exactly mirrors the crime of persecution under the Rome Statute, the persecutory intent of the perpetrator committing the underlying act (ie. the murders, abductions, arrests and incidents of torture) is an aggravating factor which is taken into account when determining the appropriate sentence for such crimes under articles 27 and 28 of the Libyan Criminal Code.

D. Issues related to Mr. Gaddafi's exercise of his rights under Libyan national law

88. In response to the questions posed in paragraph 39 of the Decision, Libya confirms that Mr. Gaddafi has been questioned on several occasions since the 1 May 2012 Application, including most recently on 13 November 2012.¹¹⁰

¹⁰⁸ ICC-01/11-01/11-239, paragraph 36.

¹⁰⁹ ICC-01/11-01/11-239, paragraph 37.

¹¹⁰ Annex 3, Public – Ministry of Justice letter relating to contours of investigation, 21 January 2013.

89. In this regard, there appear to be two unfortunate misunderstandings that underpin this aspect of the Decision, which Libya wishes to address. The first is the Statement in the Decision that Libya indicated in its Admissibility Challenge that the interrogation of Mr. Gaddafi under Article 105 of the Code of Criminal Procedure “would be conducted within two weeks”.¹¹¹ The report annexed to the Admissibility Challenge, however, and which is referred to, only indicated that “there will be investigation proceedings and *confrontation later on to regulate the witnesses’ testimonies and collect other evidence, in order to confront the accused with.*”¹¹² The report further indicates that the Investigation Committee “has finished listening to most of the testimonies” and States that “it is likely that the investigation and confrontation will take place in the following two weeks at most” with respect to the witness Statements. Within the scope of investigative proceedings under Article 105, the interrogation of the accused may be distinguished from confrontation of the accused with witness testimony.

90. The foregoing sequence of events is confirmed by the 15 January 2013 letter of Mr. Al-Seddiq Ahmed Al-Sor, Public Prosecution at the Office of the Attorney-General, namely that “the witnesses have been heard under oath” and that Mr. Gaddafi has been interrogated “to confirm its validity through the confrontation of the defendant by the Statements of witnesses.” The letter indicates that the various investigative measures “are in harmony with each other” and that “the investigations continued till after the date of 01 May 2012”.¹¹³

91. Similarly, the Decision States that: “During the Admissibility hearing, Libya indicated that Mr Gaddafi had not been interrogated yet.”¹¹⁴ This appears to be a misunderstanding of counsel’s Statement that “[t]he next step in the present investigation is for the Prosecutor-General appointed by the new cabinet to

¹¹¹ Decision, para. 38.

¹¹² Application, Annex C, p. 6.

¹¹³ Annex 2, Public –Attorney General’s office relating to progress of investigation, 15 January 2013.

¹¹⁴ Decision, para. 39.

conduct an interview with Mr. Gaddafi in person”¹¹⁵ followed by the Statement that “[t]his interview has not yet taken place.” (emphasis added)¹¹⁶ This referred to interrogation of Mr. Gaddafi by the new judicial authority and was not meant to suggest that no prior interrogation had taken place under Article 105.

92. Libya regrets any misunderstandings arising from the ambiguity of these statements.

93. In response to the question posed in paragraph 40, Mr. Gaddafi has been informed of the accusations and evidence against him but he has not exercised his right to view the investigative materials, just as he has not exercised his right to appoint counsel. In the accusatory phase however, the Chambre d’Accusation will appoint counsel if Mr. Gaddafi fails to do so again, and such counsel will necessarily review the investigative materials in order to prepare his defence.

E. Issues related to the capacity of Libyan authorities to investigate and prosecute

i. Investigation resources

94. The Chamber has inquired about the resources allocated to the Libyan prosecutorial team which is investigating Mr. Gaddafi.¹¹⁷ Libya clarifies that:¹¹⁸

(i) The Investigation Committee at the Attorney-General’s Office is composed of fourteen (14) prosecutors and other support staff. The Committee benefits from all of the financial and other resources available to the Prosecutor-General’s Office on a priority basis. The Investigation Committee has its own building in the Serraj district in Tripoli.

¹¹⁵ ICC-OI/II-OI/II-T-2-CONF-ENG, p. 25, lines 14-15.

¹¹⁶ *Id.*, line 19.

¹¹⁷ ICC-01/11-01/11-239, paragraph 41.

¹¹⁸ Annex 18, Public, NTC General Prosecutor Resolution, 19 July 2012.

- (ii) The Investigation Committee members are part of, and thus possess the full powers of, the Prosecutor-General's Office. This includes the power to summon witnesses, to search and seize evidence, to conduct forensic examinations and crime scene investigations, and to request international judicial cooperation.
- (iii) The Investigation Committee members are prosecutors and investigators with considerable experience in criminal matters. The Head of the Investigation Committee is Mr. Ibrahim Ashour Al-Ogeily (Alujili), a senior official who is the Attorney-General of Alzawia. Other senior officials in the Investigation Committee at the rank of "Prosecution Deputy" include Mr. Alhadi Abdelsalam Rehab, Mr. Alseddik Ahmed Alsour, and Mr. Ali Ammar Allafih. The Investigation Committee has also benefitted from strategic advice as to the planning of trials of former Gaddafi regime officials by UN experts.
- (iv) The Investigation Committee has conducted on-site investigations including exhumations of mass-graves as well as prisons and other locations where executions and acts of torture were carried out.
- (v) Evidence has been preserved in accordance with regular criminal investigative procedures. This has included the retention of documents, electronic material (audio CDs and video DVDs), photographs and DNA samples.

ii. Witness protection and security

95. In response to the Chamber's requests for further information pertaining to witness protection and security,¹¹⁹ Libya clarifies that:

- (i) It is envisaged that protective measures will be implemented for some witnesses who agree to testify in the proceedings against Mr. Gaddafi.
- (ii) In addition to the protective measures concerning non-disclosure of investigative materials under Article 59 and other provisions of the Code

¹¹⁹ ICC-01/11-01/11-239, paragraph 42.

of Criminal Procedure, Libyan courts have the capacity to order protective measures at subsequent phases of the proceedings including *in camera* witness testimony, witness anonymity, and police protection where required.

- (iii) During the investigation phase of proceedings, the primary protective measure pursuant to Article 59 of the Code of Criminal Procedure has been witness anonymity and maintaining the confidentiality of investigative materials.
- (iv) The security situation in Libya has gradually improved and it has not inhibited the progress of the investigation in any significant way.

iii. Defence of Mr. Gaddafi

96. In response to the Chamber's queries on the topic of Mr. Gaddafi's defence,¹²⁰ Libya confirms that he has not yet exercised his right to appoint counsel during the investigative phase in accordance with Article 106 of the Code of Criminal Procedure.¹²¹ Should he decide not to appoint counsel upon entering the accusatory phase, the Chambre d'Accusation will appoint counsel for him pursuant to Article 162 of the Libyan Criminal Procedure Code.¹²² The President of the Supreme Judicial Council has confirmed that

*according to the general rules of the Libyan law, and the judgment issued by the constitutional circuit of the Supreme Court on 23.12.2012, no trials may be conducted nor their dates affixed in accordance with the criminal provisions except after the submittal of the action to the Chamber of Accusation and with the attendance of a lawyer to represent the defendant throughout the trial period.*¹²³

¹²⁰ ICC-01/11-01/11-239, paragraph 43.

¹²¹ Annex 13, Public – Attorney-General Letter regarding defence counsel, 10 January 2013.

¹²² *Id.*

¹²³ Annex 14, Public – President of Supreme Judicial Council Letter regarding Chambre d'Accusation, 14 January 2013.

97. With respect to “concrete steps that have been taken in order to identify and secure ... independent legal representation for Mr. Gaddafi”, the Minister of Justice of Libya, Mr. Salah el-Marghani, confirms that:

Considerable steps have been taken by the Libyan Government, and in particular by representatives of the Ministry of Justice, to ensure that Saif Al-Islam Gaddafi will have the benefit of properly qualified and licensed defence counsel, amongst other fair trial guarantees, under Libyan Law.¹²⁴

The Minister of Justice has further clarified that because Mr. Gaddafi has not elected to appoint counsel of his choice pursuant to Article 106 of the Code of Criminal Procedure:

Ministry of Justice officials have been in continuous high level contact with the Libyan Law Society and the Popular Lawyers Office in order to select a suitably qualified and committed highly qualified counsel or a team of defence counsels to represent him during his forthcoming trial.¹²⁵

The Minister of Justice has reiterated that:

Under the Libyan Criminal Procedure Code, it is not possible for the trial to commence prior to a lawyer being appointed, and we shall keep you advised of our progress.¹²⁶

iv. Custody of Mr. Gaddafi

98. The Chamber has requested an update on (a) who has custody of Mr Gaddafi at present; (b) whether any agreement has been reached as to the transfer of Mr.

¹²⁴ Annex 12, Public – Ministry of Justice letter regarding appointment of defence counsel, 17 January 2013.

¹²⁵ *Id.*

¹²⁶ *Id.*

Gaddafi to Tripoli and, if so, when this transfer is expected to take place; and (c) any arrangements made for the building of a courtroom complex and prison facility that would be needed for the trial.¹²⁷

99. The Libyan Government is able to confirm that Mr. Gaddafi remains in Zintan where he has been visited by both representatives of the International Committee of the Red Cross and Human Rights Watch on several occasions. Efforts to arrange Mr. Gaddafi's transfer to a detention facility in Tripoli where other Gaddafi-era officials are presently held are still ongoing.

100. Arrangements have been made for the renovation of a courtroom complex and prison facility in Tripoli which will be capable of ensuring the proper administration of justice in accordance with minimum international standards during Mr. Gaddafi's trial. This is the prison facility where Abdullah Al-Senussi is presently held, known as Hadba, in Tripoli. It has recently been refurbished and can accommodate more than 200 prisoners. It is equipped with high quality recreation and cafeteria facilities and inmate rooms which meet minimum international standards (including televisions).

101. Libya is keen to clarify that the court appearance of Mr. Gaddafi in Zintan on 17 January 2012 is not indicative of where his trial on charges of crimes against the person will be held. This court appearance was for the purpose of charges relating to the Libyan flag and various alleged breaches of national security arising out of the visit of the OPCD to Zintan in June 2012. This is a completely separate case from the main criminal proceedings against him, and which form the subject of Libya's admissibility challenge. As the heads of the Investigation Committee for the main criminal case against Mr. Gaddafi have confirmed, it is intended that these charges will be joined with similar charges

¹²⁷ ICC-01/11-01/11-239, paragraph 45.

against other former Gaddafi regime officials and that all the accused persons will be brought to trial in one case and before one criminal circuit.¹²⁸ As outlined above, the court and prison facilities for this joint trial have been prepared in Tripoli.

102. The Chambre d'Accusation in Mr. Gaddafi's case is presently scheduled to take place at the South Tripoli Criminal Court. If a joint trial is approved by the Chambre d'Accusation, it will take place at Hadba in Tripoli which as well as containing a prison complex also includes a recently refurbished court facility. If the trial of Mr. Gaddafi is instead approved by the Chambre d'Accusation to proceed as a trial of a single accused person then it will take place at the South Tripoli Criminal Court. Both of these court complexes are fully equipped for a high security trial which complies with international best practice.

v. Capacity-building

103. Libya has received substantial measures of assistance from several UN agencies and Governments with respect to human rights, transitional justice, and the rule of law. These measures have had both direct and indirect impact on the specific case against Mr. Gaddafi ranging from the development of prosecutorial strategy against Gaddafi-era leadership figures to general capacity-building among the judiciary.

104. As set forth below, the relevant UN agencies have included the UN Support Mission in Libya (UNSMIL), the Office of the UN High Commissioner for Human Rights (UNHCHR), the UN Office of Drugs and Crime (UNODC), and the UN Development Program (UNDP). The focal point of UN assistance has been the Human Rights, Transitional Justice and Rule of Law Division, established within UNSMIL in 2011. The Director of this Division is also the

¹²⁸ Annex 11, Public – Attorney-General Memorandum regarding joinder of cases, 13 January 2013.

Representative of the UNHCHR in Libya, and is responsible *inter alia* for transitional justice, prison reform, human rights and judicial capacity-building.¹²⁹

105. The European Union has also provided assistance, as have the Governments of Denmark, Finland, Korea, The Netherlands, Morocco, Peru, South Africa, Switzerland, Tunisia, the United Kingdom, and the United States. This assistance has ranged from funding projects to providing expert training and advice on best practices.

106. A detailed description of the UN measures of assistance is indicated in the 26 September 2012 Information Note on Activities of UNSMIL.¹³⁰ An area of UNSMIL assistance that impacts the case against Mr. Gaddafi is technical advice and international experience on transitional justice, including expert discussions with local authorities in Zintan:

In December 2011, UNSMIL provided comments and advice on international best practices on the transitional justice draft law. In partnership with the High Judicial Institute, UNDP, the UN Office on Drugs and Crime (UNODC) and UNSMIL organised a conference on transitional justice in January 2012 that brought together government actors, international experts and civil society representatives to discuss strategies for implementing transitional justice. The conference produced a series of recommendations, including requests for UNSMIL support in the areas of truth-seeking and training for the justice sector. As part of the follow-up, UNSMIL in collaboration with the National Consultative Group, a local civil society think-tank, and the Embassies of South Africa and Switzerland organized a weeklong programme on transitional justice in Libya from 12 to 19 May, entitled "Envisioning Reconciliation." The programme featured six international experts (three women and three men),

¹²⁹ Annex 19, Public, Website extract 'OCHHR in Libya'.

¹³⁰ Annex 20, Public, UNSMIL Information Note, 26 September 2012.

including from South Africa and Peru, who shared comparative experiences on transitional justice and reconciliation initiatives undertaken elsewhere. The programme included a two-day workshop with political, religious and community leaders in Tripoli. The international experts also travelled to Misrata, Benghazi, Sabha and Zintan to meet with the local councils and security committees and discuss transitional justice concerns on the ground at the local level. The experts also spoke at a seminar at the High Judiciary Institute before a group of about 20 judges, prosecutors, State lawyers and public defenders.¹³¹

107. Another area of UNSMIL assistance that is relevant to the case against Mr. Gaddafi is weekly visits to and advice on detention centres, including regular visits to Zintan, and facilitating the transfer of detention centres to the control of the Government authorities in Tripoli:

UNSMIL has undertaken regular visits to detention centres in Tripoli, Benghazi, Ajdabiya, Zawiya, Misrata, Zintan, the Nafusa Mountains, Gheryan, Kufra and Sabha. During these visits, UNSMIL advised those controlling the detention centres on international standards for the security and safety of detainees. UNSMIL has conveyed to the Government information regarding the treatment of detainees and has urged the commencement of State inspections and the earliest possible assumption of State control of detention facilities and processing of cases in accordance with the law.¹³²

108. UNSMIL assistance in training the Libyan prison administration is also relevant to the case against Mr. Gaddafi:

UNSMIL is working with the Judicial Police to increase its capacity to establish control over more prisons, and receive detainees transferred to prisons under the custody of the Ministry of Justice. It is assisting to enhance the capacity of the

¹³¹ *Id.*, pp. 2-3.

¹³² *Id.*, p. 3.

*Judicial Police to address existing challenges, including the lack of trained staff, the destruction of significant parts of the penitentiary infrastructure and security problems. Besides the technical support provided, UNSMIL is coordinating the support of the international community to the authorities in the area of corrections. UNSMIL facilitated an assessment mission by a high-level delegation of the Jordanian prison service from 16 to 19 April 2012, which focused on assessing the training needs of the Libyan prison administration. Consequently, capacity building support will be tailored in response to the identified needs. These efforts will be complemented by the long-term prison reform process implemented by the UN Country Team, particularly UNODC.*¹³³

109. Another important area of UNSMIL assistance that is relevant to the case against Mr. Gaddafi is judicial reform and capacity-building:

UNSMIL is engaging with the Ministry of Justice to support the resumption of the court system over the coming months. In this connection, UNSMIL is working with the High Judicial Institute to identify capacity needs within the Libyan judiciary, and together with UNODC is conducting a legal review of a number of Libyan laws to advise on how these can be harmonised with international instruments. UNSMIL, in consultation with relevant Libyan entities, is developing a capacity development programme for public defenders, judicial police and military prosecutors. ...

*UNSMIL has been working, in close consultation with the Supreme Judicial Council, to provide support to the national committee established to examine the status of the judiciary and submit recommendations on judicial reform.*¹³⁴

110. In addition to these measures of assistance, UNSMIL support has assisted Libya in relation to the case involving Mr. Gaddafi by providing advice on how to advance conflict-related criminal proceedings before the Libyan judicial

¹³³ *Id.*, p. 3.

¹³⁴ *Id.*, pp. 3-4.

system. This includes training of judges and prosecutors, and advising the Ministry of Justice and General-Prosecutor's Office on national strategies for the investigation and prosecution of officials of the Gaddafi regime for serious conflict-related crimes:

In March 2012, in partnership with the Ministry of Justice and the High Judiciary Institute, UNSMIL held two workshops for 40 investigating judges and public prosecutors in Tripoli, focusing on two main issues: i) starting the screening process of conflict-related detainees; and ii) preparing for the investigation and trial of those accused of serious crimes as members of the former regime or during the conflict. The outcome from the workshops provided practical recommendations to the Ministry of Justice and General-Prosecutor's Office on how to advance these processes. This training will be further complemented with a direct support to the Task Force established by the Office of the General Prosecutor to formulate a national strategy for dealing with conflict related detentions. Efforts will be also streamlined with longer-term capacity building initiatives by UNDP and UNODC.¹³⁵

111. These substantial and far-reaching measures of assistance, especially those directly relevant to the case against Mr. Gaddafi, were specifically mentioned by Mr. Tarek Mitri, Special Representative of the UN Secretary-General for Libya, in his 8 November 2012 briefing to the Security Council:

UNSMIL continues to engage with interlocutors on programmes such as training the Judicial Police and advising the General Prosecutor to develop an overall strategy for prosecuting former regime figures and others who have committed serious human rights violations. UNSMIL is also urging the GNC and Government to pursue a comprehensive transitional justice strategy, including by implementing a dynamic truth-seeking process.¹³⁶

¹³⁵ *Id.*, p. 4.

¹³⁶ Annex 21, Public, Special Representative of the Secretary-General for Libya's Briefing to UN Security Council, 8 November 2012.

112. The impact and importance of these measures of assistance on the transitional justice policy of the Libyan Government, including the proceedings against Mr. Gaddafi, was reflected at a Conference on Truth and Reconciliation in Libya, held on 12-13 December 2012 in Tripoli, and organized by the UN in partnership with Libya. This event brought together some one hundred Government officials, members of the Fact-Finding and Reconciliation Commission, members of the General National Congress, members of the Council of Wise Men (Hukama), representatives from the Ministry of Martyrs and Missing Persons, civil society and victim groups, and individual experts as well as members from the diplomatic community and international experts, including from South Africa, Peru, and Tunisia, to share their countries' respective experiences in dealing with their past. At the Conference opening, the Libyan Minister of Justice, Mr. Salah Marghani, emphasized that: "Truth-seeking and transitional justice are an important part of Libya's program to exit the revolution mode to that of the State".¹³⁷

113. In addition to support from the UN, the Libyan Government has sought and received various forms of short-term and long-term assistance from several Governments and organizations with respect to its priorities in furthering transitional justice and the rule of law. These measures of assistance, and the Governments and organizations involved, are detailed in a Discussion Paper submitted by the Libyan Government to a high-level Inter-Ministerial Meeting of donor countries to Libya in London on 17 December 2012 which was attended by 54 delegates.¹³⁸ The long list of priorities and measures leaves no doubt that no effort has been spared to integrate judicial capacity-building as an essential component of Libya's democratic transition.

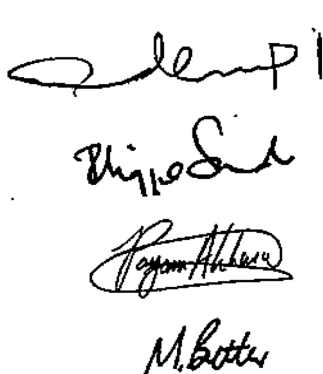
¹³⁷ Annex 22, Public, UNSMIL Press Statement on Truth and Reconciliation Conference, December 2012.

¹³⁸ Annex 23, Public, Libyan Government Transitional Justice and Rule of Law Discussion Paper, November 2012.

V. CONCLUSION

114. The Libyan Government trusts that the additional information contained in this further submission is of assistance to the Court and submits that it has offered sufficient evidence in support of its Application to find that the case against Mr. Gaddafi is inadmissible before the Court.

Respectfully submitted:



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Dated this 23rd day of January 2013
At London, United Kingdom

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