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PRE-TRIAL CHAMBER I

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

SITUATION IN LIBYA
IN THE CASE OF

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

Public & Redacted, with 2 Public Annexes

Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute

Source: The Government of Libya in the case of Abdullah Al-Senussi represented by:
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Table of Contents

PART I: INTRODUCTION AND FACTUAL & PROCEDURAL BACKGROUND

A. INTRODUCTION

1. This Application is brought under Article 19 (2) (b) of the Rome Statute, to challenge the admissibility before the ICC of the case concerning Abdullah Al-Senussi ("Abdullah Al-Senussi"). In accordance with the principle of complementarity set forth in Article 17 of the Rome Statute, Libya respectfully submits that this case is inadmissible on the grounds that its national judicial system is actively investigating Abdullah Al-Senussi for his alleged criminal responsibility for multiple acts of murder and persecution, committed pursuant to or in furtherance of State policy, amounting to crimes against humanity. These acts, allegedly committed as part of a widespread or systematic attack against Libyan civilians, include but are not limited to crimes committed in Benghazi during the period from 15 to 20 February 2011.

2. The national proceedings concerning these matters are consistent with the Libyan Government's commitment to post-conflict transitional justice and national reconciliation. They reflect the concrete willingness and ability of the Libyan Government to bring Mr Al Senussi to justice as part of its program of building a new and democratic Libya governed by the rule of law. To deny the Libyan people this historic opportunity to eradicate the long-standing culture of impunity would be inconsistent with the object and purpose of the Rome Statute, including its deference to national judicial systems.

3. This Application requests the Pre-Trial Chamber to give full effect to the principle of complementarity that is at the core of the ICC Statute. The Statute asserts that "every State" - including Libya - has "a duty ... to exercise its criminal jurisdiction over those responsible for international crimes". Libya seeks to fulfil that duty and is making every effort to take measures "at the national level", as required by the ICC Statute, and as intended by its drafters. The manner in which this application is determined is likely to have far reaching consequences for the

viability of the principle of complementarity, which in its origin aimed at ensuring the primary role of national jurisdictions within the system of international criminal justice.

4. Accordingly, for the reasons set out in detail in this Application, Libya seeks a ruling from the Chamber:

   i. Declaring the case against Abdullah Al-Senussi inadmissible; and

   ii. Quashing the Surrender Request.

5. Further, the Government of Libya exercises its right pursuant to article 95 of the Statute, for the postponement of the execution of the Court's request for the surrender of Abdullah Al-Senussi pending the determination of this admissibility challenge by the Court.[1]

B. THE MUAMMAR GADDAFI REGIME'S GROSS HUMAN RIGHTS VIOLATIONS

6. This Application must be seen against the background of the Muammar Gaddafi era. This forty-two year period was characterised by gross human rights violations that occurred on and after 15 February 2011. From the 1970s to 2011, a great number of Libyan citizens were victims of murder, torture, rape, enforced disappearances, persecution, and other serious abuses, committed by Muammar Gaddafi's security forces to silence all dissent. Even pursuit of the truth was criminalized: in one instance in 1996, following the notorious massacre of approximately 1270 prisoners at Abu Salim prison and the secret burial of the victims, family members were arrested and imprisoned for merely wanting to know the fate of their loved ones.[2] Indeed, the Gaddafi regime's steadfast efforts

[1] "Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Rome Statute", ICC-01/11-01/11-163, 1 June 2012,, at para 36.

[2] Amnesty International, "Annual Report, 2011: Libya", available at: http://www.amnesty.org/en/region/libya/report-2011; Human Rights Watch, "World Report 2011: Libya", available at: http://www.hrw.org/world-report-2011/libya; See also the exhortations for improvement in these, and related areas, in Human Rights Council, "Report of the Working Group on the Universal, Periodic Review: Libyan Arab Jamahiriya", UN doc. A/HRC/16/15, 04 January 2011.

to suppress the truth about the Abu Salim massacre led to the arrest in February 2011 of two principal campaigners for justice on behalf of the families of the victims.[3] Rather than suppress the Libyan people's protestations and demands for justice, these arrests helped fuel the uprising and subsequent overthrow of the Gaddafi regime.

C. LIBYA'S 2011 NATIONAL LIBERATION STRUGGLE

7. The 2011 Libyan revolution was a response to the tyranny of the Muammar Gaddafi regime. Inspired by the Arab Spring, major cities and towns across the country broke out in peaceful protests in virtual unison in mid-February 2011. By the end of February, the Muammar Gaddafi regime had lost control of parts of Libya. By March 2011, Muammar Gaddafi's forces had unleashed a campaign of violence against civilians and pushed the emerging rebel forces back to Benghazi and Misrata.[4]

8. On 19 March 2011, in view of the escalating atrocities, an international coalition began a humanitarian intervention by armed force to protect Libyan civilians in accordance with United Nations Security Council Resolution 1973.[5] This followed the adoption of Resolution 1970, referring the Muammar Gaddafi regime's most recent atrocities to the ICC Prosecutor.[6]

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[3] Human Rights Watch, "Libya: Arrests, Assaults in Advance of Planned Protests", available at: http://www.hrw.org/news/2011/02/16/libya-arrests-assaults-advance-planned-protests

[4] International Crisis Group, "Holding Libya Together: Security Challenges After Qadhafi", Middle East/North Africa Report N. 115, 14 December 2011; Al Jazeera "Gaddafi defiant as state teeters", 23 February 2011, available at: http://www.aljazeera.com/news/africa/2011/02/2011223543476748 7.html ["International Crisis Group Report"]; BBC News, "Libya: Gaddafi forces attacking rebel-held Benghazi", 12 March 2011, available at: http://www.bbc.co.uk/news/world-africa-12793919; Al Jazeera, "Gaddafi forces encroaching on Benghazi", 19 March 2011, available at: http://www.aljazeera.com/news/africa/2011/03/201131934914112208.html

[5] United Nations Security Council, Resolution 1973 (2011), UN Doc. S/RES/1973, adopted by the Security Council at its 6498th meeting, 17 March 2011.

[6] United Nations Security Council, Resolution 1970 (2011), UN Doc. S/RES/1970, adopted by the Security Council at its 6491st meeting, 26 February 2011; United Nations, "Security Council, Press Statement On Libya", 22 February 2011, UN doc. no. SC/10180 AFR/2120, available at: http://www.un.org/News/Press/docs//2011/sc10180.doc.htm

9. During the period that followed, the continuing attacks against peaceful protestors transformed the situation into a full-scale armed conflict.[7] On 23 August 2011 rebels encircled the Gaddafi family compound in Tripoli and occupied Green Square. With the capture of Sirte on 20 October 2011 (the day on which Muammar Gaddafi was killed), the revolution ceased and the people of Libya entered a new phase of their history.[8]

D. THE ESTABLISHMENT OF THE NTC AND CHALLENGES OF POST-CONFLICT SECURITY

10. The National Transitional Council ("NTC") was formed on 27 February 2011 to act as "the political face of the revolution".[9] On 23 March 2011, the NTC established an Executive Board to act as a transitional government for Libya.[10] The U.N. General Assembly recognized the NTC as the legitimate interim governing body in Libya in September 2011.[11] Following the defeat of the last remaining pro-Gaddafi stronghold and the death of Muammar Gaddafi on 20 October 2011, the NTC declared Libya liberated and started implementing plans to transition toward democratic elections for a General National Congress (GNC).[12]

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[7] Human Rights Watch, "World Report 2012: Libya", available at: http://www.hrw.org/world-report-2012/world-report-2012-libya; See further BBC News, "Libya protests: 84 killed in growing unrest, says HRW", 19 February 2011, available at: http://www.bbc.co.uk/news/world-africa-12512536

[8] International Crisis Group Report, CrisisWatch Database, Libya, 1 November 2011, available at: http://www.crisisgroup.org/en/publication-type/crisiswatch/crisiswatch-database.aspx?CountryIDs={28685262-BE79-473E-B18E-ED22761A0F17}; BBC News, "Libya's new rulers declare country liberated", 23 October 2011, available at: http://www.bbc.co.uk/news/world-africa-15422262

[9] Al Jazeera, "The National Transitional Council in Benghazi", 21 June 2011, available online: http://cc.aljazeera.net/asset/language/arabic/national-transitional-council-benghazi;
Global Progressive Forum, "Libya - Country Profile", available online: http://www.globalprogressiveforum.org/libya

[10] Al Jazeera, "Libyan rebels form 'interim government'", 22 March 2011, available at: http://www.aljazeera.com/news/africa/2011/03/201132219394486231O.html#

[11] UN General Assembly, 66th General Assembly, GA/11137, 2nd Meeting, 16 September 2011, available at: http://www.un.org/News/Press/docs/2011/ga11137.doc.htm

[12] See, for instance, Security Council resolution 2095 (2013), para 1, available at: http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/2095%282013%29

11. Democratic elections were held on 7 July 2012, marking a pivotal moment in Libya's transformation from authoritarianism to democratic governance.[13] Since then, the Government has been engaged in a full-scale reform of the entirety of the governmental infrastructure with the assistance of UNSMIL and its international and regional partners.[14] These reforms have been designed and are being implemented in the context of increasing peace and stability.[15] They are premised on a strong commitment to the rule of law, respect for fundamental human rights, and the eradication of impunity for international crimes, including those committed *both* before and after 15 February 2011.[16]

E. NATIONAL "OWNERSHIP" OF THE TRIAL OF ABDULLAH AL-SENUSSI AS A FOUNDATION FOR RECONCILIATION AND THE RULE OF LAW

12. Given the short time that has passed since the elections of July 2012, the positive developments that have occurred in Libya are exceptional and encouraging. They reflect the Government's commitment to national reconciliation and the development of a democratic society based on the rule of law. The Libyan Government regards the trial of Abdullah Al-Senussi for the full range of the crimes alleged against him as a matter of the highest importance. It is vital in

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[13] UN Department of Political Affairs, "UN Assistance to Libya's Landmark Elections", Available at: http://www.un.org/wcm/content/site/undpa/main/enewsletter/news0612_libya; UN Secretary-General Ban Ki-Moon, "Elections in Libya" 8 July 2012, available at: http://www.un.org/sg/statements/index.asp?nid=6182; See also, UN Envoy, Special Representative for Libya, "UN envoy praises Libyan election, highlights challenges faced by new government", available at: http://www.un.org/apps/news/story.asp?NewsID=42428&Cr=libya&Cr1=#.UVXI5lePOZY

[14] See, for example, M. Grifa, "The Libyan Revolution: Establishing a New Political System and The Transition to Statehood", 62 Arab Reform Brief, September 2012, available at: http://www.arab-reform.net/sites/default/files/ARB_62_Libya_M.Griffa_Sept12_Final_En.pdf; See, generally, http://unsmil.unmissions.org/Default.aspx?tabid=5288&language=en-US

[15] See, for example, M. Grifa, "The Libyan Revolution: Establishing a New Political System and The Transition to Statehood", 62 Arab Reform Brief, September 2012, available at: http://www.arab-reform.net/sites/default/files/ARB_62_Libya_M.Griffa_Sept12_Final_En.pdf; See, generally, http://unsmil.unmissions.org/Default.aspx?tabid=5288&language=en-US

[16] "Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute", ICC-01/11-01-01/1, 1 May 2012, Annex A - Annex 20: Press Statement of H.E. Dr Abdurrahim El-Keib, Prime Minister of the National Transitional Council of Libya, 23 April 2012; See, on the respect of human rights, Amnesty International, "Annual Report 2012: Libya", available at https://www.amnesty.org/en/region/libya/report-2012.

ensuring justice for the Libyan people as well as in demonstrating that the Libyan justice system is capable of proper investigation and prosecution, that it can conduct fair trials which meet applicable international standards. The Libyan Government is acting to reinstate the rule of law by ensuring that Abdullah Al-Senussi is called to account for his conduct with full respect for the principles of due process. That conduct was by no means limited to a few days in the course of the revolution, but also covered the whole period during which he acted as a high intelligence official of Muammar Gaddafi, including, notably the massacre at Abu-Salim.

13. The Libyan Government has expended considerable efforts to ensure an effective and genuine investigation of Abdullah Al-Senussi's conduct as a whole, in the expectation of being able to try him fairly in Libya for that conduct, in so far as it discloses crimes which may be subject to prosecution under Libyan and international law. It should be recalled that it was representatives of the NTC that initially assisted the Prosecutor of the ICC[17] and the UN International Commission of Inquiry to identify witnesses and gather evidence about events in Libya during the revolution.[18] The efforts to ensure accountability, originating in the earliest days of the democratic uprising, continue to this day, and have been significantly expedited now that the security situation has improved and stability is being progressively restored. At that time of the initial assistance to the OTP, Muammar Gaddafi's continued rule meant that the NTC was not in a position to carry out its own investigations or prosecutions. However, the fundamental change of circumstances in Libya means that the Libyan Government is now able to build upon those early investigative efforts and carry out its own prosecutions. The ICC is no longer required to fill the accountability vacuum that existed under the Gaddafi regime.

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[17] "Second Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1970(2011),)", 02 November 2011, paras 38-39, ["Second Report of the Prosecutor"] available at: http://www.icc-cpi.int/NR/rdonlyres/2DD92AOA-AC5E-49D9-A223-5C50654F3C25/283921/UNSCreportLibyaNov2011ENGl.pdf.

[18] UN General Assembly, UN Human Rights Council, "Libya: Report of the International Commission of Inquiry on Libya" (A/HRC/19/68) 2 March 2012, pp. 5, 31.

14. The Libyan Government has no intention of compromising its commitment to the rule of law by holding a rushed trial that does not meet international minimum standards of due process. It is committed to applying international human rights standards both for the conduct of its investigation and any eventual trials. Achieving this outcome will contribute to judicial capacity-building and will provide Libya's long-suffering people a unique opportunity to assume ownership over the past, to avoid impunity, and to build a better future based on respect for the rule of law and fundamental human rights.

15. In this regard, in November 2011 the UN Secretary-General published a report on the UN Support Mission in Libya[19] that highlighted and affirmed the need to uphold the "principles of Libyan ownership".[20] The Secretary-General's report recognises that Libya's post-conflict judicial sector reform is part of a "historic transition".[21] It notes that, "[a]fter 42 years of authoritarian rule and international isolation, Libya faces daunting challenges",[22] and that there will inevitably be setbacks.[23] In order "[t]o succeed, Libya must be given the space required to determine its future", adding that "[i]n this context, the role of the United Nations should be to support Libyans in their efforts".[24] The Secretary-General's Report also stated that:

> *"The ultimate criterion for my recommendations is their appropriateness to the current Libyan context. I believe that not only the United Nations, but the international community as a whole, will best support Libya not by being driven by*

[19] United Nations Security Council, Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2011/727, 22 November 2011 ["Report of the Secretary-General, 22 November 2011"].
[20] "Report of the Secretary-General, 22 November 2011", pp. 12, 16, 19.
[21] "Report of the Secretary-General, 22 November 2011", pp. 1, 11, 12.
[22] "Report of the Secretary-General, 22 November 2011", pp. 11, 12; See, further, UN Security Council, "Report of the Secretary-General on the United Nations Support Mission in Libya", UN Doc. S/2012/129, 01 March 2012, para 15: "The difficulties facing Libya's interim authorities require determined political management by its leaders, who must be given the space to address their internal priorities"; Human Rights Watch, F. Abrahams, "Libya Slogs Toward Democracy", 24 July 2012, available at http://www.hrw.org/news/2012/07/24/libya-slogs-toward-democracy
[23] "Report of the Secretary-General, 22 November 2011", pp. 11, 12.
[24] "Report of the Secretary-General, 22 November 2011", pp. 11, 12; For example, UNSMIL role in national reconciliation, available at: http://unsmil.unmissions.org/Default.aspx?tabid=5290&language=en-US

the supply side of post-conflict assistance, but by being responsive to Libya's own emerging sense of its needs for international support." [25]

16. The Libyan Government recognises that, in order to attain its goal of achieving the highest standards of fairness in its criminal justice system, support from the international community is important. It is fully receptive to such support and to this end is cooperating fully with various States and international organisations, including the UN Support Mission in Libya.[26] In particular, it is seeking assistance for Libyan prosecutors and the Libyan judiciary.[27] In his most recent report to the Security Council on 14 March 2013, the Special Representative of the Secretary-General and Head of UNSMIL, Tarek Mitri, recognised the Government's continued commitment to nation building and transitional justice and its ongoing cooperation:

> *21. "The Council is about to hear from Libya's first democratically elected Prime Minister. It has been a privilege for me and my colleagues to work with Prime Minister Zeidan and his Government. We appreciate their determination and strong commitment to build a modern, democratic and accountable state, based on rule of law and respect for human rights. UNSMIL is grateful to you Prime Minister Zeidan and to all the Ministers in his Government for fostering a relationship of confidence and close collaboration that enables UNSMIL to execute its mandate in the service of the Libyan people."* [28]

17. It is respectfully submitted that the international system has now committed itself to assisting rather than supplanting the Government of Libya in all of its

[25] "Report of the Secretary-General", 22 November 2011", p. 19.
[26] "Briefing by Special Representative of the Secretary-General for Libya, Meeting of the Security Council, 07 March 2012",, available at: http://unsmil.unmissions.org/LinkClick.aspx?fileticket=ycKqAArymCc%3d&tabid=3543&mid=6187&language=en-US
[27] UN Security Council, "Report of the Secretary-General on the United Nations Support Mission in Libya", UN Doc. S/2012/129, 01 March 2012, paragraphs 27, 29.
[28] Annex 29 – Public: "Special Representative of the Secretary-General and Head of UNSMIL, Tarek Mitri, Security Council Briefing", 14 March 2013.

branches, including its judicial branch, and that this commitment is highly relevant to the exercise of powers under the Statute of the Court.

F. PROCEDURAL HISTORY

18. On 26 February 2011 the Security Council adopted Resolution 1970, referring the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the ICC Prosecutor pursuant to Article 13(b) of the ICC Statute.[29] The situation underpinning this referral was the 2011 revolution, resulting from 42 years of tyrannical rule (at that time continuing) of Muammar Gaddafi.[30] The Security Council, acting under Chapter VII of the United Nations Charter, required "the Libyan authorities [to] cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution".[31]

19. On 3 March 2011, following a preliminary examination of available information, the ICC Prosecutor, Mr Luis Moreno Ocampo, concluded that there was a reasonable basis to believe that crimes under the ICC's jurisdiction had been committed in Libya from 15 February 2011 onwards. He opened an investigation in relation to the situation in Libya.[32]

20. On the 16 May 2011, after an initial investigation – over a period of less than two and a half months – the Prosecutor sought arrest warrants for Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi for alleged criminal responsibility for the crimes against humanity of murder and persecution, throughout Libya including, *inter alia*, Tripoli, Benghazi and Misrata.[33] On 27

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[29] United Nations Security Council, Resolution 1970 (2011), UN Doc. S/RES/1970, adopted by the Security Council at its 6491st meeting, 26 February 2011 ["Resolution 1970"].
[30] See Situation in the Libyan Arab Jamahiriya, "Decision on the 'Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi'", Pre-Trial Chamber I, ICC-01/11-12, 27 June 2011 para. 72.
[31] "Resolution 1970", para. 5.
[32] Situation in the Libyan Arab Jamahiriya, "Decision Assigning the Situation in the Libyan Arab Jamahiriya to Pre-Trial Chamber I", Presidency, ICC-01/11-1, 04 March 2011, (with annex).
[33] Situation in the Libyan Arab Jamahiriya, "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi", Pre-Trial Chamber I, ICC-01/11-4-Red, 16 May 2011, (with annexes).

June 2011, Pre-Trial Chamber I accepted this application and issued the arrest warrants.[34]

21. The three warrants relate to murders and persecutions allegedly committed from 15 February 2011 until at least 28 February 2011, through the State apparatus and Security Forces.[35] In relation to Abdullah Al-Senussi, the Pre-Trial Chamber found that there were reasonable grounds to believe that he was criminally responsible as an indirect perpetrator for the crimes against humanity of murder (multiple) (article 7(1)(a) and persecution based on political grounds (article 7(1)(h)) that were committed by members of the armed forces under his control in the city of Benghazi from 15 February to 20 February 2011.[36]

22. On 4 July 2011, the Registry filed its "Request to the Libyan Arab Jamahiriya for the arrest and surrender of Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi".[37]

23. Following the end of the revolution, on 28 October 2011 the Registry filed the "Report of the Registry regarding the execution of the requests for arrest and surrender", informing the Chamber that it had transmitted the requests for arrest and surrender.[38]

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

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

[36] Situation in the Libyan Arab Jamahiriya, "Decision on the 'Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al- Senussi'", Pre-Trial Chamber I, ICC-01/11-12, 27 June 2011, para. 71.

[37] Prosecutor v. Muammar Mohammed Abuminyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, "Request to the Libyan Arab Jamahiriya for the arrest and surrender of Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi", Registry, ICC-01/11-01/11-5, 04 July 2011.

[38] Prosecutor v. Muammar Mohammed Abuminyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, "Report of the Registry regarding the execution of the requests for arrest and surrender". Registry, ICC-01/11-01/11-19, 28 October 2011.

24. On 19 November 2011, Saif Al-Islam Gaddafi ("Mr Gaddafi") was captured near the town of Obar apparently trying to flee to Niger.[39]

25. On 22 November 2011, proceedings against Muammar Gaddafi were terminated due to his death in Sirte on 20 October 2011. [40]

26. On 8 January 2012, the Libyan Prosecutor-General commenced an investigation of serious crimes (including murder and rape) allegedly committed by Saif Al-Islam Gaddafi during the 2011 revolution (including in the period between 15 February to 28 February 2011). A similar investigation in respect of Abdullah Al-Senussi by the Libyan Military Prosecutor was commenced on 9 April 2012. These investigations are ongoing and are now being led by the Libyan Prosecutor-General's office.

27. On 1 May 2012, the Government of Libya submitted an application pursuant to articles 17(l)(a) and 19(2)(b) of the Rome Statute, challenging the admissibility of the case against Saif Al-Islam Gaddafi and Abdullah Al-Senussi. The Government of Libya informed the Pre-Trial Chamber that "an extradition request to Mauritania for Abdullah Al-Senussi [was] pending" and that "[t]he justice ministries of both countries are in regular contact and are monitoring Abdullah Al-Senussi's condition in order to determine when his transfer will be possible".[41] On 4 May 2012, the Chamber determined, *inter alia*, that the admissibility challenge would be "understood to only concern the case against Mr Gaddafi".[42]

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

[40] Prosecutor v. Muammar Mohammed Abuminyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, "Decision to Terminate the Case Against Muammar Mohammed Abu Minyar Gaddafi", Pre-Trial Chamber I, ICC-01/11-01/11-28, 22 November 2011.

[41] "Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute", ICC-01/11-01-01/1, Application of 01 May 2012, paras. 30, 96. ["Government of Libya Article 19 Application - Saif Al-Islam Gaddafi"].

[42] "Decision on the Conduct of the Proceedings Following the "Application on behalf of the Government of Libya pursuant to Article 19 of the Statute", ICC-01/11-01/11-134, 04 May 2012, para 8.

28. On 15 January 2013, the Government of Libya filed governmental and medical reports confirming Abdullah Al-Senussi's arrival in Libya on 5 September 2012, his good state of health, and his detention at the Al-Hadba Detention Facility in Tripoli. The Government further informed the Chamber that the investigation into the national case against Abdullah Al-Senussi was approaching completion.[43]

29. On 23 January 2013, within submissions relating to the admissibility of the case against Saif Al-Islam Gaddafi,[44] Libya provided detailed information to the Chamber relating to the proposed joint trial of Saif Al-Islam Gaddafi and Abdullah Al-Senussi and others, including a timeline for those proceedings.[45]

30. On 28 January 2013, the Government of Libya filed the "Libyan Government's Observations regarding the case of Abdullah Al-Senussi".[46] This filing clarified Libya's intention to continue to comply with its obligations to the Court in general, and the Court's request for arrest and surrender of Abdullah Al-Senussi in particular. The Government confirmed that a military trial of Abdullah Al-Senussi was not imminent,[47] and any civilian trial was not estimated to begin until the middle of May at the earliest.[48] Further, Libya confirmed that it was seeking postponement of the surrender request pursuant to article 95 of the Statute on the basis that:

    i. An intention to challenge admissibility with respect to the case of Abdullah Al-Senussi was notified to the Court on 1 May 2012;[49]

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[43] "Observations by Libya in response to the OPCD Notification of 8 January 2013", ICC-01/11-01/11-251, 15 January 2013.
[44] "Libyan Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi", ICC-01/11-01/11-258-Red2, 23 January 2013 ["Submission on Admissibility 23 January 2013"].
[45] "Submission on Admissibility 23 January 2013", paras 59-60.
[46] "Libyan Government's Observations regarding the case of Abdullah Al-Senussi", ICC-01/11-01/11-260, 28 January 2013. ["Libyan Government's Observations 28 January 2013"].
[47] "Libyan Government's Observations 28 January 2013" para 14.
[48] "Libyan Government's Observations 28 January 2013", para 15.
[49] "Libyan Government's Observations 28 January 2013", para 2.

ii. A supplemental submission containing further information critical to this admissibility challenge would be filed with the Court by 29 March 2013.[50]

31. On 6 February 2013, the Chamber determined that article 95 was not applicable as there was no admissibility challenge under consideration by the Chamber at that time in relation to Abdullah Al-Senussi. On that basis, it reiterated Libya's obligation to immediately surrender Abdullah Al-Senussi, and noted that it would determine in due course what actions would be taken to ensure States comply with their obligations to the Court.[51] It further ordered that Libya arrange a privileged legal visit by counsel to Abdullah Al-Senussi's detention facility in Libya. [52]

32. On 12 February 2013, the Government sought leave to appeal the Chamber's 6 February 2013 Decision, and specifically its ruling regarding the inapplicability of article 95 and the continued obligation on the Libyan Government to comply with the Request for Surrender of Abdullah Al-Senussi.[53] The Chamber subsequently refused leave to appeal on 25 February 2013 on the basis that the appealable issue was not shown to affect the expeditiousness of the proceedings or the outcome of the trial.[54]

33. On 11 February 2013, within submissions relating specifically to the case of Mr Saif Al-Islam Gaddafi, the Government informed the Court that it was "in the process of agreeing a protocol" on "the scope of future privileged visits by defence counsel" with the ICC Registry in relation to both Mr Gaddafi and Abdullah Al-Senussi.[55] On 4 March 2013, Libya stressed that the "Government …

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[50] "Libyan Government's Observations 28 January 2013", para 11.
[51] Decision on the "Urgent Application on behalf of Abdullah Al-Senussi for Pre-Trial Chamber to order the Libyan Authorities to comply with their obligations and the orders of the ICC", ICC-01/11-01/11-269, 06 February 2013, para. 23 ["Decision of 06 February 2013"].
[52] "Decision of 06 February 2013", para. 40.
[53] "Decision of 06 February 2013".
[54] Decision on the "Government of Libya's Application for Leave to Appeal the "Decision on the Urgent Application on behalf of Abdullah Al-Senussi for Pre-Trial Chamber to order the Libyan Authorities to comply with their obligations and the orders", ICC-01/11-01/11-287, 25 February 2013.
[55] "Libyan Government's Response to Urgent Defence Request of 21 January 2013", ICC-01/11-01/11-274, 11 February 2013, para. 14 (emphasis added).

has voluntarily entered into negotiations with the Registry to conclude a Memorandum of Understanding between the Government and the court in order to facilitate cooperation between the parties and provide security measures for all court participants."[56] An update on the progress made by the Libyan Government in settling the terms of this Memorandum of Understanding was provided to the Registry on 28 March 2013.

34. As 29 March 2013 is an ICC court holiday this Admissibility Challenge is filed on 2 April 2013 - the next working day for the ICC Registry following 29 March 2013.

PART II: APPLICABLE LAW

A. LEGAL BASIS FOR CHALLENGE

35. Libya is exercising its sovereign right to challenge the admissibility of the case against Abdullah Al-Senussi pursuant to article 19(2)(b) of the Statute "on the ground that it is investigating or prosecuting the case".

36. The Government of Libya ("the Applicant", or "the Government") submits that the evidence annexed in support of this application is sufficient to render the case inadmissible on the basis that it shows that Libya is carrying out concrete and specific investigative steps in relation to the case against Abdullah Al-Senussi and that its investigation is not in any way vitiated by "unwillingness" or "inability" on the part of the Government.

37. The Government invites the Chamber to consider the materials served in support of this application and to determine their merits with reference to two important contextual matters:

    i. The need to interpret the admissibility provisions in the light of the object and purpose of the Statute; and

[56] "Libyan Government's consolidated reply to the responses of the Prosecution, OPCD, and OPCV to its further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi", ICC-01/11-01/11-293-Red, 04 March 2013, para. 13 (emphasis added).

ii. The fundamental change in circumstances in Libya since the Security Council's referral of the situation to the Court.

38. The Government also submits that the admissibility assessment should be made by the Pre-Trial Chamber in accordance with the following key principles:

i. It is accepted that an admissibility determination involves a two stage process, requiring the existence of domestic proceedings relating to the same case and encompassing the same individual. However, the Applicant notes that there is a lack of clarity in the Court's jurisprudence regarding the additional constituent elements of "the case", which must be present in order for the Court to be satisfied that the *same case* is being investigated. In particular, it is unclear whether the "same case" also implies a requirement for a precise correspondence of factual incidents under investigation by the Court and the State. Whilst the Government submits that it satisfies this requirement in any event, if the Court were to take a different view, the Pre-Trial Chamber is invited to adopt a purposive approach to the interpretation of "the case" by applying the "substantially the same conduct" test, as articulated by the Appeals Chamber in the Kenyan admissibility challenge, which, it is submitted, does not require a precise correspondence of incidents but rather the investigation of substantially the same factual incidents. The Government submits that when one applies the "substantially the same conduct" test, the appropriate question to ask is whether any factual incidents under investigation which may not be exactly the same as those included within the ICC investigation are similar and / or related incidents which arise out of substantially the same course of conduct. It is submitted that this interpretation is more consistent with the object and purpose of the Statute, notably in that it gives some content to the governing principle of complementarity.

ii. The Government submits that as the Applicant it only bears the initial burden of proof to establish that domestic proceedings in relation to "the

case" are in existence. The burden of proof then shifts to the party asserting that those proceedings are vitiated in some way by "unwillingness", "inability" or a lack of genuineness. A distribution of the burden in this way is consistent with the object and purpose of the Statute and the model of complementary accountability created by it.

39. In summary, it is submitted that the evidence presented to the Chamber in support of the Government's application pursuant to article 19(1)(b), demonstrates that *the case* is being investigated by Libya such that it is inadmissible pursuant to article 17(1)(a). Specifically, the Libyan authorities have presented evidence sufficient to establish that "proper investigations are currently ongoing" in relation to the same case as that outlined in the ICC warrant. It is submitted that the Government satisfies the burden of proving the existence of such an investigation. Whatever conclusion is reached as to the interpretation and application of the term "case", there is no evidence to demonstrate that Libya is either unable or unwilling to carry out a genuine investigation into the case sufficient to render the case inadmissible.

40. Further and alternatively, the Chamber is invited to consider embracing a "positive" approach to complementarity by declaring the case inadmissible subject to the implementation of monitoring and assistance initiatives and review by the Chamber of the investigation and prosecution carried out by the Applicant as they develop.

B. THE OBJECT AND PURPOSE OF THE STATUTE

41. The Applicant submits that the Chamber must interpret and apply the admissibility provisions in a manner which is consistent with, and gives full effect to, the object and purpose of the Statute.

42. The development of the Court's model of complementarity suggests that three key priorities informed the drafting of the complementarity provisions: i) the primary role of national jurisdictions in prosecuting international crimes; ii) the

exceptionality of the Court's jurisdiction; and iii) the application of objective criteria in determining when such exceptional circumstances arise. These priorities should inform the Chamber's interpretation of the admissibility provisions as well as its assessment of this application.

43. This will be achieved not by imposing international accountability for a narrowly defined *case*, as identified and delineated by the OTP, but by allowing the Libyan judicial authorities a margin of appreciation in determining the parameters of its domestic investigation thereby encouraging national accountability and local ownership of the judicial process.

44. The Chamber will be familiar with the general rule of treaty interpretation set out in article 31 (1) of the Vienna Convention on the Law of Treaties 1969, which provides that a "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*" (emphasis added). The object and purpose of a treaty carries even greater significance when the treaty, as here, is the constituent instrument of an international organisation. As the International Court of Justice has explained:

> *"The constituent instruments of international organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realising common goals. Such treaties can raise specific problems of interpretation owing, inter alia, to their character which is conventional and at the same time institutional; the very nature of the organisation created, the objectives which have been assigned to it by its founder, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties."*[57]

45. The object and purpose of the Rome Statute is articulated in paragraphs 4 and 5

[57] "Legality of the Use by a State of Nuclear Weapons in Armed Conflict case", I.C.J. Rep. (1996), Advisory Opinion of the International Court of Justice (8 July 1996), para. 19.

of the Preamble:

> *"Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation;*
>
> [and]
>
> *Determining to put an end to impunity for the perpetrators of these crimes, and thus to contribute to the prevention of such crimes..."*

46. In order to fulfil this object and purpose, the Statute created a model of accountability in which domestic courts retain their primary and existing duty to investigate and prosecute international crimes; the possibility that their jurisdiction might be ceded or transferred to the ICC if states fail to act is intended to provide an incentive for them to do so, but the ICC is not intended as a substitute for the competent national courts. This is embodied in the principle of complementarity, which is simultaneously a political solution (reconciling states' concerns about divesting control over their own affairs with the imperative of accountability for international crimes), an organisational principle (delineating responsibilities between the Court and national jurisdictions) and, importantly, a goal (catalysing states to fulfil their existing obligations).

47. This model of accountability germinated in the discussions of the International Law Commission ("ILC") in the early 1990s. It establishes a subsidiary relationship between the Court and national jurisdictions. The word "complementarity" was selected to describe this relationship because "subsidiarity" was already in use in the European Union context. The principle of complementarity was unanimously endorsed at each stage of the negotiating process. Without it, the Statute would have been unacceptable to the

preponderance of states and the Court would not have come into existence.[58] The principle of complementarity is the cornerstone of the Rome Statute, and its significance and centrality should not circumvented or undermined.

48. The principle of complementarity, as manifested in the admissibility provisions, reflects the drafters' intention that the ICC was designed to be a tribunal of last resort, exercising jurisdiction only when the domestic jurisdiction has failed to act or is unwilling or unable to do so genuinely.[59] It is underpinned by a presumption that national courts are the most appropriate and effective fora for ensuring such accountability.[60] The Court's model of accountability recognises that trials conducted away from the seat of the crimes lead to a sense of disconnection and disenfranchisement for the victims.[61] This is a criticism that has been levelled at the ICTY, ICTR, and the SCSL (following the relocation of the *Taylor* trial to The Hague).[62] A local trial, whilst not negating these concerns completely, does not suffer from the same deficiencies. Trials closer to the scene

[58] S Williams, "Issues of Admissibility" in O Triffterer (ed) "Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article" (Baden-Baden 1999), 384. Note the Ad Hoc Committee Report at para 109: "'It was observed that complementarity…was to reflect the jurisdictional relationship between the international criminal court and national authorities, including national courts. It was generally agreed that a proper balance between the two was crucial in drafting a statute that would be acceptable to a large number of States"; Newton points out that it represented a "golden thread of consensus" towards the establishment of the Court (M Newton, "Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court" (2001) 176 Military Law Review 20, 45); "Without complementarity the very idea of an International Criminal Court would probably not have overcome the hurdle of state sovereignty concerns". (J Pejic, "Creating a Permanent International Criminal Court: The Obstacles to Independence and Effectiveness" (1998) 29 Columbia Human Rights Law Rev 291, 310).

[59] Rome Statute, Article 17.

[60] Judge Hans-Peter Kaul has written ex-judicially that "'One might say that the ICC is "subordinated" to national courts, subsidiary to the jurisdiction exercised by national courts. Whenever possible and appropriate, this must be clearly recalled and explained again to all concerned."(.' (Judge Hans Peter Kaul, "The International Criminal Court – its relationship to domestic jurisdictions" in Stahn, C and Sluiter, G (eds), "The Emerging Practice of the International Criminal Court" (Martinus Nijhoff Publishers, Leiden; Boston 2009), page 34.

[61] Kritz, NJ, "Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights" (1996) 59 Law & Contemp. Probs. 127, 149.

[62] See for example: http://www.npwj.org/content/Making-Justice-Count-Assessing-impact-and-legacy-Special-Court-Sierra-Leone-Sierra-Leone-and

of the events at issue have inherent practical, expressive and legacy value.[63] In terms of the practical values of the prosecution, the state with territorial jurisdiction does not have to overcome language difficulties and has simpler, more economical and more efficient access to witnesses and evidence.[64] The expressive value lies in the local trial being best able to address the particular concerns of the affected people by communicating more directly with them. It also plays an important role in restoring the authority of the law where it has been absent and strengthening the criminal justice infrastructure.[65]

49. For these reasons, the admissibility provisions are framed in negative terms. Thus, when domestic proceedings exist, a case is inadmissible unless the State is unwilling or unable to investigate or prosecute genuinely. The determination of inadmissibility is mandatory, thus the Court shall declare a case inadmissible unless the domestic proceedings are wanting within the terms of the Statute. Framing the admissibility provisions in this way underscores the Statute's deference to national jurisdictions. As held by the Appeals Chamber in the *Katanga Case*: "the complementarity principle […] strikes a balance between safeguarding the *primacy* of domestic proceedings vis-à-vis the International Criminal Court on the one hand, and the goal of the Rome Statute to 'put an end to impunity' on the other hand".[66] It follows from this recognition of the 'primacy' of domestic jurisdiction that the Court should only exercise jurisdiction "[i]f States do not or cannot investigate and, where necessary, prosecute".[67]

[63] J Alvarez, "The New Dispute Settlers: (Half) Truths and Consequences" (2003) 38 Texas International Law Journal 405, 437; GJ Simpson, "Law, War and Crime: War Crimes Trials And The Reinvention Of International Law" (Polity, Cambridge 2007), 30.
[64] "Report of the Ad Hoc Committee on the Establishment of an International Criminal Court", United Nations General Assembly, Official Records, Fiftieth Session Supplement No.22 (A/50/22) (1995).
[65] R Dicker and H Duffy, "National Courts and the ICC" (1999) 6 Brown J World Affairs 53, 54, 59.
[66] "Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case", ICC-01/04-01/07 OA 8, 25 September 2009, para 85.
[67] Ibid.

C. CONTEXT WITHIN WHICH THE ADMISSIBILITY CHALLENGE IS MADE: A FUNDAMENTAL CHANGE IN CIRCUMSTANCES IN LIBYA

50. The central significance of the complementarity principle, with its deference to domestic proceedings, applies regardless of the manner in which the jurisdiction of the Court has been triggered.[68]

51. Here, the Court's jurisdiction was triggered by Security Council Resolution 1970 (2011) on 26 February 2011.[69] This Resolution was adopted when the Muammar Gaddafi regime was still ruling Libya and because of the commission (and apprehended continuation) of State-sponsored mass-atrocities. In that context, there was complete inactivity on the part of the Gaddafi regime and impunity prevailed, hence the need for the referral to the Court.[70]

52. Following the Referral, the Office of the Prosecutor ("OTP") completed its preliminary examination speedily and opened its investigation into the situation in Libya on 2 March 2011, identifying its three potential targets for prosecution, one of whom was Abdullah Al-Senussi.[71]

53. Libya's liberation and the establishment of the NTC constituted a fundamental change of circumstances. These changes were characterised by a determination on the part of the Government's transitional justice policy to put an end to impunity and reinstate the rule of law. Bringing to justice suspected perpetrators of crimes committed during the revolution became a matter of priority for Libya, one fully consistent with the democratic aspirations of the Libyan people. As

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[68] The applicability of complementarity in the context of Security Council referrals is clear from Article 53 (3) (a), which allows a review of admissibility considerations under Article 17 in the context of Security Council referrals. It is further supported by para. 4 of Security Council Resolution 1593 (2005) and ICC practice in the Darfur and the Libyan situations respectively.

[69] "Resolution 1970".

[70] See several statements concerning Resolution 1970 and referral of crimes against humanity to the International Criminal Court in: "6491st Meeting (Saturday 26 February 2011, 8pm, New York)", United Nations Security Council, S/PV. 649, 26 February 2011.

[71] ICC Press Release: "ICC Prosecutor to open an investigation in Libya" 02 March 2011 available at: http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0111/press%20releases/Pages/statement%20020311.aspx.

stated by the NTC Prime Minister in a press release on 23 April 2012 following a visit by the ICC Prosecutor, holding national trials is seen as being essential to post-conflict judicial capacity-building, national reconciliation, and the establishment of the rule of law:

> *"[A]s I discussed with the [ICC] Prosecutor, we will make every necessary effort to ensure a fair trial for these two defendants, in connection with their alleged commission of crimes against humanity during the Libyan peoples' struggle for freedom in 2011. Just as the Libyan people celebrate their freedom and prepare for democratic elections in June of this year, they are still haunted by the terrible atrocities and suffering of the past. In the liberation struggle, thousands upon thousands lost their children, their family and loved ones. The murderous campaign of the Gaddafi regime was a national tragedy that has touched the lives of virtually every Libyan citizen. Amidst the many challenges that it faces in rebuilding the country and creating security, the investigation and prosecution of Saif Al-Islam Gaddafi and Abdullah Al-Senussi has been a priority. It is imperative for Libya to come to terms with past human rights abuses and to create a new culture in which the rule of law is allowed to flower and prevail. The investigation and, as appropriate, prosecution of these two defendants in a trial in Libya that meets the highest standards of international law will be a unique opportunity for national reconciliation. It will strengthen the capacity of our judiciary in furtherance of the new Libya that we are now struggling to build. The Libyan people are entitled to have a chance to do justice in this matter – that is what the principle of complementarity requires, no more and no less. Justice in Libya is what our people demand, it is what the victims of these terrible crimes demand, and it is our job to ensure that it is achieved in accordance with international standards."*[72]

54. The Libyan Government's commitment to domestic accountability was recognised by the Prosecutor in his third report to the Security Council:

[72] "Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute", ICC-01/11-01-01/1, 01 May 2012, Annex A.

"In these meetings, all concerned expressed gratitude for the Court's intervention in Libya at the height of the violence and how the issuance of arrest warrants strengthened the Libyan people's resolve to stop Gaddafi's crimes; they reiterated their support for the ICC and their interest to work cooperatively together to ensure justice for victims. While the Court's intervention was seen as necessary and timely given that there were no prospects for justice under Gaddafi's regime, the national authorities stressed their intent to conduct fair and impartial national investigations and prosecutions of Saif Al-Islam Gaddafi and Abdullah Al-Senussi that meet international standards and that, in their analysis, would satisfy the admissibility requirements of the Rome Statute."[73]

55. In the Office of the Prosecutor's most recent report to the Security Council, the ICC's new prosecutor, Fatou Bensouda noted that:

"4. ...My Office appreciates the commitment of the Libyan authorities to respect the judicial process and will continue to engage with them within the limits prescribed by the Statute. ...

8. I wish to thank the Government of Libya for its commitment to working with the ICC and for its active engagement with the judicial process. I encourage the government to redouble those efforts in the interests of justice. My Office appreciates the challenges inherent in the historic political transition underway in Libya. I believe that all can agree that justice must remain a key element of this transition. Looking beyond the cases currently before the Court, there remains much that my Office and the Government of Libya can do together to make justice a reality for Libya's victims. I call on the international community and in particular this Council — to intensify their efforts to assist the Government of Libya in any way they can to combat impunity and reinforce a culture of the rule of law. I believe that by working together, we can help address threats to Libya's security, both from within and outside, that have been created by past and ongoing criminality, and demonstrate to

[73] Third Report Of The Prosecutor Of The International Criminal Court To The Un Security Council Pursuant To UNSCR 1970 (2011), ICC-01/11 available at: www.icc-cpi.int/NR/rdonlyres/D313B617-6A86-4D64-88AD-A89375C18FB9/0/UNSCreportLibyaMay2012Eng.pdf

the Libyan people that the world is committed to assisting them in their efforts to secure justice and lasting peace.

9. My Office understands that the Government of Libya has committed to a comprehensive strategy to address all crimes and end impunity in Libya. I encourage the Government of Libya to make this strategy public, and to work with key partners to receive feedback on this strategy and to seek out the views and concerns of victims in Libya. Early finalization of this strategy will be yet another milestone on Libya's path to democracy and rule of law".[74]

56. The initial Security Council referral, and the admissibility requirements under the Statute, must be interpreted with due regard to this fundamental and irrevocable change of circumstances in Libya. The Security Council Resolution, and the referral to the Court, have themselves contributed to these changes and the establishment of conditions that allow for the fair and proper investigation of, *inter alia*, alleged crimes against humanity in Libya from 15 February 2011 onwards. At the time of the Referral, there was no possibility of relevant domestic proceedings being pursued and, accordingly, no active concurrency of jurisdiction. Domestic prosecutions are now a high priority for the new Libya. As the strict admissibility requirements are not met in Abdullah Al-Senussi's case, the Court should defer to these domestic proceedings.

57. The object and purpose of the Statute and the underlying complementarity principles are called into sharp focus by the reality that this challenge is being brought by an *active* State, which, despite facing the challenges of transition from five decades of authoritarian rule, is actively engaging with the international community, including the Court. Libya is taking its transitional justice and accountability obligations very seriously.

58. The Court's consideration of this challenge must be determined with full regard to these *unique* circumstances and the object and purpose of the Statute and

[74] "ICC Prosecutor Statement to the United Nations Security Council on the situation in the Libya Arab Jamahiriya, pursuant to UNSCR 1970 (2011)", 07 November 2012.

without undue deference to previous judicial determinations regarding admissibility, which are factually distinguishable and, in any event, are not binding as a matter of precedent.[75]

D. THE TWO STAGES OF THE COMPLEMENTARITY ASSESSMENT

59. The Appeals Chamber set out the two stages in the complementarity assessment in *Katanga*:

> *"Therefore, in considering whether a case is inadmissible under Article 17(1)(a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse."*[76]

60. The first stage in that assessment is establishing the existence of domestic proceedings relating to the same "case". However, there is a lack of clarity in the Court's jurisprudence regarding the additional constituent elements of "the case", which must be present in order for the Court to be satisfied that the *same case* is being investigated. In particular, it is unclear whether there is a requirement for a precise correspondence of incidents under investigation by the Court and the State. Whilst the Government submits that the evidence it has provided satisfies such a requirement, it nevertheless invites the court to adopt a more purposive approach to the interpretation of "the case" by interpreting the "substantially the same conduct" test, articulated by the Appeals Chamber in the Kenyan admissibility challenge, which, it is submitted, does not require an overly prescriptive or precise correspondence of incidents. The relevant state should be

[75] Article 28(2) of the Statute provides that the "The Court may apply principles and rules as interpreted in its previous decisions." Therefore, the Court is not required to follow its previous decisions.
[76] "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.

permitted, if the interests of justice so demand, to investigate similar and / or related incidents which arise out of substantially the same course of conduct, as well as other serious allegations of crimes against national and international law. It is submitted that this interpretation is most consistent with the object and purpose of the Statute. Accordingly, the Chamber is invited to critically examine the definition of "a case" and delineate its parameters in a way that does not unduly restrict the assessment, thereby undermining the principle of complementarity and the object and purpose of the Rome Statute.

i. The parameters of the "case": the object of the complementarity assessment

61. The identification of the parameters of the "case" has assumed a level of significance in the Court's early admissibility jurisprudence that was not envisaged by the negotiators/drafters of the Statute because the two stages of the admissibility test were not enunciated explicitly.[77] This is because the focal point for the negotiations on complementarity was identifying the circumstances in which the Court could exercise jurisdiction *despite* the existence of current or completed domestic proceedings.[78] Therefore, there was an underlying acceptance that, in order for there to be a conflict of jurisdiction that required resolution, there must be/have been relevant domestic proceedings.

62. The first enunciation of the parameters of a "case" and, accordingly, the parameters of the admissibility inquiry, was made by PTCI in its decision on the application for an arrest warrant for Mr Thomas Lubanga:

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[77] Save for discussions about the subject matter of a Security Council could refer – 'matter, 'situation' or 'case'. See for example, "Report of the Ad Hoc Committee on the Establishment of an International Criminal Court", United Nations General Assembly, Official Records, Fiftieth Session Supplement No.22 (A/50/22) (1995) at 27; and Hans-Peter Kaul, "Statement by Hans-Peter Kaul Head of the German delegation on United Nations negotiations on the establishment of an International Criminal Court (ICC) Complementarity, Trigger Mechanism", at 3-4, delivered to the Preparatory Committee on the Establishment of an International; Criminal Court (04 August 1997): "We support the ILC proposal that the statute should give to the Security Council the explicit competence to submit to the court situations involving threats to or breaches of international peace and security and acts of aggression. But it would be in our view quite inappropriate if the Security Council could submit individual cases."

[78] See generally, D Robinson, "The Mysterious Mysteriousness of Complementarity" (2010) 21 Criminal Law Forum 67, 68.

"Having defined the concept of a case as including "specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects,"[79] *the Chamber considers that it is a conditio sine qua non for a case arising from the investigation of a situation to be inadmissible that national proceedings encompass both the person and the conduct which are the subject of the case before the court."*[80] (emphasis added)

63. The definition of "case", with its reference to "specific incidents", combined with the perceived requirement that the national proceedings encompass both the same person and the same conduct, have been consistently followed by differently constituted Chambers and by the Office of the Prosecutor in its preliminary examinations and requests for arrest warrants.[81] As noted above, whilst the Government submits that its investigation satisfies the most restrictive interpretation of either the "same conduct" test or the "substantially the same conduct test", it being predicated substantially on the same precise incidents as those pursued by the ICC, the extent to which the "substantially the same conduct" test actually requires a correspondence of incidents has not been defined by the Appeals Chamber.

64. An interpretation of the "case" which requires a domestic investigation that investigates precisely the same factual incidents investigated by the ICC is too restrictive and contrary to the object and purpose of the Statute. Whilst the "substantially the same conduct" test enumerated by the Appeals Chamber may be the correct test in principle, it remains to be precisely defined. It needs to be

[79] Situation in the Democratic Republic of the Congo, "Decision on the Applications for the Participation in the Proceedings of VPRS 1-6", ICC-01/04-101-tEN-Corr 22-03-2006, 17 January 2006, para 65.
[80] "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", ICC 01/04-01/06, 10 February 2006, para 31.
[81] Prosecutor v Ahmad Muhammad Harun ('Ahmad Harun') and Ali Muhammad Al Ab-Al-Rahman ('Ali Kushayb'), "Decision on the Application under Article 58 (7) of the Statute", ICC-02/05-01/07-1-Corr, 27 April 2007, para 24:
''The Chamber is of the view that for a case to be admissible, it is a condition sine qua non that national proceedings do not encompass both the person and the conduct which are the subject of the case before the Court''; and "Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo", ICC-01/05-01/08, 10 June 2008, para 21: ''The Chamber considers that ... there is nothing to indicate that he is already being prosecuted at national level for the crimes referred to in the Prosecutor's Application''.

interpreted to avoid the demand for a rigid correspondence between the incidents under examination by the state and the ICC. Such an approach to the admissibility assessment at this stage in the criminal process may, in fact, undermine the interests of justice, given, *inter alia*, the scale of the criminality falling within the ICC's subject matter jurisdiction, and the potential scope for principled differences in investigative and prosecutorial focus, including the crimes that become apparent during the state's ongoing investigations. There is also a need to avoid The Hague becoming a *de facto* refuge for accused or convicted persons in respect of even more serious charges falling (for whatever reason) outside the scope of the ICC's jurisdiction.

65. The conduct which falls under the rubric of the situation referred to the Court by the Security Council comprises conduct stretching over a period of time and over varying geographical locations, conduct committed not through the individual acts of a single person but through numerous individual acts by numerous people, within the context of a policy or plan. A narrow interpretation and application of the "same conduct" test, which ignores the complexity of the Libyan situation will mean that, if the relevant domestic proceedings address only a representative sample of the incidents under investigation by the ICC, or focus on different but equally, if not more, grave criminal conduct arising out of the revolution, then this would militate against rendering a case inadmissible. This approach runs counter to the Statute's primary goal of ending impunity and its ancillary goal of catalysing national courts into ensuring accountability for the most serious violations of international law.

ii. The need for clarity regarding the legal basis for, and parameters of, the "same conduct" test

66. First, by way of general observation, it is respectfully suggested that the "same conduct" test has been created and applied by the Court without a comprehensive consideration of the legal basis for it, or an exploration of its consistency with the object and purpose of the Statute.

67. In the Kenya admissibility appeal, the Appeals Chamber did discuss the textual basis for the "same conduct" test but it did so without the assistance of a meaningful factual context within which to embed the debate. The Kenyan admissibility challenge was not based on the existence of ongoing investigations of the relevant individuals and, therefore, it was not necessary or even possible to consider whether the "cases" related to the same conduct. Nevertheless, the Appeals Chamber stated as follows:

> *"Articles 17 (1) (c) and 20(3) of the Statute state that the Court cannot try a person tried by a national court for the same conduct unless the requirements of article 20(3)(a) or (b) of the Statute are met. Thus, the defining elements of a concrete case before the Court are the individual and the alleged conduct. It follows that for such a case to be inadmissible under article 17 (1) (a) of the Statute, the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court."*

68. According to the Appeals Chamber, the test is based on the purported interoperability between the reference to "conduct" in article 20 (3), which deals with the *ne bis in idem* principle, and all three sub-paragraphs of article 17 (1). It is said that this "follows" simply through cross-referencing from article 20(3) in article 17(1)(3).

69. It is respectfully submitted that this does not "follow". There is no textual imperative within the Statute to support the Appeal Chamber's interpretation of "case" for the purposes of article 17 (1) (a) and (b). The three scenarios set out in article 17(1) are intended to "cover a State's complete range of activities with regard to criminal procedure from the opening of an investigation until the final judgment"[82]. The principal function of the *ne bis in idem* principle is to uphold the basic right of the defendant not to be placed at risk of punishment twice for the same conduct. It is primarily aimed at protecting the interests of the defendant,

[82] I Tallgren and A Reisinger Coracini, "Article 20: Ne bis in idem" in O Triffterer (ed) "Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article" (Baden-Baden 2008), 68.

rather than the interests of the relevant state. The considerations that may apply in one context do not necessarily apply in the other, particularly not as a matter of simple transference from considerations of the appropriateness of a second trial to the complementarity considerations (largely) relevant to the pre-trial stage. At the early stage of the criminal process, namely when there is an ongoing or completed investigation or an ongoing prosecution, the complementarity principle needs to be applied having regard to its principal objective of giving effect to the Statute's deference or presumption in favour of domestic prosecutions.

70. This view is consistent with the comments made by Trial Chamber II in the *Katanga* admissibility challenge:

> *"[A]fter the confirmation of charges, only challenges based on article 17(1)(c) of the Statute are allowed. The possibility of only bringing challenges based on the alleged violation of the ne bis in idem principle at this stage of the proceedings is explained by the fact that it is only when the charges are confirmed that it is possible to determine whether the case falls within the scope of article 20 of the Statute. Any other challenge to admissibility, whether stemming from the protection of the sovereign right of States to investigate and prosecute in cases of crimes committed by their nationals or in their territory, or from the sufficient gravity of the case, must be made before the confirmation of the charges. ...*
>
> *The distinction between subparagraph (c) and the other sub-paragraphs of article 17(1) is confirmed by the drafting history of this article. Originally, the ne bis in idem principle was not included in article 35 (current article 17) of the Draft Statute for an International Criminal Court. The only reference to ne bis in idem was contained in article 42 of the Draft Statute (current article 20), which followed article 41, which became the current article 67, which defined the rights of the accused, in Part V entitled "The Trial". This belated inclusion of the ne bis in idem principle in article 17(1)(c) as a basis for challenging admissibility is therefore explained essentially by the need to protect the rights of the accused, in*

contrast to paragraphs (a), (b) and (d) of the same article, the purpose of which is to safeguard the sovereign rights of States and to ensure that cases brought before the Court are of sufficient gravity. Moreover, it should be recalled that the ne bis in idem principle is defined in article 20 to which article 17(1) only makes reference."[83]

71. It is more consistent with the object and purpose of the Statute and its model of complementary accountability for the Court to adopt a broad notion of case that allows deference to genuine investigations and prosecutions that for good reason may have adopted an alternative prosecutorial focus or strategy to that of the ICC Prosecutor based on a principled assessment of the overall interests of justice. The force of this argument is increased when one considers that a State can only challenge admissibility once whereas the Prosecutor will be able to keep the domestic proceedings under review and seek a redetermination of admissibility if there is any perceived lack of "genuineness" in the proceedings.

72. A purposive interpretation of the "substantially the same conduct" test and the requisite contours of the "case" accords with the object and purpose of the Statute. Rather than requiring an exact correspondence of incidents, domestic proceedings involving the investigation and prosecution of similar and / or related incidents arising out of substantially the same course of conduct to those being investigated by the Office of the Prosecutor should be viewed as sufficient to render the case inadmissible, in the absence of a sufficient showing of unwillingness or inability.

73. To this end, it is suggested that the Court should adopt an interpretation of 'conduct' in line with the notion of 'criminal transaction' applied by the Ad Hoc Tribunals in the context of joinder of defendants and crimes which, in turn, is similar to the notion of a 'course of conduct'. As to the former, Rule 48 of the ICTY Rules of Procedure and Evidence provides that: '[p]ersons accused of the

[83] Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, "Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute)", (Trial Chamber II), ICC-01/04-01/07-1213, 16 June 2009, paras 47 and 48.

same or different crimes committed in the course of the same transaction may be jointly charged and tried.' Similarly, Rule 49 of the ICTY Rules of Evidence and Procedure provides the possibility of a joinder of crimes 'if the series of acts committed together form the same transaction.' Rule 2 of the ICTY RPE defines transaction as 'a number of acts or omissions whether occurring as one event or a number of events, at the same or different locations and being part of a common scheme, strategy or plan'.

74. In determining whether or not crimes or defendants should be joined, the commonality of place and time of the commission of the acts are significant factors. Features of the acts themselves are important, including: the underlying method and means; the victims of the crimes; the characteristics and the roles of the perpetrators and; whether or not there was a common purpose or plan that formed the basis of the criminal acts.[84] In defining the 'same transaction' for the purposes of Rule 49, the various acts of the accused can be found to have a common purpose even if they do not overlap in time and place. The 'same transaction' requirement will thus be met if the Trial Chamber finds that there is 'a reasonable showing' that the accused had a common scheme, strategy or plan.[85]

75. In the *Milošević Case*, the Prosecution sought the joinder of three indictments (Croatia, Bosnia and Kosovo) in a single trial pursuant to Rule 49. The Prosecution submitted that all three indictments concerned 'the same transaction in the sense of a common scheme, strategy or plan, namely the accused *Milošević*'s overall conduct in attempting to create Greater Serbia'. The Prosecution asserted that: 'It's always been accepted by the practice of the

[84] Prosecutor v. Brdjanin & Talić "Decision on Motions by Momir Talić for a Separate Trial and for Leave to File a Reply", IT-99-36-PT, 09 March 2000, para. 20; Prosecutor v. Kovačević, "Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998", Separate Opinion of Judge Mohamed Shahabuddeen", IT-97-24-AR73, 02 July 1998, 2-3; Prosecutor v. Meakić, "Decision on prosecutor´s motion for joinder of accused", IT-95-4-PT, 17 September 2002, 1-2; Prosecutor v. Milošević, "Decision on prosecution´s motion for joinder", IT-99-37-PT/IT-01-50-PT/IT-01-51-PT, 13 December 2001, para. 46.

[85] Prosecutor v. Ntabakuze and Kabiligi "Decision on the Defence Motion Requesting an Order for Separate Trials", ICTR—97-34-1, 30 September 1998.

Tribunal that acts at different places and times connected in a certain way can form the basis of a single indictment.'[86] In reaching its decision on joinder, the Trial Chamber referred to the Separate Opinion of Judge Shahabuddeen in the Appeals Chamber Decision in *Kovačević*, in which His Honour held that in order for charges to be joined they 'must bear a reasonable relationship to the matrix of facts involved in the original charge.' Judge Shahabuddeen expressed the view that Rule 49 appears to have been modelled on the 'same transaction' test used in the federal system of the United States of America, according to which it has been said that ' it is proper ...to join offenses which are closely related in that they were *interrelated parts of a particular criminal episode.'*

76. The Appeals Chamber allowed the joinder of the three indictments (the Trial Chamber having only allowed the joinder of Croatia and Bosnia:

> *"A joint criminal enterprise to remove forcibly the majority of the non-Serb population from areas which the Serb authorities wished to establish or to maintain as Serbian controlled areas by the commission of the crimes charged remains the same transaction notwithstanding the fact that it is put into effect from time to time and over a long period of time as required....the Appeals Chamber is satisfied that the events alleged in all three indictments do form part of the same transaction."* [87] *(emphasis added)*

77. Similar ideas underpin the concept of 'course of conduct', which is in fact explicitly referred to in the Statute in article 7(2), which defines an 'attack against a civilian population' as the contextual element of a crime against humanity. Article 7(2) describes an 'attack' as a 'course of conduct involving the multiple commission of acts...pursuant to in or in furtherance of a State or organizational policy to commit such attack.' 'Course of conduct' is also a concept which has a solid foundation in various areas of domestic criminal law. A broad overview of

[86] Transcript of Prosecutor v. Milošević, Interlocutory Appeal Hearing, 30 January 2002, p 298, lines 4-17.
[87] Prosecutor v Milošević, "Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder", IT-99-37-AR73, IT-01-50-AR73, and IT-01-51-AR73, 18 April 2002, para 21; Proseutor v. Popovic et al, "Decision on Motion for Joinder", IT-02-57-PT et al, 21 September 2005, para 14.

the notion of 'course of conduct' reveals that it accounts for a nexus or interrelation between multiple acts. This interrelation may be evidenced by a coincidence of time, place and character or (and often very significantly) by a commonality of purpose.[88]

78. It is suggested that given that article 17 was drafted with the purpose of minimising the Court's intervention to exceptional instances, the Chamber should draw from the established concepts of 'criminal transaction' or 'course of conduct' when deciding whether or not a particular 'case' is the subject of national proceedings. On that basis, where the domestic proceedings relate to similar and / or related incidents which arise out of substantially the same course of conduct as that being investigated by the Court, it should be inadmissible.

79. Such an approach properly permits the domestic prosecutor some discretion to determine the most appropriate prosecutorial strategy, giving effect to the intended bias of the Statute in favour of domestic prosecutions. An exacting requirement for identity between the domestic and ICC proceedings may override that discretion, displacing the domestic prosecutor's authority based on the ICC prosecutor's own preference regarding the content of the charges or, possibly, extraneous considerations such as the need to be seen to be taking action. In this way, it is respectfully submitted that the Court would be in danger of imposing a form of *de facto* primacy in contradiction to the object and purpose of the Statute.

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[88] For example, the Moorov principle in Scottish criminal jurisprudence, which permits multiple acts to be charged as one continuing offence when there is a connection between the separate acts (indicated by the external relation in time, character or circumstance) which is such as to exhibit them as subordinates in some particular and ascertained unity of intent, project, campaign or adventure which lies beyond or behind – but is related to – the separate acts' (Moorov v HM Advocate (1930) J.C. 68, 73. In Australia, 'course of conduct' is considered in the context of assessing compensation for victims of criminal offences and is described as 'a succession or series of acts (or omissions) which because of a sufficiently close interrelation, whether by nature, time, place or otherwise, display, in aggregation, an identifiable overall pattern' (HW v LO [2000] QCA 377, para 7). In the UK, proof of a course of conduct is central to the offences in the Protection from Harassment Act 1997. A course of conduct requires that that there is a nexus between a series of acts, which must be 'connected in type and in context' (Pratt v Director of Public Prosecutions [2001] EWHC Admin 483, para 10), which is to be contrasted with 'separate and isolated incidents' (R v Hills [2001] 1 FCR 569).

iii. Previous determinations regarding "case" are factually distinct

80. The Libyan admissibility challenges have particular features that distinguish them from previous challenges before the Court and previous *proprio motu* determinations of admissibility by the variously constituted chambers of the Court. The Court has not yet had the opportunity to consider the interpretation, applicability and viability of the test in circumstances of *contested* jurisdiction by an *active* territorial state. It is submitted that the wholly different circumstances pertaining to the Libyan situation warrant the need to interpret the "substantially the same conduct" test to ensure a purposive or flexible interpretation of the definition of a "case".

a. The *Lubanga* case

81. In the *Lubanga* case, admissibility was considered *proprio motu* by PTCI in the context of the Prosecutor's arrest warrant application, which followed from its voluntary referral of the situation in the DRC by the Congolese authorities. At first, the OTP sought to ground the admissibility of the case upon the DRC's inability but developments in the DRC meant that this was no longer sustainable. Accordingly, on the basis of its definition of "case", PTCI went on to note that while there had been domestic proceedings regarding serious allegations against Mr Lubanga, they contained "no reference to his alleged criminal responsibility for the alleged UPC/FPLC's policy/practice of enlisting into the FPLC, conscripting into the FPLC and using to participate actively in hostilities children under the age of fifteen". Accordingly, PTC1 found that "the DRC cannot be considered to be acting in relation to the specific case before the Court."[89] The Court applied a very narrow interpretation of the same conduct test, requiring a precise coincidence of criminality in form and substance. However, in the circumstances, the Court was not required to address (and did not examine) the precise meaning of its narrow formulation of "conduct". Rather, the fact of the

[89] Prosecutor v. Thoms Lubanga Dyilo, "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", ICC 01/04-01/06, 10 February 2006, paras 38-39 ["Lubanga Dyilo Decision on Warrants of Arrest"].

voluntary referral meant that the DRC was inactive *in toto* with regards to Mr Lubanga at the time of his surrender to the Court as it had discontinued proceedings against him. The PTC was not faced with a "decision not to prosecute" or the existence of an ongoing investigation but simply a voluntary state of inactivity that did not warrant further detailed examination or definition.

b. The *Katanga* case

82. Also in the DRC situation, Mr Katanga challenged the admissibility of the case on the basis that he was the subject of ongoing proceedings in the DRC. The Trial Chamber did not consider admissibility with reference to the "same conduct" test but sought to draw the purported waiver of admissibility as a result of the DRC's self-referral within the parameters of "unwillingness".[90] Whilst this approach appeared to involve a disregard of the first stage of the complementarity assessment, it might reasonably be seen to be a finding or acceptance that there was complete inactivity on the part of the DRC authorities by reason of the self - referral and consequential relinquishment of jurisdiction.

83. The Appeals Chamber rejected the Trial Chamber's introduction of a new kind of "unwillingness" and instead applied the dual-limb test and found that there were no 'proceedings' at all, as the DRC authorities had abandoned the proceedings against Katanga when it referred the situation to the Court. The Appeals Chamber decided that this did not constitute a decision under article 17(1)(b), nor did the actions of the authorities fall within any of the other 'proceedings' covered by article 17. It was a case of complete inactivity. As the Appeals Chamber held, at paragraph 81:

[90] The Trial Chamber introduced a new form of unwillingness by stating that "There is also the case of a State which may not want to protect an individual, but, for a variety of reasons, may not wish to exercise its jurisdiction over him or her. This second form of "unwillingness", which is not expressly provided for in article 17 of the Statute, aims to see the person brought to justice, but not before national courts. The Chamber considers that a State which chooses not to investigate or prosecute a person before its own courts, but has nevertheless every intention of seeing that justice is done, must be considered as lacking the will referred to in article 17." Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chiu, "Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute", ICC-01/04-01/07-1213tENG, 15 July 2009, 77.

"[A]t the time of the admissibility challenge proceedings before the Trial Chamber, there were no proceedings in the DRC in respect of the Appellant. Hence the question of whether the 'same conduct' test is correct is not determinative for the present appeal." (emphasis added)[91]

c. The Kenyan admissibility challenge - *Ruto et al* & *Kenyatta et al*

84. Similarly, in the Kenyan decision, although the Court did opine upon the "same conduct" test and added the qualification that the proceedings had to relate to "substantially the same conduct", in reality it did so without the benefit of examining an ongoing and active investigation into the same, similar or related conduct. The Appeals Chamber stated at paragraph 43 that:

"[T]he purpose of the admissibility proceedings under article 19 of the Statute is to determine whether the case brought by the Prosecutor is inadmissible because of a jurisdictional conflict. Unless there is such a conflict, the case is admissible. The suggestion that there should be a presumption in favour of domestic jurisdictions does not contradict this conclusion. Although article 17(1) (a) to (c) of the Statute does indeed favour national jurisdictions, it does so only to the extent that there actually are, or have been, investigations and/or prosecutions at the national level. If the suspect or conduct have not been investigated by the national jurisdiction, there is no legal basis for the Court to find the case inadmissible."

85. Again, however, the circumstances pertaining to the Kenyan situation and the admissibility assessment of the three specific cases arising from it are markedly different to Libya's investigation of Abdullah Al-Senussi. Specifically, there were no ongoing proceedings in relation to the three individuals subject to ICC summonses. Rather, the Kenyan Government merely relied on general submissions relating to efforts to reform its judicial system to support a general

[91] "Appeals Chamber Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case", ICC-01/04-01/07 OA 8-1497, 25 September 2009, referred to at para 52 of the "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-01/09-02/11-96, 30 May 2011.

finding of ability and willingness. It referred to the possibility of investigations being undertaken following a "bottom – up" investigative strategy, without any specificity regarding the content of those investigations. This contrasts sharply with the concrete and specific steps being made by the Libyan Government in relation to its focussed investigations of Mr Gaddafi and Abdullah Al-Senussi. The Pre-Trial Chambers' summary of Kenya's proposals highlights this difference:

> *"[B]y the end of July 2011, [Kenya] will provide the Chamber with a progress report regarding investigations carried out under the new DPP and "how they extend up to the highest levels". This report will build "on the investigation and prosecution of lower level perpetrators to reach up to those at the highest levels who may have been responsible". Moreover, by the end of August 2011, the Government will submit a further report on, inter alia, the "progress made with investigations to the highest levels" followed by a third report on the "progress made with investigations and readiness for trials in light of [the] judicial reforms".*[92]

86. Thus, at the time of the admissibility challenge, there was a state of inactivity regarding the three ICC suspects. Consequently, the Court was not required to interpret and apply the "same conduct" test to a specific set of alleged factual incidents as the challenge was not premised on any ongoing investigation of any such incidents. Nevertheless, the Appeals Chamber referred to the requirement that the "case" encompass not only the same person but also the same conduct, seemingly as a matter of course, and made the additional qualification that the case encompass "*substantially* the same conduct", without any explanation of what that entailed.

iv. The appropriate parameters of the "substantially the same conduct test"

87. As this survey demonstrates, the Court has not yet had the opportunity to

[92] The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey And Joshua Arap Sang, "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-01/09-01/11-101, 30 May 2011, para 15.

examine ongoing, concurrent domestic proceedings encompassing an individual who is the subject of an ICC arrest warrant. As such, it has not yet been required to identify the most appropriate parameters of the "[substantially] the same conduct" test in circumstances where a State is actively pursuing investigations of the same individuals of interest to the Court in relation to conduct carried out within the ambit of the situation referred to the Court

88. As a consequence, there is no clear authority regarding the appropriate parameters of the "same conduct test" or the recently formulated "substantially the same conduct test" and the degree to which a precise coincidence of incidents is required. It is submitted that these parameters should be defined in a manner that is consistent with the object and purpose of the Statute, mindful of the need to ensure that overall justice is done. This requires the state to be accorded a margin of appreciation as to the contours of the case to be investigated, and the ongoing exercise of the national authorities' prosecutorial discretion as to the focus and formulation of the case. Consistent with the principle of complementarity, and bearing in mind the overall criminality under consideration, a domestic prosecutor may legitimately hold genuine differences of opinion with the ICC Prosecutor regarding the appropriate contours of a particular case and the overall interests of justice. The domestic authorities should not be unduly restrained in pursuing a national accountability agenda by being compelled to conduct an investigation and prosecution that mirrors precisely the factual substance of the investigation being conducted from time to time by the OTP.[93]

89. It is submitted that if the national authorities are conducting an investigation into

[93] This position was adopted by the Trial Chamber in the Bemba admissibility challenge: "'for the purposes of Article 17 of the Statute, the case that was brought against the accused in the CAR was *broadly the same* as the prosecution has now brought before Trial Chamber III, save that the *charges are inevitably different* (given the particular crimes within the ICC's jurisdiction: Article 5 of the Statute) and the evidence has developed and changed as a result of the investigation by the OTP. The conduct and underlying offences (murder, rape, pillage etc) are the same, as are many of the central events that are relied on.".' Prosecutor v. Bemba, "Decision on the Admissibility and Abuse of Process Challenges", ICC-01/05-01/08-802, 24 June 2010, para 218.

the same individual of interest to the Court in relation to similar and / or related incidents arising out of substantially the same course of conduct, then it can be said to be conducting proceedings in relation to the same "case". The fact that the domestic prosecutor may have differed from the ICC Prosecutor in the specifics of his prosecutorial focus should be not be accorded undue weight through an overly restrictive definitional approach to the meaning of "the case."

E. BURDEN AND STANDARD OF PROOF

90. The Court held in the *Judgment on Kenya Appeal* that:

> *"A State that challenges the admissibility of a case bears the burden of proof to show that the case is inadmissible. To discharge that burden, the State must provide the Court with evidence of 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 on-going."*[94]

91. The Court further clarified with respect to the quality of proof that:

> *"[A] statement by a Government that it is actively investigating is not [...] determinative. In such a case the Government must support its statement with tangible proof to demonstrate that it is actually carrying out relevant investigations.' In other words, there must be evidence with probative value."*[95]

92. It is submitted that the burden of proof for Libya, with reference to the particular circumstances and facts of this case, only relates to the first stage of the admissibility test – namely, the existence or otherwise of relevant domestic proceedings.

93. In the circumstances Libya has satisfied the burden of proof regarding the

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[94] Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19 (2) (b) of the Statute", ICC-01/09-02/11OA, 30 August 2011, para 61. ["Judgment on the appeal of the Republic of Kenya"].

[95] "Judgment on the appeal of the Republic of Kenya", para 62.

existence of relevant proceedings by providing substantial evidence – all of it having a sufficient degree of specificity and probative value – to demonstrate that "it is actually carrying out relevant investigations" with respect to Abdullah Al-Senussi.

94. Beyond establishing that it is conducting an investigation or prosecution of the relevant "case", the Government is not required to prove that the relevant proceedings have not been vitiated in some way. The burden of proving that Libya is "unwilling or unable genuinely to carry out the investigation or prosecution or that the proceedings lack genuineness lies on the party asserting it. This follows from several considerations:

95. *First*, the plain wording of Article 19(2) requires a State challenging admissibility only to establish that "it is investigating or prosecuting the case". As submitted above this is clear from the negative framing of article 17 which provides that a case is inadmissible where there are relevant proceedings unless those proceedings indicate a lack of willingness or ability to carry them out genuinely. Neither this provision, nor Rule 51 of the Rules of Procedure and Evidence, contains a further requirement of proof in regard to "genuineness" or a duty by the State to positively prove "willingness" or "ability".

96. *Second*, to require such proof would be inconsistent with article 17 which is framed – where there is proof of judicial action – in terms of "inadmissibility" as the rule, rather than the exception. The underlying premise of complementarity is to ensure that the Court does "not interfere with national investigations or prosecutions except in the most obvious cases".[96] According to the wording of Article 17(1)(a), a case is deemed admissible before the ICC if there is inaction by a national judicial system. However, a case is presumed to be inadmissible if it "is being investigated or prosecuted by a State which has jurisdiction over it", "unless" such judicial activity is not genuine. This is consistent with Appeals

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

Chamber jurisprudence 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".[97] It is further supported among the "most highly qualified publicists"[98] who concur that "[i]f investigations or trials are underway, there would seem to be a presumption that the case is inadmissible".[99]

97. *Third*, consistent with the principle of complementarity, Articles 19(2) and 17(1)(a) should be interpreted in light of "a policy of giving the benefit of doubt to States exercising jurisdiction and assuming that they are acting in good faith."[100] The suspect treatment of judicial action by States would be manifestly contrary to the expressly stated "primacy" of domestic jurisdictions[101] and the object and purpose of the Rome Statute to encourage national proceedings.

98. *Fourth*, it is a general principle of law – *onus probandi actori incumbit*[102]– that the burden of proof rests with the party making an allegation. It is for the party alleging that State judicial action is not "genuine" or the State is not "able" or "willing" to provide supporting evidence of its allegation. It would be absurd if the converse were true, since a State would have to anticipate and respond – both *ex hypothesi* and *in abstracto* – to each and every possible allegation of bad faith or competence in relation to its judicial actions.

99. Consequently, the burden of proof shifts to the party asserting that the Libyan

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[97] "Judgment on the appeal of the Republic of Kenya", para. 43.
[98] Statute of the International Court of Justice, Article 38(1)(d).
[99] See e.g. William A. Schabas, "The International Criminal Court: A Commentary on the Rome Statute 2010", p. 345; see also Sharon A. Williams & William A. Schabas, "Article 17", in Otto Triffterer (ed.), "Commentary on the Rome Statute of the International Criminal Court" (2nd ed.), 2008, p. 616.'
[100] Informal expert paper: "The principle of complementarity in practice", ICC-01/04-01/07-1008-AnxA 30-03-2009, para. 55.
[101] "Appeals Chamber Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case", ICC-01/04-01/07 OA 8-1497, 25 September 2009.
[102] See e.g. Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), International Court of Justice, Judgment of 20 April 2010, para. 162 ('in accordance with the well-established principle of onus probandi incumbit actori, it is the duty of the party which asserts certain facts to establish the existence of such facts") and Prosecutor v. Bemba, "Decision on the Admissibility and Abuse of Process Challenges", ICC-01/05-01/08-802, 24 June 2010.

Government is unwilling or unable to carry out these proceedings genuinely. The shifting of the burden of proof in this way draws support from the admissibility jurisprudence of the European Court of Human Rights which provides greater interpretative assistance than the references previously cited by the OTP to support its view that there is no shift in the burden of proof.[103] In that context, the machinery established by the Convention for the protection of human rights is subsidiary to the national systems safeguarding human rights.[104] The subsidiary character of the ECHR system is supported by an assumption, reflected in Article 13 of the Convention, that there is an effective remedy available in the domestic jurisdiction in respect of an alleged breach of Convention rights.[105] Pursuant to Article 35, an applicant must exhaust the local remedies available to him/her before a complaint will be admissible.

100. The Grand Chamber dealt with the shifting or "distribution" of the burden of proof in the case of *Akdivar and Others v Turkey* in the following terms:

> *"In the area of the exhaustion of domestic remedies there is a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective and available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement ... One such reason may be constituted by the national authorities remaining totally passive in the face of serious allegations of misconduct*

[103] JJ. Barceló, "'Burden of Proof, Prima Facie Case and Presumption in WTO Dispute Settlement", ', Cornell International Law Journal, Vol.42, p.32-33.
[104] Handyside v. the United Kingdom, 5493/72 of 7 December 1976, Series A no. 24, p. 22, para 48; and Akdivar and Others v. Turkey, 99/1995/605/693, p. 1210, para 65.
[105] Selmouni v. France [GC], no. 25803/94, ECHR 1999-V, para 74; Kudła v. Poland [GC], no. 30210/96, ECHR 2000-XI, para 152; Andrášik and Others v. Slovakia (dec.), nos. 57984/00 et al., ECHR 2002-IX.

or infliction of harm by State agents, for example where they have failed to undertake investigations or offer assistance. In such circumstances it can be said that the burden of proof shifts once again, so that it becomes incumbent on the respondent Government to show what they have done in response to the scale and seriousness of the matters complained of."[106] (emphasis added)

101. Once the Government has discharged its burden of proving that there was an appropriate and effective remedy available to the applicant it is for the latter to show that the remedy was in fact exhausted (*Grässer v. Germany*, no. 66491/01, decision of 16 September 2004) or it was for some reason inadequate and ineffective in the particular circumstances of the case (*Selmouni v. France* (excessive delay in conduct of inquiry) or that there existed special circumstances absolving him or her from the requirement: (*Akdivar v. Turkey* (civil strife, risk of reprisals)).

102. Irrespective of where the burden of proof lies, the Libyan Government asserts that the evidence it has submitted in support of this application shows that Libya is *genuinely* investigating the case in a manner consistent with an intention to bring Abdullah Al-Senussi to justice within the meaning of article 17(2) of the Statute. It is plain that there is no motive whatsoever to allow Abdullah Al-Senussi to enjoy impunity or to carry out the investigation and prosecution of him so as to shield him from justice. There is no trace of any intent other than 'to bring the person concerned to justice'.

F. STAGE 2 OF THE COMPLEMENTARITY ASSESSMENT: ASSESSING THE QUALITY OF THE PROCEEDINGS

103. Alternatively, the evidence served with this application establishes to the requisite standard that the Libyan Government is willing and able to investigate and prosecute "the case" against Abdullah Al-Senussi in a genuine way. This is evidenced by the concrete and specific steps that the Government is taking with

[106] Akdivar and Others v. Turkey, 99/1995/605/693, para 68.

regard to investigating the case against Abdullah Al-Senussi. These are set out below in Section III: Factual Submissions.

104. The Court should interpret and apply the provisions relating to the criteria for stage two of the complementarity assessment in accordance with their object and purpose. Considerable assistance in this regard can be gathered from the negotiating history, which reveals that the identification of the requisite criteria was a painstaking task. The ILC's 1994 Draft Statute provided the foundation for the current criteria. The third paragraph of the draft preamble provided that the Court 'was intended to be complementary to national justice systems in cases where such trial procedures *may not be available or may be ineffective*.'[107] In terms of what was meant by 'unavailable' or 'ineffective', the commentary to the Preamble noted that the court 'is intended to operate in cases where there is *no* prospect of those persons being *duly* tried in national courts. The emphasis is thus on the court as a body which will complement existing national jurisdictions'. (Emphasis added).

105. In the course of the negotiations a consensus developed that these criteria should be tightened and that their aim was to ensure that 'sham' domestic proceedings should not be able to trump the ICC. It was in the course of the *Ad Hoc* Committee's discussions that 'inability' and 'unwillingness' were introduced by the Australian and Canadian representatives as signifiers of sham proceedings.[108]

i. Unwillingness

106. Article 17(2)(a) describes the first manifestation of unwillingness, namely that the proceedings were/are being undertaken 'for the purpose of shielding the person concerned from criminal responsibility'. As Arbour and Bergsmo point out, this requires the identification of a 'devious intent on the part of the State,

[107] UN, "Draft Statute for the International Criminal Court, Report of the International Law Commission on the work of its forty-sixth session, 02 May-22 July 1994" (1994) (A/49/10) (emphasis added).
[108] UN, "Report of the Ad Hoc Committee on the Establishment of an International Criminal Court" (1995) (UN Doc A/50/22), para 109.

contrary to its apparent actions.'[109] This not only shows the high threshold that must be met in order to establish "unwillingness" but further supports the argument that the burden of proof for establishing such intent falls on the party asserting it.

107. Article 17(2)(b) describes the second manifestation of unwillingness: 'an unjustified delay' that is 'inconsistent with an intent to bring the person concerned to justice'. The Preparatory Committee's draft had required that the delay be 'undue' but this was considered by many delegates at Rome as creating too low a threshold, enabling the Court to second guess national decisions in a way which was undesirable in principle.[110] The higher standard of 'unjustified' was preferred, as it would enable national jurisdiction to provide justifications or reasons for any delay before the Court could exercise jurisdiction, whereas a finding of 'undue' delay could occur against or without the views of the relevant state.[111] This not only shows the high threshold for establishing "unwillingness": it also supports the submission that the burden of establishing an "unjustified" delay lies on the party asserting it, whilst the State may then proffer evidence in rebuttal.

108. The final demonstration of 'unwillingness' is set out in article 17(2)(c) and concerns the independence and impartiality of the proceedings. Independence and impartiality are familiar concepts in the human rights arena where the right to a fair trial includes the right to be tried by an 'independent and impartial tribunal.'[112] This was inserted to deal with situations in which the

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[109] L Arbour and M Bergsmo, "Conspicuous Absence of Jurisdiction Overreach" in HAM Von Hebel, JG Lammers and J Schukking (eds), "Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos" (The Hague 1999).

[110] S Williams, "Issues of Admissibility" in O Triffterer (ed) "Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article" (Baden-Baden 1999), 391.

[111] J. Holmes, "The Principle of Complementarity" in Roy S. Lee, The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results" (1999), pp 54. [Holmes, "The Principle of Complementarity"]

[112] International Covenant on Civil and Political Rights (ICCPR), Article 14(1); European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Articles 1, 2, 6(1); Statute of the Inter-American Commission on Human Rights (IACHR), Articles 1, 2, 8(1), African Charter on Human and Peoples' Rights (AfCHPR), Articles 7(1) and 26; Velásquez Rodríguez v. Honduras, Inter-Am.Ct.H.R.

relevant state is endeavouring to prosecute an alleged perpetrator but there is some manipulation of the conduct of the proceedings to ensure that the accused is not found guilty.[113]

109. Ultimately, each of the scenarios under article 17(2) requires proof of the subjective intention of the State – either an intention to 'shield the accused' or an absence of 'intent to bring the person concerned to justice'.

110. It is submitted that the list of criteria in article 17(2) is exhaustive and that this reflects the desire of the drafters to limit the circumstances in which a finding of unwillingness can be made. This is clear from the text of the *chapeau*, which provides that the Court shall consider 'one or more of the following', which imports a degree of specificity, restricting the factors that might be considered to those expressly stated. They are exhaustive, as the absence of words such as 'including' or '*inter alia*' clearly indicate.[114] This position is further supported by the *travaux;* the drafters wished to limit the Court's involvement to circumstances that were expressly defined.[115]

111. The phrase 'in accordance with the norms of due process recognised by international law' was inserted in order to insert further objectivity into the determination of unwillingness.[116] The 'principles of due process recognized by international law' include the relevant provisions of international instruments defining human rights and humanitarian standards.[117] 'Due process' includes procedural rights such as equality of arms, publicity of

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(Ser. C) No. 4 (1988), Inter-American Court of Human Rights (IACrtHR), (29 July 1988) para 177; Anguelova v Bulgaria (Application No.38361/97) (13 June 2002) (2004) 38 E.H.R.R. 31, paras 138 -40 and 144; Kelly et al. v. The United Kingdom, Application No. 30054/96, Judgement of 4 May 2001, paras 95-8.

[113] Holmes, "The Principle of Complementarity", page 51.

[114] M. Benzing, "The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight Against Impunity", in: A.von Bogdandy and R.Wolfrum (eds.),Max Planck Yearbooks/United Nations Law, Volume 7, 2003, 602.

[115] El Zeidy, "The Principle of Complementarity in International Criminal Law: Origin, Development and Practice" (Koninklijke Brill: Leiden: 2008),", 890.

[116] UN, "Bureau Discussion Paper: Part 2: Jurisdiction, Admissibility and Applicable Law" (06 July 1998) (A/CONF.183/C.1/L), 16.

[117] Universal Declaration of Human Rights , Article 10; ICCPR, Article 9, as well as regional conventions such as ECHR, Article 6; IACHR, Article 8; AfCHPR (1981), Article 7.

proceedings, and expeditiousness of trial. The Statute does not, however, indicate what inference would or should be drawn if an absence of due process is proved or, if it does permit an inference to be drawn, what kind of violation would lead to the drawing of an inference and what the nature of that inference would be. The meaning to be given to this phrase is uncertain at best.[118] However, it is plain that the Statute did not envisage a wholesale examination of the overall trial process, an examination that, in any event, would be impracticable given that the particular article 17(2) focus may be upon the pre-trial investigation. Due process is to be examined with a view to determining whether the process is designed to shield the person concerned from criminal responsibility, not to ensure that the domestic proceedings accord with a particular ideal as determined by the ICC. Throughout the negotiating history of the Statute, States frequently voiced their concern that a determination of admissibility of a case by the Court did not become a general judgment on the fairness and efficiency of the national system.[119] The negotiating states were anxious that the complementarity assessment not empower the ICC to act as an appellate type court or to pass judgment on the internal functioning and integrity of national judicial systems by measuring the national legal system against some exacting standard beyond that required for a fair trial.[120]

ii. Inability

a. Object and purpose

112. Pursuant to article 17(3), the question of "inability", as viewed through an assessment of "total or substantial collapse or unavailability" of the national

[118] J Gurule, "United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court's Jurisdiction Truly Complementary to National Criminal Jurisdictions?" (2001-2002) 35 Cornell Int'l L.J. 1, footnote 61.

[119] J. Holmes, "The Principle of Complementarity" pp. 50-51.

[120] See for example, UN, "Report of the Ad Hoc Committee", para 43; UN, "Summary of the Proceedings of the Preparatory Committee During the Period 25 March - 12 April 1996" (7 May 1998) (A/AC.249/1), paras 115, 126; see also Robert Cryer, Hakan Friman, Darryl Williams & Elizabeth Wilmshurst, "An Introduction to International Criminal Law and Procedure" (2nd ed.), 2010, p. 156; Sharon A. Williams & William A. Schabas, "Article 17", in Otto Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court (2nd ed.), 2008, p. 624.

judicial system will have far-reaching consequences on whether the complementarity principle is applied in a realistic and reasonable manner, or becomes an arcane concept with little or no practical utility. To repeat, the object and purpose of the Statute is to ensure the primary role of national jurisdictions in prosecuting international crimes.

113. In the vast majority of situations, States emerging from situations of mass-atrocity will not possess a sophisticated or developed judicial system. The purpose of transitional justice is to provide an opportunity for post-conflict judicial capacity-building within the broader context of national reconciliation and democratization. Where a national judicial system is, with international cooperation and assistance, able to conduct viable investigations and prosecutions, it would be at variance with the principle of complementarity to deny the State the opportunity to do so.

114. For the same reasons as outlined above in relation to "unwillingness", it is submitted that a purposive reading of the Statute supports the application of a high threshold for establishing inability. The drafters did not envisage a Court that would act as a substitute for strained national systems but rather as a court of last resort, claiming jurisdiction only in exceptional circumstances.[121]

b. Collapse or Unavailability

115. The text of Article 17(3) provides for two cumulative sets of considerations: first, 'collapse' or 'unavailability' of the national judicial system and secondly, whether, as a result of that 'collapse' or 'unavailability', the State is 'unable to obtain the accused, or the necessary evidence and testimony, or otherwise unable to carry out proceedings'.[122] The principal consideration under article 17(3) is whether there is a 'total or substantial collapse or 'unavailability' of the national

[121] Holmes, "Complementarity National Courts Versus the ICC", 686; Philips, "The International Criminal Court Statute: Jurisdiction and Admissibility"; JK Kleffner, "The Impact of Complementarity on National Implementation of Substantive International Criminal Law" (2003) 1 JICJ 86, 97.
[122] "Informal expert paper: The Principle of Complementarity in Practice", ICC-01/04-01/07-1008-AnxA 30 March 2009, para 49.

judicial system which has affected the ability of the national jurisdiction to carry out its proceedings genuinely.

116. The Statute requires the 'collapse' of the national judicial system to be either 'total' or 'substantial'. 'Partial' collapse was explicitly rejected as an insufficient indication of inability.[123] 'Partial' was replaced with 'substantial' as it raised the threshold while avoiding the situation where 'part of a State's judicial apparatus was incapacitated but significant portions remained intact'[124] and it remained possible to carry out genuine proceedings. The high threshold to be satisfied is evident from the Pre-Trial Chamber's finding in *Lubanga*, that despite the sustained and systemic difficulties prevailing in the DRC, the fact that "the DRC national judicial system has undergone certain changes, particularly in the region of Ituri where a *Tribunal de Grande Instance* has been re-opened in Bunia", meant that "the Prosecutor's general statement that the DRC national judicial system continues to be unable in the sense of Article 17(1) (a) to (c) and (3), of the Statute does not wholly correspond to the reality any longer."[125]

117. The negotiating history provides little assistance as to its meaning of "unavailability". It is suggested that "unavailability" pertains to the scenario in which a judicial system is in fact operative but, for a range of legal or factual reasons, it is incapable of functioning in relation to a particular case.[126] The evidence provided in support of this application shows that there are no factual or legal impediments to Libya's investigation of Abdullah Al-Senussi and, therefore, no "unavailability" within the terms of the Statute. To the contrary, the Government has taken concrete and identifiable steps to advance the

[123] Holmes, "The Principle of Complementarity"p. 53.
[124] Holmes, "The Principle of Complementarity"p. 53.
[125] "Lubanga Dyilo Decision on Warrants of Arrest" para. 37.
[126] "Informal expert paper: The Principle of Complementarity in Practice", ICC-01/04-01/07-1008-AnxA 30 March 2009, para 50; F Gioia, "Comments on Chapter 3" in JK Kleffner and G Kor (eds), "Complementary Views on Complementarity: Proceedings of the International Roundtable on the Complementary Nature of the International Criminal Court (Amsterdam, 25/26 June 2004)" (The Hague 2006), 107.

investigation and prosecution of Abdullah Al-Senussi, based upon its determination to bring him to justice.

c. Unable to Obtain the Accused or Evidence

118. In any event, the second cumulative requirement is not satisfied in that the Libyan Government has not been unable "to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings". Abdullah Al-Senussi is in safe custody at a detention centre in Libya which is controlled by the Libyan Government. The necessary evidence and testimony is available and readily accessible in Libya, and is being collected pursuant to the investigations being conducted. Indeed, the evidence and testimony forming the basis of the Court's arrest warrant is largely based on the product of cooperation with the Libyan authorities at a time when it was not in a position itself to use the evidence due to the Gaddafi regime's continued control and the prevailing state of impunity. Such cooperation with representatives of the then opponents of the Gaddafi regime was a significant factor in the ability of the ICC Prosecutor to request arrest warrants with unprecedented expedition in May 2011.[127] Now, with the fundamental change of circumstances brought about by the change of Government, the new Libya has been able build on that situation to obtain evidence and has had its official prosecutorial organs undertake witness interviews with all those initially interviewed by lawyers acting for the then opponents of the regime. The Libyan Government has beyond doubt taken concrete steps in relation to the investigation of the case against Abdullah Al-Senussi.

119. Libya's ability to investigate and prosecute Abdullah Al-Senussi is further enhanced by the support and tangible assistance it has received, and continues to receive, in rebuilding its infrastructure and enhancing the rule of law.[128] The specific practical features of this support will be set out in section E, but the general scope of that support and the unqualified commitment from Libya's

[127] "Second Report of the Prosecutor", paras 38-39.
[128] "Second Report of the Prosecutor", paras 282-288.

international partners is clear from the communiqué issued after the recent meeting held in Paris on 12 February 2013:

> *"1. The Government of the State of Libya and international partners met today in Paris to renew their commitment to the Libyan people and their aspirations to build a modern democratic and accountable state solidly anchored in a rule of law system, institutions and practices, and in respect for human rights. Today's International Ministerial Conference marks a new phase in the relationship between Libya and its partners, in which Conference participants – including Denmark, France, Germany, Italy, Malta, Qatar, Spain, Turkey, the United Arab Emirates, the United Kingdom, the United States of America, the African Union, the Arab Maghreb Union, the European Union, the Gulf Cooperation Council, the League of Arab States, and the United Nations – reaffirmed their unequivocal support for the Libyan Government in its determination to build, on the basis of the two attached Plans, namely the National Security Development Plan, and the Justice and Rule of Law Development Plan, a secure, prosperous and democratic nation, and overcome existing challenges in the areas of national security, rule of law and justice.*
>
> *...*
>
> *6. The International Ministerial Conference on Support to Libya builds on the Senior Officials meeting held in London on 17 December, at which the Libyan Government had outlined a comprehensive plan of action in the priority areas of security sector, justice and rule of law. The Libyan Government today presented its international partners with its priorities for the development and reform of the security, rule of law and justice sectors. Libya's international partners have stressed the significance of these priorities and pledged additional assistance in support of Libyan efforts in these sectors."*[129]

[129] "Libyan Government's consolidated reply to the responses of the Prosecution, OPCD, and OPCV to its further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi", ICC-

120. In summary, it is submitted that Libya is patently able to carry out national proceedings within the meaning of article 17(3) of the Statute.

iii. Genuineness

121. 'Genuinely' qualifies the phrase 'to carry out the investigation or prosecution' and not the terms 'unwilling and 'unable'. It was added to article 17 to inject further objectivity into the assessment of the domestic proceedings.[130]

122. The term "genuinely" requires consideration of whether the domestic proceedings are "sham" proceedings. This is supported by the *travaux*, which show that in the course of the Rome Conference, the coordinator of the informal consultations referred to the Oxford English Dictionary for elucidation of the meaning of 'genuine' and was particularly impressed with the aspect of the definition that read 'having supposed character, not sham or feigned'.[131] 'Genuinely' was thus in line with the consistently-held view that the function of the complementarity provisions was to allow the Court's proceedings to take precedence over 'sham' domestic proceedings.

123. Given the detailed criteria set out in article 17(2) and (3), it seems that 'genuinely' adds little substance to the assessment of the domestic proceedings, particularly in the case of 'unwillingness'.[132] Accordingly, the Government questions whether a stand-alone consideration of the genuineness of the proceedings is required. As one commentator has pointed out: "[if] it is established that a state is unwilling

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01/11-01/11-293-Red, 04 March 2013; "Paris Communiqué, International Ministerial Conference on Support to Libya in the Areas of Security, Justice and Rule of Law", Paris, 12 February 2013.

[130] El Zeidy, "The Principle of Complementarity in International Criminal Law: Origin, Development and Practice (Koninklijke Brill: Leiden: 2008), pp.165-166; M. Benzing, "The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight Against Impunity", in: A.von Bogdandy and R. Wolfrum (eds.),Max Planck Yearbooks/United Nations Law, Volume 7, 2003, 591-632, p.605.

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

[132] LN Sadat and S Carden, "The New International Criminal Court: An Uneasy Revolution" (2000) 88 Georgetown LJ 381, 418.

or unable to investigate or prosecute, the non-genuineness of the proceeding will be self-evident.[133]

PART III: FACTUAL SUBMISSIONS

A. INTRODUCTION

124. The Court should determine the case against Al-Senussi to be inadmissible pursuant to articles 17 and 19(2) of the Statute. The evidence adduced by the government proves, with a high degree of specificity and probative value, that the case is being investigated by Libya. Pursuant to article 17(1)(a) and 17(2) and (3), the evidence is concrete, tangible and pertinent, demonstrating that the State is willing and able to carry out the investigation genuinely. There is no evidence to support a reasonable inference to the contrary.

125. Whilst the complementarity assessment does not permit or require an appraisal of a state's criminal justice system as a whole, the following section sets out for the Court the key features of Libya's substantive and procedural law with a view to contextualising and explaining the concrete and specific investigative steps taken as well as the contours of the case against Abdullah Al-Senussi. These submissions are made with reference to Rule 51 but without prejudice to the submissions as to the shifting burden of proof set out in section I (A: Legal Basis for Challenge).

126. The evidence in support of this application must be considered in the light of the legal limitations placed upon the Government by Article 59 of Libya's Criminal Procedure Code. The Article provides, quite properly, that for the duration of the investigative phase of proceedings, evidence obtained by the Libyan prosecution services is to remain confidential and dissemination limited to those involved in the Libyan investigative or prosecutorial team. Disclosure of actual evidence, including

[133] JB Terracino, "National Implementation of ICC Crimes: Impact on National Jurisdictions and the ICC" (2007) 5 JICJ 421, 430; See also B Swart, "Comments on Chapter 5 of Rod Jensen" in JK Kleffner and G Kor (eds), "Complementary Views on Complementarity: Proceedings of the International Roundtable on the Complementary Nature of the International Criminal Court (Amsterdam, 25/26 June 2004)", (The Hague 2006), 171.

witness interviews or other documentary evidence, or even details such as witnesses' names and contact details, to persons outside the Libyan investigative or prosecutorial team before the case reaches the accusation stage of proceedings, would violate the Criminal Procedure Code. In order to provide the maximum possible cooperation with the ICC, the Minister of Justice has authorised, as an exceptional measure,[134] the provision of sample pieces of evidence to be provided to the court on a confidential basis, and these are annexed to this Article 19 application.

127. In order to protect the confidentiality of investigative materials and, in particular, to uphold witness safety and security such that the integrity of the investigation is not compromised, any details of evidence annexed to this application which could identify a witness have been redacted from the versions of this submission provided to the Defence and the Office of Public Counsel for Victims ("OPCV"). The redactions which have been made to this evidence do not affect the comprehensibility of the material so provided and will not impact upon the ability of the Defence or the OPCV to provide a meaningful response to this Admissibility Challenge. Unredacted versions of evidence have been provided to the Pre-Trial Chamber as well as to the Office of the Prosecutor. The rationale for providing this unredacted material to the Prosecutor is due to the Prosecutor's unique position of being able to compare the witness evidence gathered by her office with that gathered by the Libyan authorities in the national investigation. Libya does not have any access to information identifying the Prosecutor's witnesses in this case beyond that available in public filings. For this reason the provision of unredacted evidence to the Prosecutor's office will enable it to provide informed assistance to the Pre-Trial Chamber as to the scope of the national investigation compared to the ICC investigation. Libya notes that this approach to the provision of evidence and the redaction of information which may identify a witness has been approved by the Pre-Trial Chamber in the Gaddafi proceedings.[135]

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[134] "Submission on Admissibility 23 January 2013", Annex 3.

[135] Pre-Trial Chamber's "Decision on the "Libyan Government's proposed redactions to ICC-01/01-01/11-258-Conf-Exp and Annexes 4,5,6,7,15,16 and 17", 7 February 2013.

B. THE STAGES IN THE LIBYAN CRIMINAL JUSTICE PROCESS

128. The civilian criminal justice system in Libya (which is modelled on the Italian criminal justice system) consists of four phases: investigation, accusation (also referred to as indictment), trial and appeal before the Supreme Court. The Prosecutor-General has the power to commence investigations in relation to any particular incident or individual and also has the power to initiate criminal proceedings against defendants (Article 1 Criminal Procedure Code 1953).[136] The Prosecutor-General acts independently from the judiciary in carrying out this role and must be neutral in his work. The Libyan military criminal justice system operates in a similar fashion to the civilian criminal justice system, although there is no accusation phase in the former proceedings.

129. Where a serious crime has been alleged and, following completion of the investigation, the Prosecutor-General has formed a view that there is sufficient evidence to warrant the case proceeding, the case is forwarded to the Accusation Chamber (also known as the Indictment Division). This Chamber is a court of first instance and is composed of an independent and impartial judge who is appointed by the Supreme Council of Judicial Authority at the annual conference of Libyan Courts (which is known as the General Assembly of the Court) (Article 145 Criminal Procedure Code). It is not possible for a trial to commence prior to the conclusion of the Accusation Chamber's procedure or without a lawyer being appointed to represent the Accused.[137]

130. It is the role of the Accusation/Indictment Judge to review the investigation conducted by the Prosecutor-General's Office and if they find the evidence to be insufficient or illegally obtained, they must dismiss the case (Article 151 Criminal Procedure Code). If, on the other hand, there is deemed to be sufficient lawfully obtained evidence to found a criminal case, or if after supplementary investigations

[136] "Libyan Government's filing of additional provisions from Libyan Criminal Code and Libyan Criminal 'Procedure Code referred to in its 23 January 2013 Submission which were not referred to in its 1 May 2012 Admissibility Challenge", ICC-01/11-01/11-273, 11 February 2013.
[137] "Libyan Government's Observations regarding the case of Abdullah Al-Senussi", ICC-01/11-01/11-260, 28 January 2013, para. 13.

such evidence is found to exist, then the defendant will be given the opportunity to select a lawyer so that the case may be remitted to trial (Article 106 Criminal Procedure Code). It is the Accusation / Indictment Judge's role to ensure that any cases referred to trial are adequately and neutrally investigated, that the investigation has remained confidential, that a lawyer has been appointed for the suspect and that the investigation has been properly recorded.[138]

131. The Criminal Trial Court in Libya is also a court of first instance. When it sits in cases of serious crimes it is comprised of three judges, each of which has attained the title of 'Counsel', which is awarded to judges who have at least twenty-four years of judicial experience.

132. If the Trial Court, in cases of serious crimes, gives a verdict of acquittal the Prosecutor has the right to appeal this verdict to the Supreme Court, which is comprised of three senior counsels (Article 381 Criminal Procedure Code). If the Supreme Court determines that the not guilty verdict was unlawful, it has the power to nullify the decision and order the case to be remitted to the Trial Court for rehearing in front of different judges (Article 393 Criminal Procedure Code).

133. If, however, the judgment of the Trial Court is to convict the defendant, in cases of serious crimes, the defendant has an unqualified right to appeal this verdict and any sentence to the Supreme Court. Again, if there is an error of law found by the Supreme Court, the judgment will be quashed and the defendant will be released (Articles 365 and 381 of the Criminal Procedure Code).

134. Where a death penalty has been imposed following conviction, the sentence cannot be carried out until the Supreme Court has considered the case. Even if the defendant does not appeal the sentence, the Prosecutor is obliged to do so before the sentence can be implemented (Articles 385bis and 429 Criminal Procedure Code). In appeals involving the death penalty, the Supreme Court is not only limited to considering errors of law, but will instead review all factual, legal and procedural

[138] "Libyan Government's Observations regarding the case of Abdullah Al-Senussi", ICC-01/11-01/11-260, 28 January 2013, Annex H.

matters leading to the verdict and sentence. Where an error is detected, the Supreme Court has the power to nullify the verdict, amend the sentence or remit the case for re-hearing at the Trial Court by different judges. The sentence may not be enforced until all potential avenues of legal appeal have been exhausted (Article 400 Criminal Procedure Code).

135. There is also a possibility under Libyan law for commutation of a death sentence to one of life imprisonment in cases where the family members of victims "forgive" the convicted person. In such cases, the correct procedure – consistent with Article 6 of the International Covenant on Civil and Political Rights - is for the case to be brought back before the Trial Court to hear evidence of the family members and to impose a new sentence on the convicted person.

C. CURRENT STAGE OF PROCEEDINGS AGAINST ABDULLAH AL-SENUSSI: AN ONGOING INVESTIGATION

136. As a consequence of Abdullah Al-Senussi's previous role as Director of Military Intelligence and rank (Brigadier), the Military Prosecutor was initially responsible for investigating Abdullah Al-Senussi. The investigation commenced on 9 April 2012. It encompassed allegations of both attacks on civilians and financial crimes.

137. On 12 February 2013, the President of the Supreme Court of Libya confirmed that pursuant to the judgment of the Supreme Court, dated 17 July 2012 and Article 157 of the Libyan Criminal Procedure Code and Article 45 of the Military Procedures Act, the case against Abdullah Al-Senussi should be justiciable at the ordinary courts. Accordingly, the case now falls within the remit of the office of the civilian Prosecutor-General (also known as the Attorney-General).[139] As affirmed by the Attorney General's Office, "In order to preserve the truth, and good conduct of the criminal actions, [the] investigation has been conducted by the civil public prosecution and is still underway to date with the accused Abdullah Al-Senussi and

[139] Annex 6.

others."[140]

138. Since the filing of the Government's 23 January 2013 supplemental submissions in the Saif Al-Islam Gaddafi case, a new Prosecutor-General has taken office. Mr Abdul Qader Juma Radwan was appointed by the General National Congress on 20 March 2013, sworn into office on 25 March 2013 and commenced work on 27 March 2013.[141] He has a mandate from the General National Congress, rather than the transitional government. His extensive experience includes eight years as an investigator at the Prosecutor-General's Office in Benghazi; fourteen years as the Prosecutor-General for Benghazi; seven years as an Appeal Court Judge and, prior to taking his present post as Prosecutor-General, thirteen years as a Supreme Court Judge of Libya.

D. KEY FEATURES OF THE LIBYAN CRIMINAL JUSTICE SYSTEM

i. The independence of the Libyan Judiciary

139. The importance of the independence and impartiality of the judiciary is enshrined in the Libyan Constitutional Declaration of 2011.[142] Article 32 of that decree provides that:

> *"The Judiciary Authority shall be independent. It shall be exercised by courts of justice of different sorts and competences. They shall issue their judgments in accordance with the law. Judges shall be independent, subject to no other authority but the law and conscience. Establishing Exceptional Courts shall be prohibited."*

140. The prohibition on the establishment of exceptional courts is of critical importance to the current application, as it was the "exceptional" or "special" courts which were operational in the Muammar Gaddafi era and which carried out human rights violations against persons considered to be enemies of the regime. These extraordinary courts were staffed not by ordinary judicial officers (who reported to the Ministry of Justice and who still work as judges in Libya

[140] Annex 6.
[141] "Notification by Libyan Government supplemental to its consolidated reply to the responses of the Prosecution, OPCD, and OPCV to its further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi", ICC-01/11-01/11-306, 28 March 2013.
[142] "Government of Libya Article 19 Application - Saif Al-Islam Gaddafi", Annex G.

today) but were presided over by court officials specially appointed by Muammar Gaddafi's security apparatus. This is confirmed by a report by the UK Foreign and Commonwealth Office which states as follows:

> *"In the experience of UK officials in previous negotiations with Libya, there were effectively two states in operation: the relationship with the Ministry of Justice was positive and constructive (the former Minister is now in the Interim Transitional National Council); the other 'shadow state', accountable to [Gadd]afi and operated by the security apparatus had its own police, court and prison systems, which dealt with political prisoners and any individual deemed a threat to the regime. The UK Government had limited ability to engage with this 'Libya' on any level. This experience was reflected by non-governmental organisations (NGOs which had similarly made limited progress with the security services over human rights issues."*[143]

141. The commitment to the independence of the judiciary is reflected in the abolition of extraordinary courts. This was a matter of priority for the new Libyan Government and it confirmed the central principle that no judge is to act on the instructions of the executive. Instead, judges are to act independently and only in accordance with "law and conscience". The abolition of extraordinary courts has had a positive, indeed a transformative effect, on the Libyan judiciary as a whole. The independence of the judiciary is now not only constitutionally enshrined but is also protected under several provisions of domestic Libyan law, including Article 52 of the Judicial System Law and Article 31 of the Freedoms Act.

142. The independence of the judiciary has been further enhanced by the decision of the Supreme Court on 23 December 2012 in which it determined that the application of the Peoples' Court procedures to criminal cases was

[143] British Foreign and Commonwealth Office Conference Report, "Libya and Human Rights: the way forward",, 11 April 2011, p. 2 of 6, available at: http://m.fco.gov.uk/travel;letter=A/http%3Acentralcontent.fco.gov.uk/resources/en/pdf/mena/wilton-park-libya-report

unconstitutional.[144] Consequently these procedures (which involved the bypassing of the Accusation Chamber stage of proceedings) have no place in the prosecutions of former Gaddafi regime officials or anyone else suspected of a crime.[145] In reaching this decision, the panel of 17 Supreme Court 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.[146] The procedure followed and the principled decision making in this decision 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.[147] The unanimous finding of the Supreme Court was that the application of People's Court procedures by the prosecutor constitutes "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".[148] The Court reached this finding despite the high public importance and political sensitivity of the cases to which the prosecutor sought to apply People's Court procedures (i.e. cases of former Gaddafi era officials). Notwithstanding, the Court ruled that: "there is no room

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[144] Transcript of Gaddafi Admissibility Hearing (Open Session)", ICC-01/11-01/ 1 l-T-3-CONF-ENG ET, ICC-01/11-01/11-T-2-CONF-ENG, 10 October 2012, page 47.

[145] However, People's Court procedures that 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". "Submission on Admissibility 23 January 2013", Annex 8.

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

[147] "Submission on Admissibility 23 January 2013", paras 74 – 75.

[148] "Submission on Admissibility 23 January 2013", Annex 8.

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".[149]

ii. The rights of suspects and defendants under Libyan law

143. Suspects and defendants within the Libyan criminal justice system benefit from similar procedural rights and protections to those set out in the Rome Statute. Indeed, Libya's 2011 Constitutional Declaration has a specific provision upholding human rights and freedoms (Article 7)[150] and also has an entire Part dedicated to Judicial Guarantees. As well as providing for judicial independence and the abolition of exceptional courts, as described above, Articles 31 and 33 of this Part provide for the following due process guarantees:

i. "There shall be no crime or penalty except by virtue of the text of the law";

ii. "Any defendant shall be innocent until he is proved guilty by a fair trial wherein he shall be granted the guarantees necessary to defend himself";

iii. "Each and every citizen shall have the right to recourse to the judiciary authority in accordance with the law";

iv. "Right of resorting to judiciary shall be preserved and guaranteed for all people";

v. "Each and every citizen shall have the right to resort to his natural judge";

vi. "The State shall guarantee to bring the judiciary authorities near the litigants and shall guarantee the swift determination on lawsuits"; and

vii. "Laws shall not provide for the prohibition of judiciary authority to control any administrative decree".

144. Apart from these Constitutional guarantees, Libya is a party to international and

[149] "Submission on Admissibility 23 January 2013", Annex 8.
[150] "Government of Libya Article 19 Application - Saif Al-Islam Gaddafi", Annex G.

regional human rights instruments which guarantee the right to a fair trial, including the International Covenant on Civil and Political Rights, the United Nations Convention against Torture, the International Convention on the Elimination of Racial Discrimination, the African Charter on Human and Peoples' Rights, the Arab Charter on Human Rights and resolutions such as the Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa adopted by the African Union in 2003. The Libyan Government is committed to meeting all the fair trial requirements set out in these instruments.

145. The Libyan Government accepts that there are many transitional justice issues that need urgent attention. This recognition has underpinned the appointment of the new Minister of Justice, Salah Marghani, who took office in early December 2012. Human Rights Watch has honoured him for his "extraordinary activism" in human rights describing him as a "leading voice for justice in [his country], working relentlessly to protect the rights and dignity of others."[151] Challenges remain but Libya is committed to ensuring due process, including effective remedies where violations are shown to have occurred.

146. Under Libyan law, during the investigation phase of the case, a suspect has the right to appoint a lawyer to attend interviews with the Prosecutor-General and the Military Prosecutor and during confrontation of the defendant with witnesses by the Prosecutor-General (Article 106 of the Criminal Procedure Code). Suspects also have the right to view the investigative materials relating to their case, and any confessions that are obtained from them through duress are inadmissible in criminal proceedings against them (Article 435 Criminal Procedure Code). If the suspect does not avail himself of his right to appoint counsel, the Chambre d'Accusation will appoint counsel who will necessarily review the investigative materials in order to prepare the case for the defence.

147. The investigator is obliged to write down all investigative procedures

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

undertaken in relation to a suspect's case and not to publish or otherwise distribute details of the investigation (Articles 57 and 59 of the Criminal Procedure Code).

148. Suspects may not be imprisoned without due process and a written order signed by the Prosecutor-General which is in compliance with Article 118 of the Criminal Procedure Code and Article 9 of the Prisons Act (Law No. 5 of 2005). Likewise, a suspect should only be imprisoned in a purpose built facility - unless the Prosecutor-General waives this requirement due to exceptional circumstances (Article 4 of the Prisons Act).[152]

149. If a case has proceeded to trial and the defendant has indicated that they do not wish to appoint a lawyer, the court will appoint one (a People's Attorney appointed free of charge pursuant to Law No 4 of 1981) to represent their interests during the trial, so that the case may proceed (Article 162 and 187 Criminal Procedure Code)). Defendants may appoint foreign lawyers as long as the Libyan Law Society consents to their appointment and providing they work together with a Libyan lawyer. Any lawyer appointed to represent the interests of a defendant at trial has the right to ask for sufficient time to prepare the case. If a trial were to proceed without a lawyer being appointed, or without allowing a lawyer sufficient time to prepare the case, the trial verdict would be quashed as a nullity by the appellate court (Article 304 and 305 of the Criminal Procedure Code).

150. Other rights granted during trial proceedings include the right to a public hearing; the right to have proceedings documented; the right to be presented with the indictment and all the Prosecution evidence; the right to remain silent; the right to present defence evidence and the right to a written judgment (Articles 241, 247, 251, 266, 276 Criminal Procedure Code).[153] In relation to the presentation of evidence, the defendant has the right to call witnesses (who may

[152] "Government of Libya Article 19 Application - Saif Al-Islam Gaddafi", Annex C.
[153] "Government of Libya Article 19 Application - Saif Al-Islam Gaddafi", Annex H.

be questioned by the Prosecution through the judges) and to ask questions of witnesses relied upon by the Prosecution through the judges (Article 69, 93 244 of the Criminal Procedure Code). The rights of a defendant to present evidence are also applicable to suspects during the accusation phase of proceedings. As outlined above, a convicted person also has the right to appeal against conviction and sentence.

E. THE APPLICABLE SUBSTANTIVE LAW

151. As outlined in the Admissibility Challenge pertaining to Mr Gaddafi,[154] 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, together with the penalties set out in the Rome Statute for such crimes, into Libyan law. The effect of this bill, once enacted into law, would be that Mr Gaddafi and Abdullah Al-Senussi could be charged with the crimes against humanity of murder and persecution (i.e. the same legal categorization of crimes alleged before the ICC) and would be subject to the same sentencing regime as if he were appearing before the ICC.

152. Following the July 2012 election, a permanent legislative body, the General National Congress (the "GNC"), replaced the NTC. All of the work of the NTC that 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. Given the array of pressing issues currently being faced by Libya and the GNC, it is not entirely surprising that the international crimes bill has not been debated or adopted by that body. However, it remains on the agenda of the GNC, and it is anticipated that the international crimes bill will be considered and adopted by the GNC in due course.

[154] "Government of Libya Article 19 Application - Saif Al-Islam Gaddafi", paras 84-85.

153. If the bill is enacted into Libyan law prior to the conclusion of the proceedings in the Chambre D'Accusation in the Al-Senussi 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.

154. In the absence of the adoption of the international crimes bill prior to the transfer of Abdullah Al-Senussi's case to the Accusation Chamber, the usual criminal laws of Libya, as set out in the Criminal Code, will apply to Abdullah Al-Senussi's case. Although the exact provisions of the Criminal Code with which Abdullah Al-Senussi will be charged are not yet fixed (because he has not yet had his case heard by the Accusation Chamber), the following charges are presently envisaged to arise from the investigation conducted to date: 202 (devastation, rapine and carnage), 203 (civil war), 211 (conspiracy), 217 (attacks upon the political rights of a Libyan subject), 294 (concealment of a corpse), 296 (indiscriminate or 'random' killings), 297 (arson), 318 (stirring up hatred between the classes), 322 (aiding members of a criminal association), articles 368 (intentional murder), 429 (use of force to compel another) and 431 (misuse of authority against individuals), 432 (search of persons), 433 (unlawful arrest), 434 (unjustified deprivation of personal liberty) and 435 (torture) of the Criminal Code. Additional charges under consideration in relation to Abdullah Al-Senussi include incitement to rape, drug trafficking and serious damage to public funds.[155]

155. The definitive list of charges that will be applied at Abdullah Al-Senussi trial will be determined following careful scrutiny of the evidence in the case by the Chambre d'Accusation. Regardless of any changes to this list of charges that have been – or may yet be – added to the Libyan criminal case file pertaining to Abdullah Al-Senussi the central allegations in the national criminal proceedings remain the same as those in the ICC case – i.e. acts of murder, abductions, arrests

[155] Annex 3.

and torture of dissidents during the 2011 revolution. These core allegations (and correlative 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 course of the Libyan criminal investigation.

F. SCOPE AND METHODOLOGY OF THE DOMESTIC INVESTIGATION

i. The scope of the allegations within the Libyan investigation

156. Since Abdullah Al-Senussi's extradition to Libya, the Libyan criminal investigation has continued to progress and is now nearing the accusation stage of proceedings. More than 100 witnesses have been interviewed between 9 April 2012 and 9 of February 2013[156] generating thousands of pages of evidence. Now that a new Prosecutor-General - Mr Radwan - is in office, it is anticipated that he will shortly consider this material in the course of his review of the case in order to ensure the appropriateness of its subject matter, its progress and its fairness.

157. The scope of the investigation into the alleged criminality of Mr Al Senussi conducted thus far under the supervision of the former Prosecutor-General, Mr Hasadi, extends from the 1980s through to the attacks alleged to have been committed against civilians from the commencement of the revolution, on 15 February 2011, until the fall of the Gaddafi regime on 20 October 2011. Abdullah Al-Senussi is suspected of serious violations of international law, including torture, unlawful killings, sexual violence, physical violence, collective punishments, pillage, and a whole range of associated crimes with many hundreds, if not thousands, of victims.

158. In sum, he is suspected of being one of the worst perpetrators of international and national crimes in the region's recent history. In this context, the crimes being investigated by the ICC, alleged to have occurred in Benghazi between 15th - 20th February 2011, through Al-Senussi's command over the Security Forces and

[156] Annex 2.

through his close ties to the Gaddafi family, appear to be demonstrative only of a small fraction of his overall criminality. The subject matter of the Libyan investigation of Abdullah Al-Senussi is much broader than the ICC's investigation.[157]

159. In part, this is because the Libyan 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) has a broader temporal and geographic scope than the ICC investigation. In addition, a separate investigation is being carried out into an array of financial crimes (as distinct from blood crimes) allegedly committed by Abdullah Al-Senussi.

160. The temporal scope of the Libyan investigation of Abdullah Al-Senussi is significantly broader than the ICC investigation, which is limited to incidents occurring between 15 and 20 February 2011. The Libyan 'blood crimes' investigation encompasses events throughout the full period of the revolution, from 11 February 2011 to the fall of the Gaddafi regime in October 2011. In addition to being investigated for crimes allegedly taking place during 2011, Abdullah Al-Senussi is also being investigated for other serious crimes taking place in Libya prior to the revolution. One such crime is the massacre at Abu Selim prison which took place on 27 June 1996 and which resulted in the massacre of 1270 prisoners in the prison yard following their complaints about poor treatment. This case is one of profound national importance to the Libyan people. Statements of many eyewitnesses have been taken in relation to this incident and these statements attest to the personal involvement of Abdullah Al-Senussi in the mass killing that day.[158] The investigation and prosecution of Abdullah Al-Senussi for his alleged involvement in this massacre is critically important to Libya's transition. Abdullah Al-Senussi is additionally being investigated for various financial crimes dating back to approximately 2006 up

[157] Similarly that of Saif Gaddafi: "Transcript of Gaddafi Admissibility Hearing (Open Session)", ICC-01/11-01/11-T-2-CONF-ENG, 09 October 2012, page 21.
[158] "Government of Libya Article 19 Application - Saif Al-Islam Gaddafi", Annex F.

until October 2011. They include an allegation of embezzling 5 million Libyan dinars of public funds from April to August 2011. There are also many other allegations of embezzlement, including improperly using large amounts of foreign currencies, which are under investigation. These alleged crimes are the subject of a separate investigation.[159]

161. The geographic scope of events under investigation in Libya is also broader in several significant respects than the scope *ratione loci* of the ICC investigation. The crimes forming the subject matter of the ICC investigation are restricted to events and acts taking place in Benghazi. In Libya, the blood crimes that are under investigation include the incidents described in the ICC investigation within Benghazi but also include crimes taking place throughout Libya. In the course of its investigation, the prosecution team has been required to take investigative steps across all the main cities of Libya in order to ensure that the countrywide allegations against Abdullah Al-Senussi are properly investigated and evidenced.

ii. The evidence collected to date & samples annexed to this application

162. Samples of evidential material that are specific and probative of the ongoing, proper and concrete investigation into the ICC allegations underlying the charges against Abdullah Al-Senussi are annexed to this Admissibility Challenge. These samples indicate that there is sufficient identity between the domestic investigation and the ICC investigation to conclude that "the same case" is being investigated as the Prosecutor-General's office is collating evidence that focuses, *inter alia*, upon Muammar and Saif Al-Islam Gaddafi's criminal plan in Benghazi between the 15th to the 20th February 2011, of which Al-Senussi is suspected, by virtue of his position as head of the Military Intelligence and the ensuing control over military forces, of being instrumental in implementing. Indeed, in a mirroring of the allegations contained in the ICC's Article 58 Decision of 27 June 2011, these documents show that the Libyan investigation has gathered materials

[159] "Government of Libya Article 19 Application - Saif Al-Islam Gaddafi", Annex E.

pertaining to:

i. the existence of a State policy in February 2011, aimed at deterring and quelling, by any means, including by the use of lethal force against civilians, the demonstrations against the regime of Muammar Gaddafi;[160]

ii. Al-Senussi's command over aspects of the military, intelligence police and ad hoc militias ("Security Forces") (through, *inter alia*, his command over the Libyan Military Intelligence and his close ties to the Gaddafi family);[161]

iii. The underlying acts and incidents committed as a consequence of the plan implemented by Al-Senussi, in particular the shooting at demonstrators in Juliana Bridge (Benghazi) on 17 February 2011, the arrest of the lawyer, [REDACTED], the arrest of Idris Al-Mesmari and the shooting of countless unarmed demonstrators;[162]

iv. Al-Senussi's essential contribution to the implementation of the plan, in particular, inciting killing of civilians (e.g. to "destroy" the "filthy groups"),[163] organising the recruitment of mercenaries and mobilised militias and troops, providing (military, financial and narcotic) supplies to the Security Forces, and imprisoning, torturing or otherwise eliminating demonstrators;[164] and

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[160]Annex 8; Annex 9; Annex 3; Annex 4; Annex 10; Annex 11; Annex 12; See also: "Government of Libya Article 19 Application - Saif Al-Islam Gaddafi", Annexes C, D and I, and "Submission on Admissibility 23 January 2013", Annexes 1, 2, 3, 4, 8, 9, 10, 12, 13, 15, 16 and 17. See for comparison, Article 58 Decision paras. 14-32, 74-77.

[161] Annex 2; Annex 3; Annex 4; Annex 5; Annex 6; Annex 9; Annex 8; Annex 10; Annex 11; Annex 12; Annex 15; Annex 16; Annex 17; Annex 19; See also: "Government of Libya Article 19 Application - Saif Al-Islam Gaddafi", Annex E and "Submission on Admissibility 23 January 2013", Annexes 1, 2, 3, 4, 8, 9, 10, 11, 12, 13, 15 and 16: See for comparison, Article 58 Decision paras. 22- 25, 84 – 86.

[162] Annex 8; Annex 14; Annex 18; Annex 20; Annex 21; Annex 14; Annex 22; Annex 23; Annex 24; Annex 25; Annex 26; Annex 27; Annex 25; See also: "Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute", ICC-01/11-01-01/1, 1 May 2012, Annexes C, D and E, Libya's Submissions, para 72; "; Libyan Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi", ICC-01/11-01/11-258-Red2, (23 January 2013,) Annexes 11 and 16. See for comparison, Article 58 decision paras. 36(ii), 43, 44, 50 – 54.

[163] Annex 4.

[164] Annex 8; Annex 9; Annex 10; Annex 11 Annex 12; Annex 15; Annex 16; Annex 17; Annex 19; See also: "Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute", ICC-01/11-

v. Al-Senussi's knowledge and intent regarding the commission of the crimes.[165]

iii. Those responsible for conducting the investigation

163. As noted above, pursuant to Article 157 of the Libyan Criminal Procedure Code, due to the alleged criminality involving both civil and military persons, the investigation is now being conducted by the civilian Prosecutor-General.[166] The investigation team designated to investigate the crimes alleged to have been committed by Abdullah Al-Senussi is managed by an Investigation Committee: (1) [REDACTED], President of the Committee; (2) [REDACTED], First Prosecutor at the Prosecutor's General's Office; (3) [REDACTED], First Deputy Prosecutor at the Prosecutor's General's Office; and (4) [REDACTED], Deputy Prosecutor at the Prosecutor's General's Office.[167] [REDACTED] and [REDACTED] are also members of the Investigation Committee designated to investigate the Saif Al-Islam Gaddafi case. There are several other investigators working on the investigation in other parts of Libya (for example Benghazi) who report to and are supervised by the Committee which is in turn supervised by the Prosecutor-General.[168]

164. The Investigative Committee benefits from all of the financial and other resources available to the Prosecutor-General's Office on a priority basis. It has its own building in the Serraj district in Tripoli. Its members are part of, and thus possess

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01-01/1, 1 May 2012, Annex E, Libya's Submissions, para 72; " Libyan Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi", ICC-01/11-01/11-258-Red2, 23 January 2013, Annexes 11 and 16.: See for comparison, Article 58 decision paras. 36(ii), 43, 44, 50 – 54. See for comparison, "Warrants of Arrest in respect of Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi", ICC-01/11-01/11-2, ICC-01/11-01/11-3, ICC-01/11-01/11-4, 27 June 2011, p. 5. See for comparison Article 58 Decision paras. 29, 34, 36(iii), (v), and (vi), 46-52, 80.

[165]Annex 4; Annex 8; Annex 9; Annex 11; Annex 10; Annex 12; Annex 12; Annex 17; Annex 19; See also: "Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute", ICC-01/11-01/11-01/1, 1 May 2012, Annex E; "Libyan Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi", ICC-01/11-01/11-258-Red2, 23 January 2013, Annex 16; See for comparison, Article 58 decision paras. 36(ii), 43, 44, 50 – 54. See for comparison, "Warrants of Arrest in respect of Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi", ICC-01/11-01/11-2, ICC-01/11-01/11-3, ICC-01/11-01/11-4, 27 June 2011, p. 5 and 6 and Article 58 Decision paras. 71, 84 – 90.

[166] Annex 28.

[167] Annex 5.

[168] Annex 1; Annex 7.

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. The members of the Investigation Committee are prosecutors and investigators with considerable experience in criminal matters. They have also benefitted from strategic advice as to the planning of trials of former Gaddafi regime officials by UN experts. The Committee conducts on-site investigations, including exhumations of mass graves, as well as investigations at prisons and other locations where executions and acts of torture were carried out. The Investigative Committee has made sure to preserve evidence 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 in addition to witness testimonies.

iv. Methodology of investigation (i.e. concrete investigative steps)

165. The evidence annexed to this Admissibility Challenge consists of representative samples of an ongoing investigation which has already demonstrated concrete investigative steps pertaining to the case against Abdullah Al-Senussi. The samples are, in the main, contemporaneous notes of witness interviews conducted privately and under oath.[169] A review of these notes shows that the usual procedure for a witness interview is that after the witness has been questioned and given their answers; notes of their answers are then read back to the witness so that they can check them for accuracy before signing them. Along with other persons suspected of being involved in crimes committed during the revolution, Abdullah Al-Senussi himself has already been questioned with respect to these allegations on several occasions. The first such occasion was on 17 September 2012 and the most recent occasion was on 9 February 2013.[170]

166. The same procedures apply to the taking of evidence from all witnesses whether

[169] Annex 1; Annex 11; Annex 10; Annex 12; Annex 14; Annex 15; Annex 16; Annex 17; Annex 21; Annex 14; Annex 22; Annex 23; Annex 24; Annex 27.
[170] Annex 3.

they are a victim or a suspect. 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.[171] The accuracy of witness testimonies, which might be contested by the suspect, is verified through a process under Libyan law known as confrontation (Article 106 of the Criminal Procedure Code). Abdullah Al-Senussi has already been confronted with many statements taken from witnesses.[172]

167. The annexed samples of witness evidence also show both the procedural steps taken by the investigators in the conduct of their interviews of witnesses, as well as the kinds of other evidence being gathered to corroborate testimony in the form of identifying further witnesses, obtaining real evidence including death certificates[173], medical notes[174], photographs and video recordings. This demonstrates that the Libyan authorities are taking concrete and progressive steps to ascertain evidence which will show whether Al-Senussi is responsible for the conduct underlying the warrant of arrest issued by the Court.

168. Members of staff of the Civilian Prosecutor's Office have prepared all of the witness summaries that will form the basis of Abdullah Al-Senussi's trial. Although earlier witness testimonies were gathered by commissions of volunteers prior to the fall of the Gaddafi regime, and subsequently by the Military Prosecutor's Office, none of these will be relied upon as evidence in Mr Al–Senussi's case. To the extent that a particular witness interviewed by a volunteer or the Military Prosecutor's Office forms part of the proceedings, the witness will be re-interviewed under oath by the civilian prosecution team.

169. In an effort to obtain as broad an evidential pool as possible, the Prosecutor-General has publicly invited potential witnesses to provide assistance and evidence in order to build the case against Abdullah Al-Senussi. This has

[171] Annex 9.
[172] Annex 3.
[173] See for example: Annex 26; Annex 27; and Annex 25.
[174] See Annex 13; Annex 25.

included issuing general radio, television and SMS text announcements encouraging witnesses to come forward and provide sworn testimony to the prosecutors.

170. There are two principal categories of witnesses whom the Prosecutor-General and his team have interviewed thus far. These include but are not limited to:

i. Members of the Libyan military (including very senior officers such as military commanders and members of the [REDACTED], as well as ordinary soldiers). The Prosecutor has obtained detailed statements from high-ranking individuals who worked closely with Abdullah Al-Senussi and, as such, have an intimate knowledge of meetings he attended, instructions he issued, plans he coordinated, and actions he undertook. Without giving identifying details in respect of such witnesses, these individuals have given evidence in relation to, *inter alia,* Abdullah Al-Senussi's:

i. Advanced notice of likelihood of protests and planning of response;[175]

ii. Involvement with others, including Saif Al-Islam Gaddafi, in directing and coordinating attacks on revolutionaries in Benghazi and Tripoli;[176]

iii. Instructions and active encouragement to suppress protestors through the use of all means possible;[177]

iv. Active incitement of discord between tribal groups in furtherance of Muammar Gaddafi's policy of fostering and manipulating such discord as a means of maintaining control of the Libyan people;[178]

v. Orders to supply the front with logistics and weapons as well as

[175] For example, Annex 10.
[176] For example, Annex 10.
[177] For example, Annex 10; Annex 8; Annex 11.
[178] Annex 4.

monitoring and directing activities at the front;[179]

vi. Recruitment and funding of mercenaries to assist in suppressing the revolutionaries directly and also indirectly, by instructing other members of the military, [REDACTED];[180]

vii. Meetings with [REDACTED] to organise the recruitment and deployment of mercenaries and to discuss tactics to gain control over revolutionaries, including the use of mortars and the laying of mines;[181]

viii. Involvement in the recruitment, funding, arming and deploying of "volunteers" to engage in suppressing the revolutionaries;[182]

ix. [REDACTED];[183]

x. [REDACTED].[184]

171. Civilian eyewitnesses: (including victims, protestors, revolutionary fighters and their family members) have given evidence in relation to the following events occurring in the course of the revolution:

i. Multiple deaths and injuries suffered by peaceful protestors on different dates, including in Benghazi between 15 and 20 February 2012, substantiated by medical evidence and official records;[185]

ii. The use of heavy weaponry and snipers to target unarmed protestors in Benghazi, including individuals trying to flee;[186]

[179] For example see Annex 12; Annex 10; Annex 11.
[180] For example, Annex 10.
[181] Annex 9; Annex 8.
[182] Annex 11.
[183] Annex 8.
[184] Annex 8.
[185] For example, Annex 10.
[186] Annex 22; Annex 14.

iii. The unlawful detention and torture of protestors [REDACTED].[187]

172. The Prosecutor-General and his team plan to conduct further interviews. These interviews may include evidence relevant to the whole of Libya and all aspects of Abdullah Al-Senussi's command.

173. This witness evidence needs to be considered alongside the evidence gathered in the Saif Al-Islam Gaddafi case (which is also likely to be relied upon in Abdullah Al-Senussi's case due to its factual and legal proximity), including passenger manifests and payment records for the transport of mercenaries [REDACTED] from various African countries to Libya in order to fight with Gaddafi regime forces during the revolution.[188]

174. With respect to the issue of intercept evidence,[189] 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 after the fall of Tripoli in August 2011 and thereafter. In the course of the prosecution's investigation of the Gaddafi and Al-Senussi 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. The Prosecutor-General's team will continue to investigate to obtain any relevant intercept evidence, which implicates Abdullah Al-Senussi or others alleged to be at the core of the criminal plan.[190] If the intercepts are ultimately to be relied upon as evidence in a future trial of Abdullah Al-Senussi their admissibility will need to be decided upon by the Chambre D'Accusation.[191]

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[187] Annex 24; Annex 16.
[188] For example, see "Submission on Admissibility 23 January 2013", Annexes 6 and 7.
[189] "Decision Requesting further submissions related to the admissibility of the case against Saif Al-Islam Gaddafi", ICC-01/11-01/11-239, 07 December 2012, paras 18-19.
[190] "Government of Libya Article 19 Application - Saif Al-Islam Gaddafi", Annex C.
[191] Annex 4.

v. Future arrangements for Abdullah Al-Senussi's trial

175. Before Abdullah Al-Senussi's case can proceed to trial it needs to be approved by the Accusation Chamber, he needs to have a lawyer appointed to represent him and a final case number needs to be assigned. The case number presently assigned is: Case No. 630/2012 however this is subject to change prior to the case being approved by the Accusation Chamber.[192] Currently, it is proposed that Abdullah Al-Senussi's case will be joined with the following co-accused: Ali-Al Mahmoudi, 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 also proposed to be joined with the case against Mr Saif Al-Islam Gaddafi, case 229/2012. It is envisaged by the Investigation Committee that as the crimes are inter-related, it may be more appropriate for the preservation of evidence, for the purpose of ascertaining the truth, and for ensuring just and consistent sentences, for the trials to be heard together before the same court.[193] Although this is the recommendation of the Prosecutor General's Investigative Committee, it will be a matter for the Chambre D'Accusation to make the final determination as to whether the cases will be joined. If the cases are joined, it is likely that a new case number will be assigned to the composite case.

176. As previously indicated,[194] 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 Abdullah Al-Senussi'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 that meet minimum international standards (including television).

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[192] Annex 3.

[193] "Submission on Admissibility 23 January 2013", Annex 11.

[194] "Submission on Admissibility 23 January 2013", para. 100.

177. The Government has taken various steps to ensure the safety and security of witnesses in the case against Abdullah Al-Senussi in preparation for trial proceedings. The principal protective measure at the pre-trial phase stems from the confidentiality of investigations and the associated witness measures pursuant to Article 59 of the Libyan Criminal Procedural Code. In addition to the protective measures concerning non-disclosure of investigative materials under Article 59, 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. Witness protection during the trial stage of the proceedings falls within the discretionary powers of the trial judge under Article 275 of the Libyan Criminal Procedural Code. A criminal trial judge can accept evidence in whatever form he or she deems appropriate. This provides a significant discretion, permitting a trial judge to hear evidence by way of video-link, to preserve witness anonymity (from the public rather than from the accused) by hearing the witness in closed session, or permitting the witness to give their evidence in advance of the court hearing by way of a written statement made to a notary. These kinds of alternative procedures are common in rape cases in Libya in order to prevent victim witnesses from further humiliation. Witnesses can also be granted police protection upon the order of the trial judge.

xi. Abdullah Al-Senussi's health and access to a lawyer

178. Since Abdullah Al-Senussi's extradition to Libya from Mauritania he has received regular medical check-ups to ensure his health.[195] Apart from access to medical care, he has also been visited by independent observers as well as family members. On 4 February 2013, he was visited by four members of the Libyan Observatory for Human Rights.[196] Likewise, Abdullah Al-Senussi's daughter, Unood Al-Senussi, visited on 12 February 2013. In a recent interview by the

[195] See Medical Report contained in "Report of the Registry on the execution of the Order in relation to the request for arrest and surrender of Abdullah Al-Senussi", ICC-01/11-01/11-252-Conf-Annex3, 16 January 2013.

[196] See: http://www.libyaherald.com/2013/02/04/prison-visit-for-al-senussi/

Libya Herald, Abdullah Al-Senussi's daughter, who is in prison on charges relating to a false passport, spoke of the favourable treatment she and Abdullah Al-Senussi were receiving in prison and of her contact with her family.[197] Permission has been granted by the Minister of Justice, Mr Salah Marghani, for Abdullah Al-Senussi to be visited by both the International Committee for the Red Cross and Human Rights Watch.

179. Libya remains keen to facilitate a privileged legal visit to Abdullah Al-Senussi by his lawyer and wishes to conclude a Memorandum of Understanding with the ICC as soon as possible for this purpose. Due to the recent replacement of the Prosecutor-General, there has been some delays caused with respect to finalising this Memorandum. Now that the new Prosecutor-General, Mr Radwan, is in office, this issue will be addressed as a matter of priority.

G. CAPACITY BUILDING AND INTERNATIONAL ASSISTANCE

180. As noted already, there has been a fundamental change in Libya (and particularly within Libya's system of criminal justice) since the United Nations Security Council referred its situation to the ICC on 26 February 2011. Consistent with this transformation, Libya's judiciary, police, prosecution service and members of its legal profession have benefitted from training and other expertise gleaned from an array of international assistance measures. The international support that Libya has welcomed has, in part, focused on the provision of an array of transitional justice measures, including those related to Libya's detention, investigation and prosecution system and will have a positive impact upon the trial of Abdullah Al-Senussi.

181. The relevant UN agencies involved include 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

[197] See: http://www.saudigazette.com.sa/index.cfm?method=home.regcon&contentid=20130304155439

Human Rights, Transitional Justice and Rule of Law Division, established within UNSMIL in 2011. The Director of this Division is also the Representative of the UNHCHR in Libya, and is responsible *inter alia* for transitional justice, prison reform, human rights and judicial capacity building.[198] 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.

182. This assistance has ranged from funding projects to providing expert training and advice on best practices in diverse areas including: building an effective police force, improving security for trials, building capacity within the judiciary and within investigative and prosecutorial teams and enhancing conditions in detention centres.[199] Each area will be summarised briefly.

i. An effective police force

183. The Libyan Government is continuing to receive the assistance of the United Nations in establishing a High Committee for Police Reform and Development (HCPRD). Turkey has also pledged it's to this project. The Committee will arrange training for the Libyan police in international and regional practices, change management and organisational development.[200]

184. The Government is preparing a police reform and development strategy, which it aims to complete in the next few months. This will be based on a thorough assessment of existing capacities and a broad national consultation process. The United Nations has provided technical support for the completion of this document. The European Union, Italy, the United Kingdom and the United

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[198] "Submission on Admissibility 23 January 2013", Annex 19; UN Security Council, Resolution 2040 (2012), UN Doc. S/RES/2040 (2012), adopted by the Security Council at its 6733rd meeting, 12 March 2012, available at: http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/2040%20%282012%29

[199] See for example: "Submission on Admissibility 23 January 2013", Annex 20, p.3; See also: UN Security Council, Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2013/104, 21 February 2013, paras 26-37.

[200] "Submission on Admissibility 23 January 2013", Annex 2, page 16.

States have also pledged their support to the project. This will provide an important blueprint for the reform and restructuring of the police force.

185. A key and urgent priority for the Government is the development of a Critical Response Force in order "to ensure the rule of law, and to deter, prevent, and respond effectively to serious public order and security incidents in the immediate and longer-terms."[201] It is intended that this capability should be built on the existing Operations Department within the Ministry. International support is required to establish this capability, ensuring consistency in training standards, equipment and operational procedures. Italy has pledged its support to this project and it is hoped that the United Nations will continue to assist Libya in coordinating additional international support.[202]

186. The Government is taking steps to enhance the investigative and forensic capability of the Libyan police by utilising the existing offers of international assistance over the next 12-18 months. To date, the European Union, Italy, Turkey, Argentina and the United Kingdom have provided assistance.[203] The United Arab Emirates, France, Italy, Turkey and the United States have also pledged additional assistance.[204]

ii. Security for courts and court participants (including judges, counsel and witnesses)

187. The Government is committed to identifying appropriate measures to provide security personnel to the courts and will establish a coordination mechanism between the MoJ, MoI and MoD to ensure the security of the courts, which could take the form of a committee meeting on regular basis. The Government intends to ensure that sufficient personnel are assigned to court buildings within three

[201] "Submission on Admissibility 23 January 2013", Annex 2, page 17.
[202] "Submission on Admissibility 23 January 2013", Annex 2, page 17.
[203] Example: http://www.libyaherald.com/2013/03/19/lawyers-learn-the-power-of-forensics/; http://www.libyaherald.com/2012/07/17/turkey-starts-training-libyan-police/;
[204] "Submission on Admissibility 23 January 2013", Annex 2, page 19; For example: http://www.libyaherald.com/2013/02/19/turkey-and-libya-draw-closer-over-police-training/; http://www.libyaherald.com/2013/03/28/zeidan-looks-to-uae-for-police-and-security-expertise/; http://www.libyaherald.com/2013/01/31/visiting-uk-pm-agrees-extra-security-help/;

months. To this end, the Government is training thousands of new recruits to fortify the judicial police.[205] The UN has been providing assistance to the Government in this area. [206]

iii. Independence of the Judiciary

188. The Government is committed to bolstering the independence of the judiciary and "views this as an urgent priority in Libya in order to increase public trust in rule of law institutions."[207] This was the driving force behind the change in the composition of the Supreme Judicial Council ("SJC"). The new arrangement sees the SJC composed only of members of the judiciary and chaired by the President of the Supreme Court instead of the Minister of Justice. A review of the code of conduct of Libyan judges in light of the Bangalore Principles has also been carried out with the assistance of the UN and an UN-led workshop has been held for Libyan judges on judicial integrity and accountability. Denmark and the United Nations have also assisted with work on legislative support on the issues of judicial integrity and independence.[208]

iv. Increasing capacity to investigate and prosecute crimes

189. The UN has been providing support to the Libyan Government in the form of support in formulating a prosecutorial strategy and training on screening/criminal investigation for public prosecutors.[209] In addition, UNSMIL support continues to assist Libya in relation to the case involving Abdullah Al-Senussi by providing advice on how to advance conflict-related criminal proceedings. This includes the training of judges and prosecutors, and advising the Ministry of Justice and General-Prosecutor's Office on national strategies for

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[205] "Submission on Admissibility 23 January 2013", Annex 20, p.3 and Annex 3; Libya Herald, "Revolutionaries start training as judicial police", 2 February 2013, available at: http://www.libyaherald.com/2013/02/02/revolutionaries-start-training-as-judicial-police/

[206] "Submission on Admissibility 23 January 2013", Annex 2, page 19.

[207] "Submission on Admissibility 23 January 2013", Annex 2, page 21.

[208] "Submission on Admissibility 23 January 2013", Annex 2, page 21.

[209] "Submission on Admissibility 23 January 2013", Annex 2, page 24; Human Rights Council, "Libya : Update of the Office of the United Nations High Commissioner for Human Rights on cooperation in the field of human rights", 18 March 2013 p.2, available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.CRP.2_Englishonly.pdf

the investigation and prosecution of officials of the Gaddafi regime for serious conflict-related crimes.

190. 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.[210]

v. Detention centres

191. It is a fact that violations of human rights were committed in detention centres in 2012.[211] The new Minister of Justice has "unequivocally condemned" such practices and is taking urgent steps to immediately end such practices in all detention centres (whether under government control or not) by training judicial police, security forces, rebels and other armed groups on human rights.[212] The Libyan Ministry of Justice is also working to bring all detention centres under the full control of the judicial police as soon as possible. By May 2013 it intends to take control of all detainees in Misrata through a special arrangement that involves the creation of a new correction facility at the Aviation Academy, which

[210] "Submission on Admissibility 23 January 2013", Annex 20, para 30.
[211] "Prosecution response to Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute", ICC-01/11-01/11-167-Red, 5 June 2012, para 22.
[212] "Submission on Admissibility 23 January 2013", Annex 3, page 1.

will be under the full control of the military police. It is intended that the model of Misrata will be applied to all other areas. [213]

192. 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.[214] 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,[215] and processing of cases in accordance with the law.[216]

193. 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 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.[217]

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[213] "Submission on Admissibility 23 January 2013", Annex 3, page 1.
[214] UN Security Council, Resolution 2095 (2013), UN Doc. S/RES/2095 (2013), adopted by the Security Council at its 6934rd meeting, 14 March 2013, p.1 available at: http://unsmil.unmissions.org/Portals/unsmil/Documents/UNSMIL_UNSCR%202095_En.pdf
[215] Annex 29 - Public: "Special Representative of the Secretary-General and Head of UNSMIL, Tarek Mitri, Security Council Briefing", 14 March 2013.
[216] "Submission on Admissibility 23 January 2013", Annex 20, p.3.
[217] "Submission on Admissibility 23 January 2013", Annex 20, p.3.

PART IV: FULFILMENT OF THE ARTICLE 17 CRITERIA

194. It is submitted that the evidence adduced by the Government is amply sufficient to render the case inadmissible pursuant to Article 17. The evidence shows that the case is being duly and fully investigated by the State. The evidence is sufficient to prove that Libya is willing and able to carry out the investigation; and that Libya is the most appropriate forum for ensuring accountability for Abdullah Al-Senussi's alleged violations of international law. Alternatively, the Libyan Government invites the Court to consider implementing a positive approach to complementarity by declaring the case inadmissible subject to the fulfilment of express conditions or other ongoing obligations.

195. Unwillingness pursuant to Article 17(2)(a) must be directed towards the sole objective of shielding the person from accountability. The Libyan government has no reason to protect Abdullah Al-Senussi from investigation or prosecution. The investigation-conducted to-date, in difficult circumstances, is illustrative of the falsity of this (counterintuitive) proposition that has no basis in logic or fact.

196. As the evidence annexed to this Admissibility Challenge demonstrates, with regard to "inability" under Article 17(3) of the Statute, Libya is clearly "able to obtain the accused or the necessary evidence and testimony". Abdullah Al-Senussi is in safe and secure government-controlled custody in Libya. The necessary evidence and testimony is available and accessible in Libya, and is being collected pursuant to the investigations being conducted in accordance with law by the Prosecutor General and his team. The evidence and testimony forming the basis of the Court's arrest warrant is largely based on the product of cooperation with the Libyan Government and its associates. Such cooperation with the Libyan Government has been a significant factor in the ability of the ICC Prosecutor to request arrest warrants with unprecedented expedition in May 2011.[218] A comprehensive domestic investigation will be concluded in due course, if time is permitted.

[218] "Second Report of the Prosecutor", paras 38-39.

197. Clearly, Libya is able to carry out national proceedings within the meaning of Article 17(3) of the Statute. As noted above, the question of "inability" in the Libyan context and the Court's admissibility decision will have far-reaching consequences. In the vast majority of situations, States emerging from mass atrocities will not possess a sophisticated or functional judicial system. Indeed, the purpose of transitional justice is to provide an opportunity for post-conflict judicial capacity building in the broader context of national reconciliation and democratization. Where a national judicial system is clearly able to carry out investigations and prosecutions, and could strengthen such capacity with international cooperation and assistance, it would be manifestly at variance with the principle of complementarity to deny the State the opportunity to do so.

198. Respect for the ICC Statute and State sovereignty in this instance is not deference to a mere abstraction. The UN Secretary-General has "emphasized the need for the international community to approach Libya with full respect for the importance of Libyan ownership and for its own capabilities."[219] In upholding the principle of complementarity under the Rome Statute, this Court should do no less and recognize the "importance of Libyan ownership" by declaring this case inadmissible without any preconditions.

A. RELEVANCE OF POSITIVE COMPLEMENTARITY

199. In the event that the Court considers that the circumstances dictate, Libya invites the Court to embrace the concept of positive complementarity in a manner which gives full effect to the object and purpose of the Statute and the spirit of complementarity by allowing the Libyan Government time to complete its domestic proceedings relating to Abdullah Al-Senussi subject to monitoring and the acceptance of assistance or the fulfilment of other express initiatives and obligations.

200. As such, the Libyan Government invites the Court to declare the case

[219] "Report of the Secretary-General, 22 November 2011", para. 63.

inadmissible subject to the fulfilment of express conditions or other ongoing obligations. It is submitted that this case provides a unique opportunity to embrace the concept of positive complementarity in a manner which gives full effect to the object and purpose of the Statute and the spirit of complementarity by allowing the Libyan Government time to complete its domestic proceedings relating to Abdullah Al-Senussi subject to monitoring and the acceptance of assistance or the fulfilment of other express initiatives and obligations.

201. There is no explicit reference to this concept in the Statute, nor was it canvassed during the negotiations on complementarity, which instead focussed on developing acceptable ways to regulate jurisdictional disputes between the ICC and active national jurisdictions. However, the Statute foreshadows the formal implementation of positive complementarity initiatives by reason of its powers to regulate the admissibility proceedings as it deems appropriate pursuant to rule 58(2), providing that this does not occasion "undue delay". In addition, article 93(10) of the Statute permits a level of cooperation between the ICC and national courts by providing that the court may cooperate with, and provide assistance to, a State Party that is investigating or trying a crime within the jurisdiction of the Court.

202. The formal implementation of positive complementarity initiatives would enhance the certainty of any final disposition of the article 19 challenge. According to article 19(10), when the Court has decided that a case is inadmissible, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17. The implementation of a supervisory scheme would provide the Prosecutor with an in-depth, contemporaneous understanding of the progress of Libya's investigation and prosecution of Abdullah Al-Senussi, enhancing the reliability and expeditiousness of any subsequent review proceedings pursuant to Article 19(10). This flexibility is not accorded to the challenging State following a finding

of admissibility. Rather, the State would have to satisfy the court that there are "exceptional circumstances" justifying a further opportunity to challenge the admissibility of the case.

203. The OTP has previously indicated its preparedness to be involved in monitoring Libya's domestic proceedings. For instance, in the course of the admissibility hearing in the *Gaddafi* case, the OTP was asked to elaborate upon its written submissions regarding the possibility of monitoring domestic proceedings.[220] The legal representative for the OTP noted the following:

> *"Of course, it will be necessary if a case is found to be inadmissible before the Court and if there are national proceedings, obviously, it will be necessary to continue a monitoring role in relation to those proceedings, both to see that they proceed in the manner anticipated and to continue to assess issues of genuineness. The question I think your Honours are asking is: Who will do the monitoring? The Office of the Prosecutor has some capacity to examine national proceedings and we do some of that from the seat of the Court in The Hague, but of course the OTP may not be in a position to permanently monitor proceedings in court every day, and the situation may be compared perhaps with the Yugoslavia and Rwanda tribunals in their 11 bis proceedings, whereas your Honours know the Court had requested the Prosecutor to enter into arrangements with other organisations. In the case of the Former Yugoslavia, it was the OSCE, and the case of the Rwanda tribunal, I believe it was the African Union, but I may be mistaken on that front. So the issue we would believe would be also open for this Court to consider, with submissions from the parties and participants, to consider, should that eventuality arise, who would be most appropriately placed to monitor. And, finally, the only reason that we have mentioned this is because of course, under Article 19, paragraph 11 and paragraph 10, there is this procedure for saying of course that the Prosecutor could request for the Chamber to reconsider a decision in relation to admissibility based upon new facts arising that would negate the basis for the original decision, and on that basis*

[220] "Prosecution response to Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute", ICC-01/11-01/11-167-Red, 05 June 2012, para 22.

the Chamber may decide to recall the case to the Court."[221]

204. The OTP's preparedness to conduct such monitoring was reiterated by the Prosecutor in the course of her latest briefing to the Security Council regarding the situation in Libya and, specifically, Mr Gaddafi's admissibility challenge. She noted that:

> *"Pursuant to its stated policy, my Office promotes and encourages genuine national proceedings to combat impunity for the most serious crimes of international concern. We await rulings of the Court on Libya's challenge. Should the challenge ultimately succeed, my Office will monitor those proceedings and cooperate with Libya, to the extent my mandate allows."*[222]

205. Accordingly, in the event that the Court is not presently minded to declare the case inadmissible unconditionally, Libya invites the Chamber to embrace the concept of positive complementarity and to instead declare the case inadmissible on a temporary basis subject to ongoing monitoring and reporting on the progress of the trial by both the OTP and the Libyan Government.

B. CONCLUSION

206. For the reasons set out above, the Libyan Government exercises its right to postpone the order for surrender of Abdullah Al-Senussi, pursuant to article 95 of the Statute, pending a determination of the Government's Article 19 admissibility challenge in relation to Abdullah Al-Senussi. Furthermore, with respect to the admissibility challenge under Article 19, the Libyan Government requests the Chamber to: (a) declare the case relating to Abdullah Al-Senussi inadmissible; and (b) quash the Surrender Request pertaining to Abdullah Al-Senussi.

Respectfully submitted:

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[221] "Transcript of Gaddafi Admissibility Hearing (Open Session)", ICC-01/11-01/11-T-2-CONF-ENG, 09 October 2012, page 62 at lines -24 and page 63 lines 1-6.

[222] **"**ICC Prosecutor Statement to the United Nations Security Council on the situation in the Libya Arab Jamahiriya , pursuant to UNSCR 1970 (2011)", 07 November 2012, para 6.

Professor Ahmed El-Gehani

Professor James Crawford SC

Mr Wayne Jordash

Ms Michelle Butler

Libyan ICC Coordinator and

Counsel on behalf of the Government of Libya

in the case of Abdullah Al-Senussi

Dated this 2nd day of April 2013

At London, United Kingdom

LIST OF ANNEXES (PUBLIC)

Annex 1 - Confidential: Letter from [REDACTED] to the Attorney General in Benghazi, dated 09/06/2012, submitting an investigation file containing complaints from 2011 – 2012;

Annex 2 - Confidential: Letter from the Prosecutor ([REDACTED]) and his Deputy ([REDACTED]), with regard to information surrounding the investigation, Ref 2013-343 T-L;

Annex 3 - Confidential: Letter from the Prosecutor ([REDACTED]) and his Deputy ([REDACTED]), with regard to dates of the investigation, Ref 2013-244 T-L;

Annex 4 - Confidential: Letter from the Prosecutor ([REDACTED]) and his Deputy ([REDACTED]), detailing transcription of audio and visual tapes, Ref 2013-245 T-L and Item 438;

Annex 5 - Confidential: Letter from the Prosecutor ([REDACTED]) and his Deputy ([REDACTED]), detailing the composition of the investigation committee, Ref 2013-240 T-L;

Annex 6 - Confidential: Letter from the Prosecutor ([REDACTED]) and his Deputy ([REDACTED]), detailing jurisdiction, Ref 2013-246 T-L;

Annex 7 - Confidential: Statement from the Office of the Attorney General in Ben-Ghazi. Decision dated 01/05/2011: on the formation of an Inquiry Commission to "investigate the events and crimes done by Gaddafi battalions and completing the criminal proceedings previously conducted by the Prosecution on 18 February 2011";

Annex 8 – Confidential: Witness Interview of [REDACTED];

Annex 9 - Confidential: Witness Interview of [REDACTED];

Annex 10 - Confidential: Witness Interview of [REDACTED];

Annex 11 - Confidential: Witness Interview of [REDACTED];

Annex 12 - Confidential: Witness Interview of [REDACTED];

Annex 13 - Confidential: Excerpts from lists indicating trips from Libya to [REDACTED] to obtain medical services between 31/03/11 – 29/04/2011;

Annex 14 - Confidential: Witness Interview of [REDACTED];

Annex 15 - Confidential: Witness Interview of [REDACTED];

Annex 16 - Confidential: Witness Interview of [REDACTED];

Annex 17 - Confidential: Witness Interview of [REDACTED];

Annex 18 – Confidential: Report from the director of Judicial Expertise and Research Centre, Benghazi regarding medical reports pertaining to [REDACTED];

Annex 19 - Confidential: Samples of Military Requests from Al-Senussi [REDACTED], to [REDACTED]), dated between 1/6/2011 and 20/07/11;

Annex 20 - Confidential: Witness Interview of [REDACTED];

Annex 21 - Confidential: Witness Interview of [REDACTED];

Annex 22 - Confidential: Witness Interview of [REDACTED];

Annex 23 - Confidential: Witness Interviews of [REDACTED];

Annex 24 - Confidential: Witness Interview of [REDACTED];

Annex 25 - Confidential: Array of medical reports from Benghazi Health Centre;

Annex 26 - Confidential: Witness Interview of [REDACTED];

Annex 27 - Confidential: Death Certificate of [REDACTED] (issued by General Directorate for Passports and Citizenship, Benghazi) relating to gun death on 20th February 2011;

Annex 28 - Confidential: Letter from Chancellor, [REDACTED], President of the Supreme Court of Libya, Chairman of the Supreme Council of Judiciary, dated 12 February 2013;

Annex 29 - Public: Special Representative of the Secretary-General and Head of UNSMIL, Tarek Mitri, Security Council Briefing, 14 March 2013;

Annex 30 – Public: List of Authorities.