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Date: **17 June 2013**

PRE-TRIAL CHAMBER I

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

SITUATION IN LIBYA

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

Public Redacted version

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

Source: **Office of Public Counsel for Victims**

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

The Office of the Prosecutor
Ms Fatou Bensouda
Mr James Stewart

Counsel for Abdullah Al-Senussi
Mr Benedict Emmerson QC
Mr Rodney Dixon
Ms Amal Alamuddin
Mr Anthony Kelly
Professor William Schabas

Counsel for Saif Al-Islam Gaddafi
Mr John R.W.D. Jones QC

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims
Ms Paolina Massidda
Ms Sarah Pellet
Mr Mohamed Abdou

The Office of Public Counsel for the Defence

States Representative
Professor Ahmed El-Gehani
Professor James Crawford SC
Mr Wayne Jordash
Ms Michelle Butler

Amicus Curiae

REGISTRY

Registrar & Deputy Registrar
Mr Herman von Hebel & Mr Didier Preira

Defence Support Section

Detention Section

Victims and Witnesses Unit

Victims Participation and Reparations Section

Other
U.N. Security Council

I. PROCEDURAL HISTORY

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

2. On 1 May 2012, the Government of Libya filed an Application pursuant to article 19 of the Rome Statute, requesting the Chamber to: (i) postpone the execution of the request for surrender of Mr Gaddafi pursuant to article 95 of the Rome Statute; (ii) declare the case against him inadmissible and consequently quash the request for surrender (the "Gaddafi Admissibility Challenge").[2]

3. On 4 May 2012, the Chamber issued the "Decision on the Conduct of the Proceedings Following the 'Application on behalf of the Government of Libya pursuant to Article 19 of the Statute'" whereby it decided, *inter alia*, to appoint, for the purpose of the admissibility proceedings, the Principal Counsel of the Office of Public Counsel for Victims (the "OPCV" or the "Office") as legal representative of victims having communicated with the Court in relation to the case. [3] The Chamber specified that Libya's submissions "only concern the case against Mr Gaddafi".[4]

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[1] See the "Decision on the 'Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi'" (Pre-Trial Chamber I), No. ICC-01/11-01/11-1, 27 June 2011.
[2] See the "Application on behalf of the Government of Libya pursuant to Article 19 of the Statute", No. ICC-01/11-01/11-130-Red, 1 May 2012.
[3] See the "Decision on the Conduct of the Proceedings Following the 'Application on behalf of the Government of Libya pursuant to Article 19 of the Statute'" (Pre-Trial Chamber I), No. ICC-01/11-01/11-134, 4 May 2012, par. 13.
[4] *Idem,* par. 8.

4. On 10 December 2012, the Chamber issued the "Corrigendum to the Order in relation to the request for arrest and surrender of Abdullah Al-Senussi", instructing the Registrar to, *inter alia*, "*reiterate to the Libyan authorities the request for arrest and surrender of Al-Senussi and remind them of their obligation to comply with the request*".[5]

5. On 18 January 2013, the Chamber requested the Libyan Government to provide observations on the way Libya intends to fulfil its obligations to cooperate with the Court in relation to the arrest and surrender of Mr Al-Senussi, and especially its duty to comply with the request for surrender.[6]

6. On 28 January, Libya filed the "Libyan Government's Observations regarding the case of Abdullah Al-Senussi" stating that in the Gaddafi Admissibility Challenge it had also expressed its intention to challenge the admissibility of the case against Mr Al-Senussi and that it would submit further supplemental evidence in this regard.[7]

7. On 6 February 2013, the Chamber found that Libya's obligation to surrender Mr Al-Senussi to the Court stood fully and was not subject to any suspension under article 95 of the Rome Statute because Libya had not challenged the admissibility of the case with respect to him. On 25 February 2013, the Chamber rejected Libya's application for leave to appeal this decision.[8]

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[5] See the "Order in relation to the request for arrest and surrender of Abdullah Al-Senussi" (Pre-Trial Chamber I), No. ICC-01/11-01/11-241-Corr, 10 December 2012.
[6] See the "Decision requesting Libya to provide observations concerning the Court's request for arrest and surrender of Abdullah Al-Senussi" (Pre-Trial Chamber I), No. ICC-01/11-01/11-254, 18 January 2013.
[7] See the "Libyan Government's Observations regarding the case of Abdullah Al-Senussi", No. ICC-01/11-01/11-260, 28 January 2013.
[8] See the "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"'" (Pre-Trial Chamber I), No. ICC-01/11-01/11-287, 25 February 2013.

8. On 2 April 2013, Libya filed its Application relating to Abdullah Al-Senussi pursuant to article 19 of the Rome Statute (the "Al-Senussi Admissibility Challenge").[9] Libya requested the Court to declare the case against Mr Al-Senussi inadmissible and to postpone the execution of the request for surrender pending the determination of the admissibility challenge pursuant to article 95 of the Rome Statute. On 5 April 2013, Libya filed the relevant legislation referred to in its application.[10]

9. On 26 April 2013, the Chamber issued the "Decision on the conduct of the proceedings following the 'Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute'",[11] in which it decided, *inter alia*, (1) to appoint for the purposes of the proceedings following the Admissibility Challenge, the Principal Counsel of the OPCV as legal representative of victims who have communicated with the Court in relation to the case; (2) to invite the Defence for Mr Al-Senussi, the OPCV and the Security Council to submit observations on the Admissibility Challenge, if any, no later than Friday, 14 June 2013.[12]

10. On the same day, the Defence for Mr Al-Senussi filed its "Request for Access to All Confidential Filings, Decisions and Documents in Case ICC-01/11-01/11 prior to the Appointment of Counsel for Mr. Al-Senussi", wherein it requested to

[9] See the "Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute", No. ICC-01/11-01/11-307- Red2, 4 April 2013.
[10] See the "Libyan Government's Filing of Libyan Laws referred to in its Admissibility Challenge pertaining to Abdullah Al-Senussi filed on 2 April 2013", No. ICC-01/11-01/11-309, 5 April 2013 (notified on 8 April 2013).
[11] See the "Decision on the conduct of the proceedings following the 'Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute'" (Pre-Trial Chamber I), No. ICC-01/11-01/11-325, 26 April 2013.
[12] *Idem*, p. 7.

be granted access to all confidential materials filed in the record of the case prior to 9 January 2013.[13]

11. On 2 May 2013, the Office of the Prosecutor filed its Response to the "Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute".[14]

12. Following a decision by the Chamber[15], on 20 May 2013, the Libyan Government filed its reply to the "Response on behalf of Abdullah Al-Senussi to the Submission of the Government of Libya for Postponement of the Sur render Request for Mr. Al-Senussi"[16].

13. On 27 May 2013, the Chamber issued the "Decision on the request of Abdullah Al-Senussi for access to all confidential filings in the record of the case", granting said request[17].

14. On 31 May 2013, the Chamber rendered its "Decision on the admissibility of the case against Saif Al-Islam Gaddafi" (the "Gaddafi Admissibility Ruling"),[18] declaring the case against Mr Gaddafi admissible.

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[13] See the "Defence Request on behalf of Abdullah Al-Senussi for Access to All Confidential Filings, Decisions and Documents in Case ICC-01/11-01/11 prior to the Appointment of Counsel for Mr. Al-Senussi", No. ICC-01/11-01/11-322, 26 April 2013.

[14] See the "Prosecution's Response to 'Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute'", No. ICC-01/11-01/11-321-Red, 2 May 2013.

[15] See the "Decision on Libya's application for leave to reply to the Defence of Abdullah Al-Senussi, (Pre-Trial Chamber I), No. ICC-01/11-01/11-335, 10 May 2013.

[16] See the "Response on behalf of Abdullah Al-Senussi to the Submission of the Government of Libya for Postponement of the Surrender Requestor Mr. Al-Senussi", No. ICC-01/11-01/11-339, 20 May 2013. See also the "Libyan Government's application for leave to reply to the "Response on behalf of Abdullah Al-Senussi to the Submission of the Government of Libya for Postponement of the Surrender Request for Mr. Al-Senussi", No. ICC-01/11-01/11-330, 6 May 2013.

[17] See the "Decision on the request of Abdullah Al-Senussi for access to all confidential filings in the record of the case" (Pre-Trial Chamber I), No. ICC-01/11-01/11-342, 27 May 2013.

[18] See the "Decision on the admissibility of the case against Saif Al-Islam Gaddafi" (Pre-Trial Chamber I), No. ICC-01/11-01/11-344-Red, 31 May 2013.

15. On 7 June 2013, the Office of the Prosecutor filed a "Request for Leave to Present Additional Observations to the 'Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute'" on (1) the interpretation of "case" and "conduct" and (2) Libya's ability genuinely to carry out the investigation or prosecution of the case against Al-Senussi.[19]

16. On 11 June 2013, the Chamber issued its "Decision on the Prosecutor's request for leave to present additional observations on Libya's challenge to the admissibility of the case against Abdullah Al-Senussi", granting the filing of additional observations no later than 14 June 2013[20].

17. In accordance with the decision of the Pre-Trial Chamber dated 26 April 2013[21], the Principal Counsel of the Office hereby files her submissions on behalf of victims having communicated with the Court in relation to the case.

18. In accordance with regulation 23*bis*(2) of the Regulations of the Court, the present submission is filed "Confidential" following the original classification chosen by the Libyan Government and because it contains information which refers to documents classified confidential by the Libyan Government. A public redacted version will be filed as soon as practicable.

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[19] See the "Prosecution's Request for Leave to Present Additional Observations to the 'Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute'", No. ICC-01/11-01/11-349, 7 June 2013.

[20] See the "Decision on the Prosecutor's request for leave to present additional observations on Libya's challenge to the admissibility of the case against Abdullah Al-Senussi", (Pre-Trial Chamber I), No. ICC-01/11-01/11-351, 11 June 2013.

[21] See the "Decision on the conduct of the proceedings following the 'Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute'", *supra* note 11, par. 13 and p. 7.

II. SUBMISSIONS

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

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

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

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

21. Accordingly, there exists a precondition for the applicability of articles 17(1) and 19(2) of the Rome Statute, namely the existence of "*ongoing investigations or prosecutions*" at the national level. The term "investigation" has been interpreted as "*the taking of steps directed at ascertaining whether this individual is responsible for that conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses*".[22] The Appeals Chamber also clarified the required breadth of such national investigations: they must cover the "same case", namely the same individual and substantially the same conduct as alleged in the proceedings before the Court.[23] The evidence provided by a State in support of an admissibility challenge must be of a "*sufficient degree of specificity and probative value*" to demonstrates that it is indeed investigating the same case.[24]

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[22] See the "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'" (Appeals Chamber), No. ICC-01/09-01/11-307 OA, 30 August 2011, par. 1 (the "Ruto Admissibility Judgment") and the "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'" (Appeals Chamber), No. ICC-01/09-02/11-274 OA, 30 August 2011, par. 1 (the "Muthaura Admissibility Judgement").

[23] See the Ruto Admissibility Judgement, *supra* note 22, para. 37 *et seq.*

[24] *Idem,* par. 2.

22. As ruled by the Appeals Chamber, when "*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 in the 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.*"[25]

23. The admissibility test is therefore two-folded: first, the existence of domestic proceedings covering the "same case" under consideration before the Court has to be demonstrated[26]; second, there must be an evaluation of the willingness and ability of the State claiming to have jurisdiction over the case to genuinely investigate and prosecute.

24. The submission will, first, address the legal aspects of the two components of the admissibility test; and it will then examine whether Libya has provided evidence with sufficient degree of specificity and probative value to support its claim (i) that its national investigation covers the same case under consideration before the Court; and (ii) it is willing and able to genuinely investigate and prosecute Mr Al-Senussi.

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[25] See the "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" (Appeals Chamber), No. ICC-01/04-01/07-1497 OA8, 25 September 2009, par. 78. See also the Gaddafi Admissibility Ruling, *supra* note 18, par. 58.

[26] See the Ruto Admissibility Judgment, *supra* note 22, par. 1 and the Muthaura Admissibility Judgment, *supra* note 22, par. 1. See also the "Decision on the evidence and information provided by the Prosecution for the issuance of a warrant for arrest for Mathieu Ngudjolo Chui" (Pre-Trial Chamber I), No. ICC-01/04-02/07-3 and No. ICC-01/04-01/07-262, 6 July 2007, par. 21 ("*it is a* conditio sine qua non *for such finding that national proceedings encompass both the person and the conduct which is the subject of the case before the Court*"); the "Decision on the Prosecution Application under Article 58(7) of the Statute" (Pre-Trial Chamber I), No. ICC-02/05-01/07-1-Corr, 15 May 2007, par. 24 and the "Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo" (Pre-Trial Chamber I), No. ICC-01/04-01/06-8-Corr, 24 February 2006, par. 31.

1. The legal criteria to assess the existence of domestic proceedings covering the aspects of the "same case" under consideration before the Court

25. The interpretation of the term "case" within the meaning of article 17(1)(a) of the Rome Statute is at stake in the present case; and namely whether said term can be understood as not requiring an identity of conduct between the case being allegedly investigated at the domestic level and the one pending before the Court. Such an inquiry requires, first, the identification of the parameters of the Court's case and, second, the consideration of the degree of identity that is required for a case to be declared inadmissible before the Court. Such an assessment must be conducted in accordance with the "*substantially the same conduct*" test articulated by the Appeals Chamber.[27]

26. In this regard, Pre-Trial Chamber I has clarified, in its recent ruling on the Gaddafi Admissibility Challenge, that "*the case within the meaning of article 17 of the Statute is characterised by two components: the person and the conduct*."[28]

27. In the Al-Senussi Admissibility Challenge, Libya requests the Chamber to adopt a "*purposive*" and "*flexible*" interpretation of the definition of a "case" when ruling on the first stage of the admissibility assessment.[29] Such an interpretation, if adopted, would enable a State to successfully challenge the admissibility of a case before the Court by merely establishing that it is "*investigating similar and / or related incidents which arise out of substantially the same course of conduct*".[30] In the Government's view, this interpretation of the same conduct is most consistent with the object and purpose of the Rome Statute and would give full effect to the principle of complementarity that is at the core of the Rome Statute.[31]

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[27] See Ruto Admissibility Judgment, *supra* note 22, par. 1 and Muthaura Admissibility Judgment, *supra* note 22, par. 1.
[28] See the Gaddafi Admissibility Ruling, *supra* note 18, par. 61.
[29] See the Al-Senussi Admissibility Challenge, *supra* note 9, par. 80.
[30] *Idem*, par. 60.
[31] *Ibidem*, paras. 3 and 60.

28. The Principal Counsel submits that the Chamber should reject the approach advanced by Libya regarding the parameters of the case since it contains serious conceptual flaws, which have the effect of blurring the boundaries between the basic notions of "situation" and "case", while failing to take into account the well-settled jurisprudence of the Court on the issue.

29. In particular, the Principal Counsel contests Libya's assertions regarding the lack of clarity in relation to the parameters of a "case" before the Court.[32] The Principal Counsel submits that the admissibility test, as set out in articles 17 and 19 of the Rome Statute, cannot be interpreted and applied in isolation from other legal provision of the said text and of the existing jurisprudence. In other words, the identification of the parameters of the "case" should not be considered solely in light of the practice of the Court related to admissibility challenges. Indeed, a "case" is not a relative concept. Its scope cannot be dependent on the nature of the proceedings at hand, or on the status of the parties and participants involved. A careful review of the Court's jurisprudence shows that Chambers have thus far embraced a unitary and consistent approach to the notion of "case". In the context of Court's proceedings, and not only in relation to admissibility proceedings, Chambers have clarified that the term "case" must be interpreted as referring to specific factual incidents and circumstances.[33]

30. The Principal Counsel further contests Libya's assertions regarding the lack of clarity in relation to the parameters of the "same conduct" in the context of the

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[32] *Ibid.*

[33] See, *inter alia*, the "Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court'" (Appeals Chamber), No. ICC-01/04-01/06-2205 OA 15 OA 16, 8 August 2009, paras. 91 *et seq.* See the "Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (Pre-Trial Chamber I), No. ICC-01/04-101-tEN-Corr, 17 January 2006, para. 65; the "Decision on Victims' Participation at the Hearing on the Confirmation of the Charges" (Pre-Trial Chamber I), No.ICC-02/05-03/09-89, 29 October 2010, paras. 21-22 and the "Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008" (Appeals Chamber), 11 July 2008, No. ICC-01/04-01/06-1432 OA9 OA10, par. 63.

admissibility proceedings.[34] As noted above, Chambers have adopted a consistent and unitary interpretation of the term "case", the parameters of which have been defined as the specific factual allegations supporting each of the legal elements of the crimes alleged.[35] This approach is to be applied *mutatis mutandis* in respect of proceedings under article 19 of the Rome Statute. Indeed, Libya's contention in this respect falls short from the strict approach to the concept of "case" that was expressly endorsed in the Kenyan admissibility challenges. In this regard, the Appeals Chamber emphasized the requirement for specificity and preciseness in the following terms:

> *"The meaning of the words 'case is being investigated' in article 17(1)(a) of the Statute must therefore be understood in the context to which it is applied. For the purpose of proceedings relating to the initiation of an investigation into a situation (articles 15 and 53(1) of the Statute), the contours of the likely cases will often be relatively vague because the investigations of the Prosecutor are at their initial stages. The same is true for preliminary admissibility challenges under article 18 of the Statute. Often, no individual suspects will have been identified at this stage, nor will the exact conduct nor its legal classification be clear.* […]
> *In contrast, article 19 of the Statute relates to the admissibility of concrete cases. The cases are defined by the warrant of arrest or summons to appear issued under article 58, or the charges brought by the Prosecutor and confirmed by the Pre-Trial Chamber under article 61".*[36]

31. Moreover, assuming that the interpretation put forward by Libya is adopted only in relation to admissibility challenges brought by States under article 17 and 19 of the Rome Statute, while applying other standards in respect of other proceedings, including presumably to admissibility challenges made by other parties, this would constitute an unjustified difference in treatment between the

[34] See the Al-Senussi Admissibility Challenge, *supra* note 9, par. 66.
[35] See *supra* note 33.
[36] See the Ruto Admissibility Judgment, *supra* note 22, paras. 38-39 and the Muthaura Admissibility Judgment, *supra* note 22, paras. 38-39.

parties and participants in the proceedings, thereby introducing arbitrariness in defining the parameters of cases before the Court.

32. A commentator pointed out that the *"issues underlying the discussions on* ne bis in idem *were similar to those in the debate of the principle of the complementarity principle*".[37] Article 20 of the Rome Statute, together with the provisions of the Statute dealing with the complementarity principle, were negotiated and approved at the Rome Conference as part of the same "package".[38] There is therefore a compelling reason to conclude that the intent of the drafters was to apply the same criteria for both articles 17 and 20 of the Rome Statute, which includes the definition of the term "conduct". Pursuant to article 20(1) of the Rome Statute, the term conduct is defined as what "*formed the basis of the crimes for which the person has been convicted or acquitted by the Court*". Moreover, it appears that the addition of the terms "*with respect to the same conduct*" in the *chapeau* of article 20(3) of the Rome Statute, was entailed by the need to "*clarify that the Court could try someone even if the person had been tried in a national court provided that different conduct was the subject of the prosecution*".[39]

33. Furthermore, and as pointed out by the Prosecutor,[40] the narrow interpretation of the term "case" finds support in the discussions concerning the referral of situations to the Court and the initiation of investigations by the Prosecutor *proprio motu*. Indeed, delegates opted for the broadest notion of "situation" as opposed to the "case" in order to give the Prosecutor the discretion to determine the individuals allegedly criminally responsible and the modes of

[37] See Holmes (J.T.), "The Principle of Complementarity" in Lee (R.L.) (Ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer, 1999, p. 57.
[38] *Idem*, p. 58.
[39] *Ibidem*, p. 59.
[40] See the "Prosecution's Response to 'Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute'", *supra* note 14, par. 45 *et seq.*

liability through the identification of specific cases for investigation and prosecution.[41]

34. The "same conduct" approach is consistent with the Appeals Chamber's ruling in the *Muthaura et al.* and *Ruto et al.* cases. In those two cases, the Appeals Chamber was called upon to rule on the correctness of the Pre-Trial Chamber's finding that the national jurisdiction must be investigating *"the same conduct as in the case already before the Court*".[42] The Appeals Chamber held that the Pre-Trial Chamber committed no error of law in applying the "same conduct" test in the manner it did.[43] In doing so, the Appeals Chamber upheld the Pre-Trial Chamber's strict approach of "exactly" the same conduct. Accordingly, the Pre-Trial Chamber ought to adopt a strict approach requiring the State to establish that its domestic investigations cover the same events as in the case before the Court. Ruling differently and hence lowering the admissibility threshold to the level suggested by the Libyan Government would manifestly amount to an error of law.

35. Moreover, the interpretation proposed by the Libyan Government enables a State to bar the Court from exercising jurisdiction over a case simply by investigating any related and/or similar incident(s) as long as it falls within the situation. The Principal Counsel contends that such an interpretation defeats the object and purpose of the Rome Statute. Whereas it is true that complementarity is based on the premise that "*States have the primary responsibility to exercise criminal jurisdiction*", this is only one of the several aspects of complementarity as enshrined in the Rome Statute. A more comprehensive definition of complementarity was provided by the Appeals Chamber in the *Katanga and Ngudjolo Chui* case and reads as follows:

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[41] *Idem.*
[42] See the Ruto Admissibility Judgment, *supra* note 22, par. 27 and the Muthaura Admissibility Judgment, *supra* note 22, par. 26.
[43] *Idem*, respectively at par. 47 and 48.

> "[Complementarity] *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'*".[44]

36. As indicated by the Appeals Chamber, any interpretation of article 17 of the Rome Statute must be consistent with the Statute's main purpose, namely to put an end to impunity.[45] Allowing a State to bar the Court from exercising its jurisdiction, simply on the basis that it is investigating "similar" or "related" aspects of the case would imply that the actual conduct under consideration by the Court might go unpunished. Such an approach is therefore inconsistent with the object and purpose of the Rome Statute, as defined by the Appeals Chamber.

37. Furthermore, this approach would give full effect to the underlying *rationale* of the admissibility test. As it was recalled by the Appeals Chamber, the complementarity is to be construed as a mean "*to resolve a conflict of jurisdictions between the Court on the one hand and a national jurisdiction on the other*".[46] This position also finds support in the express language of articles 89(4) and 94 of the Rome Statute, which address the situation where a State is conducting an investigation into a different conduct with respect to the same person. This also demonstrates the incorrectness of the Libyan Government's assertion according to which the Court may become "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."[47]

38. The Principal Counsel agrees with, and fully endorses the submissions made by the Prosecutor regarding the proper interpretation of the "*substantially the same*

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[44] See the "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", *supra* note 25, par. 85.
[45] *Idem*, par. 83.
[46] See the Ruto Admissibility Judgment, *supra* note 22, par. 37 and the Muthaura Admissibility Judgment, *supra* note 22, par. 36.
[47] See the Al-Senussi Admissibility Challenge, *supra* note 9, par. 64.

conduct" test articulated by the Appeals Chamber.[48] The Principal Counsel's position therefore remains that the strict "same person/same conduct" test is the most appropriate standard, and that the introduction of the word "substantially" should be understood as a clarification to the same test, not the introduction of a different test.[49] In the view of the Principal Counsel the term "substantially" may also be understood as imposing on the challenging State to investigate the overwhelming majority of incidents referred to in the case before the Court.

2. Willingness or ability to genuinely investigate and prosecute

A. Libya must establish both its willingness and ability to carry out genuine national proceedings

39. Libya's argues that, with respect to admissibility challenges, the burden of proof lies with the challenging State only in so far as it relates to establishing the existence of an investigation with respect to the "same case" at the national level.[50] As for the second limb of article 17(1)(a) of the Rome Statute (*i.e.* unwillingness or inability), Libya asserts that the burden of proof rests with the party alleging flaws in the national investigation or prosecution.[51]

40. In fact, this position is based upon the false premise that the existence of a national investigation is *per se* sufficient to render a case inadmissible before the Court. This statement directly contradicts the jurisprudence of the Appeals Chamber, which requires consideration of both elements of article 17(1)(a) of the Rome Statute (*i.e.* the existence of the investigation and the willingness/ability element) before declaring a case inadmissible.[52]

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[48] See the "Prosecution's Response to 'Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute'", *supra* note 14, par. 57 *et seq.*
[49] *Idem,* par. 58.
[50] See the Al-Senussi Admissibility Challenge, *supra* note 9, par. 92.
[51] *Idem*, par. 94 *et seq.*
[52] See *supra* paras. 21 to 23.

41. Indeed, in the *Katanga and Ngudjolo Chui* case, the Appeals Chamber held that:

> "[…] *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 in the 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*".[53]

42. The Principal Counsel therefore submits that the Appeals Chamber's finding that "*a State that challenges the admissibility of a case bears the burden of proof to show that the case is inadmissible*"[54] must be read in light of the foregoing jurisprudence. Accordingly, the Chamber cannot declare a case inadmissible unless it is satisfied that the State is genuinely able and willing to carry out criminal proceedings against the person concerned. Whenever the ability or the willingness of a State are at issue (*i.e.* contested by a party or a participant), it is also for the State to establish the requisite elements of law and facts substantiating its claim that the case is inadmissible.

43. Moreover, when determining the allocation of the burden of proof in admissibility proceedings, due regard must be given to the context in which the Admissibility Challenge is made. In this respect, the Government itself admits that at the time this case was brought before the Court "*there was complete inactivity on the part of the Gaddafi regime and impunity prevailed*".[55] The Government now claims "*change of circumstances*" in Libya.[56] Hence, contrary to the Government's assertions,[57] the application *onus probandi actori incumbit* principle mandates that it

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[53] See the "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, *supra* note 25, par. 78.
[54] See the Ruto Admissibility Judgment, *supra* note 22, para. 2 and the Muthaura Admissibility Judgment, *supra* note 22, par. 2.
[55] See the Al-Senussi Admissibility Challenge, *supra* note 9, par. 52.
[56] *Idem*, par. 56.
[57] *Ibidem*, par. 98.

for Libya to prove that it is both willing and able to carry out a genuine investigation, at the time the Admissibility Challenge is made.

44. On the specific issue of the ability of Libya to genuinely carry out an investigation and prosecution, the Principal Counsel recalls the finding of Pre-Trial Chamber I in its recent Gaddafi Admissibility Ruling according to which said assessment had to be made in accordance with the substantive and procedural law applicable in Libya.[58] In particular, the Chamber concluded that:

> "*It is apparent* […] *that multiple challenges remain and that Libya continues to face substantial difficulties in exercising its judicial powers fully across the entire territory. Due to these difficulties* […] *the Chamber is of the view that its national system cannot yet be applied in full in areas or aspects relevant to the case, being this 'unavailable' within the term of article 17(3) of the Statute*"[59].

45. The Principal Counsel submits that these findings are equally applicable to the Admissibility Challenge submitted by Libya in respect of the *Al-Senussi* case.

B. Libya must establish that the "case" is being investigated through "clear and convincing evidence"

46. The Rome Statute does not articulate the standard of proof to be applied for the purposes of articles 17 and 19 of the Rome Statute. The Principal Counsel submits that the appropriate standard of proof to be applied is that of "*clear and convincing evidence*". In this respect, she finds it useful to refer to the definition set out in the Prosecution's submissions in the *Bemba* case:

> "*The clear and convincing standard requires that the party or participant making the assertions is capable of establishing the truth of the allegations in a convincing manner and that the Court satisfies itself that the claim is well founded in fact and law and that the facts on which it the claim is based are supported by convincing evidence. The evidence need not point to absolute certainty as such, but must be*

[58] See the Gaddafi Admissibility Ruling, *supra* note 18, par. 205.
[59] *Idem.*

> *convincing. Therefore, this standard is lower than 'proof beyond a reasonable doubt' but higher than 'proof on the preponderance of evidence'".*[60]

47. The adoption of the "clear and convincing" standard in relation to admissibility challenges made by States is supported by both logical and legal reasons.

48. The legal reason relates to the object and purpose of the Rome Statute, as well as to the different dimensions of the complementarity principle. Indeed, and as also stated above, the Appeals Chamber made it clear that any interpretation of article 17 of the Rome Statute must be consistent with the Statute's object and purpose, namely to put an end to impunity.[61] Once the admissibility challenge is upheld, the Court may not proceed forward with the case against the person concerned, subject to the exceptional circumstances set out in article 19(10) of the Statute. If States were not required to provide clear and convincing evidence showing the inadmissibility of the case, this would result in the Court finding that the case is inadmissible without being persuaded that the case is genuinely pursued at the national level. Such a result would clearly be contrary to the object and purpose of the Rome Statute. *A contrario*, the adoption of the "*clear and convincing standard*" enables the relevant Chamber to make a thorough assessment of the evidence presented in support of the admissibility challenge. The Chamber will also be in a better position to probe the nuances of each argument and submission put forward before reaching a decision.

49. The logical reason for requiring an 'enhanced' evidentiary standard relates to the specific nature of States' challenges. States challenging admissibility under

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[60] See the "Prosecution's Response to Motion Challenging the Admissibility of the Case by the Defence for Jean-Pierre Bemba Gombo pursuant to Articles 17 and 19(2)(a) of the Rome Statute", No. ICC-01/05-01/08-739, 29 March 2010, par. 43.

[61] See the "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", *supra* note 25**Error! Bookmark not defined.**, par. 83. See also *supra* par. 36.

article 19 of the Rome Statute must necessarily be conducting investigations or prosecutions at the national level. National judicial authorities responsible for investigation and prosecution of criminal offences have full control over the national proceedings. They also have unfettered access to the evidence gathered and, as such, are best placed to assist the Chamber in its determination of the admissibility of a case. Thus, if a State is genuinely pursuing a case, it ought to have little difficulty to provide the relevant Chamber with clear and convincing evidence showing that the case is inadmissible.

3. The admissibility of the case against Al-Senussi in light of the evidence provided by the Libyan Government

A. Libyan Law

50. Libya contends that the charges which are expected to arise from the investigation are as follows: article 202 (devastation, rapine and carnage), article 203 (civil war), article 211 (conspiracy), article 217 (attacks upon the political rights of a Libyan subject), article 294 (concealment of a corpse), article 296 (indiscriminate or 'random' killings), article 297 (arson), article 318 (stirring up hatred between the classes), article 322 (aiding members of a criminal association), article 368 (intentional murder), article 429 (use of force to compel another), article 431 (misuse of authority against individuals), article 432 (search of persons), article 433 (unlawful arrest), article 434 (unjustified deprivation of personal liberty) and 435 (torture) of the Criminal Code. Libya specifies that additional charges currently under consideration in relation to Mr Al-Senussi include incitement to rape, drug trafficking and serious damage to public funds.[62]

51. The Principal Counsel notes that the potential list of charges for Mr Al-Senussi is almost identical to that of Mr Gaddafi. Moreover, given that both

[62] See the Al-Senussi Admissibility Challenge, *supra* note 9, par. 154.

suspects are sought for the same crimes before the Court, it can be argued that the findings of Pre- Trial Chamber I in relation to the Gaddafi Admissibility Challenge are equally applicable to the present proceedings. In the Gaddafi Admissibility Ruling, the Chamber observed that while these crimes under Libyan Law "*do not cover all aspects of the offences to be brought under the Rome Statute*",[63] they are nonetheless sufficient to cover the use of "*the Libyan State apparatus and Security Forces to kill and persecute hundreds of civilian demonstrators or alleged dissidents to Muammar Gaddafi's regime between 15 and at least 28 February 2011, as alleged in the Warrant of Arrest*".[64]

52. The main difficulty in this regard relates to the crime of persecution. Indeed, although the crime of "persecution" is not recognised under Libyan Law, the Chamber found that the "persecutory intent" can be adequately covered by articles 27 and 28 of the Libya Criminal Law as an aggravating factor.[65] As a consequence, on the basis of these findings, the crimes set out in the Al-Senussi Admissibility Challenge can be sufficient to cover the "same conduct" for the purpose of the complementarity assessment.

B. The lack of clarity regarding the conduct of the domestic investigation

53. Libya asserts that its national judicial authorities are presently investigating Mr Al-Senussi for the same case under consideration before the Court.[66] However, the Principal Counsel notes that there is a lack of clarity regarding the start, the progress and the current status of the Libyan investigation.

54. Indeed, Libya argues that because of Mr Al-Senussi's "*previous role as Director of Military Intelligence and rank (Brigadier), the Military Prosecutor was initially*

[63] See the Gaddafi Admissibility Ruling, *supra* note 18, par. 113
[64] *Idem.*
[65] *Ibidem*, par. 111.
[66] See the Al-Senussi Admissibility Challenge, *supra* note 9, paras. 38(i) and 63.

responsible for investigating Abdullah Al-Senussi".[67] The Admissibility Challenge does not, however, contain any relevant information with regard to the concrete investigative steps carried out by the Military Prosecutor concerning Mr Al-Senussi. In the Gaddafi Admissibility Challenge, the Government asserted that the Libyan Military Prosecutor had been conducting an investigation into crimes of murder and rape allegedly committed by Mr Al-Senussi, including in the period between 15 February to 28 February 2011.[68] At the time, the Government indicated that this investigation had reached "an advanced stage" and was expected to be completed "in the near future".[69] The Government's assertions were reiterated in the "Report by Prosecutor General regarding OPCD and Abdullah Al-Senussi", in which the it was confirmed that evidentiary materials concerning the allegations of murder against Al-Senussi will be transmitted to the Military Prosecutor and will be relied upon in the investigation of the shooting of peaceful demonstrators at Julyana/Gelena bridge.[70]

55. The Principal Counsel notes that the Government does not provide any supporting evidence demonstrating the methodology and scope of the investigation allegedly conducted by the Military Prosecutor in relation to Mr Al-Senussi. Indeed, it appears that none of the material annexed to the Al-Senussi Admissibility Challenge emanates from, or were produced by, the Military Prosecution or the Libyan Ministry of Defence. Contrary to the Government's assertions, there is no evidence that the Military Prosecution was in anyway involved with the investigation of the crimes falling within the jurisdiction of the Court, and in particular, in respect of the crimes that are relevant to the subject-matter of the present case.[71]

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[67] *Idem*, par. 136

[68] See the Gaddafi Admissibility Challenge, *supra* note 2, par. 25.

[69] *Idem*.

[70] *Ibidem*, par. 50 and Annex E, p. 3.

[71] So far, the only document that the Government has produced and which appears to emanate from the military Prosecution is the "Report by Military Prosecutor regarding Abu Selim and Abdullah Al-Senussi". REDACTED. See, the Gaddafi Admissibility Challenge, supra note 2, Confidential Annex F.

56. Moreover, while the Government's previous declarations indicate that the military Prosecutor initiated, and is currently leading the investigation of Mr Al-Senussi,[72] the reports from the Prosecutor General's Office show that the investigations have been exclusively conducted by the civilian Prosecutor since 9 April 2012.[73] The explanation given by the Government with regard to these contradictory statements is unpersuasive. Indeed, the Government attempts to remedy this situation by claiming that on 17 July 2012 the Supreme Court ruled that "*the case against Abdullah Al-Senussi should be justiciable at the ordinary courts*" and therefore that "*the case now falls within the remit of the office of the civilian Prosecutor-General*".[74] This statement does not explain how the civilian Prosecutor was competent to start investigating Mr Al-Senussi before the issuance of the Supreme Court's judgment. In this regard, the Principal Counsel also notes that the Government does not provide information regarding the date of referral of the case from the military Prosecutor to the civilian Prosecutor, as well as, the procedure followed in relation to this referral.[75]

57. In addition to the uncertainties and inconsistencies concerning crucial aspects of the national proceedings, there is confusion as to the date of the commencement of the Libyan investigation. In this regard, the Principal Counsel would like to highlight that the Government previously indicated that the investigation was initiated on 3 April 2012[76], while it now asserts that the

[72] See the Gaddafi Admissibility Challenge, *supra* note 2, paras. 25, 40, 50 and 75.
[73] See the Al-Senussi Admissibility Challenge, *supra* note 9, Confidential and Redacted Annexes 1, 2, 3, 5 and 6.
[74] *Idem*, par. 137.
[75] The samples of evidence presented by the Government indicate that there is only a single case being pursued by the Libyan authorities in respect of Mr Al-Senussi. The case seems to cover all the crimes allegedly committed by the suspect, including financial and blood crimes. The reference number assigned to the case is 630/2012. See the Al-Senussi Admissibility Challenge, *supra* note 9, Confidential and Redacted Annexes 3 and 6.
[76] See the Gaddafi Admissibility Challenge, *supra* note 2, paras. 25 and 50.

commencement date is 9 April 2012.[77] In the absence of clear evidence establishing the existence of an order by relevant national authorities triggering the investigation, the Chamber is invited to draw the conclusion that no formal investigation existed at the dates indicated by the Libyan Government.

C. Scope of the national investigation

58. Since Libya is required to establish that its national investigation covers the "same case" under consideration before the Court[78], the Government must adduce sufficient evidence to support that its national judicial authorities are taking concrete steps in relation to the facts and circumstances described in the Article 58 Decision. After reviewing the materials provided, the Principal Counsel considers that the Government has failed to adduce evidence, with a sufficient degree of specificity and probative value demonstrating that the same conduct as described in the Article 58 Decision is the subject of domestic investigations.

59. As a preliminary remark, it is worth noting that in relation to the Gaddafi Admissibility Challenge Pre-Trial Chamber I has clarified that the "*Warrant of Arrest does not refer to specific instances of killings and acts of persecution, but rather refers to acts of such a nature resulting from the* [suspects'] *use of the Libyan Security Forces to target the civilian population which was demonstrating against Gaddafi's regime or those perceived to be dissidents to the regime*".[79] More specifically, the Chamber emphasized that the "*the Article 58 Decision includes a long, non-exhaustive list of alleged acts of murder and persecution committed against an identified category of people within certain temporal and geographical parameters on the basis of which the Chamber was satisfied that throughout Libya – in particular in Tripoli, Misrata, Benghazi, Al-Bayda, Dema, Tobruk and Ajdabiya - killings and inhuman acts amounting to persecution*

[77] See the Al-Senussi Admissibility Challenge, *supra* note 9, paras. 26 and 136 and Confidential and Redacted Annexes 2 and 3.
[78] See *supra* par. 19 *et seq*.
[79] See the Gaddafi Admissibility Ruling, *supra* note 18, par. 80.

on political grounds were committed by the Security Forces from 15 February 2011 until at least 28 February 2011 as part of an attack against the civilian demonstrators and/or perceived dissidents to Gaddafi's regime."[80]

60. Although the Chamber has determined that in respect of the case against Mr Gaddafi "*it would not be appropriate to expect Libya's investigation to cover exactly the same acts of murder and persecution mentioned in the Article 58 Decision*",[81] it is submitted that Libyan authorities must, at the very least, take into account the totality of these acts when investigating the case at the national level. In this regard, the impracticability of requiring States to investigate the same acts and incidents should not be presumed. Indeed, the complementarity test imposes on the State an obligation of means, not of result. Hence, the Libyan Government is not required to establish that it has in its possession conclusive incriminating evidence in respect of each of the acts or incidents set out in Article 58 Decision; rather, the Government must produce sufficient evidence demonstrating that it has used its best efforts to investigate the same conduct as contained in the relevant documents issued by the relevant Chamber. Moreover, while the Principal Counsel acknowledges that the events described in Article 58 Decision may not "*represent unique manifestations of the form of criminality*",[82] this does not *per se* release the Government from its obligation to duly investigate the incidents described therein.

61. The Principal Counsel notes that Libya has provided samples of evidentiary material in order to substantiate its Admissibility Challenge. These samples include witness interviews, victims' complaints, medical reports[83] death certificates[84] and requests emanating from the suspect in relation to REDACTED[85].

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[80] *Idem*, par. 81.
[81] *Ibidem*, par. 83.
[82] *Idem*, par. 82.
[83] See the Al-Senussi Admissibility Challenge, *supra* note 9, Confidential and Redacted Annexes 18 and 25.
[84] See the Al-Senussi Admissibility Challenge, *supra* note 9, Confidential and Redacted Annexes 25 and 27.
[85] See the Al-Senussi Admissibility Challenge, *supra* note 9, Confidential and Redacted Annex 19.

62. While the Principal Counsel acknowledges that most of these documents do have probative value, they, however, fail to satisfy the specificity requirement as articulated by the Appeals Chamber.[86] As indicated in the Al-Senussi Admissibility Challenge, the material provided only refers to the general aspects of the individual criminal responsibility of Mr Al-Senussi, such as the existence of a State policy, the suspect's command over the Security Forces and his essential contribution to the criminal plan.[87]

63. With respect to the underlying facts and incidents, the Libyan investigation appears to overlook the overwhelming majority of acts contained in the Article 58 Decision. The Principal Counsel notes that the Government of Libya has only provided two items of evidence that specifically refer to the incidents under consideration by the Court, namely Annex 16 to Libya's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi[88] and Annex 8 to the Admissibility Challenge.[89] Those two items cover the following incidents: (1) REDACTED and (2) the shooting at demonstrators in the Julyana bridge.

64. Apart from the abovementioned incidents, the Government fails to demonstrate that it is actively investigating the remaining acts described in Article 58 Decision. As defined by the Appeals Chamber, the term "investigation" has to be understood as "*the taking of steps directed at ascertaining whether this individual is responsible for that conduct*".[90] The remaining references to the incidents set out in

[86] See the Ruto Admissibility Judgment, *supra* note 22, par. 2 and the Muthaura Admissibility Judgment, *supra* note 22, par. 26.
[87] See the Al-Senussi Admissibility Challenge, *supra* note 9, paras. 162-163.
[88] See the "Libyan Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi'", 8 February 2013, No. ICC-01/11-01/11-258-Red2, Annex 16.
[89] See the Al-Senussi Admissibility Challenge, *supra* note 9, Confidential and Redacted Annex 8.
[90] See the Ruto Admissibility Judgment, *supra* note 22 par. 1 and the Muthaura Admissibility Judgment, *supra* note 22, par. 1 (we emphasise).

Article 58 Decision are contained in some of the victims' complaints[91] – not in witness statements, as asserted by the Prosecution[92]. Victims' complaints *per se* do not constitute evidentiary material that the crimes alleged therein are indeed being investigated, although they may provide basis for subsequent investigations. In the absence of evidence showing that subsequent investigative steps have been taken in relation to the remaining incidents, there are compelling reasons to believe that a situation of inactivity continues as far as these incidents are concerned.

65. As a result, the Principal Counsel submits that Libya has failed to provide the Chamber with evidence carrying a sufficient degree of specificity and probative value that demonstrates that it is investigating substantially the same case.

D. Libya's ability to conduct a genuine investigation

66. As pointed out above,[93] the second prong of the admissibility test requires the challenging State to proof that it is able to genuinely investigate the case. Article 17(3) of the Rome Statute stipulates that : "[i]*n order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings*". At this stage and in light of the recent developments in Libya, it seems particularly relevant to address the various factors that are likely to hinder Libya's capacity to genuinely investigate the case.

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[91] See the Al-Senussi Admissibility Challenge, *supra* note 9, Confidential and Redacted Annexes 14, 16, 17, 20, 21, 22, 23, 24 and 26.

[92] It seems that the Prosecution considers that the Confidential and Redacted Annexes 14, 16, 17, 20, 21, 22, 23, 24 and 26 are witness statements. See the "Prosecution's Response to 'Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute'", supra note 14, par. 75 and footnote 147. The Office notes that said Annexes refer to complaints which seem to emanate by victims of crimes committed during the 2011 Revolution, while Confidential and Redacted Annexes 8, 9, 10, 11, 12 and 15 seem to be witness statements taken by REDACTED. In this regard, the Office wishes to draw the attention of the Chamber on the fact that these two different categories of documents seem to have been drafted by two different authorities. REDACTED.

[93] See *supra* par. 39 *et seq.*

67. In the Gaddafi Admissibility Ruling, Pre-Trial Chamber I noted "*that multiple challenges remain and that Libya continues to face substantial difficulties in exercising its judicial powers fully across the entire territory*".[94] The Chamber also observed "*that* [the Libyan] *national system cannot yet be applied in full in areas or aspects relevant to the case, being thus "unavailable" within the terms of article 17(3) of the Statute*".[95] The Principal Counsel submits that these findings concerning the unavailability of the Libyan national judicial system are similarly applicable to the case of Mr Al-Senussi, with the exception of the criterion relating to Government's inability to obtain the person concerned. In addition to the factors enumerated by the Chamber in the Gaddafi Admissibility Ruling, the Principal Counsel wishes to draw the attention of the Chamber to the following considerations.

(1) Libya's ability to ensure the safety of the proceedings

68. Libya experiences a precarious security situation as proven by the numerous attacks on ministries and other governmental entities. Reports suggest that Libya is not fully able to ensure security and safety of criminal courts and, as a result, they have to operate at *minima*. A report by the International Crisis Groups details a number of recent attacks on courts:

> "*Across the country, criminal courts operate at a bare minimum. In the Jebel Akhdar region, east of Benghazi, inadequate security and threats against local prosecutors and judges have forced the suspension of all investigations and trials since December 2012. The courthouse in Waddan, a desert city some 600km south east of Tripoli, was torched in February 2013 and all case files destroyed. Most government- controlled prisons are overcrowded and devoid of proper security, a situation that has led to numerous jailbreaks since the end of the conflict. The presence of thousands of convicted criminals, whom Qadhafi set free in the early days of the uprising and whom*

[94] See the Gaddafi Admissibility Ruling, *supra* note 18, par. 205.
[95] *Idem*.

current authorities have been unable to recapture, also has contributed to the increase in banditry and violence."[96]

69. These attacks coupled with the Chamber's findings in the Gaddafi Admissibility Ruling concerning the Government's lack of control over detention facilities as well as the security risks faced by lawyers who act for associates of the former regime,[97] cannot but lead to the conclusion that the Libyan judicial system is unavailable within the meaning of article 17(3) of the Rome Statute. Indeed, the Chamber ruled that the failure of the Government to ensure proper representation for Mr Gaddafi constitutes an impediment to the conduct of domestic proceedings, because of the lack of the guarantees for a fair trial in accordance with articles 31 and 33 of the 2011 Libyan Constitutional Declaration.[98] On this basis, the Chamber concluded that the Government is "*otherwise unable to carry out its proceedings*"[99] and thus unable to genuinely investigate the case of Mr Gaddafi.

70. This form of inability is not only relevant for the proceedings against Mr Gaddafi, but also for the case of Mr Al-Senussi and other members of the former regime. Consistent with this approach, Egyptian courts recently refused the extradition of former high-level officials to Libya on the basis that they would not be guaranteed their full rights in Libya. On 3 April 2013, Cairo's Administrative Court ruled against the extradition of Muammar Al Gaddafi's cousin, Qaddaf al-Dam, to Libya. The Court found that Qaddaf al-Dam may be subject to possible risk of unfair trial, that Egypt was party to international convention which call for the jurisdiction to accede to the plaintiff's request.[100]

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[96] See INTERNATIONAL CRISIS GROUP "Trial by Error: Justice in Post-Qadhafi Libya", Middle East/North Africa Report N°140, 17 April 2013, pp. 3-4. This report is available at the following address: http://www.crisisgroup.org/~/media/Files/Middle%20East%20North%20Africa/North%20Africa/libya/140-trial-by-error-justice-in-post-qadhafi-libya.pdf.

[97] See the Gaddafi Admissibility Ruling, *supra* note 18, par. 213.

[98] *Idem*, par. 214.

[99] *Ibidem*, p. 87 (iii).

[100] See DAILY NEWS EGYPT, "Egypt court rules against handing Kadhafi cousin to Libya", available at the following address: http://www.dailynewsegypt.com/2013/04/04/egypt-court-rules-

71. In sum, there are compelling reasons to believe that domestic proceedings of Mr Al-Senussi will not be conducted in accordance with the internationally recognized standards for fair and independent prosecution, as required by Rule 51 of the Rules of Procedure and Evidence.

(2) Libya's ability to obtain witness testimonies

72. Ensuring witnesses' and victims' protection is a necessary requirement for a genuine investigation and prosecution. This is particularly the case in the Libyan context given the overall precarious security situation in the country.[101] As the trial of the officials associated with the former regime starts, the risk for the safety of the persons and parties to the proceedings will undoubtedly increase. Libyan national laws do not provide for any special protective measures for victims and witnesses who participate to or appear during the proceedings.[102] There is no indication that a witness protection program has ever been put in place.[103] It also remains to be seen whether any potential witnesses' protection reform can yield concrete positive results. This might prove indeed difficult given that the Libyan police is still undergoing substantial reforms as put forward by the Government itself.[104]

73. The measures set out in the Al-Senussi Admissibility Challenge fall short of addressing the security challenges faced by Libya.[105] The obligation to preserve witnesses' anonymity is only recognized in the investigation phase, in accordance

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against-handing-kadhafi-cousin-to-libya/ and THE NEW YORK TIMES, "Egypt: Court Blocks Extradition of Ex-Qaddafi Aide to Libya", available at the following address: http://www.nytimes.com/2013/04/04/world/middleeast/egypt-court-rules-against-extradition-of-former-qaddafi-aide-to-libya.html?_r=0 .

[101] See *supra* paras. 68-71.

[102] See the "OPCV's observations on ' 'Libyan Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi'", 18 February 2013, No. ICC-01/11-01/11-279, par. 65 *et seq*.

[103] In this sense, see also the Gaddafi Admissibility Ruling, *supra* note 18, paras. 209 and 211.

[104] *Idem*, par. 184.

[105] See the Al-Senussi Admissibility Challenge, *supra* note 9, paras. 176-177.

with article 59 of the Libyan Code of Criminal Procedure.[106] At the trial stage, measures for witness protection are uncommon and are left to the discretionary powers of the trial judges under Article 275 of the Libyan Criminal Procedural Code. Likewise, there is no clear procedure regulating access to document and disclosure. The lack of protective measures under Libyan law was further confirmed in the *amicus curiae* brief filed jointly by the Redress Trust and Lawyers for justice in Libya.[107]

(3) Lack of independent judiciary

74. Libya contends that it committed to the independence of the judiciary and that such commitment has been reflected "*in the abolition of extraordinary courts*".[108] The Government also admits that these courts were responsible for committing "*human rights violations against persons considered to be enemies of the regime*" in the Muammar Gaddafi era.[109] As further evidence of the steps taken to enhance the independence of the Libyan judiciary, the Government refers to the recent change in the composition of the Supreme Judicial Council, which is now "*composed only of members of the judiciary and chaired by the President of the Supreme Court instead of the Minister of Justice*".[110]

75. The Principal Counsel notes that, despite these improvements, the measures taken by the Government fail to address the core problems faced by the judiciary in Libya. In particular, the Government does not offer concrete solutions for the major shortcomings inherited from the Gaddafi's era, including the aspects concerning the integrity and independence of the judges themselves.

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[106] *Idem*, par. 177.
[107] See the "Lawyers for Justice in Libya and Redress Trust's observations pursuant to Rule 103 of the Rules of Procedure and Evidence", No. ICC-01/11-01/11-172, 8 June 2012, paras. 20 *et seq.*
[108] See the Al-Senussi Admissibility Challenge, *supra* note 9, paras. 140-141.
[109] *Idem*, par. 140.
[110] *Ibidem*, par. 188.

76. In this respect, it is worth noting that in October 2012, the Supreme Judicial Council presented a draft law on the vetting of judges. A complete restructuring of the judiciary was proposed, included the establishment of an independent committee for readmitting judges and prosecutors meeting the requisite qualifications.[111] This bill was never passed and the reform process is stalled. It appears that the Libyan authorities have currently chosen to keep in place the existing judicial system which survived the fall of the former regime.

77. Reports of independent NGOs have criticized the lack of "*comprehensive transitional justice strategy encompassing criminal trials but also appropriate vetting mechanisms and truth commissions*".[112] It was pointed out that "*the Judicial Reform Committee that the Supreme Judicial Council appointed in June 2012, never came close to suggesting a total overhaul of the inherited judicial system*".[113] It was that the most pressing measure that the Government should take is "*to send clear signs that judicial personnel found to be either corrupt or guilty of unlawful behaviour, notably condoning torture, will be dismissed after undergoing a vetting process. This would best be undertaken by an independent committee, rather than through the direct exclusion of judges who manned Qadhafi's 'special' courts, as the draft law on political exclusion presently proposes*."[114]

78. On the other hand, the complexity of the vetting process and the risks associated with an extensive vetting of the justice sector were described in the following terms:

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[111] The draft law is available in Arabic at the following address: http://www.hlrn.org/~hlrnnew/img/documents/LibyaTJ_Drft.pdf

[112] See "Trial by Error: Justice in Post-Qadhafi Libya", *supra* note 96, p. ii, last paragraph. See also ILAC Rule of Law Assessment Report, "Report Libya 2013", p. 31 *et seq.* This report is available at the following address: http://www.ilac.se/download/reports_documents/mission-reports_documents/Libya_Report_FULL-ENGLISH-web.pdf.

[113] See "Trial by Error: Justice in Post-Qadhafi Libya", *supra* note 96, p. 16.

[114] *Idem*, p. 39.

> *"The justice sector's ability to act independently during the current transitional period is also degraded by its lack of legitimacy. This issue is complicated by the fact that the justice sector is both the object of transitional reform efforts, and the vehicle for the transitional prosecution of past abuses. Thus, any extensive vetting of justice sector actors (judges, prosecutors, People's Lawyers, private lawyers) will significantly impact the system's ability to process cases. Yet, as one interlocutor in the Ministry of Justice put it, "how can the same judges suspected of misbehaviour during the Gaddafi regime sit in judgment of alleged Gaddafi supporters? "*[115]

79. It appears therefore clearly that the Libyan judiciary continues to be manned by the very same judges who supported the former regime and who sat in "special" and "extraordinary" courts known for their lack of independence and impartiality and for having endorsing human rights violation for decades, as acknowledge by Libya itself.[116] The Principal Counsel also notes that it has not been reported that any of the judges who served during the Gaddafi-era on People's Court and other types of "extraordinary" or "special" courts has been dismissed from duty on such basis. Libya's assertions regarding the independence of the national judiciary must therefore be placed in this specific context. The change in the composition of the Supreme Judicial Council and the abolition of the "special" courts are far from constituting an appropriate remedy to the core problems of the judiciary in Libya.

80. The Principal Counsel submits that this lack of independent judges in the different phases of domestic proceedings constitutes a form of unavailability of the judicial system. As a result, it is an important factor militating in favour of Libya's inability to genuinely investigate the case of Mr Al-Senussi.

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[115] See "Report Libya 2013", *supra* note 112, p. 7.
[116] See *supra* par. 74.

FOR THE FOREGOING REASONS the Principal Counsel respectfully requests the Pre-Trial Chamber to declare that the case against Abdullah Al-Senussi is admissible before the Court.

Paolina Massidda
Principal Counsel

Dated this 17th day of June 2013

At The Hague, The Netherlands