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PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernández 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
With Public Annexes A and B and Confidential – *Ex Parte*, Prosecution, Defence
and OPCV only Annex C**

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

Source: Office of the Prosecutor

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The Office of the Prosecutor

Counsel for Saif Al-Islam Gaddafi

Xavier-Jean Keita

Melinda Taylor

Counsel for Abdullah Al-Senussi

Benedict Emmerson

Rodney Dixon

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

The Office of Public Counsel for Victims

Paolina Massidda

Sarah Pellet

Mohamed Abdou

**The Office of Public Counsel for the
Defence**

States Representatives

Philippe Sands

Payam Akhavan

Michelle Butler

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Counsel Support Section

Deputy Registrar

Mr Didier Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section Other**

Introduction

1. Libya submits that it is investigating Saif Al-Islam for the same case as the ICC and that the investigation is nearly complete. Libya says that it is unable to provide the requested evidential material at this stage because its legislation does not allow disclosure until the case reaches the accusation stage. Libya provides, however, a sample of the evidence: REDACTED witness summaries, REDACTED witness testimonies, phone intercepts and flight documentation.
2. The Prosecution submits that while it appears that Libya has taken some concrete investigative measures, the material provided is insufficient to establish, on a balance of probabilities, that Libya is investigating the same case. The Prosecution submits, however, that due consideration should be given to the challenges that Libya is facing in this transitional post-conflict stage and to the fact that it has secured relevant international assistance. Therefore, the Prosecution considers that Libya should be afforded reasonable time to provide additional materials to demonstrate that it is investigating the same case.

Procedural Background

3. On 16 May 2011, the Prosecution requested an arrest warrant for Muammar Gaddafi, Saif Al-Islam Gaddafi ("Saif Al-Islam") and Abdullah Al-Senussi ("Al-Senussi").¹ On 27 June 2011, Pre-Trial Chamber I decided on the Prosecution's application ("Article 58 Decision")² and issued arrest warrants against Muammar Gaddafi and Saif Al-Islam as indirect co-perpetrators under article 25(3)(a) for the crimes of murder and persecution committed in various localities in Libya, in particular, Tripoli, Benghazi and Misrata from 15 to 28 February 2011.³ On the same date, the Pre-Trial Chamber issue an arrest warrant against Abdullah Al-

¹ ICC-01/11-4-Red.

² ICC-01/11-1.

³ ICC-01/11-13 and 14.

Senussi as a principal under article 25(3)(a) for the crimes of murder and persecution committed in Benghazi from 15 till 20 February 2011.⁴

4. On 22 November 2011, the proceedings regarding to Muammar Gaddafi were terminated due to his death.⁵
5. On 1 May 2012, the Chamber received the "Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute", challenging the admissibility of the case against Saif Al-Islam ("Admissibility Challenge").⁶ Libya indicated that it was investigating Saif Al-Islam for the same case as the ICC and provided REDACTED witness summaries as supporting material.⁷ The Office of Public Counsel for victims ("OPCV"),⁸ the Prosecution⁹ and the Office of Public Counsel for the defence ("OPCD")¹⁰ filed responses.
6. On 9 and 10 October 2012, the Chamber held a hearing on the admissibility of the case against Saif Al-Islam ("Admissibility Hearing"), in the presence of representatives of Libya, the Prosecutor, OPCD and OPCV.¹¹
7. On 7 December 2012, the Pre-Trial Chamber requested Libya to provide the evidence on which it intends to rely for the purposes of its Admissibility Challenge and its submissions on concrete issues related to Libya's domestic proceedings by 23 January 2013 ("Pre-Trial Chamber's Request").¹² The Prosecution was instructed to provide its assessment on the admissibility of the case, taking into account the material provided by Libya and any additional information gathered by the Prosecution from other sources.¹³

⁴ ICC-01/11-15.

⁵ ICC-01/11-01/11-28.

⁶ ICC-01/11-01/11-130-Red.

⁷ ICC-01/11-01/11-145-Conf-AnxC.

⁸ ICC-01/11-01/11-166-Red-Corr.

⁹ ICC-01/11-01/11-167-Red ("Prosecution's First Response").

¹⁰ ICC-01/11-01/11-190-Corr-Red.

¹¹ ICC-01/11-01/11-T-2-Red-ENG and ICC-01/11-01/11-T-3-Red-ENG.

¹² ICC-01/11-01/11-239, paras.14-47 and p.23.

¹³ ICC-01/11-01/11-239, paras.50-51.

8. On 23 January 2013, Libya filed its “further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi” (“Libya’s Submissions”).¹⁴ Samples of evidence were attached in Annexes 4-7 and 15-17, which were filed ex parte, Pre-Trial Chamber and Prosecution only.
9. On 7 February 2013, following a motion of the OPCD and response from Libya, the Pre-Trial Chamber reclassified the relevant annexes as confidential with certain redactions and extended the deadline for OPCD and OPCV to respond to 18 February 2013.¹⁵

Confidentiality

10. The Prosecution files its response confidential because it refers to documents that have this same level of confidentiality. REDACTED.¹⁶ REDACTED.

Libya’s Submissions

1. The Libyan investigation and the evidence submitted

11. Libya asserts that it is investigating the same case, namely, the same incidents and the allegations of criminal responsibility with respect to Saif Al-Islam, in particular acts of murder, abductions, arrest and torture of dissidents.¹⁷ Libya’s case against Saif Al-Islam is however broader than the ICC’s: it includes financial crimes and the timeframe and geographic scope are significantly broader, extending from 11 February 2011 through October 2011, and including other localities such as Bani Walid and other parts of Libya.¹⁸ Saif Al-Islam is being investigated for “ordinary” crimes (such as intentional murder, indiscriminate or

¹⁴ ICC-01/11-01/11-258-Red2.

¹⁵ ICC-01/11-01/11-271-Red.

¹⁶ REDACTED.

¹⁷ Libya’s Submissions, paras.63-68, 82-83; Annex 3.

¹⁸ Ibid., paras.63-65.

random killings and torture),¹⁹ as the draft law designed to incorporate international crimes into the Libyan law has not been approved.²⁰

12. Libya further notes that the domestic prosecution team will seek to join the case of Saif Al-Islam (229/2012) with the case against 10 other persons (630/2012), all high officials of Gaddafi's regime, including Al-Senussi. The *Chambre d'Accusation* will, however, make the ultimate decision on joinder.²¹
13. Notably, Libya indicates that at this stage it cannot provide to the Pre-Trial Chamber all the investigative measures taken and information requested because its internal legislation (in particular Article 59 of the Code of Criminal Procedure) does not allow disclosure until the case reaches the accusation stage.²² However, Libya has provided a "sample" of this material as supporting documentary evidence, in particular, REDACTED witness testimonies, phone intercepts and flight documentation.²³ According to Libya, these samples are "limited and indicative examples of the many pieces of documentary evidence which are contained within the investigative file in Tripoli relating to Mr. Gaddafi" and provide "substantial documentary proof" that Libya is investigating the same factual incidents and allegations of criminal responsibility of Saif Al-Islam as those described in the Article 58 Decision.²⁴
14. Libya proposes that the Chamber send a representative or a delegation to Libya to view the entire case file or otherwise to allow Libya six additional weeks to prepare copies and English translations of the investigative materials.²⁵

¹⁹ Ibid., paras.81-82.

²⁰ Ibid., paras.78-80.

²¹ Ibid., para.59. Annex 11.

²² Ibid., paras.29-32.

²³ REDACTED. Note that these annexes were subsequently disclosed to OPCD and OPCV with minor redactions.

²⁴ Libya's Submissions, paras.70-71. See also paras.72-73.

²⁵ Ibid., para.70.

2. Progress of the Investigation and evidence submitted

15. Libya notes that the investigation has progressed and is nearly complete. Libya indicates that it has gathered a total of 50 witness testimonies, eight more since 1 May 2012.²⁶ Libya says that it has interviewed the highest civilian and military officials from Gaddafi's regime.²⁷ Saif Al-Islam has also been interviewed on a number of occasions and has been confronted with witnesses. He has been informed of the accusations and evidence against him, but he has reportedly elected not to exercise his right to appoint counsel.²⁸ All of the witness testimonies that are part of Saif Al-Islam's file have been gathered by members of the Ministry of Justice prosecution team assigned to this case.²⁹
16. The prosecutorial team working on the Saif Al-Islam's case (Investigation Committee at the Attorney's General Office) is composed of 14 prosecutors and other support staff, including investigators, with considerable experience in criminal matters.³⁰ The Investigative Committee conducted on-site investigations at prisons and other locations including exhumations of mass-graves and evidence has been preserved in accordance with regular criminal investigative procedures.³¹
17. Libya confirms that Saif Al-Islam remains in Zintan.³² Although Libya indicates that it plans to try Saif Al-Islam in a renovated courtroom in Tripoli, it does not indicate when his transfer is expected to take place.³³ Libya also submits that it

²⁶ Libya's Submissions, para.48.

²⁷ Ibid., para.49.

²⁸ Ibid., paras.49, 88-93, 96. Libya indicates that considerable steps have been taken to ensure that Saif-Al Islam has the benefit of a qualified counsel (Ibid., para.97 and Annex 12) and that the trial will not start until Saif Al-Islam is appointed a lawyer (Ibid., para.96 and Annexes 12 and 14).

²⁹ Ibid., para.51.

³⁰ Ibid., para.94(i)-(iii). Annex 18.

³¹ Ibid., para.94(iv)-(v).

³² Ibid., para.99.

³³ Ibid., paras.100,102.

has no control over all detention centers and, due to this fact, it still has not secured the interview of two witnesses.³⁴

18. The Investigative Committee as well as other Libyan public officials have received international assistance, in particular from UN agencies, the European Union and numerous Governments.³⁵

19. In terms of “directions, orders and decisions issued by authorities in charge of the investigation as well as internal reports, updates, notifications or submissions” contained in the Libyan investigation file,³⁶ Libya attaches two court orders that each extend the detention of Saif Al-Islam for 45 days, the latest order dating 3 December 2012, in application of the Code of Criminal Procedure.³⁷ In addition, Libya attaches a memorandum produced by the Head of the Investigative Committee that recommends the joinder of Saif Al-Islam’s case with the case against other senior members of Gaddafi’s regime.³⁸ Other letters attached from Libyan officials appear to have been produced upon request of Dr Gehani and for the purposes of these proceedings. See in particular Annexes 1 to 3, 12-14.

Prosecution’s Submissions

20. The Prosecution will first address Libya’s Submissions on the applicable legal framework and second, whether the Prosecution considers that Libya has proved that the case is inadmissible before the ICC.

³⁴ Ibid., para.50.

³⁵ Ibid., paras.103-113 ; annexes 19-20.

³⁶ Pre-Trial Chamber’s Request, para.11.

³⁷ Libya’s Submissions, annexes 9 and 10. The Prosecution notes that the court orders are signed by three judges of the South Tripoli Court but indicate that the defendant appeared while being in custody and was read the charges. Libya does not clarify how this was done as it also indicates that Saif Al-Islam still remains in Zintan (para.99).

³⁸ Annex 11.

1. Law on Complementarity

(a) Admissibility Determination: a two-stage enquiry

21. Libya correctly notes that an admissibility determination follows a two-step inquiry, namely, (1) whether there exists a national investigation and/or prosecution in relation to the case at hand, and (2) where such proceedings exist, whether they are vitiated by an unwillingness or inability to carry them out genuinely.³⁹ The unwillingness or inability of a State having jurisdiction over the case becomes relevant – and will be considered – only where, due to ongoing or past investigations or prosecutions in that State, the first prong of the test has been satisfied.⁴⁰

(b) The burden and standard of proof

22. Libya advances two different burdens and standards of proof for assessing each of these steps. First, in order to prove the existence of national proceedings, it claims that the burden rests with the State and that the standard of proof is a balance of probabilities. Second, for proof of genuineness, it claims that the burden rests with the party questioning the genuineness of the State action, and that the standard is higher given the seriousness of an accusation of grave State misconduct.⁴¹ Libya bases its position, *inter alia*, on the claim that there is a legal presumption in favour of the primacy of national proceedings.⁴²

23. The Prosecution submits that Libya has the burden to prove both elements of the admissibility test, namely the existence of an investigation and the genuineness of Libya's willingness and ability to investigate, to the standard of a balance of probabilities.⁴³ It is essential that the State bear the burden on both prongs of the

³⁹ Libya's Submissions, para.8 referring to ICC-01/04-01/07-1497 OA8, para.78.

⁴⁰ ICC-01/04-01/07-1497OA8, paras.75,79.

⁴¹ Libya's Submissions, paras.21-26.

⁴² Ibid., para.7.

⁴³ ICC-01/05-01/08-802, para.203; ICC-01/09-02/11-274 OA, para.61. See Prosecution's First Response, para.16.

admissibility test because it has superior, and often exclusive, access to the necessary information, and therefore is in the best position to know the state of affairs and provide relevant evidence.⁴⁴ Further, the allocation of the burden to the State is also consistent with the *raison d'être* of the principle of complementarity: to prove a case inadmissible, the State must establish that it is undertaking a meaningful investigation that genuinely seeks to ascertain the criminal responsibility of the suspect.⁴⁵ Otherwise, a fraudulent or hopelessly inadequate investigation would preclude ICC action.⁴⁶ Thus, the Prosecution submits that though the complementarity regime is premised on a “preference” for national proceedings, it disagrees with Libya’s position that this preference is a “presumption” that thereby shifts the burden to the opponent to disprove the State’s willingness or ability. Rather, as the Appeals Chamber has set out, “a State that challenges the admissibility of a case bears the burden of proof to show that the case is inadmissible”.⁴⁷

(c) Evidence demonstrative of the existence of an investigation

24. The Appeals Chamber has further held that the challenging party has the burden to provide the Court with “evidence with a sufficient degree of specific and probative value that demonstrates that it is indeed investigating the case”.⁴⁸ These investigative steps must be directed at ascertaining whether the suspect is responsible for the criminal conduct alleged.⁴⁹ Furthermore, for a challenge brought under Article 17(1)(a), it is not necessary that domestic investigations

⁴⁴ JJ. Barceló, ‘Burden of Proof, Prima Facie Case and Presumption’, Cornell International Law Journal, Vol.42, p.32-33; C.K.Hall in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, p.645; Informal Expert Paper: Principle of Complementarity in Practice, para.56.

⁴⁵ ICC-01/09-02/11-274OA, para.61.

⁴⁶ Principle of Complementarity in Practice: Informal expert paper, para.22. See fn.9 in particular.

⁴⁷ ICC-01/09-01/11-307OA, para.62.

⁴⁸ Ibid., para.8 quoting ICC-01/09-02/11-274 OA, paras.2,61.

⁴⁹ ICC-01/09-01/11-307OA, para.62.

itself be completed at the time an admissibility challenge is filed, but “concrete progressive investigative steps be taken and demonstrated” to the Court.⁵⁰

25. Pre-Trial Chamber I requested two types of evidence: first, evidence related to the admissibility of the proceedings, that is, “material capable of proving that an investigation is ongoing and that appropriate measures are being envisaged to carry out the proceedings”;⁵¹ and second, samples of evidence on the merits of the domestic case to substantiate its claim that its investigation of Saif Al-Islam’s case is ongoing.⁵²

(d) Same person and same conduct test

26. The Applicant refers to the Appeals Chamber’s jurisprudence and says that it must be investigating “substantially the same conduct” for the case to be inadmissible before the ICC.⁵³ The Prosecution has considered, in the light of Libya’s further submissions, the question whether this means that the conduct in question must be exactly the same (meaning the same acts and incidents), or whether these can vary in any way; and if so, to what degree. As a preliminary matter, this question may not arise in the present case if the Chamber concludes that Libya is in fact investigating all of the same acts and incidents that form the basis of the Article 58 Decision.⁵⁴ To the extent that the Chamber considers, nonetheless, that the issue does arise from Libya’s Submissions, the Prosecution offers the following observations.

27. With respect to the first limb of the admissibility determination, the Appeals Chamber held in the Kenya cases that the Pre-Trial Chamber did not err when it applied the “same person / same conduct” test.⁵⁵ Elsewhere in the judgment,

⁵⁰ ICC-01/09-02/11-274OA, para.81.

⁵¹ Pre-Trial’s Chamber Request, paras.10-11.

⁵² Pre-Trial’s Chamber Request, para.12.

⁵³ Libya’s Submissions, para.27.

⁵⁴ Libya’s Submissions, paras.63-67. Annex 3.

⁵⁵ ICC-01/09-01/11-307OA, para.47. The Appeals Chamber further held that the same person/same conduct test is deeply rooted in the Statute itself. Article 17(1)(c) and Article 20(3) refer to “the same conduct” in relation to

however, the Appeals Chamber referred to the test as requiring that domestic authorities investigate the same person for “substantially the same conduct”.⁵⁶ At issue therefore is what the term “substantially” means in this context.⁵⁷

28. The Prosecution submits that the “substantially the same conduct” test cannot be applied in a manner that is so flexible that its purpose is undermined. For example, under a loose interpretation whereby the underlying incidents and facts could vary, a domestic authority could choose to genuinely investigate the same suspect for the same type of conduct (e.g. killings), but for incidents that are not investigated by the ICC, with the knowledge that the evidence in those other non-ICC incidents is weak and that the investigation will therefore not progress to a genuine trial that poses the same likelihood of conviction. Under the loose interpretation that allows the State to choose incidents, a “genuine” investigation into weak incidents would suffice to support a successful admissibility challenge and, potentially, block further ICC proceedings. To ensure that impunity does not prevail, the Court must guard against the possibility that a State could orchestrate “genuine proceedings” based on weak incidents deliberately pursued in order to block any ICC cases based on substantially the same conduct.⁵⁸

29. At the same time, the inclusion of “substantially” in the test adopted by the Appeals Chamber recognizes that the purposes of the test could be met even if a national investigation or prosecution does not necessarily match *exactly* all of the features of the ICC’s investigation or prosecution, notwithstanding the references to ‘same conduct’ in Article 20(3) and Article 90(1) in the context of admissibility.

the same person. The express link between Article 17(1)(c) and the principle of *ne bis in idem* shows that the case must relate to the same person and the same conduct. Further, Article 90, which deals with the choice of forum allocation with respect to competing requests for extradition and surrender explicitly sets out the same person/same conduct test, relating it back to the tests for admissibility.

⁵⁶ ICC-01/09-02/11-307OA, paras.1,40,62.

⁵⁷ Any apparent difference between the two tests should be interpreted in a manner that avoids internal inconsistency within the judgment, but rather seeks to reconcile any ambiguity or uncertainty.

⁵⁸ Moreover, the Prosecution will be unable to exercise scrutiny over incidents chosen by a State that it itself has not investigated, and will be unable also to do so once the challenge has been brought as a consequence of the operation of Article 19(7).

The cases that come before the ICC, and that could be the subject of an admissibility challenge, often involve massive and complex alleged criminality involving many individual incidents. Investigators and prosecutors will, therefore, often have considerable latitude regarding the particular focus on their investigation into the conduct alleged. In this case, for example, the Prosecution focused on incidents occurring in February and early March 2011, while Libya appears to have approached the case with a broader lens and is investigating alleged crimes during the entire period of the conflict.

30. Further, the focus of any particular investigation or prosecution can reflect legal, evidentiary or strategic considerations that may be markedly different for the ICC than for national authorities. For example, provisions in criminal statutes or procedures might favor some particular crimes over others. Or the national authorities might have access to evidence that is different from the Prosecution or might have strategic considerations that would cause it to pursue a case with a slightly different focus.
31. To balance these competing concerns, therefore, the Prosecution submits that in applying the “substantially the same conduct” test of the Appeals Chamber, the Chamber should satisfy itself that, at a minimum, the national authorities are focused on the same course of conduct and series of events as the ICC, meaning that they are examining the person’s criminal responsibility in the context of substantially the same incidents and underlying facts and allegations of criminal responsibility. In examining to what extent the national investigation or prosecution matches the Prosecution’s investigation or prosecution, the Chamber should consider whether the conduct that forms the basis of the ICC crimes – for which the Court seeks the person’s surrender - is reflected in the crimes for which the suspect stands accused at the national level.

32. Where the national authorities match all of the incidents and facts and allegations of criminal responsibility investigated or prosecuted by the ICC exactly, this first prong of the test will automatically be satisfied. Therefore, national authorities that assert jurisdiction over a case – particularly, when their investigations commence after the ICC’s charges are brought -- will have an incentive to match as precisely as possible the investigation or prosecution of the ICC. If the focus of the national investigation or prosecution differs in any respect from the ICC case, however, then the Chamber will need to scrutinize the national efforts more closely, including reasons for such divergence, in order to determine whether the national authorities and the ICC are focused on substantially the same conduct.

(e) Genuine investigation and prosecution: willingness and ability

33. The second part of the admissibility test requires Libya to demonstrate that it is willing and able to genuinely investigate or prosecute the case.⁵⁹ The term “genuinely” in Article 17(1)(a) and (b) requires a showing that the investigative and prosecutorial efforts are sincere and that there exist the means to bring them to completion.⁶⁰

34. First, the Chamber’s determination of a State’s “willingness” should be guided by the drafting history of Article 17. As the Prosecution noted in its previous response, an overarching concern by negotiating States was that a determination of admissibility by the Court not become a judgment on the fairness of the national system *per se*.⁶¹ Hence, the ICC should not function as a court of appeal

⁵⁹ Article 17(1)(a) and (b).

⁶⁰ This term qualifies “to carry out the investigation or prosecution” and “to prosecute”. Note that “genuinely” was preferred to “effectively”, which was proposed in earlier drafts but was unacceptable to several delegations, because of a concern that the ICC might “judge” a legal system against a perfectionist standard. Informal Expert Paper : the Principle of Complementarity in Practice, para.22, fn.9. See also Kevin J. Heller, *The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process*, 17 CRIM. L. FORUM 255 (2006), at p.11 ; 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. 50-51.

⁶¹ Prosecution’s First Response, paras.28-31. In particular, a proposal from Italy that would have specifically made the lack of due process a ground for admissibility was rejected since, according to the Coordinator of the Working Group, “many delegations believed that procedural fairness should not be a ground for defining complementarity”. J. Holmes, “The Principle of Complementarity” in Roy S. Lee, *The International Criminal*

on national decisions based on alleged domestic deviations from applicable human rights norms.⁶² The Court cannot find a State unwilling on the sole ground that the national proceedings violate due process, but must also find a violation of one of the three subparagraphs in Article 17(2).⁶³

35. Second, in order to find a State “unable”, Article 17(3) requires two sets of considerations: first, total or substantial “collapse” or “unavailability” of the national judicial system, and second and as a consequence, whether the State is unable to obtain the accused, or the evidence and testimony, or is otherwise unable to carry out proceedings.⁶⁴ Commentators to the Rome Statute refer to the ordinary meaning of these terms and state that “inability” embraces objective criteria such as a political situation that makes holding trials impossible or a debilitating lack of judges, prosecutors and other court personnel.⁶⁵ Obstruction by uncontrolled elements that render the system unavailable has also been considered a relevant factor.⁶⁶ Other factors may include public disorder, natural disasters and chaos resulting from a civil war.⁶⁷ The Prosecution observes that while Article 17 sets out benchmarks to enable the Court to identify cases that cannot be genuinely heard before national courts, the Statute’s complementarity provisions should not become a tool for overly harsh structural assessments of

Court: The Making of the Rome Statute: Issues, Negotiations, Results (1999), p. 50 ; E. Carnero Rojo, “The Role of Fair Trial Considerations in the Complementarity Regime of the International Criminal Court: From ‘No Peace without Justice’ to ‘No Peace with Victor’s Justice’?”; 18 Leiden Jrnl Int’l L. (2005), pp.848-849.

⁶² 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. 50-51; see also *ibid* pp.52-56. E. Carnero Rojo, “The Role of Fair Trial Considerations in the Complementarity Regime of the International Criminal Court: From ‘No Peace without Justice’ to ‘No Peace with Victor’s Justice’?”; 18 Leiden Jrnl Int’l L. (2005), pp.852-854.

⁶³ Prosecution’s First Response, para.31 and authorities cited therein.

⁶⁴ Kevin J. Heller, The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process, 17 CRIM. L. FORUM 255 (2006), p.10.

⁶⁵ Kevin J. Heller, The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process, 17 CRIM. L. FORUM 255 (2006), p.10.

⁶⁶ Informal Expert Paper: Principle of Complementarity in Practice, para.50, Annex 4.

⁶⁷ Mohamed El Zeidy, *The Principle of Complementarity in International Criminal Law* (2008), p.222; see generally pp.222-228.

the judicial machinery in developing countries or in countries in the midst of a post-conflict democratic transition.⁶⁸

(f) The Prosecution's obligation to monitor the admissibility of the case

36. The Chamber requested the Prosecution to provide its assessment on the admissibility of the case, in light of the material provided by Libya and also any information it has gathered from other sources.⁶⁹ The Prosecution recalls that, in consequence of the operation of Article 19(7), it suspended its investigative activities with respect to this case following the Admissibility Challenge on 1 May 2012. The Prosecution's monitoring of admissibility has therefore focused primarily on open sources. The Prosecution has also analyzed materials obtained from international organizations that may in part be relevant to the Chamber's determination.

2. The admissibility of the case against Saif Al-Islam

(a) First step of the admissibility test: Is Libya investigating the same case?

37. The Libyan authorities provided some samples of evidential material that are specific and appear to be probative of some of the allegations underlying the charges against Saif Al-Islam. If these samples are considered together with the previously-provided witness summaries, it appears that the Libyan investigation focuses on REDACTED;⁷⁰ REDACTED;⁷¹ REDACTED;⁷² REDACTED;⁷³ REDACTED.⁷⁴ For the remaining underlying acts and incidents described in the Article 58 Decision, Libya provides a letter by the Minister of Justice.⁷⁵

⁶⁸ S. Williams, and W. Schabas in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, p.624.

⁶⁹ Pre-Trial Chamber's Request, paras.50-1.

⁷⁰ REDACTED.

⁷¹ REDACTED.

⁷² REDACTED.

⁷³ REDACTED.

⁷⁴ REDACTED.

⁷⁵ Annex 3. See Libya's Submissions, paras.63-68, 82-83.

38. Although Libya says that it is investigating all of the same incidents and allegations of Saif Al-Islam's criminal responsibility at issue in the Prosecution's case, the supporting evidence provided is insufficient to conclude on a balance of probabilities that Libya is indeed investigating substantially the same conduct as the one described in the Article 58 Decision. As the Appeals Chamber noted, it is not sufficient for national authorities to assert that Libya is investigating the same case.⁷⁶ The Prosecution considers that additional supporting material would be needed in order to reach an informed positive determination on its application. At the same time, the Prosecution recognizes that while Libya has to date failed to discharge its burden fully, the information provided does, in the Prosecution's view, sufficiently demonstrate the existence of national proceedings against the suspect. As such, Libya should be required to furnish additional samples from its investigative file within a reasonable timeframe.

(b) Second Step of the admissibility test: whether Libya is willing and able to investigate

39. If the Chamber finds that Libya has demonstrated that it is investigating or prosecuting the same case, it will then consider Libya's willingness or ability. The Prosecution accordingly provides its submissions on the second limb of the admissibility test.

(i) Willingness

40. From the material submitted, it appears that Libya is genuinely willing to investigate Saif Al-Islam: first, Libya does not appear to be shielding Saif Al-Islam from criminal responsibility;⁷⁷ second, the delays in the investigation are not presumptively excessive, unreasonable, inconsistent with an intent to bring the person to justice, or – if the Chamber were to conclude that there is unexplained delay – attributable to anything other than logistical, technical and other obstacles

⁷⁶ ICC-01/09-02/11-274OA, paras.2,61.

⁷⁷ Article 17(2)(a).

arising from the challenges of establishing a fully functional government in a transitional post-conflict stage.⁷⁸ The Prosecution notes that it is essential that Libya not be held to a higher standard with regard to the speed and progress of its proceedings than has been met by the ICC itself or other international tribunals, particularly given the history of Libya, its very recent emergence from four decades of autocratic rule, and the serious security challenges facing the country. Third, Libya has not shown lack of independence or impartiality inconsistent with the intent to bring Saif Al-Islam to justice.⁷⁹

(ii) Ability

41. The Prosecution notes that Libya has taken relevant steps in a relatively short period of time and against an extremely difficult backdrop: as noted above, Libya has apparently assembled a group of qualified attorneys and investigators to prosecute the case⁸⁰ and it has undertaken relevant specific investigative measures such as the gathering of witness testimonies and phone intercepts.⁸¹ Libya has secured relevant international assistance on the rule of law, including the training of judges and prosecutors and the provision of strategic advice on the prosecution of members of Gaddafi's regime.⁸² Further, the Libyan Criminal Code appears to penalize as ordinary crimes the underlying allegations of the Article 58 Decision (see in particular random killing and premeditated murder).⁸³ For reasons set forth in its previous filings, the Prosecution does not consider that the classification of the crimes in this case by Libya as "ordinary" crimes, as opposed to international crimes, is determinative.⁸⁴ In addition, prior legislation

⁷⁸ Article 17(2)(b).

⁷⁹ Prosecution's First Response, para.32. The two requirements of Article 17(2)(c) are conjunctive.

⁸⁰ Libya's Submissions, para.94 and annex 18.

⁸¹ REDACTED.

⁸² Libya's Submissions, para.110 and annexes 19 and 20.

⁸³ ICC-01/11-01/11-158-AnxA. Libya submits that persecutory intent is an aggravating factor. Libya Submissions, para.87.

⁸⁴ Prosecution's Response, paras.23-26.

that infringed international standards on human rights, such as the People's Court, has been found unconstitutional.⁸⁵

42. However, the Prosecution also notes that not all detention centers, including apparently the one holding the suspect in this case, are under the control of the Minister of Justice and Libya has no access to certain detainees held in these centers.⁸⁶ Further, abuses and deaths have occurred in detention centers in 2012,⁸⁷ REDACTED.⁸⁸

43. Most notably, Libya does not clarify whether it has gained custody over Saif Al-Islam and when his transfer to Tripoli will be effected.⁸⁹ It is also unclear whether Saif Al-Islam has been interviewed by the Investigative Committee in charge with his case or the Zintan authorities. Moreover, it appears that his interview has been conducted without the presence of a lawyer.⁹⁰ Although the presence of a lawyer appears to be a requirement under Article 106 of the Libyan Code of Criminal Procedure, Libya claims that Saif Al-Islam waived this right.⁹¹

44. Nonetheless, the investigation of the case against Saif Al-Islam has progressed and the Libyan legislation does permit a trial in absentia.⁹² Hence, and in light of the evidence submitted and notwithstanding the challenges faced by Libya as a post-conflict country, the Prosecution concludes that Libya appears, at this time and in light of the materials considered, able to conduct the proceedings. This

⁸⁵ Annex 8. Libya Submissions, paras.74-77. Note that Libya set out the procedural rights and protections that are at the core of the Libyan legislation and criminal justice system : see Admissibility Challenge, paras.56-65.

⁸⁶ Libya Submission, paras.50,99. See also HRW, Libya: Slow Pace of Reform Harms Rights, 6 February 2013: <http://www.hrw.org/news/2013/02/06/libya-slow-pace-reform-harms-rights>

⁸⁷HRW, Libya: Slow Pace of Reform Harms Rights, 6 February 2013: <http://www.hrw.org/news/2013/02/06/libya-slow-pace-reform-harms-rights>; Amnesty International, Libya Rule of Law or Rule of Militias ?:

http://www.amnesty.nl/sites/default/files/public/libya_rule_of_law_or_rule_of_militias_.pdf

⁸⁸ REDACTED.

⁸⁹ Libya's Submissions, paras.98-102. See prior submissions whereby Libya indicated that it has no control over Saif Al-Islam: ICC-01/11-01/11-T-2, p.29, Ins.14-24; ICC-01/11-01/11-146-Conf-Annex A, para.10; ICC-01/11-01/11-160, para.20.

⁹⁰ Libya's Submissions, para.96.

⁹¹ ICC-01/11-01/11-158-AnxB, p.2 and Libya Submissions, para.96.

⁹² See Annex B to this filing, in particular Article 348 of the Code of Criminal Procedure. Note that Dr. Gehani's submissions were unclear in this regard: ICC-01/11-01/11-T-3, p.62.

assessment is subject to revision based on changed circumstances, including a failure by the State to progress genuine proceedings further, pursuant to Article 19(10)-(11).

Relief sought

45. Libya has not provided sufficient supporting evidence to demonstrate that it is investigating the same case as before the ICC. Considering that Libya appears willing to genuinely investigate and prosecute Saif Al-Islam, and in the circumstances of this case -- namely, Libya finds itself in the midst of a post-conflict democratic transition and has availed itself of external assistance -- the Prosecution would support that Libya is afforded a reasonable and final period of time to provide additional material in support for its admissibility challenge.



Fatou Bensouda,
Prosecutor

Dated this 12th day of February 2013

At The Hague, The Netherlands