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

Date: **4 November 2013**

THE APPEALS CHAMBER

**Before: Judge Akua Kuenyehia, Presiding Judge
Judge Sang-Hyun Song
Judge Erkki Kourula
Judge Anita Ušacka
Judge Sanji Mmasenono Monageng**

SITUATION IN LIBYA

IN THE CASE OF

THE PROSECUTOR

v.

SAIF AL-ISLAM GADDAFI and ABDULLAH AL-SENUSSI

Public Document with Confidential *Ex Parte* Annexes 1 and 2 (to Chambers and Al-Senussi Defence only) and Public Annex 3

Document in Support of Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I's 'Decision on the admissibility of the case against Abdullah Al-Senussi'

Source: Mr. Abdullah Al-Senussi, represented by Ben Emmerson QC, Rodney Dixon, Amal Alamuddin, and Anthony Kelly

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

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I. Introduction

1. The Defence for Mr. Abdullah Al-Senussi hereby files its Document in Support of the Appeal¹ against Pre-Trial Chamber I's "Decision on the admissibility of the case against Abdullah Al-Senussi",² dated 11 October 2013. The Defence filed its notice of appeal on 17 October 2013, and requested that the Pre-Trial Chamber's Decision be suspended.³
2. This Document in Support of the Appeal is filed pursuant to Articles 82(1)(a) and 83(2)(a) of the Rome Statute, Rules 154(1) and 156 of the Rules of Procedure and Evidence and Regulations 33(1)(d) and 64 of the Regulations of the Court.
3. The Defence submits that the Pre-Trial Chamber erred in law and fact in finding that Mr. Al-Senussi's case is inadmissible before the ICC. No reasonable chamber could find that in the present circumstances Libya is able to carry out genuine proceedings or willing to bring Mr. Al-Senussi to justice in an impartial and independent manner, having regard to the recognised standards of due process under international law. Mr. Al-Senussi's case is precisely the case that should be tried at the ICC in accordance with the principle of complementarity. The Defence submits that the Appeals Chamber should reverse the Pre-Trial Chamber's Decision and order that the case is tried before the ICC. The Defence relies on three grounds of appeal:
 - Ground 1: The Pre-Trial Chamber erred in law and fact and abused its discretion in finding that Libya is not unwilling and unable genuinely to carry out the proceedings against Mr Al-Senussi within the meaning of the provisions of Article 17.
 - Ground 2: The Appeals Chamber is requested to consider new evidence, which was not previously available, concerning the mistreatment of Mr. Al-Senussi in

¹ Due to the very important issues and evidence addressed in this appeal, and the necessity of referring to the full background and all of the evidence in support of this appeal, Counsel for Mr. Al-Senussi request that the Appeals Chamber permit a limited extension of the page-limit for this appeal and its annexes pursuant to Regulation 37 of the Regulations of the Court.

² Decision on the admissibility of the case against Abdullah Al-Senussi, ICC-01/11-01/11-466-Conf, 11 October 2013 (hereinafter "Impugned Admissibility Decision").

³ Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I's 'Decision on the admissibility of the case against Abdullah Al-Senussi', and Request for Suspensive Effect, ICC-01/11-01/11-468-Conf, 17 October 2013 (hereinafter "Notice of Appeal").

detention and the conduct of the national proceedings which is relevant to Ground 1 as it further demonstrates that Libya is not willing and able to carry out genuine proceedings in Libya.

- Ground 3: The Pre-Trial Chamber erred in law and fact in finding that Libya was investigating and prosecuting the same case as the case before the ICC.
4. The specific errors identified in the three grounds of appeal, independently and cumulatively, materially affect the Impugned Decision in that, but for those errors, the Chamber would have found Mr. Al-Senussi's case admissible before the ICC. The errors constitute errors of law and of fact, and abuse of discretion, and show that the proceedings were unfair in a way that affected the reliability of the Decision pursuant to Articles 82(1)(a) and 83(2)(a) of the Rome Statute.
 5. The Defence, therefore, respectfully requests that, pursuant to Article 83(2), the Appeals Chamber:
 - reverses the Impugned Admissibility Decision;
 - finds that the case against Mr. Al-Senussi is admissible before the Court; and,
 - orders the immediate surrender of Mr. Al-Senussi to the Court.

II. Standard of Review

6. The Appeals Chamber has found that “[n]either the Statute nor the Rules of Procedure and Evidence provide for what grounds can be raised on appeal pursuant to article 82(1)(a) of the Statute”⁴ and thus “the parties are at liberty to raise any relevant ground of appeal including the grounds as specified under article 81(1)(a) and (b).”⁵

⁴ *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58', ICC-01/04-169, 13 July 2006, para. 32.

⁵ *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58', ICC-01/04-169, 13 July 2006, para. 33.

These grounds of appeal can include errors of procedure, fact, law and “[a]ny other ground that affects the fairness or reliability of the proceedings or decision.”⁶

7. When reviewing an admissibility decision, the Appeals Chamber has previously required a showing that “the error raised by an appellant must have materially affected the impugned decision.”⁷ The Appeals Chamber has clarified that “an error materially affect[s] the impugned decision if the decision would have been ‘substantially different’”⁸ and has required that “as part of the reasons in support of a ground of appeal, an appellant is obliged not only to set out the alleged error, but also to indicate, with sufficient precision, how this error would have materially affected the impugned decision.”⁹
8. The Appeals Chamber has in previous decisions concerning admissibility identified the standard of review applicable on appeal. It has referred to standards of review relied upon in other interlocutory appeals that did not concern admissibility proceedings.¹⁰ The Appeals Chamber has stated that for errors of law it “will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision.”¹¹
9. With regard to alleged errors of fact, the Appeals Chamber has stated that when reviewing an admissibility decision it will determine whether the Pre-Trial Chamber

⁶ Article 81(1)(b).

⁷ *Prosecutor v. Katanga*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, 25 September 2009, para. 37.

⁸ *Prosecutor v. Katanga*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, 25 September 2009, para. 37.

⁹ *Prosecutor v. Joseph Kony et al.*, Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009", ICC-02/04-01/05-408, 16 September 2009, para. 48.

¹⁰ See for example, *Prosecutor v. Katanga*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, 25 September 2009, para. 37; *Prosecutor v. Bemba*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled "Decision on the Admissibility and Abuse of Process Challenges", ICC-01/05-01/08-962, 19 October 2010, para. 63, 64.

¹¹ *Prosecutor v. Banda and Jerbo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled ‘Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation’, ICC-02/05-03/09-295, 17 February 2012, para. 20; *Prosecutor v. Calliste Mbarushimana* Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled “Decision on the confirmation of charges”, ICC-01/04-01/10-514, 30 May 2012, para. 15.

“committed an error of fact by misappreciating facts, disregarding relevant facts, or taking into account facts extraneous to the *sub judice* issues.”¹²

10. The Appeals Chamber has held that its functions “extend to reviewing the exercise of discretion by the Pre-Trial Chamber to ensure that the Chamber properly exercised its discretion”¹³ but that “the Appeals Chamber will interfere with a discretionary decision only under limited conditions.”¹⁴ The Appeals Chamber identified the conditions “justifying appellate interference”¹⁵ to be:

- (i) “where the exercise of discretion is based on an erroneous interpretation of the law;
- (ii) where it is exercised on a patently incorrect conclusion of fact; or
- (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion.”¹⁶

¹² *Prosecutor v. Bemba*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled "Decision on the Admissibility and Abuse of Process Challenges", ICC-01/05-01/08-962, 19 October 2010, para. 63, 64.

¹³ *Prosecutor v. Joseph Kony et al.*, Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009", ICC-02/04-01/05-408, 16 September 2009, para. 80. See also, *Prosecutor v. Kenyatta*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', ICC-01/09-02/11-274, 30 August 2011, paras. 87, 88.

¹⁴ *Prosecutor v. Joseph Kony et al.*, Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009", ICC-02/04-01/05-408, 16 September 2009, para. 80. See also, *Prosecutor v. Kenyatta*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', ICC-01/09-02/11-274, 30 August 2011, paras. 87, 88.

¹⁵ *Prosecutor v. Joseph Kony et al.*, Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009", ICC-02/04-01/05-408, 16 September 2009, para. 80. See also, *Prosecutor v. Kenyatta*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', ICC-01/09-02/11-274, 30 August 2011, paras. 87, 88.

¹⁶ *Prosecutor v. Joseph Kony et al.*, Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009", ICC-02/04-01/05-408, 16 September 2009, para. 80.

III. Grounds of Appeal

Ground 1: The Pre-Trial Chamber erred in law and fact, and abused its discretion, in finding that Libya is not unwilling and unable genuinely to carry out the proceedings against Mr. Al-Senussi in Libya, within the meaning of Article 17(1)(a), (2)(c) and (3), respectively.

11. The Pre-Trial Chamber found that Libya had established on the evidence before the Chamber that it was not unwilling and not unable genuinely to carry out the proceedings against Mr. Al-Senussi in Libya.¹⁷ The Chamber rejected all of the arguments raised by the Defence that Libya was both not able to try Mr. Al-Senussi and not willing to do so in accordance with the provisions of Article 17.

12. The Appellant's submission is that the Pre-Trial Chamber erred in making these findings as the Chamber failed to define the applicable legal standards, misapplied the applicable legal provisions and case law, misappreciated and disregarded relevant facts, and reached erroneous conclusions based on its flawed assessment of the facts and defective reasoning. In accordance with the Court's jurisprudence, the Appellant submits that these errors, individually and cumulatively, materially affected the Decision, and but for these errors the decision would have been substantially different in that the Chamber should have found that Libya is unwilling and unable genuinely to try Mr. Al-Senussi in Libya and to bring him to justice.

13. In particular, the Appellant submits that no reasonable chamber could find that "Libya is not unwilling or unable genuinely to carry out its proceedings in relation to the case against Mr Al-Senussi"¹⁸ within the meaning of Article 17 for two main reasons:
 - The Pre-Trial Chamber erred its legal analysis, assessment of the evidence and its reasoning in finding that, "having regard to the principles of due process recognised by international law,"¹⁹ the proceedings in Libya are being "conducted independently or impartially ... in a manner which is inconsistent with the intent to bring Mr Al Senussi to justice in accordance with article

¹⁷ Impugned Admissibility Decision, para. 310.

¹⁸ Impugned Admissibility Decision, para. 311.

¹⁹ Article 17(2).

17(2)(c),”²⁰ particularly given that this is a case in which the death penalty applies; and / or

- The Pre-Trial Chamber erred in its legal analysis, assessment of the evidence and its reasoning in finding that “Libya is not unable genuinely to carry out the proceedings against Mr Al-Senussi.”²¹ The Chamber erred in rejecting each of the Appellant’s grounds that due to the total or substantial collapse or unavailability of its national judicial system Libya is either unable to obtain custody of Mr. Al-Senussi, or unable to obtain “the necessary evidence, including witness testimony, for judicial proceedings” against Mr. Al-Senussi”²², or is unable to guarantee “effective witness protection programs,”²³ or is otherwise unable to carry out its proceedings against Mr. Al-Senussi, in particular because Mr. Al-Senussi “has had no access to legal representation”²⁴ which is plainly an “impediment”²⁵ to the conduct of the proceedings.

14. Each of these errors materially affected the impugned decision as they were relied on by the Chamber in reaching its determination that Libya is able and willing to try Mr Al-Senussi and therefore that genuine proceedings can be carried out. Without such errors, the Chamber could not have reached this result, and the case would have been deemed admissible.

15. The Appellant sets out below each of the legal and factual errors committed by the Chamber in reaching its overall conclusion that Libya is willing and able to try Mr. Al-Senussi. The Appellant submits that each of these errors, individually and cumulatively, provide compelling grounds for the Appeals Chamber to reverse the Admissibility Decision.

Overview of Pre-Trial Chamber’s main legal and factual findings

16. By way of introduction, the Appellant highlights the main findings of the Pre-Trial Chamber which underpin its over-arching conclusion on “unwillingness” and

²⁰ Impugned Admissibility Decision, para. 241.

²¹ Impugned Admissibility Decision, para. 310.

²² Defence Response of 14 June 2013, para. 70.

²³ Defence Response of 14 June 2013, para. 70.

²⁴ Defence Response of 14 June 2013, para. 70.

²⁵ Defence Response of 14 June 2013, paras. 121, 127.

“inability”, and which show the grave deficiencies in the Chamber’s overall approach and reasoning.

Legal findings

17. In respect of the applicable legal framework, the Pre-Trial Chamber rightly referred to the provisions of Article 17(1)(a), 17(2) and 17(3) of the Statute.²⁶ The Chamber, however, did nothing more than identify and repeat these provisions, and note the obvious point that “willingness” and “ability” must be assessed in relation to the specific domestic proceedings concerning the same case that is before the ICC, i.e. the circumstances surrounding the national proceedings against Mr. Al-Senussi.²⁷

18. For the purposes of the present appeal the relevant provisions of Article 17(2), which were identified by the Chamber are:

(2) *“In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:*

...

(c) the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person to justice.”²⁸

19. The relevant provisions of Article 17(3), as identified by the Chamber are:

(3) *“In 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 is unable to carry out its proceedings.”²⁹*

20. The Chamber correctly proceeded on the basis that in respect of Article 17(3), any one or more of the conditions being met would constitute inability and that it was not necessary to show that all of the conditions existed cumulatively.³⁰

²⁶ Impugned Admissibility Decision, paras. 199-202.

²⁷ Impugned Admissibility Decision, para. 202.

²⁸ Article 17(2)(c). See, Impugned Admissibility Decision, para. 200.

²⁹ Article 17(3). See, Impugned Admissibility Decision, para. 201.

³⁰ Impugned Admissibility Decision, para. 235.

21. The only other pronouncement on the applicable legal standard made by the Chamber was that it emphasised that “alleged violations of the accused’s procedural rights are not *per se* grounds for a finding of unwillingness or inability under Article 17 of the Statute.”³¹ The Chamber held that any such violation “must be linked to one of the scenarios provided for in Article 17(2) or (3) of the Statute.”³² The Chamber went on to find that “depending on the specific circumstances, certain violations of the procedural rights of the accused may be relevant to the assessment of the independence and impartiality of the national proceedings that the Chamber is required to make, having regard to the principles of due process recognized under international law, under Article 17(2)(c) of the Statute.”³³ The Chamber specified that – as the wording of the provision makes clear – a finding of unwillingness can only be made when the manner in which the proceedings are being conducted, in addition to indicating a lack of independence and impartiality, are considered in the circumstances to be inconsistent with the intent to bring the person to justice.³⁴
22. On the death penalty, the Chamber only noted that under Libyan law on appeal a “more stringent procedure is followed when the death penalty has been imposed following conviction.”³⁵ The Appeals Chamber also only noted the Defence’s argument that considerations of due process must be more stringent in Mr. Al-Senussi’s case because he faces the death penalty³⁶, but it did not address this crucial argument any further in its Decision.
23. As to the lack of any contact by Mr. Al-Senussi with the Defence team, the Chamber only noted that it “may” prejudice the Defence’s ability to raise relevant factual matters with the Chamber.³⁷ The Chamber did not consider whether this most elementary of breaches of the accused’s rights – the failure to permit him to consult with his lawyers at all so that the Chamber could be informed about the conditions he faces in detention and in the national proceedings – in itself demonstrated that Mr. Al-Senussi was not being treated independently, impartially, and fairly and being brought to justice. It is unthinkable that any accused before the ICC could be refused access to his ICC lawyers and that the ICC would nevertheless continue blindly with the

³¹ Impugned Admissibility Decision, para. 234.

³² Impugned Admissibility Decision, para. 234.

³³ Impugned Admissibility Decision, para. 234.

³⁴ Impugned Admissibility Decision, para. 235.

³⁵ Impugned Admissibility Decision, para. 205.

³⁶ Impugned Admissibility Decision, para. 220.

³⁷ Impugned Admissibility Decision, para. 29, 219. See also note 551.

proceedings as though there was no problem. And yet, this is exactly what the Pre-Trial Chamber did.

24. A number of points arise from the Chamber's very limited legal analysis that show the errors in the Chamber's overall approach and reasoning, as considered further below³⁸:

- At no stage did the Pre-Trial Chamber consider which principles of due process recognised by international law had to be taken into account pursuant to Article 17(2), and at no stage is any reference made in the Pre-Trial Chamber's decision to any of these principles being considered and applied by the Chamber to assess the proceedings taking place in Libya against Mr. Al-Senussi, and whether they are being conducted independently and impartially and in a manner consistent with bringing him fairly to justice.
- At no stage did the Pre-Trial Chamber consider and define the meaning and scope of what conduct should be considered "in the circumstances" to be "inconsistent with an intent to bring the person concerned to justice."³⁹ This is clearly a fundamental requirement that is central to any determination of "unwillingness", but its legal content was not addressed by the Chamber in its Decision, even though it concluded that Libya was bringing Mr. Al-Senussi to "justice".
- At no stage did the Pre-Trial Chamber determine whether due process considerations and the requirement that Mr. Al-Senussi should be brought to "justice" should be viewed in a more stringent way in light of Mr. Al-Senussi facing the death penalty. The national proceedings that are being conducted by Libya were never assessed by the Chamber by applying a more stringent standard because of the death penalty, and the Chamber simply gave no reason one way or the other why it had not done so.
- At no stage did the Chamber consider in the Decision whether the failure to allow Mr. Al-Senussi to consult with his Defence team at all and to be able to

³⁸ See paras. 32-136

³⁹ Article 17(2)(b).

convey to the Chamber all relevant information about his circumstances, was a fundamental breach of his rights and all considerations of due process, which could not be reversed, such as to require Mr. Al-Senussi to be transferred to The Hague.

Factual findings

25. Instead, with respect to its factual findings, the Pre-Trial Chamber held that on the materials presented, Libya had established that it was both able and willing genuinely to try Mr. Al-Senussi in Libya. In reaching this overall conclusion, the Chamber placed great reliance on the “progress” of the national investigation in Libya which had reached the Accusation Stage by the time of the Chamber’s Decision on admissibility, following the hearing in Libya on 19 September 2013.⁴⁰
26. In specifically finding that Libya had shown that it was not “unwilling” to try Mr. Al-Senussi, the Chamber held that Libya had “provided persuasive information showing that the investigations into Mr Al-Senussi’s case are not being conducted in a manner that is inconsistent with the intent to bring Mr Al-Senussi to justice.”⁴¹ The Chamber relied heavily on Libya’s investigation against Mr. Al-Senussi⁴² having advanced and led to the transfer of the case to the Accusation Chamber, and which the Chamber found “*to have been adequately conducted.*”⁴³ The fact that Mr. Al-Senussi had not, in particular, benefitted from any legal representation in any of these proceedings including before the Accusation Chamber was rejected by the Chamber as a basis to find that he was not being brought to justice in accordance with the requirements of Article 17(2)(c). The way the Chamber sought to deal with the patent inconsistency between its finding that the proceedings were conducted “adequately” when Mr. Al-Senussi had had no legal representation at all, was to say that his right to legal representation had been “*primarily prejudiced so far by the security situation in the country.*”⁴⁴

⁴⁰ Impugned Admissibility Decision, paras. 289-310.

⁴¹ Impugned Admissibility Decision, para. 292.

⁴² Impugned Admissibility Decision, paras. 289, 292, 298-300, 303.

⁴³ Impugned Admissibility Decision, para. 292.

⁴⁴ Impugned Admissibility Decision, para. 292.

27. As set out below⁴⁵, the Appellant submits that this is a completely unsustainable finding. No reasonable Chamber could ever find that proceedings were or can be conducted “adequately” when the accused’s basic right to legal representation, as well as all of his other due process and fair trial rights, had not been guaranteed – for whatever reason – especially when having regard to the “principles of due process recognized by international law.”⁴⁶ The bringing of an accused to “justice” must on any reasoning mean that the person must be tried fairly in accordance with national laws and taking into account well-recognised international standards. “Fairness” is axiomatic of “justice” in any context, whether national or international.

28. Moreover, the Chamber’s findings in relation to “inability” that followed, reveal fundamental defects in the Chamber’s reasoning:

- The Chamber found that despite the security challenges the “progressive and concrete investigative steps” taken in Mr. Al-Senussi’s case, which have reached the Accusation Stage, demonstrated that the “ongoing security challenges” do not adversely impact on Libya’s ability to conduct the national proceedings.⁴⁷ Indeed, the Chamber went as far as to say that the fact that “the hearing on 19 September 2013 occurred *without incident*” confirms that Libya is “in a position to address the ongoing security difficulties in order that the proceedings against Mr Al-Senussi not be hindered.”⁴⁸
- Yet, as noted above, the Chamber blamed the fact that Mr. Al-Senussi had not benefitted from any legal representation at all in the proceedings on these very security challenges. In other words, the Chamber did acknowledge that these ongoing security challenges *are* an impediment to the conduct of the proceedings in Libya because they prevent Mr. Al-Senussi from having legal representation.

29. As set out below⁴⁹, the Chamber should have found that the lack of legal representation, and denial of Mr. Al-Senussi’s due process and fair trial rights, showed that Mr. Al-Senussi was not being brought to justice in accordance with Libyan law

⁴⁵ See paras. 83-88.

⁴⁶ Article 17(2).

⁴⁷ Impugned Admissibility Decision, para. 299.

⁴⁸ Impugned Admissibility Decision, para. 303.

⁴⁹ See paras. 33-82.

and international law, and that the security situation was a clear impediment to his rights being protected, including to his right to legal representation, and to him being tried independently, impartially and fairly. In the current circumstances in Libya in which there is overwhelming public anger and pressure to convict and execute Mr. Al-Senussi, supported by armed and violent militia groupings who enjoy unlimited power to do as they please, it is inconceivable that the outcome of Mr. Al-Senussi's national trial could be anything other than a conviction, followed by his execution. It is precisely for these reasons that he should be tried at the ICC and not in Libya.

30. Indeed, the same Pre-Trial Chamber found in its admissibility decision in Mr. Gaddafi's case that his case was admissible based on the fact that the lack of legal representation created an impediment to the conduct of proceedings in Libya.⁵⁰ It specifically found that the security situation which contributing to Mr. Gaddafi having no legal representation *did* mean that the ICC should try Mr. Gaddafi⁵¹. Yet, for Mr. Al-Senussi the Chamber held exactly the opposite – that the security situation justified his lack of legal representation and hence was not a reason for Mr. Al-Senussi to be tried at the ICC.

31. The Chamber also found in relation to Libya's capacity to obtain evidence and provide effective witness protection that the security situation does not prevent Libya from being able to try Mr. Al-Senussi. The Chamber reiterated its concerns about witness protection,⁵² given that it had already done so in its admissibility decision in Mr. Gaddafi's case,⁵³ but failed to give any reasons why in its overall assessment these serious concerns did not equally render Libya unable to try Mr. Al-Senussi.

Specific errors committed by the Pre-Trial Chamber

32. The Appellant submits that the Pre-Trial Chamber committed several critical legal and factual errors in reaching its overall conclusion that Libya is not unwilling and unable to try Mr. Al-Senussi. These are set out below in the following order:

⁵⁰ Gaddafi Admissibility Decision, para. 212-214.

⁵¹ Gaddafi Admissibility Decision, paras. 212, 213.

⁵² Impugned Admissibility Decision, para. 301.

⁵³ Gaddafi Admissibility Decision, paras. 209-211.

- (i) The failure to take account of the lack of any contact between the Defence team and Mr. Al-Senussi to obtain his instructions and place all relevant evidence before the Chamber.
- (ii) The failure to rely on the lack of legal representation during the proceedings to date, including the Accusation Stage, to find that Libya is both unwilling and unable to try Mr. Al-Senussi.
- (iii) The failure to find that Mr. Al-Senussi is not being brought to justice in proceedings that are independent and impartial in light of the overwhelming evidence placed before the Chamber (and taking into account the new evidence which is the subject of Ground 2).
- (iv) The failure to find that Libya is unable to try Mr. Al-Senussi given that it is unable to obtain the necessary evidence, provide adequate witness protection and is otherwise unable to carry out the proceedings.

(i) Failure to take account of the Defence's lack of contact with Mr. Al-Senussi

33. The Pre-Trial Chamber noted “that the Defence’s ability to raise certain factual matters may have been prejudiced by the absence of direct contacts with Mr. Al-Senussi, since a visit to Mr. Al-Senussi by his counsel has not taken place, despite the Chamber’s order to this effect.”⁵⁴ But the Chamber also noted that the Defence had not insisted on such a visit taking place before any ruling on admissibility⁵⁵, and that the Chamber was of the view that “the fact that the Defence did not have access to Mr Al-Senussi cannot *per se* lead to the positive conclusion that certain fundamental rights of Mr Al-Senussi have been violated in the course of the domestic proceedings against him, or be in itself sufficient to cast doubt on Libya's counter-assertions.”⁵⁶

34. On this crucial point, the Chamber erred in two respects, which are each considered in turn below:

⁵⁴ Impugned Admissibility Decision, paras. 219, 29.

⁵⁵ Impugned Admissibility Decision, para. 29.

⁵⁶ Impugned Admissibility Decision, note 551.

- First, the Chamber failed to take into account when assessing the evidence, and determining whether Libya had discharged its burden and established the requirements of Article 17(2)(c) and (3), that the Defence had been unable to obtain Mr. Al-Senussi's instructions and place all relevant information on his circumstances before the Chamber in response to Libya's assertions. Hence, the Chamber failed to address that Mr. Al-Senussi's most essential of rights – to be represented and heard by the Chamber – had been violated. The contorted reasoning of the Chamber – that the lack of access does not “per se” mean that the Chamber can conclude that Mr. Al-Senussi's rights had been violated etc – misses the vital point that his rights have been violated by being refused access to his lawyers and that his case has been undeniably and irreversibly prejudiced by that fact alone.
- Second, it was wrong for the Chamber to rely on the fact that the Defence had not asserted that a legal visit was a necessary pre-condition for the Defence to make its submissions, and that the determination of the admissibility challenge should be suspended until such a visit has taken place. It was of course absolutely essential for the Defence to obtain Mr. Al-Senussi's instructions, and the Defence thus took all possible steps to get a visit arranged. It was grossly unfair for the Chamber to penalise the Defence in any way for the lack of a visit when only Libya could have ensured that it was arranged. The Chamber did not criticise Libya at all in its Decision for failing to arrange the visit for over 8 months. In the Defence's submission, this exposes the bias of the Chamber in not being prepared to identify Libya's failings, when they are plain to see, and when they would have been highlighted by any reasonable chamber.

Mr. Al-Senussi was not heard by the Chamber

35. When considering the Defence's allegations that Mr. Al-Senussi's fundamental rights were being violated during the domestic proceedings, the Chamber found that the Defence's assertions were “generic” and “without any tangible proof”⁵⁷ The Chamber held that Libya was under no duty to disprove any of these allegations because they had not been properly substantiated. As set out below, this finding in effect reversed

⁵⁷ Impugned Admissibility Decision, para. 239.

the burden of proof.⁵⁸ The Chamber also failed to take into account that the Defence's allegations could have been further substantiated through the Defence being allowed to take instructions from Mr. Al-Senussi in a privileged and confidential environment. It was clearly essential to the Chamber's assessment of the evidence, both in relation to unwillingness and inability, to receive information from the accused himself as to his treatment in detention and whether his rights were being observed in the national proceedings.

36. Instead, the Pre-Trial Chamber relied on a report from Human Rights Watch about its single visit to Mr. Al-Senussi, and failed to give any weight, when assessing the probative value of this evidence, to the fact that Mr. Al-Senussi had not been able to speak to his own Defence Counsel about his treatment.⁵⁹
37. Furthermore, the Chamber incorrectly relied on the fact that the Defence did not ask for the proceedings to be suspended until a visit had taken place, to seek to negate any prejudice that resulted from the lack of any contact with Mr. Al-Senussi. The Chamber should have determined whether the proceedings were prejudiced by Mr. Al-Senussi not being able to provide material information himself in response to the evidence submitted by Libya. And clearly the proceedings must have been prejudiced by the fact that Mr. Al-Senussi, who is the subject of the admissibility challenge, was not able to be heard by the Pre-Trial Chamber. It is the most elementary of all principles of fairness and due process that the judges must hear from the other side (in this case, Mr. Al-Senussi) in response to the assertions being made by the applicant (Libya).
38. The very fact that Libya failed to allow a visit was relied on by the Defence to argue that Libya was unwilling and unable to try Mr. Al-Senussi.⁶⁰ The least that a national system must provide in order even to claim to conduct fair and impartial trial proceedings is to permit the accused to have access to his lawyers so that all relevant

⁵⁸ See paras 70-83 below.

⁵⁹ Impugned Admissibility Decision, paras. 235-240.

⁶⁰ Defence Response on behalf of Mr. Abdullah Al-Senussi to "Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute", ICC-01/11-01/11-356, 14 June 2013, paras. 126, 138 (hereinafter "Defence Response of 14 June 2013"); Filing on behalf of Mr. Abdullah Al-Senussi pursuant to "Decision on additional submissions in the proceedings related to Libya's challenge to the admissibility of the case against Abdullah Al-Senussi" of 19 August 2013, ICC-01/11-01/11-418, 26 August 2013, paras. 19, 21 (hereinafter "Further Submissions of 26 August 2013").

and material evidence can be placed before the Court. The Chamber completely failed to address this argument.

39. It did not acknowledge and address that Mr. Al-Senussi has an undeniable right to counsel under the Rome Statute. It is unimaginable that any of the accused now before the Court would be denied access to their counsel and forced to continue with the proceedings. Yet, the Pre-Trial Chamber has been prepared to proceed as though there is no problem with Mr. Al-Senussi being totally cut-off from his lawyers, and has failed to explain why his case should be any different to any other accused before the ICC.

40. The Chamber did not refer to or apply the cornerstone provisions of Article (67)(1)(b) and (d):

(1) "In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

...

(b). To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

...

(d). Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it."

41. The Chamber should also have had in mind Article 55(2) of the Rome Statute which provides that:

(1) "Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned:

(a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;

(b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;

(c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any

case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and

(d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.”

The Defence took all possible steps to visit Mr. Al-Senussi

42. The Defence proceeded on the basis that no admissibility challenge could succeed when Libya had refused to allow the Defence to visit or speak with Mr. Al-Senussi. The Defence urged the Pre-Trial Chamber to make an immediate decision on admissibility so that Mr. Al-Senussi could be transferred to The Hague where his rights would be protected, including his right to consult with counsel in a secure, privileged and confidential environment. The Defence had repeatedly asked the Pre-Trial Chamber to enforce its order to Libya to arrange the visit and to report Libya’s non-compliance to the Security Council, which the Chamber had refused to do.⁶¹ The Defence had also requested the Pre-Trial Chamber not to suspend the surrender request in order that Mr. Al-Senussi could be brought to The Hague so that his lawyers could consult with him; which was also refused by the Chamber.⁶²
43. In the Appellant’s submission there was nothing further that the Defence could have done to seek to pursue the implementation of the Chamber’s order so that a visit could take place as soon as practicable.
44. To the extent that Libya will argue that it did not fail to comply with the Chamber’s order, this assertion should be flatly rejected by the Appeals Chamber. Libya was ordered as far back as February 2013 to facilitate this visit.⁶³ It failed in all the months that followed to agree to a Memorandum of Understanding with the

⁶¹ Renewed Application on behalf of Mr. Abdullah Al-Senussi to Refer Libya and Mauritania to the UN Security Council with Public Annex 1 and Confidential and Ex Parte (Registry only) Annexes 2 and 3, ICC-01/11-01/11-304, 19 March 2013; Defence Application on behalf of Mr. Abdullah Al-Senussi to refer Libya to the Security Council with Confidential Ex Parte (Chamber only) Annex 1, ICC-01/11-01/11-399, 9 August 2013.

⁶² 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, ICC-01/11-01/11-319, 24 April 2013; Appeal on behalf of Mr. Abdullah Al-Senussi against the “Decision on Libya’s postponement of the execution of the request for arrest and surrender of Abdullah Al-Senussi pursuant to article 95 of the Rome Statute and related Defence request to refer Libya to the UN Security Council”, ICC-01/11-01/11-439, 9 September 2013.

⁶³ Decision on the "Urgent Application on behalf of Abdullah Al-Senussi for Pre-Trial Chamber to order the Libyan Authorities to comply with their obligations and the orders of the ICC", ICC-01/11-01/11-269, 6 February 2013, paras. 39-40, p. 15.

Registry,⁶⁴ and most recently has refused to agree to an *ad hoc* arrangement to permit the visit to take place.⁶⁵ The only reasonable inference that could be drawn, which the Pre-Trial Chamber should have drawn, is that Libya has delayed excessively in arranging any visit and has no genuine intention of allowing Mr. Al-Senussi to speak with his Defence team. That in and of itself, in the Appellant's submission, establishes that Libya is not bringing Mr. Al-Senussi to justice having regard to Libyan law and international standards of due process.

45. Even in cases in which the burden is on the applicant – not the State – to prove a legal point, it has been held to be improper for the applicant to be penalised when the information it requires is in the State's control. Both the Inter-American Court of Human Rights and the European Court of Human Rights have also found in circumstances in which the State has prevented defendants from accessing information or evidence within the control of the State, that it would not be appropriate to draw adverse inferences against the defendant.⁶⁶ It has been argued that such an approach should be adopted in admissibility proceedings before the ICC.⁶⁷

46. Moreover, where the respondent State refuses to cooperate with the court or other adjudicative body, for example by refusing to provide access to information relevant to the determination of the individual's rights, it has been held that the matter must be decided to the detriment of the respondent State.⁶⁸ The UN Human Rights Committee has recognised that, in cases where the author of a communication to the Committee has supported his allegations “and where further clarification of the case depends on

⁶⁴ First report of the Registry on the visit of the defence team of Abdullah Al-Senussi to Libya, ICC-01/11-01/11-294-Conf-Exp, 6 March 2013; Second report of the Registry on the visit of the defence team to Libya, ICC-01/11-01/11-328, 3 May 2013, paras. 3, 8-11; Third report of the Registry on the visit of the defence team to Libya, ICC-01/11-01/11-408-Conf-Exp, 16 August 2013, paras. 3-8; ICC-01/11-01/11-444-Conf-Exp-Anx2; Sixth Report of the Registry on the visit of the defence team to Libya, ICC-01/11-01/11-467-Conf, 14 October 2013, para. 5.

⁶⁵ Sixth Report of the Registry on the visit of the defence team to Libya, ICC-01/11-01/11-467-Conf, 14 October 2013, para. 4. Also see, Notice of Appeal, para. 29 - in which the Defence highlights that Libya has made assertions about Mr. Al-Senussi's continued representation before the ICC.

⁶⁶ *Orhan v. Turkey*, Application no. 25656/94) Final Judgment, 6 November 2002; *Neira Alegria et al. Case*, I.-A. Court H.R., Series C: Decisions and Judgments, No. 20, 1995, p. 29; Article 39 of the Rules of Procedure and Evidence of the Inter-American Commission on Human Rights.

⁶⁷ C. Hall, 'Article 19' in O. Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court* (Hart Publishing 2008) at pp. 645 and 652.

⁶⁸ Human Rights Committee, General Comment No 33, para 10: “In the experience of the Committee, States do not always respect their obligation. In failing to respond to a communication, or responding incompletely, a State which is the object of a communication puts itself at a disadvantage, because the Committee is then compelled to consider the communication in the absence of full information relating to the communication. In such circumstances, the Committee may conclude that the allegations contained in the communication are true, if they appear from all the circumstances to be substantiated.”

information exclusively in the hands of the State party, the Committee may consider such allegations as substantiated in the absence of satisfactory evidence and explanations to the contrary submitted by the State party.”⁶⁹ This is justified in light of the fact that it would be unfair to rest the burden solely on the defendant “especially considering that the [defendant] and the State party do not always have equal access to the evidence and that frequently the State party alone has access to relevant information.”⁷⁰

47. In the present case, the burden of proof rested on Libya, and the Chamber erred in finding that Libya’s burden had been discharged because the Defence had not insisted on the proceedings being suspended. It was entirely within Libya’s control to arrange the visit, and Libya failed in its duty to comply with the Chamber’s order to arrange the visit.

48. For the avoidance of any doubt, the Defence files this appeal without prejudice Mr. Al-Senussi’s fundamental right to provide instructions to his Counsel in the admissibility proceedings. The Appeals Chamber should not decide this appeal without Counsel being able to consult Mr. Al-Senussi. It would be a flagrant breach of his human rights and all standards of due process under Libyan law and international law for the Appeals Chamber to dispose of this matter without Mr. Al-Senussi being able to provide his instructions and all relevant information, particularly in response to Libya, and most importantly concerning his conditions, to the Appeals Chamber. However, given that Libya has failed to arrange a legal visit under the necessary conditions and that there is nothing to indicate that this position will change, the Appeals Chamber should reverse the Admissibility Decision on this basis alone.

49. It is of course still open to the Appeals Chamber to grant Mr. Al-Senussi’s appeal against the postponement of his surrender order so that he can be transferred to The Hague immediately while the appeal is pending in order that he can consult with his counsel.⁷¹

⁶⁹ Human Rights Committee, *Bleier v Uruguay*, Communication No R 7/30, para 13.3.

⁷⁰ Human Rights Committee, *Marais v Madagascar*, Communication No 49/1979, para 18.2. See also HRC *Bleier*, para 13.3.

⁷¹ Appeal on behalf of Mr. Abdullah Al-Senussi against the “Decision on Libya’s postponement of the execution of the request for arrest and surrender of Abdullah Al-Senussi pursuant to article 95 of the Rome Statute and related Defence request to refer Libya to the UN Security Council”, ICC-01/11-01/11-439, 9 September 2013.

(ii) Failure to rely on the lack of legal representation to find unwillingness and inability

50. The right to legal representation is at the heart of fairness and justice in the conduct of any criminal proceedings.⁷² It is common ground that Mr. Al-Senussi has had to face criminal proceedings in Libya for over 13 months during the entire investigation and accusation stages without any legal representation and assistance. It has undoubtedly impeded his ability to exercise his rights in both the investigation and accusation stages and effectively challenge the case being brought against him, which cannot now be remedied and reversed. As set out below, the accusation stage is now complete and his trial is due to commence, and yet he still has no lawyer.⁷³

51. This flagrant breach of his most fundamental rights is a reason alone to find that Libya is unwilling and unable to try Mr. Al-Senussi in accordance with Libyan law and having regard to well-established international human rights and due process standards. The lack of legal representation is thus relevant to both the “unwillingness” and “inability” requirements of Article 17.

52. The Pre-Trial Chamber rightly noted that Mr. Al-Senussi is yet to have any lawyer appointed to represent him in the domestic proceedings in Libya. The Chamber also rightly referred to Article 106 of Libya’s Criminal Procedure Code⁷⁴ which provides that “during the investigation phase of the case, a suspect has the right to appoint a lawyer to attend interviews with the Prosecutor-General and the Military Prosecutor and during confrontation of the defendant with witnesses by the Prosecutor-General.”⁷⁵

⁷² Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, ICC-01/04-01/06-772, 14 December 2006, paras. 36, 37.

⁷³ See para. 80 below.

⁷⁴ Impugned Admissibility Decision, paras. 206, 233.

⁷⁵ See, Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11-307-Red2, 2 April 2013, para. 146 (hereinafter “Admissibility Application of 2 April 2013”).

53. However, the Chamber erred in finding that the lack of legal representation did not mean that Libya was unwilling and unable to try Mr. Al-Senussi⁷⁶ for the following reasons, which are each considered in turn below:

- First, the Chamber did not find that Article 106 – a central provision of due process in Libyan law – was violated given that Mr. Al-Senussi had not obtained legal representation, despite his repeated requests for a lawyer⁷⁷, during the investigation stage when he was questioned and interrogated by the Libyan authorities.
- Second, the Chamber erred in not finding that the denial of Mr. Al-Senussi’s right to counsel during the investigation and accusation stages would have a prejudicial impact on the proceedings, which cannot be reversed and remedied.
- Third, the Chamber reversed the burden of proof and failed to require Libya to establish that the lack of legal representation was not an impediment to it being willing and able genuinely to carry out the proceedings. In so doing, the Chamber contradicted in its own findings in the same case against Saif Gaddafi.

Violations of Article 106 of the Libyan Code and international treaties

54. The Chamber, having noted Article 106 of the Libyan Code⁷⁸ and that Mr. Al-Senussi had been interrogated during the investigation stage⁷⁹, failed to connect these two facts and make the obvious and logical finding that Libya had acted in violation of Mr. Al-Senussi’s due process rights by interrogating without permitting him to have a lawyer

⁷⁶ Impugned Admissibility Decision, para. 206, 233.

⁷⁷ Defence Response of 14 June 2013, paras. 124-127; Further Submissions of 26 August 2013, paras. 19, 20; Addendum to “Filing on behalf of Mr. Abdullah Al-Senussi pursuant to ‘Decision on additional submissions in the proceedings related to Libya’s challenge to the admissibility of the case against Abdullah Al-Senussi’ of 19 August 2013,” and Urgent Application pursuant to Regulation 35, ICC-01/11-01/11-432, 5 September 2013, para. 20 (hereinafter “Addendum of 5 September 2013”). See, Libya: Ensure Abdallah Sanussi Access to Lawyer, HRW, 17 April 2013 (<http://www.hrw.org/news/2013/04/17/libya-ensure-abdallah-sanussi-access-lawyer>); ICC: Libya's Bid to Try Gaddafi, Sanussi, HRW, 13 May 2013, Question 34 (<http://www.hrw.org/news/2013/05/13/qa-libya-and-international-criminal-court#40>); Libya must surrender Saif al-Islam al-Gaddafi to International Criminal Court, Amnesty International, 18 September 2013 (<http://www.amnesty.org/en/for-media/press-releases/libya-must-surrender-saif-al-islam-al-gaddafi-international-criminal-court->).

⁷⁸ Impugned Admissibility Decision, paras. 227, 233.

⁷⁹ Impugned Admissibility Decision, paras. 96, 230.

of his choosing. Consequently, the Chamber failed to consider and decide whether this violation was sufficient to find that Libya was not bringing Mr. Al-Senussi to justice in accordance with the provisions of Article 17(2)(c).

55. In the Appellant's submission, this violation is plainly so fundamental that it must demonstrate that Libya is not treating Mr. Al-Senussi fairly and justly. Not only has he had no legal representation throughout the investigation stage, he has had no lawyer during the accusation stage, and still has no lawyer⁸⁰. The Chamber failed to find that any violation had occurred even though the Chamber recognised that "According to Libya's Criminal Procedure Code, suspects have a right to legal representation during the investigation phase of the case, both in interviews with the Prosecutor-General and when confronted with witnesses, as well as the right to view the investigating material relating to their case. If the suspect does not appoint counsel, the Accusation Chamber will appoint counsel to review the investigative materials in order to prepare the case for the defence."⁸¹

56. Libya has also consistently maintained that the Accusation Chamber would appoint counsel before confirming the charges and transferring the case to the Trial Chamber. In a recent filing to the Appeals Chamber in Mr. Gaddafi's case, for instance, it referred to "the requirement under Libyan law that he is entitled to legal representation from the commencement of the accusation phase."⁸² And yet, Mr. Al-Senussi had no lawyer during the accusation stage and still has no lawyer.

57. The right to legal representation is an indispensable and obligatory requirement in any criminal case, especially one involving the death penalty. The Chamber did note that "Libya's willingness and ability to carry out its proceedings against Mr Al-Senussi must be assessed in light of the relevant law and procedures applicable to domestic proceedings in Libya."⁸³ The Pre-Trial Chamber also found that "applicable guarantees" under the Libyan system include "a number of relevant human rights

⁸⁰ Interview with Omar Al-Haddad on 24 October 2013 (<https://www.facebook.com/photo.php?v=542053822536678>). See, minute 4:51 in which Omar Al-Haddad says " ... and there is another important fact, as we heard from one of the lawyers, Abdullah al-Senussi and Saif al-Islam Gaddafi have not yet had lawyers appointed for them and in the coming hearing if no lawyer is appointed to them the Criminal Court will appoint them a lawyer for their defence."

⁸¹ Impugned Admissibility Decision, para. 206.

⁸² The Libyan Government's further submissions in reply to the Prosecution and Gaddafi Responses to "Document in Support of Libya's Appeal against the "Decision on the admissibility of the case against Saif Al-Islam Gaddafi", ICC-01/11-01/11-454-Red, 23 September 2013, para. 47.

⁸³ Impugned Admissibility Decision, para. 203.

instruments,”⁸⁴ and that “Libya is party to international and regional human rights instruments that guarantee the right to a fair trial, including the International Covenant on Civil and Political Rights, ... [and] the African Charter on Human and Peoples' Rights” among others.⁸⁵ However, the Chamber made no reference to any of the relevant provisions of these instruments – in particular those that guarantee an accused’s right to legal representation – in the Decision to assess whether Libya had in fact demonstrated that Mr. Al-Senussi was being brought to justice.

58. In particular, Article 14 of the International Covenant on Civil and Political Rights (ICCPR) unquestionably protects the right to legal representation in criminal proceedings:

*“In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”*⁸⁶

*“3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; ... [and] ... (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;”*⁸⁷

59. Article 7 of the African Charter on Human and Peoples’ Rights is equally clear on the right to legal representation:

*1. “Every individual shall have the right to have his cause heard. This comprises: ... (c) the right to defence, including the right to be defended by counsel of his choice; ... ”*⁸⁸

60. As set out above⁸⁹, Articles 55(2) and (67)(1)(b) and (d) of the Rome Statute enshrine the right to legal representation as an essential part of the ICC’s Statute. Legal representation is obviously critical when an accused is being interrogated – as has

⁸⁴ Impugned Admissibility Decision, para. 203.

⁸⁵ Impugned Admissibility Decision, para. 203, note 476.

⁸⁶ ICCPR, Article 14(1).

⁸⁷ ICCPR, Article 14 (3).

⁸⁸ African Charter on Human and Peoples’ Rights, Article 7.

⁸⁹ See paras. 40, 41.

occurred in Mr. Al-Senussi's case – to assist the accused, to ensure his rights are protected, and to seek to prevent abuse and mistreatment, particularly if inflicted to obtain a confession.⁹⁰ The Chamber in Mr. Gaddafi's case highlighted this problem as an impediment in the proceedings.⁹¹

61. For all of these reasons, the Chamber should have found that in the absence of legal representation for over 13 months, Libya had not satisfied the Court that Mr. Al-Senussi was being brought to justice and that Libya was able to carry out the proceedings.

The impact of these violations on the proceedings

62. In Mr. Al-Senussi's case the Chamber failed to take account of evidence that Mr. Al-Senussi has made confessions during his interrogations while being unrepresented. On 27 August 2013 the Libyan Prosecutor Mr. Al-Seddik al-Sur announced that Mr. Al-Senussi had made confessions about allegedly collaborating in the production of car bombs in the city of Benghazi.⁹² Libya did not deny this fact in any of its filings.⁹³

63. Indeed, Libya admits,⁹⁴ as the Chamber noted, that he has been interrogated several times, and gives the dates of some interrogations. It also admits that that Mr Al-Senussi has been confronted with witness statements against him⁹⁵. Libya even goes so far as saying that Mr Al-Senussi “has been confronted *with most of the evidence collected against him*”, as the Chamber also notes.⁹⁶

64. The Pre-Trial Chamber failed to address these violations of Mr Al-Senussi's rights to counsel and to remain silent. It failed to recognise that such violations, as well as others that were in the record, taint any future ‘judicial’ process in Libya irremediably.

⁹⁰ See, Addendum of 5 September 2013, para. 20 and Ground 2.

⁹¹ Gaddafi Admissibility Decision, paras. 212-215.

⁹² Addendum of 5 September 2013, para. 20. See, Libya to Try Gadhafi's Son Next Month, AP, 27 August 2013 (http://hosted.ap.org/dynamic/stories/M/ML_LIBYA?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT).

⁹³ See, Government's Submissions and Response to Defence “Filing on behalf of Mr. Abdullah Al-Senussi pursuant to “Decision on additional submissions in the proceedings related to Libya's challenge to the admissibility of the case against Abdullah Al-Senussi” of 19 September 2013” and ““Addendum” filed on 5 September 2013”, ICC-01/11-01/11-455, 26 September 2013, para. 28 (hereinafter “Libya Submissions of 26 September 2013”).

⁹⁴ Admissibility Application of 2 April 2013 para 165.

⁹⁵ ICC-01/11-01/11-307-Conf-Anx3-Red . See also, Defence Response of 14 June, para. 43; Impugned Admissibility Decision, para. 96.

⁹⁶ Impugned Admissibility Decision, n. 606.

65. First, the Pre-Trial Chamber failed to address the fact that prolonged detention incommunicado, which has already occurred can *in itself* amount to inhumane treatment contrary to the well-established right of individuals to be free from torture and cruel, inhuman or degrading treatment or punishment⁹⁷. It goes without saying that in circumstances in which a suspect has been tortured and mistreated by a State, it is impossible to conclude that the State's process is able to conduct genuine proceedings or that there is a functioning system with an intent to bring the person to 'justice'.

66. Second, the right to legal assistance applies at an early stage and cannot simply be 'cured' by the imposition of a lawyer at a later stage. The right - enshrined in the statutes of various international criminal tribunals⁹⁸ as well numerous human rights instruments⁹⁹ that Libya has ratified and that the Chamber admitted were relevant to its determination - applies to all stages of criminal proceedings. This includes the pre-trial stage¹⁰⁰ and investigation stage¹⁰¹. The right arises immediately or very shortly upon arrest, applies at hearings challenging pre-trial detention¹⁰² as well as at any

⁹⁷ African Commission on Human and Peoples' Rights, *Article 19 v Eritrea*, Communication No 275/03, para 101; Human Rights Committee, *Caldas v Uruguay*, Communication No 43/1979, para 13.3.

⁹⁸ Rome Statute of the International Criminal Court (Rome, 17 July 1998, 2187 UNTS 90) arts 55(2)(c)-(d), 67(1)(d); Statute of the International Criminal Tribunal for the former Yugoslavia (25 May 1993, 32 ILM 1159 (1993)) arts 18(3), 21(4)(d); Statute of the International Criminal Tribunal for Rwanda (8 November 1994, 33 ILM 1598 (1994)) arts 17(3), 20(4)(d).

⁹⁹ International Covenant on Civil and Political Rights (New York, 16 December 1966, 999 UNTS 171) arts 14(3)(b) and (d); European Convention on Human Rights (Rome, 4 November 1950, 213 UNTS 221) art 6(3)(c); American Convention on Human Rights (San José, 22 November 1969, 1144 UNTS 143) art 8(2)(d); African Charter on Human and Peoples' Rights (Banjul, 27 June 1981, 1520 UNTS 217) art 7(1)(c); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1987, GA Res 39/46, UN Doc A/RES/39/46 (1987)) art 6(3).

¹⁰⁰ Human Rights Committee, *Borisenko v Hungary*, Communication No 852/1999, 14 October 2002 para 7.5; Human Rights Committee, *Wright and Harvey v Jamaica*, Communication No 459/1991, 27 October 1995, para 10.2; European Court of Human Rights, *Ocalan v Turkey*, Application No 46221/99, Judgment, 12 May 2005, para 131; European Court of Human Rights, *Magee v the United Kingdom*, Application No 28135/95, Judgment, 6 June 2000, para 41; European Court of Human Rights, *John Murray v the United Kingdom*, Application No 18731/91, Judgment, 8 February 1996, para 62; European Court of Human Rights, *Imbrioscia v Switzerland*, Application No 13972/99, Judgment, 24 November 1993, para 36; Inter-American Commission on Human Rights, *Lendore v Trinidad and Tobago*, Case No 12.269, Judgment, 20 March 2009, para 43; Inter-American Commission on Human Rights, Report No 41/00 (1999), para 304; African Commission on Human and Peoples' Rights, *Egyptian Initiative for Personal Rights and Interight v Arab Republic of Egypt*, Communication No 334/06, para 209.

¹⁰¹ European Court of Human Rights, *Ocalan v Turkey*, Application No 46221/99, Judgment, 12 May 2005, (n100) para 131.

¹⁰² European Court of Human Rights, *Benham v the United Kingdom*, Application No 19380/92, Judgment, 10 June 1996 ([http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57990#{%22itemid%22:\[%22001-57990%22\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57990#{%22itemid%22:[%22001-57990%22]})). See, para. 61. "The Court agrees with the Commission that where deprivation of liberty is at stake, the interests of justice in principle call for legal representation."; See also, *Hooper v the United Kingdom*, Application No 42317/98, Judgment, 16 November 2004, para 20 (<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67466>).

preliminary hearing determining the charges against the accused.¹⁰³ This is especially so where the individual in question is suspected of or is charged with a capital offence.¹⁰⁴

67. In the words of the African Court of Human Rights, the right to counsel applies during all stages of any criminal prosecution “*including preliminary investigations in which evidence is taken, periods of administrative detention, trial and appeal proceedings*”. Similarly, Principle 7 of the UN Basic Principles on the Role of Lawyers guarantees the right for arrested and detained persons to have “prompt access to a lawyer, and *in any case not later than forty-eight hours from the time of arrest or detention*”¹⁰⁵. The Inter-American Commission on Human and Peoples’ Rights requires that defendants be given the opportunity to retain counsel “as soon as reasonably practicable following their arrest or detention.”¹⁰⁶

68. The provision of legal assistance at the eleventh-hour cannot ‘cure’ a violation of the right to counsel at the earlier stages given that the denial of access to legal assistance during the preliminary stage is likely to have a seriously prejudicial effect on the fairness of the subsequent trial.¹⁰⁷ As the European Court of Human Rights has found,

¹⁰³ *Wright and Harvey v. Jamaica*, Comm. n. 459/1991, 27 October 1995, para. 10.2 – “the Committee considers that it is undisputed that Mr. Wright was not represented by counsel at the preliminary hearing of the charges against him. The Committee affirms that legal assistance must be made available to an accused who is charged with a capital crime. This applies not only to the trial and relevant appeals, but also to any preliminary hearings relating to the case. The Committee notes that there is no indication that the lack of representation at the preliminary hearing was attributable to Mr. Wright. The Committee finds therefore that the failure to make legal representation available to Mr. Wright at the preliminary hearing constitutes a violation of article 14, paragraph 3(d), of the Covenant.”

¹⁰⁴ Human Rights Committee, *Kelly v Jamaica*, Communication No 537/1993, para 9.4 - “... the Committee reaffirms that it is axiomatic that legal assistance be made available to convicted prisoners under sentence of death. This applies to all stages of the process.” See also Human Rights Committee, *Robinson v Jamaica*, Communication No 223/1987, para 10.3 - “The Committee, noting that article 14 (3)(d) stipulates that everyone shall have ‘legal assistance assigned to him, in any case where the interests of justice so require’, believes that it is axiomatic that legal assistance be available in capital cases.” See further Inter-American Commission on Human Rights, Report No 41/00 (1999), para 304: “Strict compliance with [the guarantee of access to legal assistance in Article 8(2)(d) of the American Convention on Human Rights] is particularly fundamental in the context of trials involving capital offenses.”

¹⁰⁵ United Nations, *Basic Principles on the Role of Lawyers*, 7 September 1990.

¹⁰⁶ Inter-American Commission on Human Rights, Report No 41/00 in Annual Report (1999), para 304 (<http://www.cidh.org/annualrep/99eng/Merits/Jamaica12.023c.htm>).

¹⁰⁷ European Court of Human Rights, *Imbrioscia v Switzerland*, Application No 13972/99, Judgment, 24 November 1993, para 36. Whilst this is the language of the European Court of Human Rights, the African Commission on Human and Peoples’ rights implicitly relies on a similar notion by extending the right to counsel to “preliminary investigations in which evidence is taken, periods of administrative detention” etc. See, African Commission on Human and Peoples’ Rights, *Egyptian Initiative for Personal Rights and Interight v Arab Republic of Egypt*, Communication No 334/06, para 209; Human Rights Committee, *Wright and Harvey v Jamaica*, Communication No 459/1991, 27 October 1995, para 10.2. In *Wright and Harvey v Jamaica*, the Human Rights Committee found a violation of Mr Wright’s right to legal representation under the ICCPR in circumstances where he was denied legal representation at his preliminary hearing although he benefited from such representation at subsequent hearings.

“[t]o deny access to a lawyer for the first 48 hours of police questioning in a situation where the rights of the defence *may well be irretrievably prejudiced* whatever the justification for such denial [is] incompatible with the rights to a fair trial for the accused.”¹⁰⁸ In *Ocalan*, the European Court found that such irremediable prejudice had occurred when the accused “received no legal assistance during [a 6-day] period and made several self-incriminating statements that were subsequently to become crucial elements of the indictment and the public prosecutor's submissions and a major contributing factor in his conviction”.¹⁰⁹ Similarly in the *Magee* case, the European Court found a violation of Article 6, paragraph 1 in conjunction with Article 6, paragraph 3(c) in that the applicant was denied access to a solicitor. The incriminating statements made by the applicant within the first 24 hours of detention prior to being granted access to a solicitor became the central platform of the prosecution’s case. The applicant was convicted and sentenced to 20 years’ imprisonment. Referring to the judgment of the European Court, the English Court of Appeal later quashed the applicant’s conviction.¹¹⁰

69. In Mr. Al-Senussi’s case, Libya admits that he has already made multiple ‘confessions’ and that the admissibility of evidence – thus including confessions – occurs at the Accusation stage, which has already been completed (not surprisingly, by confirming all charges against Mr Al-Senussi).¹¹¹ These serious violations of Mr. Al-Senussi’s rights clearly show that Libya is unable and unwilling to try him.

¹⁰⁸ European Court of Human Rights, *John Murray v the United Kingdom*, Application No 18731/91, Judgment, 8 February 1996, para 66.

¹⁰⁹ European Court of Human Rights, *Case of Ocalan v. Turkey*, App nl. 46221/99, Judgment, Strasbourg, 12 May 2005, para. 131. See also, European Court of Human Rights, *Case of Magee v. The United Kingdom*, App No. 28135/95, Judgment, 6 June 2000, para. 43. Paragraph 43 states – “The Court observes that prior to his confession the applicant had been interviewed on five occasions ... Apart from his contacts with the doctor, the applicant was kept incommunicado during the breaks between bouts of questioning conducted by experienced police officers operating in relays. It sees no reason to doubt the truth of the applicant's submission that he was kept in virtual solitary confinement throughout this period. ... The austerity of the conditions of his detention and his exclusion from outside contact were intended to be psychologically coercive and conducive to breaking down any resolve he may have manifested at the beginning of his detention to remain silent. Having regard to these considerations, the Court is of the opinion that the applicant, as a matter of procedural fairness, should have been given access to a solicitor at the initial stages of the interrogation as a counterweight to the intimidating atmosphere specifically devised to sap his will and make him confess to his interrogators.”

¹¹⁰ European Court of Human Rights, *Case of Magee v. The United Kingdom*, App No. 28135/95, Judgment, 6 June 2000, paras. 40-44. See also, *Case of Berlinski v. Poland*, App Nos. 27715/95 and 30209/96, Judgment, 20 June 2002 - “It is also uncontested that the applicants' request for an official lawyer to be appointed was ignored by the authorities, with the result that they had no defence counsel for more than a year. Given that a number of procedural acts, including questioning of the applicants and their medical examinations, were carried out during that period ... the Court finds no justification for this restriction which deprived the applicants of the right to adequately defend themselves during the investigation and trial”.

¹¹¹ See Impugned Admissibility Decision, para 147, citing Admissibility Application of 2 April 2013, para 174 - “If the intercepts are ultimately to be relied upon as evidence in a future trial of Abdullah Al-Senussi their

Reversal of burden of proof and lack of evidence about legal representation

70. The Pre-Trial Chamber erred by in effect reversing the burden of proof in its reasoning and findings. Although the Chamber repeated its finding in the *Gaddafi* Admissibility Decision that “the challenging State is required to substantiate all aspects of its allegations to the extent required by the concrete circumstances of the case” and that the State must “substantiat[e] all requirements set forth by law when seeking to successfully challenge the admissibility of a case”¹¹², it did not consistently apply this finding on the burden of proof.
71. The Chamber held that it “will take into account only those irregularities that may constitute relevant indicators of one or more of the scenarios described in article 17(2) or (3) of the Statute, and that are sufficiently substantiated by the evidence and information placed before the Chamber”.¹¹³ Yet, it is not for the Defence to prove that irregularities have occurred (although the Defence provided ample evidence of unwillingness and inability, as set out below) – the burden is on Libya to establish that the requirements of Article 17(2) and (3) have been satisfied.
72. This error pervades the Chamber’s findings on inability and unwillingness and as a result materially affected the Chamber’s conclusions in relation to Article 17(2)(c) (unwillingness) and 17(3) (inability). It arises particularly in respect of the Chamber’s findings on the lack of representation (and in relation to other findings.)
73. The Chamber failed to provide any reasoning as to why Libya had discharged its burden of establishing that the lack of legal representation did *not* reveal an inability and unwillingness to hold genuine proceedings, as Libya is required to do under Article 17. Moreover, the Chamber’s findings in Mr. Al-Senussi’s case were wholly inconsistent with its findings in the *Gaddafi* Admissibility Decision. Although the Chamber “acknowledges that the alleged investigation into the case against Mr Gaddafi may significantly overlap with the case in relation to Mr Al-Senussi” – and indeed the two suspects are charged in the same case both in Libya and at the ICC –

admissibility will need to be decided upon by the Chambre D’Accusation.” See also, Impugned Admissibility Decision, para 204. See para. 80.

¹¹² Impugned Admissibility Decision, para. 27. See, *Gaddafi* Admissibility Decision, para. 52.

¹¹³ Impugned Admissibility Decision, para. 221.

the Chamber reached contradictory conclusions as between the two suspects on the same facts.

74. In Mr. Gaddafi’s case, the Chamber found that if the impediment of not having legal representation “is not removed, a trial cannot be conducted in accordance with the rights and protections of the Libyan national justice system”.¹¹⁴ In Mr. Al-Senussi’s case, however, although the Chamber noted that the problem of legal representation “holds the potential to become a fatal obstacle to the progress of the case”,¹¹⁵ it found that it did not constitute an impediment at the time of the admissibility decision to progress being made in the proceedings because Libya had stated that it “expected” legal representation to be secured at the order of the Accusation Chamber “in the very near future”.¹¹⁶ Libya claimed that there were lawyers from Mr. Al-Senussi’s tribe who could be appointed in the future and that the security challenges were not insurmountable. Libya had said the same about Mr. Gaddafi – that the obstacle of obtaining legal representation would be overcome in the future in the accusation stage before his trial commenced.¹¹⁷ But the Chamber correctly found in that case that the lack of legal representation remained at the time of the admissibility decision “a practical impediment to the progress of domestic proceedings”, and thus Libya was unable to try Mr. Gaddafi.¹¹⁸

75. The mere fact that Libya asserts in general and vague terms – without any evidence to substantiate it – that in Mr. Al-Senussi’s case lawyers – unspecified and unnamed – have indicated their willingness to represent him, provides no assurance that he will actually get any legal representation. Libya has also provided no evidence that the security concerns can and will be overcome in respect of these or any other lawyers. The Chamber was not convinced in Mr. Gaddafi’s case that the impediment would be resolved, and there is no reason that the evidence in Mr. Al-Senussi’s case, which is no different, provides any basis to conclude that there is sufficient evidence to show that Mr. Al-Senussi will benefit from legal representation at some future date. On the

¹¹⁴ Gaddafi Admissibility Decision, para. 214.

¹¹⁵ Impugned Admissibility Decision, para. 307.

¹¹⁶ Impugned Admissibility Decision, para. 208 citing Libya Submissions of 26 September 2013, para. 28.

¹¹⁷ Libyan Government’s further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi”, ICC-01/11-01/11-258-Red, 23 January 2013, para. 97; Libyan Government’s consolidated reply to the responses of the Prosecution, OPCD, and OPCV to its further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi, ICC-01/11-01/11-293-Conf, 4 March 2013, paras. 53, 54.

¹¹⁸ Gaddafi Admissibility Decision, para. 215.

contrary, the evidence shows that defence lawyers are being attacked for representing individuals in Mr. Al-Senussi's case.¹¹⁹ The security situation is if anything getting worse¹²⁰ and Libya has provided no evidence to establish that it will improve in the coming months when the trial is due to start.

76. As found in Mr. Gaddafi's case, Libya has not discharged its burden and shown "whether and how it will overcome the existing difficulties in securing a lawyer"¹²¹, and the same finding should have been made in Mr. Al-Senussi's case.

77. It must also be taken into account that the vague evidence about potential lawyers indicating a willingness to defend Mr. Al-Senussi was only offered in Libya's final submission on 26 September 2013.¹²² Indeed, all of Libya's submissions about what occurred at the hearing on 19 September 2013, which were only provided in its final submission on 26 September 2013, were mere assertions without any concrete evidence being adduced. The Defence had no opportunity to respond to these assertions from Libya and was not heard in respect of them.

78. In finding that the Chamber "*has no reason to put into question the information provided by Libya in this regard*"¹²³, the Chamber effectively reversed the burden of proof onto the Defence to disprove Libya's unsubstantiated assertions, and yet the Defence was not even provided an opportunity to respond.

¹¹⁹ Following the hearing on 19 September, several defence lawyers representing accused in Mr. Al-Senussi's case expressed fear for their safety and one defence lawyer was attacked by the relatives of victims as he was leaving the court in Tripoli. In addition, the lawyer appointed to represent Mr. Gaddafi in Zintan expressed fear for her safety after her nephew was kidnapped only days after she acted for Mr. Gaddafi.

See, Saif Gaddafi's lawyer concerned for her safety after kidnap of nephew, *The Telegraph*, 4 October 2013 (<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/10356314/Saif-Gaddafis-lawyer-concerned-for-her-safety-after-kidnap-of-nephew.html>).

¹²⁰ Report of the Secretary-General on the United Nations Support Mission in Libya, S/2013/516, 5 September 2013, para. 38 (<http://reliefweb.int/sites/reliefweb.int/files/resources/N1343182.pdf>); *Libya: Suspend Death Sentences Against Gaddafi Loyalists*, HRW, 4 October 2013 (<http://www.hrw.org/news/2013/10/04/libya-suspend-death-sentences-against-gaddafi-loyalists>); *Torture and Deaths in Detention in Libya*, UNSMIL, 1 October 2013, p. 14; *Libya must surrender Saif al-Islam al-Gaddafi to International Criminal Court*, Amnesty International, 18 September 2013 (<http://www.amnesty.org/en/for-media/press-releases/libya-must-surrender-saif-al-islam-al-gaddafi-international-criminal-court->); *Libya PM Ali Zeidan kidnapped at gunpoint*, Sky News, 10 October 2013 (<http://news.sky.com/story/1152519/libya-pm-ali-zeidan-kidnapped-at-gunpoint>); *Libyan PM Ali Zeidan detained by militia*, BBC, 10 October 2013 (<http://www.bbc.co.uk/news/world-africa-24470850>); *Latest abduction highlights 'dysfunctional' justice system*, Amnesty International, 3 September 2013 (<http://www.amnesty.org/en/news/libya-latest-abduction-highlightsdysfunctional-justice-system-2013-09-03>); *Political killings drive Libya toward new civil war*, UPI, 24 October 2013 (http://www.upi.com/Top_News/Special/2013/10/24/Political-killings-drive-Libya-toward-new-civil-war/UPI-74441382644366/?spt=rln&or=1).

¹²¹ Gaddafi Admissibility Decision, para. 215.

¹²² Libya Submissions of 26 September 2013 para. 28.

¹²³ Impugned Admissibility Decision, para. 308.

79. The evidence before the Chamber showed that Libya was unwilling and unable to provide legal representation to Mr. Al-Senussi. In a press conference only weeks before the Chamber's Decision, Libya itself admitted that the lack of legal representation for Mr. Al-Senussi is a clear impediment to conducting any proceedings in Libya¹²⁴. Libya provided no evidence of any change in circumstances, beyond the bald assertion in its filing of 26 September 2013 that members of Mr Al-Senussi's tribe may come forward to represent him.¹²⁵ Libya had made a similar assertion on 14 August 2014, but no lawyer had subsequently been appointed.¹²⁶

80. Furthermore, it was reported that on 24 October 2013 the Accusation Chamber confirmed the charges against Mr. Al-Senussi, which ended the confirmation phase. And yet, as the report confirms, Mr. Al-Senussi still has no legal representation.¹²⁷ He has thus not been assisted by a lawyer during the entirety of this very important phase of the case in which the charges and the evidence can be challenged¹²⁸, despite Libya indicating that he would have a lawyer. Libya had stated that if the "suspect does not avail himself of his right to appoint counsel, the Chambre d'Accusation will appoint counsel"¹²⁹ and "[i]t is the Accusation / Indictment Judge's role to ensure ... that a lawyer has been appointed for the suspect"¹³⁰. The Chamber relied on Libya's submissions that the "final hurdle to securing legal representation will be overcome at the order of the Accusation Chamber" when deciding that Libya is able to try Mr. Al-

¹²⁴ Addendum of 5 September 2013, paras. 21-23 citing video-interview available at http://www.youtube.com/watch?feature=youtu.be&v=ti1BEX-DQGQ&desktop_uri=%2Fwatch%3Fv%3Dt1BEX-DQGQ%26feature%3Dyoutu.be&nomobile=1 ([unofficial translation]"[the upcoming court proceedings on 19 September will require defence counsel and] today I called on Libyan lawyers to accept to undertake this work or else the trial will never take place. I mean if the Libyans - Libyan lawyers - do not accept this job and to work on it the court will not sit, the hearing will not be held, and if the hearing is not held and the court does not sit then in this case the ICC will say to us 'you are not able to try [these people]'... Libyan law is one of those laws which permits recourse to foreign lawyers easily, but without providing such a lawyer the session can't be held in the first place".

¹²⁵ Libya Submissions of 26 September 2013, paras. 9, 28.

¹²⁶ Libyan Government's consolidated Reply to the Responses by the Prosecution, Defence and OPCV to the Libyan Government's Application relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11-403-Red2, 14 August 2013, para. 146. Libya stated that it "remains committed to securing legal representation for Mr. Al-Senussi. The sensitivity of the case and the security situation is such that there has been some delay in achieving this. However, recently, several local lawyers have indicated their willingness to represent Mr. Al-Senussi in the domestic proceedings."

¹²⁷ Interview with Omar Al-Haddad on 24 October 2013 (<https://www.facebook.com/photo.php?v=542053822536678>). See, minute 4:51 in which Omar Al-Haddad says " ... and there is another important fact, as we heard from one of the lawyers, Abdullah al-Senussi and Saif al-Islam Gaddafi have not yet had lawyers appointed for them and in the coming hearing if no lawyer is appointed to them the Criminal Court will appoint them a lawyer for their defence."

¹²⁸ Admissibility Application of 2 April 2013, paras. 130, 146.

¹²⁹ Admissibility Application of 2 April 2013, para. 146.

¹³⁰ Admissibility Application of 2 April 2013, para. 130.

Senussi.¹³¹ However, as at the closing of the Accusation Stage on 24 October 2013, it has been reported that Mr. Al-Senussi has still not been appointed a lawyer¹³², and there is no indication when that could happen, if at all. Libya has instead claimed in its latest filing before the Appeals Chamber that the Accusation Stage has not been completed¹³³ even though the Libyan Prosecutor has stated that the charges have now been confirmed and that the trial will commence.

81. These developments underscore the importance of the Chamber not relying on the undertaking of Libya that it expected a lawyer to be appointed very soon, especially when Mr. Al-Senussi's rights continue to be ignored as he has to participate in proceedings without any legal representation. No reasonable chamber would tolerate such a fundamental violation of due process over such a lengthy period of time.

82. Moreover, the Chamber ruled on these matters in its Admissibility Decision just 3 days before it was due to receive the Registry's report, as ordered by the Chamber, about what arrangements could be made with Libya on an *ad hoc* basis to permit the Defence urgently to visit Mr. Al-Senussi. Any possibility of hearing from Mr. Al-Senussi on these vital matters – including whether lawyers from his tribe might represent him – was thus pre-empted by the Chamber ruling before it had even waited for the outcome of its own order.

Contradictory findings on security challenges

83. The Chamber was wrong to seek to get around the blatant violation of Mr. Al-Senussi's right to legal representation by finding that it was primarily due to the "current security concerns"¹³⁴, namely that lawyers are afraid to come forward due to safety concerns¹³⁵. Although the security situation has contributed to the problem, this does not change the fact that Mr. Al-Senussi is not being brought to justice. Ultimately, the reason why counsel has not been appointed should be irrelevant to the Chamber's conclusion: either the security situation does not allow for counsel to be

¹³¹ Impugned Admissibility Decision, para. 308 citing Libya Submissions of 26 September 2013, para. 28.

¹³² <https://www.facebook.com/photo.php?v=542053822536678>.

¹³³ Response to the Al-Senussi Defence's "Request for Suspensive Effect", ICC-01/11-01/11-471, 28 October 2013, para. 16.

¹³⁴ Impugned Admissibility Decision, paras. 302-309.

¹³⁵ Saif Gaddafi's lawyer concerned for her safety after kidnap of nephew, The Telegraph, 4 October 2013 (<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/10356314/Saif-Gaddafis-lawyer-concerned-for-her-safety-after-kidnap-of-nephew.html>).

appointed, indicating Libya's inability to carry out genuine proceedings, or Libya is unwilling to do so and Mr. Al-Senussi is not being brought to justice.

84. The Appellant submits that there was ample evidence before the Chamber to show that Libya had in fact not sought to ensure that Mr. Al-Senussi did obtain legal representation. Despite his repeated requests, no lawyers were permitted to visit Mr. Al-Senussi. Family visits were heavily restricted, which would have prevented him from seeking the assistance of his family to obtain legal representation.¹³⁶ Defence lawyers in Mr. Al-Senussi's case have been harassed and attacked and their family members have been abducted.¹³⁷ The Government has taken no steps to investigate and prosecute this behaviour and prevent its re-occurrence. It should also be taken into account that Libya has not facilitated a visit for Mr. Al-Senussi's Defence team. The Pre-Trial Chamber gave no weight at all to these matters, and instead sought to avoid the central issue by blaming the problem on "the security situation". Moreover, as set out below, the Chamber was required to consider all evidence relevant to Mr. Al-Senussi not being brought to justice and not being tried fairly, which extended beyond the denial of legal representation.

85. By finding that the security situation had caused the lack of legal representation, the Chamber contradicted its own finding that the security situation had not adversely affected Libya's ability to conduct the national proceedings. The Chamber found that the fact that the case had progressed to the Accusation Stage "without incident" showed that the security situation had not constituted an impediment.¹³⁸ Yet, the Chamber at the same time claimed that the security challenges had in fact impeded the appointment of a lawyer, which does directly impact on the conduct of the proceedings.¹³⁹

86. As noted above, the Chamber went further and held that Libya had established that these security challenges could be overcome in future, and thus it could not be said that they were an impediment which showed that Libya was unable to try Mr. Al-Senussi. This finding is directly at odds with the Pre-Trial Chamber's decision in Mr.

¹³⁶ See new evidence submitted under Ground 2.

¹³⁷ Saif Gaddafi's lawyer concerned for her safety after kidnap of nephew, *The Telegraph*, 4 October 2013 (<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/10356314/Saif-Gaddafis-lawyer-concerned-for-her-safety-after-kidnap-of-nephew.html>).

¹³⁸ Impugned Admissibility Decision, para. 303.

¹³⁹ Impugned Admissibility Decision, para. 307.

Gaddafi's case in which the Chamber held that the difficulties in securing a lawyer due to the security challenges were an impediment which demonstrated that Libya was unable to try him.¹⁴⁰ No reasonable chamber could possibly justify a different outcome for Mr. Al-Senussi when the same security challenges have also resulted in him having no legal representation.

87. In Mr. Al-Senussi's case the Chamber sought to distinguish the two cases on entirely misconceived grounds. First, it noted that Mr. Gaddafi is not under Government control, whereas Mr. Senussi is imprisoned in Tripoli by the central Government.¹⁴¹ This matter is irrelevant. At no stage did the Chamber in its analysis of the problem of legal representation in Mr. Gaddafi's case state that it was an impediment to the progress of the proceedings on account of *where* Mr. Gaddafi was imprisoned.¹⁴²

88. Second, the Chamber said that in the present case, there was evidence from Libya that lawyers could be assigned in the near future – from “Mr. Al-Senussi's tribe” who have indicated “their willingness to represent” him – and that the security concerns were not insurmountable¹⁴³, whereas the Chamber stated that attempts to secure legal representation for Mr. Gaddafi had “repeatedly failed”.¹⁴⁴ This assertion is false. Attempts to assign lawyers have repeatedly failed in both cases.¹⁴⁵ In Mr. Gaddafi's case, Libya has also asserted that lawyers could be assigned in the future and that Libya would overcome the problem.¹⁴⁶ Libya submitted that it had engaged in high level contacts with the Libyan Law Society, the Popular Lawyer's Office, and was in the process of approaching the Bar Association of Tunisia and Egypt.¹⁴⁷ There is thus no difference between the two cases.

¹⁴⁰ Gaddafi Admissibility Decision, paras. 212, 213.

¹⁴¹ Impugned Admissibility Decision, para. 308.

¹⁴² Gaddafi Admissibility Decision, paras. 212-214.

¹⁴³ Impugned Admissibility Decision, paras. 306-308.

¹⁴⁴ Impugned Admissibility Decision, para. 308.

¹⁴⁵ Gaddafi Admissibility Decision, para. 213.

¹⁴⁶ Libyan Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi”, ICC-01/11-01/11-258-Red, 23 January 2013, para. 97; Libyan Government's consolidated reply to the responses of the Prosecution, OPCD, and OPCV to its further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi, ICC-01/11-01/11-293-Conf, 4 March 2013, paras. 53, 54.

¹⁴⁷ Libyan Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi”, ICC-01/11-01/11-258-Red, 23 January 2013, para. 97; Libyan Government's consolidated reply to the responses of the Prosecution, OPCD, and OPCV to its further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi, ICC-01/11-01/11-293-Conf, 4 March 2013, paras. 53, 54.

Correct legal approach

89. The Chamber's approach in Mr. Gaddafi's case is clearly correct and in accordance with the ICC's jurisprudence which requires that a Chamber make its determination about admissibility on the basis of the concrete information available at the time of the decision.¹⁴⁸ The Chamber's approach in Mr. Al-Senussi's case, which contradicts the proper approach, should be rejected as it is speculative and based on the possibility of events occurring which the Chamber is unable to verify will materialise at some later date. In the absence of concrete evidence that establishes that Mr. Al-Senussi has legal representation – as opposed to vague and unsubstantiated expectations from Libya – the problem must remain an obstacle to the progress of the proceedings which shows that Libya is unable to try Mr. Al-Senussi. Indeed, the lack of legal representation in the accusation phase has deprived Mr. Al-Senussi of the benefit of legal assistance in challenging the prosecution case and in exercising all available rights under Libyan law during this stage of the proceedings¹⁴⁹ which cannot now be reversed. As noted above, he has made confessions which can now be used against him.

90. The Prosecution accepts that Libya must positively demonstrate that there is no “foreseeable risk” that the difficulties in appointing counsel cannot be overcome. The Prosecution submitted that the Court must “remain vigilant to obvious obstacles, established on the basis of concrete evidence, that establish a foreseeable risk that national proceedings cannot in fact be carried out”¹⁵⁰. The Prosecution pointed out that the drafting history of Article 17 shows that State delegations were concerned about “whether there was a defect in the approach taken by the State which inevitably, if left to its conclusion, would result in a travesty of justice”. The Prosecution submitted in a subsequent filing in the *Gaddafi* appeal proceedings that “the difficulties in finding a lawyer ... have been acknowledged by [Libya] itself, and are therefore *not a matter of mere speculation*. Second, [Libya] has acknowledged that counsel is a pre-requisite to present the charges before the Indictment Chamber and

¹⁴⁸ Gaddafi Admissibility Decision, para. 220.

¹⁴⁹ See, Admissibility Application of 2 April 2013, paras. 129-131, 143-150.

¹⁵⁰ Prosecution's 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", ICC-01/11-01/11-355, 14 June 2013, para. 24.

move to the prosecution of the case. Thus, unless a lawyer is provided ... the proceedings will not move forward. Although the Chamber needs to consider the facts at the time of the admissibility proceedings and should not engage in speculative assessments on how events will unfold at the domestic level, this is not the situation in the instant case: the Chamber has identified a specific obstacle which - unless adequately addressed - will impede the progress of the proceedings. Therefore, it was not unreasonable to request the [Libya] to demonstrate how it intended to overcome this obstacle.”

91. The Chamber’s approach in Mr. Al-Senussi’s case must be erroneous as it would permit States to “undertake” to take steps in the future in order to seek to try cases nationally, and would require the ICC to declare such cases inadmissible. The Appeals Chamber has firmly rejected such an approach as being impermissible under the Statute finding that to discharge its burden, the State must provide the Court “with evidence of a sufficient degree of specificity and probative value” and that it is “not sufficient merely” to make assertions.¹⁵¹

(iii) Failure to find that Mr. Al-Senussi is not being brought to justice in proceedings that are independent and impartial

92. The Appellant submits that the evidence establishes that Mr. Al-Senussi is not being brought to justice in proceedings that are independent and impartial, having regard to the well-established international standards of due process as required by Article 17. No reasonable chamber could have found on the evidence and in the circumstances in Mr. Al-Senussi’s particular case that he is being treated fairly and will receive a fair and independent trial in Libya. Even if he was to be appointed a lawyer by the court, this would not establish that Libya has been and is willing and able to try him. This is because Mr. Al-Senussi’s basic due process and fair trial rights have not and will not be protected so that it could be concluded that he is being brought to justice in independent and impartial proceedings.

93. The Defence relied on a comprehensive body of evidence that showed that the case was admissible before the ICC. The Defence submits that the Pre-Trial Chamber has

¹⁵¹ Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’, ICC-01/09-02/11-274, 30 August 2011, para. 61.

failed to appreciate the significance of this evidence, when considered as a whole, and has erred in giving it no weight. The Chamber has instead selected aspects of the evidence piecemeal and sought to dismiss without proper analysis and justification the overwhelming case which shows that Mr. Al-Senussi is being treated unfairly, in violation of Libyan law and international law, and will be convicted and sentenced to death in proceedings that profess to be legitimate but which in reality fall well below any acceptable standard.

94. The Defence sets out below each of the errors committed by the Chamber in reaching its overall conclusion. These errors, individually and cumulatively, establish that the Appeals Chamber should reverse the Impugned Decision. The Defence submits that the Chamber committed the following errors, each of which is considered in turn below: (i) substantial and compelling evidence was completely overlooked; (ii) in its assessment of the evidence, the Chamber failed to have regard to international standards and it placed undue weight on irrelevant factors; (iii) the Chamber erred in its findings about Mr. Al-Senussi's treatment in detention and in finding that his due process rights had been guaranteed; (iv) the Chamber's findings on impartiality and independence were defective; and (v) its findings about Mr. Al-Senussi's unlawful rendition from Mauritania were in error.

Substantial and compelling evidence overlooked by the Chamber

95. The Defence emphasises that there is an extensive and overwhelming body of evidence submitted during the admissibility proceedings, which the Pre-Trial Chamber failed to take into account and / or failed to give any weight and to assess rationally, that demonstrates that Libya is unwilling and unable to try Mr. Al-Senussi.

96. The evidence in fact establishes that the conditions for holding a fair, impartial and independent trial in Libya simply do not exist (the sources of the evidence are provided in the footnotes):

- Mr. Al-Senussi has been detained in what is essentially incommunicado imprisonment, without access to any lawyer at any time, for over 13 months¹⁵².

¹⁵² Defence Response of 14 June 2013, paras. 121-130, 132; Further Submissions of 26 August 2013, para. 19; Addendum of 5 September 2013, paras. 21-23. See also, Defence Application on behalf of Mr. Abdullah Al-

As acknowledged by the Chamber,¹⁵³ he has been interrogated during this time without any lawyer being present in violation of Libyan law¹⁵⁴, he has made confessions, and there is new evidence that he is being mistreated to obtain further confessions.¹⁵⁵ Indeed, the very point of incommunicado detention is to cut-off the prisoner from the world and to break him to induce a confession.

- The public demand in Libya is for Mr. Al-Senussi to be executed for the serious crimes that it is alleged he committed as Colonel Gaddafi's intelligence chief, including the massacre of prisoners at Abu Salim prison in 1996.¹⁵⁶ The Libyan Government has consistently reassured the Libyan public that Mr. Al-Senussi should be convicted and executed.¹⁵⁷ Similar evidence of vengeful statements and actions has been provided by the Defence for Mr. Gaddafi. International organisations have reported the increased likelihood of revenge convictions in which the death penalty will be imposed particularly for individuals like Mr. Al-Senussi.¹⁵⁸ In these circumstances, and given the

Senussi to refer Libya to the Security Council with Confidential *Ex Parte* (Chamber only) Annex 1, ICC-01/11-01/11-399, 9 August 2013, paras. 2, 3; Application for Leave to Reply to the "Response to Defence Application on behalf of Mr. Abdullah Al-Senussi to refer Libya to the Security Council with Confidential *Ex Parte* (Chamber only) Annex 1," filed on 26 August 2013, ICC-01/011-01/11-429, 3 September 2013, para. 13. See in particular, ICC: Libya's Bid to Try Gaddafi, Sanussi, HRW, 13 May 2013, Question 34 (<http://www.hrw.org/news/2013/05/13/qa-libya-and-international-criminal-court#40>); Libya must surrender Saif al-Islam al-Gaddafi to International Criminal Court, Amnesty International, 18 September 2013 (<http://www.amnesty.org/en/for-media/press-releases/libya-must-surrender-saif-al-islam-al-gaddafi-international-criminal-court->).

¹⁵³ IAD, paras. 96, 230.

¹⁵⁴ Defence Response of 14 June 2013, paras. 125, 126; Addendum of 5 September 2013, para. 20. See also, Application for Leave to Reply to the "Response to Defence Application on behalf of Mr. Abdullah Al-Senussi to refer Libya to the Security Council with Confidential *Ex Parte* (Chamber only) Annex 1," filed on 26 August 2013, ICC-01/011-01/11-429, 3 September 2013, para. 13.

¹⁵⁵ See Ground 2.

¹⁵⁶ Defence Response of 14 June 2013, paras. 92, 95, 168; Addendum of 5 September 2013, paras. 15, 16. See in particular, Libya must surrender Saif al-Islam al-Gaddafi to International Criminal Court, Amnesty International, 18 September 2013 (<http://www.amnesty.org/en/for-media/press-releases/libya-must-surrender-saif-al-islam-al-gaddafi-international-criminal-court->). See also, Defence Application on behalf of Mr. Abdullah Al-Senussi concerning Libya's Announcement of Trial Date in August 2013, ICC-01/11-01/11-380, 10 July 2013, para. 5.

¹⁵⁷ The Defence submitted, for example, the statement of NTC Chairman Mustafa Abdul Jalil saying: "all this evidence is sufficient to sentence [Senussi and Gaddafi] to death. The Judge or judges who are viewing these cases should have issued these judgments, because they [the judgments] will be applauded by the Libyans." The Defence also submitted that in response to public demands that Mr. Al-Senussi should be executed, State officials have been assuring the public that Mr. Al-Senussi will be tried "by the end of Ramadan" (i.e. 8 August 2013). See, Defence Response of 14 June 2013, para. 168. See in particular ICC-01/11-01/11-340-Conf-AnxE (statement by Mustafa Abdul Jalil (NTC Chairman, 11 May 2013); The full interview- published on 29 April 2013 - is also found at <http://www.youtube.com/watch?v=WZDTi5GK5kI> at 44:27 minutes, and Defence Application on behalf of Mr. Abdullah Al-Senussi concerning Libya's Announcement of Trial Date in August 2013, ICC-01/11-01/11-380, 10 July 2013, para. 5.

¹⁵⁸ Further Submissions of 26 August 2013, paras. 10, 16-18; Addendum of 5 September 2013, paras. 5, 13. See, Libya: Suspend Death Sentences Against Gaddafi Loyalists, HRW, 4 October 2013 (<http://www.hrw.org/news/2013/10/04/libya-suspend-death-sentences-against-gaddafi-loyalists>); Libya: al-Gaddafi loyalists at risk of 'revenge' death sentences, Amnesty International, 2 August 2013 (<http://www.amnesty.org/en/news/libya-al-gaddafi-loyalists-risk-revenge-death-sentences-2013-08-02>).

security threats facing all judicial parties in these cases, the pressure on the Libyan judiciary is such that the only possible outcome of any national proceedings in Libya will be Mr. Al-Senussi's conviction and execution. There is no guarantee that Mr. Al-Senussi's right to be presumed innocent is being respected.

- Judges and prosecutors, including in Mr. Al-Senussi's case, are under threat and attack.¹⁵⁹ It is inconceivable that any judges would be able to do anything other than convict and order Mr. Al-Senussi's execution given the consequences for their own position and indeed their own safety and lives.¹⁶⁰
- This fact is reinforced by the prominence and power of armed militia groups¹⁶¹ who have been able to abduct a member of the prosecution team in Mr. Al-

¹⁵⁹ Defence Response of 14 June 2013, para. 72, 73, 78, 95-98; Further Submissions of 26 August 2013, paras. 6-14. See in particular, Libya: Wave of Political Assassinations, HRW, 8 August 2013 (<http://www.hrw.org/news/2013/08/08/libyawave-political-assassinations>); Libya: al-Gaddafi loyalists at risk of 'revenge' death sentences, Amnesty International, 2 August 2013 (<http://www.amnesty.org/en/news/libya-al-gaddafi-loyalists-risk-revenge-death-sentences-2013-08-02>); International Legal Assistance Consortium Rule of Law Assessment Report on Libya of 2013, p. 44, 47 (hereinafter "ILAC Report of 2013") (<http://www.ilac.se/2013/05/09/ilac-assessment-report-libya-2013/>); International Crisis Group, Trial by Error: Justice in Post-Qadhafi Libya, 17 April 2013, p. 3 (hereinafter "ICG Report of April 2013"); Libya must seek justice not revenge in case of former al-Gaddafi intelligence chief, Amnesty International, 18 October 2012; Human Rights Watch World Report 2013, p. 583 (https://www.hrw.org/sites/default/files/wr2013_web.pdf); US Statement Department, Libya 2012 Human Rights Report, page 3 (<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper>) (emphasis added); Justice Minister denounces detention of public prosecutor and Congressman: Khoms militiamen seize power station in protest, Libya Herald, 23 May 2013 (<http://www.libyaherald.com/2013/05/23/justice-ministerdenounces-detention-of-public-prosecutor-and-congressman-khoms-militiamen-seize-power-station-in-protest/>).

¹⁶⁰ The Defence submitted a report from Amnesty International which concluded, in light of reports of attacks and threats to judges and lawyers, that "*It is doubtful that Libya's judicial system can be truly independent and impartial under such circumstances.*" Further Submissions of 26 August 2013, para. 11 citing Libya: al-Gaddafi loyalists at risk of 'revenge' death sentences, Amnesty International, 2 August 2013 (<http://www.amnesty.org/en/news/libya-al-gaddafi-loyalists-risk-revenge-death-sentences-2013-08-02>). See also, Defence Response of 14 June 2013, para. 95 citing International Legal Assistance Consortium Rule of Law Assessment Report on Libya of 2013, p. 47 (hereinafter "ILAC Report of 2013") (<http://www.ilac.se/2013/05/09/ilac-assessment-report-libya-2013/>).

¹⁶¹ The Defence provided the Pre-Trial Chamber with evidence of "increasing insecurity and breakdown of law and order in Libya, which directly affects the Government's ability to conduct judicial proceedings" - leading reports to highlight the "absence of effective justice and security" in Libya - and including evidence of the "storming of Libya's General National Congress [and Parliament] on multiple occasions by armed groups, attacks on the Ministry of Justice, Ministry of Foreign Affairs, and the Prime Minister's Office, as well as attacks on lawyers and foreign embassies." The Defence also provided evidence of escalating insecurity including storming of the Interior Ministry and the subsequent resignation of the Interior Minister, the resignation of Libya's deputy Prime Minister due to the "security breakdown" and "dysfunctional" Government, clashes in Tripoli with the army unable to intervene, the formation of an emergency Government, the virtual "collapse" of the Congress and the kidnapping of Mr. Al-Senussi's daughter while in the custody of judicial police.

See, Defence Response of 14 June 2013, paras. 70, 76, 78; Further Submissions of 26 August 2013, para. 4, 7, 8, 10, 32-38; Addendum of 5 September 2013, para. 10-18. See also, US Statement Department, Libya 2012 Human Rights Report; Libya: Wave of Political Assassinations, HRW, 8 August 2013; Libya: al-Gaddafi loyalists at risk of 'revenge' death sentences, Amnesty International, 2 August 2013; UN Security Council

Senussi's case¹⁶², Mr. Al-Senussi's daughter while under police 'protection', and even the Prime Minister without facing arrest and prosecution.¹⁶³ It is widely acknowledged that militia groupings control and have ready access to prisons, including Al-Hadba prison.¹⁶⁴ Irrespective of whether it can be said that some arm of the Government has some control of Al-Hadba prison, the evidence plainly shows that militia groups are heavily involved in running the prison and, at the very least, have constant access to it.¹⁶⁵ In these circumstances it is inconceivable that any court sitting at Al-Hadba could be regarded as free and independent of the influence of armed militia groupings.

- Judge Van den Wyngaert highlighted in her Declaration that "I cannot help but note the widely reported abduction and release of Libyan Prime Minister Ali Zeidan on 10 October 2013. It is unclear, at this point in time, what effect these events might have on the already precarious security situation in Libya. Further deterioration of the security situation could extend to Mr Al-Senussi's

6962nd Meeting, S/PV. 6962, 8 May 2013, New York; Armed men attack Libya Interior Ministry, PressTV, 3 July 2013 (<http://www.presstv.ir/detail/2013/07/03/311994/libya-interior-ministry-attacked/>); Interior Ministry besieged by hundreds of armed men, Libya Herald, 2 July 2013 (<http://www.libyaherald.com/2013/07/02/interior-ministrybesieged-by-hundreds-of-armed-men/>); Libya interior minister Mohammed al-Sheikh resigns, BBC, 18 August 2013 (<http://www.bbc.co.uk/news/world-africa-23750456>); Libyan interior minister resigns over 'interference', Arab News, 19 August 2013 (<http://www.arabnews.com/news/461737>); Interior minister of Libya resigns, news24, 18 August 2013 (<http://www.news24.com/Africa/News/Interior-minister-of-Libya-resigns-20130818>); Libya: Latest abduction highlights 'dysfunctional' justice system, Amnesty International, 3 September 2013 (<http://www.amnesty.org/en/news/libya-latest-abduction-highlights-dysfunctional-justice-system-2013-09-03>).

¹⁶² Defence Response of 14 June 2013, paras. 97, 98.

¹⁶³ Libyan PM Ali Zeidan detained by militia, BBC, 10 October 2013 (<http://www.bbc.co.uk/news/world-africa-24470850>); Libya PM Ali Zeidan kidnapped at gunpoint, Sky News, 10 October 2013 (<http://news.sky.com/story/1152519/libya-pm-ali-zeidan-kidnapped-at-gunpoint>).

¹⁶⁴ Defence Response of 14 June 2013, paras. 76-93; ICC-01/11-01/11-356-AnxC-Conf-Exp; Further Submissions of 26 August 2013, paras. 4, 23-28; Addendum of 5 September 2013, paras. 15-18; Libya: Ensure Abdallah Sanussi Access to Lawyer, HRW, 17 April 2013 (<http://www.hrw.org/news/2013/04/17/libya-ensure-abdallah-sanussi-access-lawyer>); Libya: Suspend Death Sentences Against Gaddafi Loyalists, HRW, 4 October 2013 (<http://www.hrw.org/news/2013/10/04/libya-suspend-death-sentences-against-gaddafi-loyalists>); Thousand detained in Libya outside state control, IRIN, 24 September 2013; In the new Libya, former prisoners guard their onetime captors, Washington Post, 3 March 2013 (http://articles.washingtonpost.com/2013-03-03/world/37418071_1_saif-al-islam-gaddafi-senussi-libyan-rebels); International Crisis Groups, Divided We State: Libya's Enduring Conflicts, 14 September 2012 (<http://www.crisisgroup.org/~media/Files/Middle%20East%20North%20Africa/North%20Africa/libya/130-divided-we-stand-libyas-enduring-conflicts>); Libya: Latest abduction highlights 'dysfunctional' justice system, Amnesty International, 3 September 2013 (<http://www.amnesty.org/en/news/libya-latest-abduction-highlights-dysfunctional-justice-system-2013-09-03>).

¹⁶⁵ Defence Response of 14 June 2013, paras. 86-93; ICC-01/11-01/11-356-AnxC-Conf-Exp. See also, Thousand detained in Libya outside state control, IRIN, 24 September 2013 – which states that Amnesty International recently highlighted that "[w]e've visited prisons where the abuse is systematic. Often militias come and go as they please, *even in prisons that are supposed to be under government control*. They're better armed than the judicial police and treat prisoners however they want. In one detention facility, we even documented a case where a militia abducted a prisoner from within his jail cell."

legal proceedings and, accordingly, affect Libya's ability to carry out those proceedings".¹⁶⁶

- Against the backdrop of widespread reports of torture and abuses –and even deaths – in Libyan detention centres, including from the UN,¹⁶⁷ the risks faced by Mr. Al-Senussi must be taken very seriously.¹⁶⁸ Indeed, as set out below, there is now evidence available of his mistreatment in prison before and after the hearing on 19 September 2013 in order to obtain yet another confession from him. This is what has been happening to accused from the former Gaddafi regime in prisons across the country¹⁶⁹, and it would be implausible to conclude that Mr. Al-Senussi is not being exposed to the same treatment when he is regarded by the Government and the public in general as ‘public enemy No. 1’. There is undisputed evidence that he is guarded in prison by persons who allege to be victims of his crimes.¹⁷⁰ It was simply insufficient for the

¹⁶⁶ Impugned Admissibility Decision, Declaration of Judge Christine Van den Wyngaert, ICC-01/11-01/11-466-Anx, para. 2.

¹⁶⁷ Defence Response of 14 June 2013, para. 77, 79, 83, 84, 127; Further Submissions of 26 August 2013, para. 24; Addendum of 5 September 2013, paras. 5, 13. See, UN Security Council Resolution 2095, S/RES/2095 (2013), para. 5; ILAC Report of 2013; New Libyan Government Struggles To Restore Order, Al Monitor (<http://www.almonitor.com/pulse/security/2013/01/new-libyan-government-works-to-restore-order.html>); Commission on Human Rights in the Libyan National Congress criticizing violations and torture, 26 February 2013 (<http://shorouknews.com/news/view.aspx?cdate=26022013&id=f3f500da-ed1b-4acd-b4e3-c27663e7368d>); Human Rights concerns about armed brigades holding detainees in Libya, Office of the High Commission for Human Rights website, 26 January 2013 (<http://www.ohchr.org/EN/NewsEvents/Pages/HRconcernsaboutarmedbrigadesholdingdetaineesinLibya.aspx>); Security Council Briefing, 14 March 2013, Special Representative of the Secretary-General and Head of UNSMIL, Tarek Mitri, para. 13, 14; Libya: Update of the Office of the United Nations High Commissioner for Human Rights on cooperation in the field of human rights, A/HRC/22/CRP.2, 18 March 2013, page 3; Libya: Ensure Due Process for Extradited Libyans, HRW, 30 March 2013 (<http://www.hrw.org/news/2013/03/30/libya-ensure-due-process-extradited-libyans>); International Crisis Group, Trial by Error: Justice in Post-Qadhafi Libya, 17 April 2013, p. 34; Libya: al-Gaddafi loyalists at risk of ‘revenge’ death sentences, Amnesty International, 2 August 2013 (<http://www.amnesty.org/en/news/libya-al-gaddafi-loyalists-risk-revenge-death-sentences-2013-08-02>); Libya: Latest abduction highlights ‘dysfunctional’ justice system, Amnesty International, 3 September 2013 (<http://www.amnesty.org/en/news/libya-latest-abduction-highlights-dysfunctional-justice-system-2013-09-03>); In the new Libya, former prisoners guard their onetime captors, Washington Post, 4 March 2013 (http://www.washingtonpost.com/world/middle_east/in-the-new-libya-former-prisoners-guard-theircaptors/2013/03/03/e2f7bf9c-7f47-11e2-b99e-6baf4ebe42df_story_1.html); Report of the Secretary-General on the United Nations Support Mission in Libya, S/2013/516, 5 September 2013, para. 38, 40 (<http://reliefweb.int/sites/reliefweb.int/files/resources/N1343182.pdf>); Libya must surrender Saif al-Islam al-Gaddafi to International Criminal Court, Amnesty International, 18 September 2013 (<http://www.amnesty.org/en/for-media/press-releases/libya-must-surrender-saif-al-islam-al-gaddafi-international-criminal-court->); More instances of torture and killing in prisons, says Marghani, Libyan Herald, 2 October 2013 (<http://www.libyaherald.com/2013/10/02/more-instances-of-torture-and-killing-in-prisons-says-marghani/>).

¹⁶⁸ Defence Response of 14 June 2013, para. 138-140; Further Submissions of 26 August 2013, para. 31; Addendum of 5 September 2013, para. 14.

¹⁶⁹ See note 164 above.

¹⁷⁰ Defence Response of 14 June 2013, para. 89. See, In the new Libya, former prisoners guard their onetime captors, Washington Post, 3 March 2013 (http://articles.washingtonpost.com/2013-03-03/world/37418071_1_saif-al-islam-gaddafi-senussi-libyan-rebels).

Chamber to have relied upon a single report from Human Rights Watch about their brief visit to Mr. Al-Senussi in April 2013 to be satisfied that he has not been the subject of any mistreatment at all in detention and that his rights were all being protected.¹⁷¹ Indeed, Human Rights Watch never stated in its report that it was of the view that Mr. Gaddafi had been treated properly and that his rights were all guaranteed. They merely reported on what Mr. Al-Senussi had told them, without commenting on whether they believed he was telling the whole truth or was able to do so given that he was in detention.

- The conduct of the national judicial proceedings has been wholly inadequate, particularly given that Mr. Al-Senussi has had no legal representation at all.¹⁷² When lawyers have been appointed for defendants in Mr. Al-Senussi's case, they have been attacked and their family members have been abducted.¹⁷³ At the hearing on 19 September, defence lawyers were harassed, intimidated and attacked.¹⁷⁴ For the Chamber to find that the hearing on 19 September proceeded "without incident" is a gross misstatement.
- Every independent organisation that has monitored trials in Libya has found critical deficiencies in the availability and the implementation of due process

¹⁷¹ Impugned Admissibility Decision, para. 240.

¹⁷² Defence Response of 14 June 2013, paras. 121-130, 132; Further Submissions of 26 August 2013, para. 19, 21; Addendum of 5 September 2013, paras. 21-23. See also, Defence Application on behalf of Mr. Abdullah Al-Senussi to refer Libya to the Security Council with Confidential *Ex Parte* (Chamber only) Annex 1, ICC-01/11-01/11-399, 9 August 2013, paras. 2, 3; Application for Leave to Reply to the "Response to Defence Application on behalf of Mr. Abdullah Al-Senussi to refer Libya to the Security Council with Confidential *Ex Parte* (Chamber only) Annex 1," filed on 26 August 2013, ICC-01/011-01/11-429, 3 September 2013, para. 13. See in particular, ICC: Libya's Bid to Try Gaddafi, Sanussi, HRW, 13 May 2013, Question 34 (<http://www.hrw.org/news/2013/05/13/qa-libya-and-international-criminal-court#40>); Libya must surrender Saif al-Islam al-Gaddafi to International Criminal Court, Amnesty International, 18 September 2013 (<http://www.amnesty.org/en/for-media/press-releases/libya-must-surrender-saif-al-islam-al-gaddafi-international-criminal-court->).

¹⁷³ Defence Response of 14 June 2013, paras. 76, 95; Further Submissions of 26 August 2013, para. 11; Saif Gaddafi's lawyer concerned for her safety after kidnap of nephew, The Telegraph, 4 October 2013 (<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/10356314/Saif-Gaddafis-lawyer-concerned-for-her-safety-after-kidnap-of-nephew.html>); http://www.presssolidarity.net/news/ONENEWS/23172-%D8%A7%D9%84%D8%B3%D9%86%D9%88%D8%B3%D9%8A_%D9%8A%D9%86%D9%83%D8%B1_%D9%83%D8%A7%D9%81%D8%A9_%D8%A7%D9%84%D8%AA%D9%87%D9%85_%D8%A7%D9%84%D9%85%D9%88%D8%AC%D9%87_%D8%A5%D9%84%D9%8A%D9%87_%D9%88%D9%8A%D8%A4%D9%83%D8%AF_%D8%AD%D9%8A%D8%A7%D8%B2%D8%AA%D9%87_%D9%84%D8%A3%D8%AF%D9%84%D8%A9_%D8%B9%D9%84%D9%89_%D8%A8%D8%B1%D8%A7%D8%A1%D8%AA%D9%87/.

¹⁷⁴ Saif Gaddafi's lawyer concerned for her safety after kidnap of nephew, The Telegraph, 4 October 2013 (<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/10356314/Saif-Gaddafis-lawyer-concerned-for-her-safety-after-kidnap-of-nephew.html>).

protections.¹⁷⁵ In Mr. Al-Senussi's case itself, as noted above, he has repeatedly requested a lawyer to assist him¹⁷⁶ while he has been interrogated,¹⁷⁷ and yet none has been provided.¹⁷⁸ In addition, Libya has provided no information or evidence about what occurred during those interrogations.¹⁷⁹ There was simply no basis for the Chamber to conclude that Mr. Al-Senussi's rights to due process have been guaranteed. Given all of the violations to date, it is quite impossible that Mr. Gaddafi can now still receive a fair trial.

- It is also inconceivable that in the face of inadequate witness protection programmes, Defence witnesses for Mr. Al-Senussi are going to be prepared to

¹⁷⁵ Defence Response of 14 June 2013, paras. 77, 84, 124-127; Further Submissions of 26 August 2013, paras. 10, 11, 20, 22. In particular, Amnesty International has reported that "*Abdallah Al-Senussi is not being granted the same rights as other detainees held at the prison, including access to legal counsel, contact with the outside world and other detainees, and regular family visits and phone calls*" and Human Rights Watch reports gross due process violations during the trials of former Gaddafi officials and supporters, including; denying lawyers access or private meetings with their client, having a guard "present during meetings at the detention site and in court, intimidating the defendants and making them reluctant to discuss the case freely with the lawyer"; denying lawyers attendance to prosecutors' interrogations which included "allegedly coerced confessions by co-defendants"; and "reject[ing] the defense lawyers' requests to summon key witnesses for cross examination." See, Libya must surrender Saif al-Islam al-Gaddafi to International Criminal Court, Amnesty International, 18 September 2013 (<http://www.amnesty.org/en/for-media/press-releases/libya-must-surrender-saif-al-islam-al-gaddafi-international-criminal-court->) and Libya: Suspend Death Sentences Against Gaddafi Loyalists, HRW, 4 October 2013 (<http://www.hrw.org/news/2013/10/04/libya-suspend-death-sentences-against-gaddafi-loyalists>). See other reports of due process violations, including: UN Security Council Resolution 2095, S/RES/2095 (2013), para. 5; Libya: al-Gaddafi loyalists at risk of 'revenge' death sentences, Amnesty International, 2 August 2013 (<http://www.amnesty.org/en/news/libya-al-gaddafi-loyalists-risk-revenge-death-sentences-2013-08-02>); Libya: Ensure Abdallah Sanussi Access to Lawyer, HRW, 17 April 2013 (<http://www.hrw.org/news/2013/04/17/libya-ensure-abdallah-sanussi-access-lawyer>); International Legal Assistance Consortium Rule of Law Assessment Report on Libya of 2013 (<http://www.ilac.se/2013/05/09/ilac-assessment-report-libya-2013/>); Libya: Ensure Due Process for Extradited Libyans, HRW, 30 March 2013 (<http://www.hrw.org/news/2013/03/30/libya-ensure-due-process-extradited-libyans>); Security Council Briefing, 14 March 2013, Special Representative of the Secretary-General and Head of UNSMIL, Tarek Mitri, para. 13, 14; Request for Provisional Measures Under Rule 98 of the Rules of Procedure of the African Commission on Human and Peoples' Rights, Letter from Honourable Commissioner Catherine Dupe Atoki, Chairperson of the African Commission on Human and Peoples' Rights to H.E. Mr. Mustafa Abdul Jalil, Chairman of the National Transitional Counsel, 18 April 2012 (ICC-01/11-01/11-414-Anx1); Letter from the African Commission, ACHPR/COMM/411/12/LBY/1015/12, 9 November 2012 (ICC-01/11-01/11-414-Anx2); Order for Provisional Measures, In the Matter of African Commission on Human and Peoples' Rights v. Libya, Application No. 002/2013, 15 March 2013 (ICC-01/11-01/11-414-Anx3); and Interim Report of the African on Human and Peoples' Rights notifying the Executive Council of Non-Compliance by a State, in accordance with Article 31 of the Protocol, 4 June 2013 (ICC-01/11-01/11-414-Anx4).

¹⁷⁶ Defence Response of 14 June 2013, paras. 124-127; Further Submissions of 26 August 2013, paras. 19, 20; Addendum of 5 September 2013, para. 20. See, Libya: Ensure Abdallah Sanussi Access to Lawyer, HRW, 17 April 2013 (<http://www.hrw.org/news/2013/04/17/libya-ensure-abdallah-sanussi-access-lawyer>); ICC: Libya's Bid to Try Gaddafi, Sanussi, HRW, 13 May 2013, Question 34 (<http://www.hrw.org/news/2013/05/13/qa-libya-and-international-criminal-court#40>); Libya must surrender Saif al-Islam al-Gaddafi to International Criminal Court, Amnesty International, 18 September 2013 (<http://www.amnesty.org/en/for-media/press-releases/libya-must-surrender-saif-al-islam-al-gaddafi-international-criminal-court->).

¹⁷⁷ Defence Response of 14 June 2013, paras. 43, 125, 126, 132, 138; Addendum of 5 September 2013, para. 20.

¹⁷⁸ Addendum of 5 September 2013, paras. 21-23. See, Libya must surrender Saif al-Islam al-Gaddafi to International Criminal Court, Amnesty International, 18 September 2013 (<http://www.amnesty.org/en/for-media/press-releases/libya-must-surrender-saif-al-islam-al-gaddafi-international-criminal-court->).

¹⁷⁹ Defence Response of 14 June 2013, para. 137. See also para 43 where the Defence submits that Confidential Annex 3 provides "no details are given about the contents of these interrogations."

come forward to testify on his behalf.¹⁸⁰ The threat of militia attacks, or from the public more generally, on such witnesses are substantial and clearly cannot be discounted as per the Chamber's approach.

- Mr. Al-Senussi has had very limited contact with any family members.¹⁸¹ When his young daughter, Anoud Al-Senussi, travelled to Libya to visit him, she was herself detained, prosecuted for allegedly carrying a false passport and imprisoned for over 10 months¹⁸² in the notorious Al-Ruiymi prison in which it has been widely reported that prisoners have been tortured and mistreated, and then kidnapped her upon her late release.¹⁸³
- Despite all of these very serious deficiencies in the national proceedings against Mr. Al-Senussi, and the limited amount of evidence available about Mr. Al-Senussi's circumstances, it is completely unacceptable that his Defence team has been prevented from ever visiting him since their appointment in January 2013.¹⁸⁴

97. The central question that the Appeals Chamber must therefore address is whether any reasonable chamber could find in light of this wide-ranging body of evidence that Libya has discharged its burden of showing that the proceedings are being conducted independently, impartially and fairly and with the intention of bringing Mr. Al-Senussi

¹⁸⁰ Defence Response of 14 June 2013, paras. 106-119; Further Submissions of 26 August 2013, para. 8. The Defence submitted reports that Libyan law enforcement authorities are hindered in investigations because they face "many obstacles due to the prevailing security situation" and lack "the means to summon witnesses without the use of force," including that authorities are unable to call witnesses due to the fact that witnesses "are scared and often do not show up if they've been summoned." See also, Defence submissions on the weakness of the judicial police. Defence Response of 14 June 2013, paras. 81, 82, 95, 112; Further Submissions of 26 August 2013, para. 12; Addendum of 5 September 2013, paras. 12-18, 25.

¹⁸¹ Defence Response of 14 June 2013, para. 124; Addendum of 5 September 2013, para. 20.

¹⁸² Defence Response of 14 June 2013, para. 169; Further Submissions of 26 August 2013, para. 25; Addendum of 5 September 2013, paras. 2, 6, 10-14; Libya: Latest abduction highlights 'dysfunctional' justice system, Amnesty International, 3 September 2013; Safety Concerns for Loyalist's Daughter: Anoud Abdallah Al-Senussi, Amnesty International, 31 October 2012 (<http://amnesty.org/en/library/asset/MDE19/022/2012/en/4507d0dd-1403-4e96-aa76-cf548e094ce8/mde190222012en.html>).

(<http://www.amnesty.org/en/news/libya-latest-abduction-highlights-dysfunctional-justice-system-2013-09-03>).

¹⁸³ Addendum of 5 September 2013, paras. 14, 17. See, Libya: Violent Response to Tripoli Prison Mutiny, Human Rights Watch, 3 September (<http://www.hrw.org/news/2013/09/03/libya-violent-response-tripoli-prison-mutiny>).

¹⁸⁴ Defence Response of 14 June 2013, paras. 128-130; Addendum of 5 September 2013, para. 19. See also, Defence Application on behalf of Mr. Abdullah Al-Senussi to refer Libya to the Security Council with Confidential *Ex Parte* (Chamber only) Annex 1, ICC-01/11-01/11-399, 9 August 2013; and Application for Leave to Reply to the "Response to „Defence Application on behalf of Mr. Abdullah Al-Senussi to refer Libya to the Security Council with Confidential *Ex Parte* (Chamber only) Annex 1,“" filed on 26 August 2013, ICC-01/011-01/11-429, 3 September 2013.

to justice. The requirement that the proceedings must be impartial and independent and be consistent with an intention on the part of Libya to bring Mr. Al-Senussi to justice must be assessed having regard to international standards of due process. Bringing an accused to justice must entail treating him humanely and fairly and conducting fair proceedings – these requirements are all integral to the definition of “justice” as a matter of international law.¹⁸⁵ The Chamber is thus required to determine whether Libya is conducting fair investigative and prosecutorial proceedings taking into account the fair trial and due process requirements that are recognised under international law. This view is re-enforced by the Chamber’s duty under Article 21(3), which provides that the Chamber’s application and interpretation of the law “*must be consistent with internationally recognized human rights*”.¹⁸⁶

98. In the Defence’s submission, the evidence clearly establishes that Libya is not conducting fair, impartial and independent pre-trial and trial proceedings, having regard to international standards. Even if Libya can show that it is trying in difficult circumstances to conduct fair proceedings (which has not been established), the Chamber must nevertheless still assess whether Libya is in fact conducting fair, impartial and independent proceedings, for if it is failing (and the Appellant submits it is falling far short), then it cannot be concluding that Libya is acting consistent with an intent to bring the person to justice. A State cannot be said to be acting consistent with an intent to hold fair proceedings when it is plainly not conducting such proceedings. In other words, there is no requirement that the State must deliberately and purposefully intend to treat the accused unfairly – although there is ample evidence of such an intention in the present case, including by seeking to obtain a confession from Mr. Al-Senussi by mistreating him. If it is established that the accused is not subject to impartial, fair and just proceedings, then there can be no other conclusion than that he is not being brought to justice.

¹⁸⁵ Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, ICC-01/04-01/06-772, 14 December 2006, paras. 36, 37. The Appeals Chamber states: “ ... Human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights; first and foremost, in the context of the Statute, the right to a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety. The Statute itself makes evidence obtained in breach of internationally recognized human rights inadmissible in the circumstances specified by article 69 (7) of the Statute. Where fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped.”

¹⁸⁶ Rome Statute, Article 21(3).

Defects in the Chamber's legal and factual analysis of the evidence

99. The Chamber simply did not address any of these legal and factual issues. It also did not at any stage identify and consider in its Decision any of the standards of due process recognised under international law that is was required to do by Article 17(2). It merely emphasised that the Defence had shown that no violations occurred under “Libya’s own national law”.¹⁸⁷ It is noticeable that the Chamber did not at any stage assess the proceedings having regard to any international standards. Even in respect of Libya’s national law, the Chamber provided no legal definition for the requirements of Article 17(2)(c). It merely repeated that violations of Libyan law may be relevant to the assessment of the independence and impartiality of the national proceedings and whether the conduct of the proceedings in the circumstances is to be considered inconsistent with the intent to bring the person to justice.¹⁸⁸

100. In particular, the provisions of ICCPR directly concern the standards which should have been taken into account by the Chamber in determining whether Mr. Al-Senussi was being brought to justice:

Article 6

“1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

Article 9

1. “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.”

¹⁸⁷ Impugned Admissibility Decision, para. 221.

¹⁸⁸ Impugned Admissibility Decision, para. 235.

Article 10

1. "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
- 2.(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons; ...
3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation."

Article 14

1. "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
 - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
 - (c) To be tried without undue delay;
 - (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
 - (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
 - (g) Not to be compelled to testify against himself or to confess guilt."

101. Similarly, the African Charter provides that:

Article 3

1. "Every individual shall be equal before the law. 2. Every individual shall be entitled to equal protection of the law."

Article 6

“Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.”

Article 7

1. “Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defence, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal. 2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.”

102. As noted above, the Rome Statute itself requires that:

Article 55***Rights of persons during an investigation***

1. “In respect of an investigation under this Statute, a person:

- (a) Shall not be compelled to incriminate himself or herself or to confess guilt;*
- (b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;*
- (c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and*
- (d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.”*

2. “Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned:

- (a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;*
- (b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;*
- (c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and*
- (d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.”*

103. The Chamber could not have had regard to these basic standards in concluding that Mr. Al-Senussi is being brought to justice in Libya when he has been imprisoned incommunicado, without a lawyer throughout his proceedings, cut-off from his family, interrogated, mistreated to confess, knowing that his young daughter is held in detention by his captors and is then kidnapped, without any visit from his ICC lawyers, guarded by his alleged victims, with armed militia present, against a backdrop of immense public pressure for his execution as revenge for the past, and now having had the charges against him confirmed for trial to commence shortly.

“Progress” in the proceedings and the hearing on 19 September 2013

104. And yet, the Pre-Trial Chamber places considerable weight on Libya having “progressed” the case to the Accusation Stage with the hearing on 19 September being conducted “without incident”¹⁸⁹ to conclude that Libya was both willing and able to try Mr. Al-Senussi.¹⁹⁰ The Chamber also relied on the generalised evidence that Libya was receiving “international assistance” to enhance its investigative and forensic capabilities¹⁹¹ even though this information was not shown to have any particular bearing on Mr. Al-Senussi’s case, which the Chamber repeatedly emphasised had to be the focus of its assessment.¹⁹²

105. The Appellant submits that the heavy reliance the Chamber placed on these factors was misplaced:

- The mere fact that proceedings have progressed does not establish that Libya has conducted the proceedings independently and impartially in Mr. Al-Senussi’s case, and in a manner that is consistent with bringing him to justice having regard to the principles of due process recognised by international law.
- The Pre-Trial Chamber failed to take into account that even though the proceedings had advanced to the accusation stage, they were characterised by widespread violations of Mr. Al-Senussi’s due process rights, as explained above.

¹⁸⁹ Impugned Admissibility Decision, para. 303.

¹⁹⁰ Impugned Admissibility Decision, paras. 209-215, 303.

¹⁹¹ Impugned Admissibility Decision, para. 216.

¹⁹² Impugned Admissibility Decision, paras. 171, 203, 235, 245.

- The Pre-Trial Chamber also failed to take into account the evidence that shows that even though the proceedings have reached the accusation stage, they are not being conducted in a manner that is consistent with bringing the person to justice because Libya had not established that Mr. Al-Senussi would receive a fair and impartial trial in which his rights would be protected.

106. All of the evidence about the hearing on 19 September 2013 consists of mere assertions by Libya. There is no independent evidence to verify whether the proceedings were conducted “adequately”. Moreover, the Defence was not able to respond to any of the information provided by Libya, as these submissions were made in the final filing by Libya on 26 September 2013. The Chamber has wrongly accepted Libya’s unsubstantiated assertions without hearing from the Defence – and of course without hearing from Mr. Al-Senussi about how he was treated at the hearing. Indeed, there is compelling evidence which shows that the hearing was a complete shambles in which Mr. Al-Senussi was unrepresented, and those defence lawyers who were present were intimidated and harassed. Certain of this evidence was publicly available¹⁹³, and other evidence is referred to in Ground 2 concerning the admission of new evidence.¹⁹⁴ No reasonable chamber could ever find that this hearing complied with acceptable standards of criminal justice.

Treatment in detention and violations of Mr. Al-Senussi’s due process rights

107. The Chamber rejected the Defence’s submissions that there was no concrete evidence submitted by Libya which showed that Mr. Al-Senussi was been treated properly in detention and that his due process rights were being implemented. The Chamber found that because the Defence had not shown that he was being mistreated and denied his rights, it was not incumbent on Libya to disprove that Mr. Al-Senussi’s rights were being violated. The Chamber stated that “the burden of proof that lies with Libya cannot be interpreted as an obligation to disprove any possible ‘doubts’ raised by the opposing participants in the admissibility proceedings”.¹⁹⁵

¹⁹³ Saif Gaddafi's lawyer concerned for her safety after kidnap of nephew, The Telegraph, 4 October 2013 (<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/10356314/Saif-Gaddafis-lawyer-concerned-for-her-safety-after-kidnap-of-nephew.html>).

¹⁹⁴ See, Ground 2.

¹⁹⁵ Impugned Admissibility Decision, paras 238-239.

108. The Chamber in effect, here again, reversed the burden of proof by requiring the Defence to prove that he was not being treated humanely and brought to justice, when the onus should have been on Libya to establish the requirements of Article 17(2)(c). Furthermore, the “uncertainties” that the Defence raised were not mere “possible doubts” – they were fundamental questions about whether Mr. Al-Senussi was being treated fairly and justly including whether he was being mistreated, informed of his rights to silence, brought before a judge in proceedings in which the lawfulness of his detention could be challenged, and had access to the evidence being used against him.¹⁹⁶ These critical issues were raised in the context of Mr. Al-Senussi not having access to a lawyer and legal advice, and not being able to have any contact with his Defence Counsel.

109. The Chamber also relied on three pieces of evidence to find that Libya has in any event answered the Defence’s concerns: (i) a report from Human Rights Watch about its visit to Mr. Al-Senussi in April 2013, (ii) a letter from the Prosecutor-General’s office about his interrogations which stated that this had been recorded in writing, and (iii) medical reports that had previously been filed by Libya.¹⁹⁷

110. The Chamber’s reliance on this evidence to find that Libya had discharged the burden of proof is flawed:

- As noted above, Human Rights Watch did not claim and conclude in its Report that Mr. Al-Senussi was being treated humanely and fairly. It simply reported on what Mr. Al-Senussi had told Human Rights Watch during its visit. There is no evidence to confirm that this visit was in fact private and confidential. He was interviewed in circumstances in which he will likely have known his conversation was being monitored and in which he could have been under threats to himself and his family. Further, it is a single visit that took place in April – many months have passed since this visit, which are unaccounted for.
- The Prosecutor-General’s letter contains no information about whether Mr. Al-Senussi’s rights were guaranteed during the interrogations, and what

¹⁹⁶ Impugned Admissibility Decision, para. 238.

¹⁹⁷ Impugned Admissibility Decision, para. 240.

materials were provided to him.¹⁹⁸ He certainly did not benefit from legal representation, as is his right, and yet the Chamber made no mention of this glaring omission.

- Libya has provided no records of any proceedings in which Mr. Al-Senussi's detention has been judicially reviewed and extending, and in which he has been able to participate effectively and meaningfully.
- The medical reports referred to were submitted by Libya as far back as in January 2013, and concerned medical examinations going back to September 2012.¹⁹⁹ They contained the scantiest of detail and, as the Defence submitted in response at the time, the reports showed that Libya was providing the minimum amount of information to the Chamber about Mr. Al-Senussi's medical condition.²⁰⁰ Since then, the Defence has repeatedly raised questions about Mr. Al-Senussi's deteriorating health and has insisted on him being examined by an independent doctor.²⁰¹ Libya has refused to take any of these steps and has provided no up to date information about his condition. In the absence of such information, it is impossible for the Chamber to verify the true position, and certainly erroneous to decide that Libya has proven that his medical condition is satisfactory. The burden was on Libya to confirm his current medical condition.
- Indeed, the recent photographic evidence that the Defence has submitted under Ground 2 of Mr. Al-Senussi at a hearing on 3 October 2013 shows the substantial amount of weight he has lost and bruising to his face. The new evidence referred to in Ground 2 establishes that he has been

¹⁹⁸ Admissibility Application of 2 April 2013, Confidential Annex 2, ICC-01/11-01/11-307-Conf-Anx2.

¹⁹⁹ Impugned Admissibility Decision, para. 240 citing Admissibility Application of 2 April 2013, paras. 178. The Admissibility Application of 2 April 2013 notes the Registry Report of 15 January 2013 which annexes a medical report for Mr. Al-Senussi which is dated 5 September 2012. See, ICC-01/11-01/11-252-Conf-Anx3

²⁰⁰ Further Submissions of 26 August 2013, para. 28.

²⁰¹ Defence Response of 14 June 2013, para. 132; Further Submissions of 26 August 2013, paras. 26-29; Renewed Application on behalf of Mr. Abdullah Al-Senussi to Refer Libya and Mauritania to the UN Security Council with Public Annex 1 and Confidential and Ex Parte (Registry only) Annexes 2 and 3, ICC-01/11-01/11-304, 19 March 2013, para 46 (See, note 74).

mistreated before and following the hearing on 19 September 2013 and that the hearing itself lacked any measure of due process and fairness.²⁰²

111. For all of these reasons, the Chamber erred in being satisfied that the requirements of Article 17(2)(c) had been met. If the Chamber had given due weight to the full body of evidence before it, as summarised above, and factored in that Mr. Al-Senussi was without any legal representation, despite his repeated request for legal assistance, it could not have rationally determined that Mr. Al-Senussi was being treated in accordance with Libyan law and the recognised international standards of due process.

Lack of independence and impartiality

112. The Chamber rejected the Defence submission that Government statements that assumed Mr. Al-Senussi's guilt showed that it was impossible for Mr. Al-Senussi to be tried independently and to receive a fair trial.²⁰³ The sole reason offered by the Chamber was that "given the manner in which Libya's proceedings are developing to date", the Chamber was not persuaded that these statements "can be attributed to the actual or perceived conduct of the Libyan judicial authorities that are involved in proceedings against Mr. Al-Senussi".²⁰⁴

113. The Chamber completely overlooked the effect and impact that these statements would have on the judiciary, making it impossible in light of the public demand for Mr. Al-Senussi's execution and the prominence of armed militia groups who have attacked judges and judicial authorities, for any court to give Mr. Al-Senussi a fair and independent hearing in which he could be acquitted. The well-established principle of 'justice being done and being seen to be done' was entirely lacking in the Chamber's analysis. Libya did not establish that in Mr. Al-Senussi's particular case – given the profile of the case, which Libya has acknowledged is a sensitive case²⁰⁵ – he can be tried in circumstances in which the immense pressures from Government, the militia and the public for his conviction and execution is even remotely avoidable.

²⁰² See, Ground 2. See also, Public Annex 3.

²⁰³ Impugned Admissibility Decision, para. 241.

²⁰⁴ Impugned Admissibility Decision, para. 241.

²⁰⁵ Government's Submissions and Response to Defence "Filing on behalf of Mr. Abdullah Al-Senussi pursuant to "Decision on additional submissions in the proceedings related to Libya's challenge to the admissibility of the case against Abdullah Al-Senussi" of 19 September 2013" and ""Addendum" filed on 5 September 2013"", ICC-01/11-01/11-455, 26 September 2013, para. 12.

114. Most importantly, the Chamber failed to address in its Decision that a higher level of scrutiny was demanded for Mr. Al-Senussi's case because it carried the death penalty. It noted the Defence's submissions in this regard²⁰⁶, but did not at any stage apply this more rigorous standard in its assessment of the conduct of Mr. Al-Senussi's case. The Chamber did not make any findings about the Defence's submission, and did not explain on what basis it may have rejected this central argument.

115. The Defence submits that there was no proper basis to dissent from this argument which is based on the well-established general principle of criminal law that in death penalty cases only the highest standards of due process and protection of the rights of the accused will suffice²⁰⁷ – which, at the very least, requires that the accused benefit from legal representation and advice throughout the proceedings.

116. The Chamber also rejected the Defence's submissions concerning the defective and 'trumped up' proceedings in Libya against Mr. Al-Senussi's daughter, Anoud Al-Senussi.²⁰⁸ Yet, the Chamber ignored the Defence's main submission that her kidnapping when she was finally released was clear evidence that Mr. Al-Senussi faced the same perilous dangers, and could never be released from prison.²⁰⁹ The Defence also emphasised that Anoud's detention would have placed enormous pressures on Mr. Al-Senussi, knowing that his daughter was detained in prison in Libya – and then abducted – while he was being interrogated and facing national proceedings.²¹⁰ Her ordeal also highlights the extreme difficulties of Mr. Al-Senussi having any contact with his family – a fundamental right that is protected under international law, including the African Charter.²¹¹ None of these very significant factors were even mentioned by the Chamber in its Decision, let alone discounted.

117. The Chamber referred to various arguments raised by Libya to seek to show that its judicial system was acting independently and impartially. None of this material has anything to do with Mr. Al-Senussi's case.²¹² It refers to other accused and other

²⁰⁶ Impugned Admissibility Decision, para. 220.

²⁰⁷ See, Defence Response of 14 June 2013, paras. 157-162.

²⁰⁸ Impugned Admissibility Decision, para. 242.

²⁰⁹ Addendum of 5 September 2013, paras. 14, 18.

²¹⁰ Defence Response of 14 June 2013, para. 169.

²¹¹ See, Principles and Guidelines on the Rights to a fair Trial and Legal Assistance in Africa; adopted by the African Commission on Human and Peoples' Rights in November 1999. These guidelines define and explain in detail the rights incorporated in Article 7 of the African Charter.

²¹² Impugned Admissibility Decision, paras 248-258.

proceedings. The Chamber emphasised in relation to the Defence evidence concerning the judges who were presiding over trials of ex-Gaddafi officials²¹³ that this material was “of a general nature” which can only be considered “to the extent that such systematic difficulties have a bearing on the domestic proceedings against Mr. Al-Senussi”²¹⁴. Having set this as the applicable standard, the Chamber never applied it to the evidence relied on by Libya which was not shown to be directly relevant to the circumstances in Mr. Al-Senussi’s case. The decision by the Supreme Court on 23 December 2012²¹⁵, for example, only has a bearing on Mr. Al-Senussi’s case to the extent that the fair trial principles that it espouses have not been afforded to Mr. Al-Senussi. This decision does not in any way confirm that Mr. Al-Senussi’s rights are being upheld in his particular case.

118. Similarly, the Chamber relies on a discussion paper of the Libyan Government of 13 December 2012 which focussed on measures taken to bolster the independence of the judiciary with the assistance of the international community.²¹⁶ Yet, this information was not shown to have any particular bearing on Mr. Al-Senussi’s case. It amounts to nothing more than “contextual information”, which is how the Chamber described the Defence’s evidence in dismissing its relevance to the case at hand.²¹⁷ The acquittals referred to by the Chamber are likewise irrelevant.²¹⁸ They have no bearing on Mr. Al-Senussi’s case and were in any event for unrelated offences. The central point, which the Chamber did not address, is whether Mr. Al-Senussi’s proceedings were being conducted in a way and in circumstances in which the only possible outcome was one of conviction.

119. The Chamber thus acted inconsistently in its treatment of the Defence’s materials as opposed to those relied on by Libya in reaching its overall conclusion that it was not persuaded that the judiciary lacks independence and impartiality in respect of Mr. Al-Senussi’s case.²¹⁹ The Chamber again referred to the hearing on 19 September as an example of the independence of the judicial system in that the hearing was adjourned in order to allow certain Defence teams to view the accusation file.²²⁰ However, no

²¹³ Impugned Admissibility Decision, para. 246.

²¹⁴ Impugned Admissibility Decision, para. 245.

²¹⁵ Impugned Admissibility Decision, para. 251.

²¹⁶ Impugned Admissibility Decision, para. 252.

²¹⁷ Impugned Admissibility Decision, paras 245-246.

²¹⁸ Impugned Admissibility Decision, para. 255.

²¹⁹ Impugned Admissibility Decision, 258.

²²⁰ Impugned Admissibility Decision, para. 256.

mention is made of the most important point that Mr. Al-Senussi was without any legal representation.

Evidence of unlawful rendition from Mauritania

120. The Chamber rejected the Defence's arguments that Mr. Al-Senussi's unlawful rendition from Mauritania to Libya showed that Libya was unwilling and unable to try Mr. Al-Senussi. The Chamber gave no reasons for this finding – it simply stated that “irrespective of whether they are true”, they do not demonstrate “the existence of one of the scenarios envisaged under Article 17(2) or (3) of the Statute”.²²¹

121. The Chamber did not therefore consider whether the fact that Libya paid 200 million US dollars to Mauritania for Mr. Al-Senussi's unlawful transfer is a critical factor in determining whether his proceedings are being conducted impartially, independently and fairly.²²² It is inconceivable that in these circumstances Libya would require anything other than a conviction for Mr. Al-Senussi. Libya has not established that Mr. Al-Senussi could ever get a fair trial given the way Libya behaved in obtaining custody of him. Neither Libya nor Mauritania have ever provided information to the ICC to show that he was transferred in accordance with any legal and judicial process, despite the fact that both countries were under an obligation to transfer Mr. Al-Senussi to the ICC.²²³

122. The Defence re-iterates that the matter of Libya's and Mauritania's unlawful conduct, contrary to principles of international law, is the subject of separate appeal proceedings, which should be taken into account.²²⁴

(iv) Failure to find that Libya is unable to try Mr. Al-Senussi

²²¹ Impugned Admissibility Decision, para. 236.

²²² Impugned Admissibility Decision, para. 236.

²²³ Urgent Application on behalf of Abdullah Al-Senussi for Pre-Trial Chamber to order the Libyan Authorities to comply with their obligations and the orders of the ICC, ICC-01/11-01/11-248, 9 January 2013; Renewed Application on behalf of Mr. Abdullah Al-Senussi to Refer Libya and Mauritania to the UN Security Council with Public Annex 1 and Confidential and Ex Parte (Registry only) Annexes 2 and 3, ICC-01/11-01/11-304, 19 March 2013.

²²⁴ Defence Application on behalf of Mr. Abdullah Al-Senussi for Leave to Appeal against ‘Decision on the request of the Defence of Abdullah Al-Senussi to make a finding of non-cooperation by the Islamic republic of Mauritania and refer the matter to the Security Council’, ICC-01/11-01/11-431, 4 September 2013.

123. The Chamber emphasised that “not simply any ‘security challenge’ would amount to” the Libyan system being unable to carry out the proceedings, but only those that had a “tangible impact on the proceedings against Mr. Al-Senussi”.²²⁵ However, in respect of each of the issues that it considered, the Chamber failed to give any weight to the real impediments created by the fragile state of security in Libya as it impacted directly on Mr. Al-Senussi’s case, as set out below. The Chamber’s overall conclusion that Libya has established that it is able to carry out the proceedings in Mr. Al-Senussi’s case pursuant to Article 17(3) should be reversed.

Lack of Governmental control over detention facilities

124. The Chamber found that it was satisfied that Libya had demonstrated that “it is currently in a position to exercise sufficient control over the detention facilities in which Mr. Al-Senussi is being held”.²²⁶ Even the wording of this finding acknowledges that the Government does not have complete control over Al-Hadba prison. The Defence submission which the Chamber did not address is that militia groups participate in the running of the prison and have free access to it.²²⁷ The Chamber erred in its finding in that it misappreciated crucial evidence of militia being able to influence the treatment of Mr. Al-Senussi and the conduct of his proceedings which are being held at the prison.²²⁸ It is unacceptable for Mr. Al-Senussi to be exposed in this way to armed groups outside of the control of the Government, many of which consist of alleged victims from the Gaddafi era.²²⁹

125. In support of its conclusion that the prison is under ‘Government control’ – a conclusion which was critical to the Chamber’s finding that the country’s judicial system has not “total[ly] or substantial[ly] collapsed” or is not “unavailable” for purposes of Article 17(3) – the Chamber cites only to assertions made by Libya and a single report by Human Rights Watch stating that the detention facility is administered

²²⁵ Impugned Admissibility Decision, paras 261-262.

²²⁶ Impugned Admissibility Decision, para. 264.

²²⁷ Decision Response of 14 June 2013, paras. 86-93; Further Submissions of 26 August 2013, paras. 23, 24; Addendum of 5 September 2013, paras. 15-18. Amnesty International has stated that “[w]e’ve visited prisons where the abuse is systematic. Often militias come and go as they abducted a prisoner from within his jail cell.” See, Thousand detained in Libya outside state please, *even in prisons that are supposed to be under government control*. They’re better armed than the judicial police and treat prisoners however they want. In one detention facility, we even documented a case where a militia control, IRIN, 24 September 2013 (emphasis added).

²²⁸ See paras. 95, 96.

²²⁹ Defence Response of 14 June 2013, para. 89. See, In the new Libya, former prisoners guard their onetime captors, Washington Post, 3 March 2013 (http://articles.washingtonpost.com/2013-03-03/world/37418071_1_saif-al-islam-gaddafi-senussi-libyan-rebels).

by the judicial police.²³⁰ As against this evidence – which is supposed to discharge Libya’s burden “to substantiate all aspects of its allegations” – the Chamber set aside Defence evidence, including a witness statement provided confidentially by the Defence that confirms the fact that militia control the prison. Moreover, the Human Rights Watch report, when read as a whole, in fact confirms that the prison is under the control of the National Guard, a former Islamist militia.²³¹

126. The fact that judicial proceedings are ongoing – as highlighted by the Chamber²³² – does not demonstrate that the militia have no control over the prison. There is nothing to suggest that the militia are doing anything other than backing Mr. Al-Senussi’s prosecution so that he can be convicted and sentenced to death.²³³ The point is that their presence and influence makes a mockery of fair and just proceedings. It overshadows the pretence of Government control and normality. The *ex parte* statement that was submitted by the Defence²³⁴ reveals this day to day reality in the prison, which no reasonable chamber could have ignored.

127. Turning to other detention facilities, the Chamber initially accepted that it had to take into account that other prisons where witnesses were detained were not under Government control.²³⁵ However, when it came to drawing its overall conclusion at the end of its Decision, the Chamber reasoned that this factor was not decisive because Libya had shown that it was able to advance the investigation against Mr. Al-Senussi and gather evidence despite the security challenges and not being in control of prisons.²³⁶ It sought to distinguish its finding in Saif Gaddafi’s case – that this inability to obtain the necessary evidence due to the lack of control over prisons meant that Libya was unable to try his case – by stating that Libya had in Mr. Gaddafi’s case not satisfactorily demonstrated “that it had collected more than a few sparse items of

²³⁰ Impugned Admissibility Decision, note. 606.

²³¹ Libya: Ensure Abdallah Sanussi Access to Lawyer, HRW, 17 April 2013 (<http://www.hrw.org/news/2013/04/17/libya-ensure-abdallah-sanussi-access-lawyer>). Human Rights Watch noted al-Hadba correctional facility and that Mr. Al-Senussi is “being held in an adjacent facility under the authority of the National Guard and supervised by Gweider.”

²³² Impugned Admissibility Decision, para. 265 and footnote 606.

²³³ Defence Response of 14 June 2013, para. 89. See, In the new Libya, former prisoners guard their onetime captors, Washington Post, 3 March 2013 (http://articles.washingtonpost.com/2013-03-03/world/37418071_1_saif-al-islam-gaddafi-senussi-libyan-rebels).

²³⁴ Impugned Admissibility Decision, para. 265. See, ICC-01/11-01/11-356-AnxC-Conf-Exp.

²³⁵ Impugned Admissibility Decision, paras. 267-270

²³⁶ Impugned Admissibility Decision, paras 295-301.

evidence as part of its investigation”.²³⁷ This finding is wholly unsustainable and should be reversed for two reasons:

- In Mr. Gaddafi’s decision the Chamber did not rely anywhere on the lack of evidence gathered in that case to find that Libya was unable to carry out the proceedings due to the security situation and not exercising sufficient control over prisons to obtain the necessary evidence. It based its finding about inability on the lack of control over prisons being an impediment to Libya obtaining “the necessary evidence and testimony”.²³⁸ Indeed, the Chamber specifically found that even if it could be said that Libya was investigating the same case – in other words, that its investigations were sufficiently developed – the case was still admissible before the ICC on account of Libya being unable to carry out the proceedings due to not being able to obtain the necessary evidence given the lack of control over detention facilities.²³⁹ This was a free-standing basis to reject Libya’s admissibility application.
- Libya is investigating Mr. Gaddafi’s and Mr. Al-Senussi’s cases as a joint case for crimes in which it is alleged they jointly participated as part of a common plan and policy. This is the very point Libya asserts to show that it is investigating the same overall conduct as charged by the ICC.²⁴⁰ If the security situation and lack of control of prisons is truly not impeding the investigation, then this must apply in the same measure to Mr. Gaddafi’s case. And yet, the Chamber found in Mr. Gaddafi’s case that Libya was unable to carry out the proceedings.

128. The Defence submits that these are fundamental inconsistencies which the Appeals Chamber must correct. The proper approach is as the Chamber adopted in Mr. Gaddafi’s case that the security situation and lack of control of prisons (and lack of witness protection, as discussed below) are all serious impediments to being able to carry out the proceedings, as they would be in any criminal justice system. The fact that investigations have been advancing does not overcome these obstacles. The

²³⁷ Impugned Admissibility Decision, para. 297.

²³⁸ Gaddafi Admissibility Decision, paras. 209-211.

²³⁹ Gaddafi Admissibility Decision, paras. 209-211.

²⁴⁰ Admissibility Application of 2 April 2013, paras. 73-79.

critical point is that if the necessary evidence cannot be obtained and witnesses are not protected, it makes it impossible to conduct the proceedings in Libya. In particular, if defence witnesses cannot be obtained due to the lack of Government control of prisons or because they are too afraid to come forward without genuine and independent witness protection, it cannot be concluded that Libya is able to try Mr. Al-Senussi.

Lack of security for judicial authorities and organs

129. The Chamber again initially accepted that “the existence of serious security concerns in Libya [including threats to judges and judicial authorities] is an issue relevant to the final determination on Libya’s ability to conduct its proceedings against Mr. Al-Senussi”.²⁴¹ However, when it made its final determination, the Chamber found that these security concerns have not “so far” prejudiced the proceedings against Mr. Al-Senussi “as demonstrated by the progressive and concrete investigative steps taken to date” and the fact that judicial proceedings have reached the accusation stage.²⁴² The Chamber also stated that “other former officials of the Gaddafi regime are also subject to ongoing judicial proceedings, whether in the same case against Mr. Al-Senussi or not”.²⁴³

130. These same security concerns were considered by the Chamber in Mr. Gaddafi’s case, and found to be sufficiently serious to hold that Libya was unable to conduct his trial in Libya²⁴⁴. His proceedings were also continuing at the time of the Chamber’s Decision in his case, and Libya unsuccessfully had sought to rely on this fact²⁴⁵, and the proceedings are still continuing as part of the same joint case involving Mr. Al-Senussi and other officials of the Gaddafi regime. The charges have also been confirmed against Mr. Gaddafi as part of the same dossier of evidence submitted before the Accusation Chamber²⁴⁶. The judicial system has nevertheless been deemed “unavailable” for Mr. Gaddafi. The Defence submits that it is wholly inconsistent for

²⁴¹ Impugned Admissibility Decision, para. 281.

²⁴² Impugned Admissibility Decision, para. 299.

²⁴³ Impugned Admissibility Decision, para. 299.

²⁴⁴ Gaddafi Admissibility Decision, para. 205, 211-214.

²⁴⁵ See for example, Gaddafi Admissibility Decision, para. 193, 195.

²⁴⁶ Libya court indicts Kadhafi aides over 2011 uprising, Global Post, 24 October 2013 (<http://www.globalpost.com/dispatch/news/afp/131024/libya-court-indicts-kadhafi-aides-over-2011-uprising>); Libyan court charges 30 Gaddafi aides with murder, embezzlement and other crimes, global post, 24 October (<http://www.globalpost.com/dispatch/news/regions/africa/131024/libyan-court-charges-30-gaddafi-aides-murder-embezzlement-and-ot>); Libyan Court charges Gaddafi-era figures, BBC, 24 October 2013 (<http://www.bbc.co.uk/news/world-africa-24659181>). See also, ICC-01/11-01/11-455-Conf-AnxA.

the Chamber to have found that the judicial system is “available” to try Mr. Al-Senussi in the same case. There is simply no rational justification for the distinction that the Chamber has sought draw.

131. Furthermore, the Chamber was wrong to imply that it was necessary to show that the judges and judicial officials in Mr. Al-Senussi’s case had themselves been threatened and attacked because of their involvement in Mr. Al-Senussi’s case.²⁴⁷ Given the evidence that judges are at serious risk in the precarious security situation in Libya and in light of the lack of control the Government is able to exert over armed militia groups – who are even able to abduct the Prime Minister – it was incumbent on the Chamber to give proper weight to these major concerns. As the Defence has submitted, the real danger exists that the judges will feel unable independently to assess the evidence against Mr. Al-Senussi, which could lead to any acquittals, for fear of reprisals and without having any effective protection from the Government for their safety. No reasonable chamber could find that in these circumstances the Libyan justice system could be held to be available and able to conduct fair and impartial proceedings.

Lack of security for witnesses

132. The Chamber adopted the same reasoning in respect of the security situation of witnesses. It held initially that the fact that witnesses “may be afraid of coming forward or may be eliminated, ultimately causing prejudice to the domestic proceedings” is relevant to its overall conclusion on whether Libya is unable to carry out the proceedings against Mr. Al-Senussi.²⁴⁸

133. The Chamber noted that Libya had provided similar information in Saif Gaddafi’s case about the availability of protective measures for witnesses, but that it had again in Mr. Al-Senussi’s case submitted no evidence about any specific witness protection programmes that exist under domestic law. The Chamber found that as Libya had provided no new submissions, its finding in Mr. Gaddafi’s case that Libya did not have the capacity to ensure protective measures and had no “effective functioning of a

²⁴⁷ Impugned Admissibility Decision, para. 273-275.

²⁴⁸ Impugned Admissibility Decision, para. 283.

witness protection programme in the country”, remained valid in Mr. Al-Senussi’s case.²⁴⁹

134. However, as noted above, when it made its final determination at the end of its Decision, the Chamber then sought to distinguish the findings in Mr. Gaddafi’s case on the basis of there being more evidence gathered in Mr. Al-Senussi’s case.²⁵⁰ This means that essentially the Chamber found that, so long as it is possible to obtain necessary *prosecution* evidence, there is no need to consider the ability to obtain necessary Defence evidence – something which clearly contradicts the most basic notion of a ‘genuine’ judicial proceeding as required under Article 17. The Defence submits that this is an indefensible basis for declaring Libya unable to try Mr. Gaddafi, but able to prosecute Mr. Al-Senussi. The findings from each case contradict each other. As explained above, the Chamber never took into consideration the amount of evidence gathered in Mr. Gaddafi’s case as a justification for its decision that the lack of witness protection rendered Libya unable to try Mr. Gaddafi. It found his case admissible as there was no evidence of any effective witness protection programme which could prejudice the proceedings. Similarly, the Chamber found in Mr. Al-Senussi’s case that there was no evidence of any effective witness protection programmes. The inescapable conclusion is that it must equally prejudice Mr. Al-Senussi’s case, and that Libya has therefore not established that it is able to carry out the proceedings in Mr. Al-Senussi’s case.

135. Indeed, as submitted before the Chamber²⁵¹, and as further set out in the new evidence under Ground 2²⁵², Mr. Al-Senussi’s case will clearly be prejudiced due to the lack of effective witness protection as defence witnesses will not be prepared to come forward due to considerable security concerns.

Summary submission on Ground 1

136. For all of these reasons, the Appellant submits that the Admissibility Decision should be reversed on the grounds that the Pre-Trial Chamber erred in finding that Libya was willing and able to conduct proceedings against Mr. Al-Senussi. Each of the errors of

²⁴⁹ Impugned Admissibility Decision, paras. 286-287.

²⁵⁰ Impugned Admissibility Decision, paras. 296-301.

²⁵¹ Defence Response of 14 June 2013, paras. 112, 113, 118; Further Submissions of 26 August 2013, para. 8.

²⁵² See, Ground 2.

law and fact identified were central to the Chamber's conclusion on "inability" and "willingness" and reveals that (i) the Chamber's exercise of discretion was based on an erroneous interpretation of the law; (ii) it was exercised on a patently incorrect conclusion of fact; or (iii) the decision was so unfair and unreasonable as to constitute an abuse of discretion - or a combination of these factors.

Ground 2: There is compelling new evidence that was not previously available which demonstrates that Libya is unwilling and unable genuinely to carry out the proceedings against Mr. Al-Senussi, within the meaning of Article 17(1)(a), (2) and (3)

137. The Defence has received new evidence that was not previously available concerning Mr. Al-Senussi's treatment in detention in Libya before and during the accusation stage of the case and pertaining to the circumstances of the national proceedings during the before and during the accusation stage. This evidence could not have been submitted to the Pre-Trial Chamber as the information only became available after the Admissibility Decision. In the Appellant's submission, it is vital that this new evidence is taken into account as part of the present admissibility proceedings as it provides information, in particular, about Mr. Al-Senussi's mistreatment after the hearing on 19 September 2013 in which the authorities have been seeking to obtain confessions from Mr. Al-Senussi. The new evidence shows that Mr. Al-Senussi is not being treated humanely and fairly and in a manner consistent with bringing him to justice. It also shows that Libya is unable genuinely to carry out the proceedings against him. It is thus directly relevant to the very issues being considered by the Appeals Chamber in Ground 1 of the appeal.

138. As set out below, the Defence submits that the Appeals Chamber is entitled to admit new evidence that is relevant to the issues on appeal. Alternatively, the Appeals Chamber can refer the new evidence back to the Pre-Trial Chamber to reconsider its decision in light of the new evidence.

Applicable law on the admission of new evidence on appeal

139. Regulation 62(1) and (2) of the Regulations of the Court provide that:

- (1) *“A participant seeking to present additional evidence shall file an application setting out:*
- (a) The evidence to be presented;*
 - (b) The ground of appeal to which the evidence relates and the reasons, if relevant, why the evidence was not adduced before the Trial Chamber.*
- (2) *The Appeals Chamber may:*
- (a) Decide to first rule on the admissibility of the additional evidence, in which case it shall direct the participant affected by the application filed under sub-regulation 1 to address the issue of admissibility of the evidence in his or her response, and to adduce any evidence in response only after a decision on the admissibility of that evidence has been issued by the Appeals Chamber; or*
 - (b) Decide to rule on the admissibility of the additional evidence jointly with the other issues raised in the appeal, in which case it shall direct the participant affected by the application filed under sub-regulation 1 to both file a response setting out arguments on that application and to adduce any evidence in response.”*

140. Although these provisions apply in the context of appeals against judgment pursuant to Rule 150, the Defence submits that they should be read to apply in respect of interlocutory appeals pursuant to Rule 154. The regulations applicable to interlocutory appeals are silent on the issue of the admission of new evidence. The Defence submits that the Court may be guided by the jurisprudence of the *ad hoc* International Tribunals which have in similar circumstances held that the provisions on the admission of new evidence applicable to appeals against judgment apply to interlocutory appeals in the absence of any provisions in the rules dealing with the admission of new evidence for interlocutory appeals.

141. Rule 115 of the ICTY’s Rules of Procedure and Evidence provides that “[a] party may apply by motion to present additional evidence before the Appeals Chamber” and “[i]f the Appeals Chamber finds that the additional evidence was not available at trial and is relevant and credible, it will determine if it could have been a decisive factor in reaching the decision at trial.”²⁵³ Rule 115 of the ICTR’s Rules includes the same provisions.²⁵⁴ The ICTY Appeals Chamber has repeatedly found that while “[a] plain reading of the Rule suggests that the mechanism of additional evidence on appeal is only available on an appeal from judgment and is not applicable to interlocutory

²⁵³ ICTY Rules of Procedure and Evidence, Rule 115.

²⁵⁴ ICTR Rules of Procedure and Evidence, Rule 115.

appeals,”²⁵⁵ Rule 115 is applicable to interlocutory appeals as well.²⁵⁶ Similarly, it is well-established in the ICTR’s jurisprudence that additional evidence may be submitted under Rule 115 in interlocutory appeals.²⁵⁷

142. The Defence has therefore submitted the new evidence in the present case in the Document in Support of the Appeal in accordance with the “formal requirements of Regulation 62(1)(a) and (b)”, namely that it “sets out the evidence to be presented, the ground of appeal to which it relates and the reasons why it was not adduced before the [Pre]-Trial Chamber.”²⁵⁸

143. The Defence requests the Appeals Chamber to admit this new evidence and to provide Libya with an opportunity to respond to it in the appeal.

144. It should also be taken into account that the Appeals Chamber has previously considered evidence that was not before the chamber below in limited circumstances pursuant to Regulation 28 of the Court. This Regulation provides that:

- (1) *“A Chamber may order the participants to clarify or to provide additional details on any document within a time limit specified by the Chamber.*
- (2) *A Chamber may order the participants to address specific issues in their written or oral submissions within a time limit specified by the Chamber.*
- (3) *These provisions are without prejudice to the inherent powers of the Chamber.”*

²⁵⁵ *Prosecutor v. Jovica Stanisic and Franko Simatovic*, Case Nos.: IT-03-69-AR65.1, IT-03-69-AR65.2, Decision on Prosecution’s Application Under Rule 115 to Present Additional Evidence in its Appeal Against Provisional Release, 11 November 2004, para. 5.

²⁵⁶ *Prosecutor v. Jovica Stanisic and Franko Simatovic*, Case Nos.: IT-03-69-AR65.1, IT-03-69-AR65.2, Decision on Prosecution’s Application Under Rule 115 to Present Additional Evidence in its Appeal Against Provisional Release, 11 November 2004, para. 7; *Prosecutor v. Mejakic et al.*, Decision on joint defense motion to admit additional evidence before the Appeals Chamber pursuant to rule 115, IT-02-65-AR11bis.1, 16 November 2005, para. 6; *Prosecutor v. Nikola Sainovic & Dragoljub Ojdanic*, Case No.: IT-99-37-AR65, Decision on Motion for Modification of Decision on Provisional Release And Motion to Admit Additional Evidence, 12 December 2002, p. 3; *Prosecutor v. Vidoje Blagojevic et al.*, Case No.: IT-02-53-AR65, Decision on Motion to Present Additional Evidence, 28 May 2002, p. 2.

²⁵⁷ *Prosecutor v. Semanza*, Case No.: ICTR-97-20-A, Decision, 31 May 2000, para. 35-41.

²⁵⁸ Directions under regulation 62 of the Regulations of the Court, ICC-01/04-01/06-2958, 21 December 2012, para. 5.

145. The Appeals Chamber “may act pursuant to regulation 28 of the Regulations of the Court not only on its own motion, but also on request” from the parties.²⁵⁹ In addition the Appeals Chamber has found that “[i]t may be regarded as axiomatic that, if any power is conferred upon a court to make an order or issue a decision, the parties have an implicit right to move the Chamber to exercise it.”²⁶⁰

146. The Appeals Chamber has stated that “submissions under regulation 28 of the Regulations of the Court are not intended to reiterate a position or demonstrate mere disagreements with the position of another party.”²⁶¹ Instead, the Appeals Chamber has previously granted Regulation 28 requests concerning the submissions of “additional authorities”²⁶² on appeal, explaining that “it would not have been in the interests of justice to deprive the appellant of the opportunity to make informed submissions in the circumstances of the present case.”²⁶³ The Appeals Chamber found that the submission of additional information could be granted in “exceptional circumstances” and when “necessary for the proper determination of the appeal.”²⁶⁴

147. In the alternative, the Appeals Chamber can follow the ICC’s jurisprudence which has confirmed that a decision may be reconsidered, holding that “in certain circumstances a Chamber is entitled to depart from its decisions on matters of substance as regards the law or the facts of the case.”²⁶⁵ A decision may be reconsidered in light of new evidence which affects the impugned decision. The Trial Chamber in *Bemba* stated on multiple occasions that “absent any new information about which the Chamber had no knowledge at that time of its original decision ... there is no basis on which the

²⁵⁹ *Prosecutor v. Lubanga*, Decision on the "Prosecution's Application under Regulation 28 to provide Clarification or Additional Details which Impact on the Appeals against the Decisions to Stay the Proceedings and Release the Accused", ICC-01/04-01/06-1476, 13 October 2008, para. 3.

²⁶⁰ Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, para. 20.

²⁶¹ Decision on the Libyan Government's request to file further submissions, ICC-01/11-01/11-442, 12 September 2013, para. 13.

²⁶² *Prosecutor v. Katanga*, Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", ICC-01/04-01/07-476 , 13 May 2008, paras. 11, 14, 20; Katanga, Order in relation to the Defence Application to Request Leave to Provide Additional Details and Authorities, ICC-01/04-01/07-164, 24 January 2008, p. 2.

²⁶³ *Prosecutor v. Katanga*, Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", ICC-01/04-01/07-476 , 13 May 2008, para. 20.

²⁶⁴ *Prosecutor v. Katanga*, Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", ICC-01/04-01/07-476 , 13 May 2008, para. 20.

²⁶⁵ *Prosecutor v. Lubanga*, Trial Chamber I, Decision on the defence request to reconsider the “Order on numbering of evidence” of 12 May 2010, 30 March 2011, ICC-01/04-01/06-2705, para. 14.

Chamber should reconsider the matter”²⁶⁶ and that “the Chamber will not revisit its previous decisions in the absence of new facts or circumstances that may influence that decision.”²⁶⁷ The Trial Chamber in *Lubanga* found that this finding by the *Bemba* Trial Chamber²⁶⁸ “impl[ied] clearly thereby that on different facts the Chamber might have been persuaded to amend its earlier approach.”²⁶⁹ Indeed, the Trial Chamber in *Lubanga* reconsidered, and rescinded, a previous decision based on “new circumstances” which made the decision “unfair” to the Defence.²⁷⁰

148. In recognising the remedy of reconsideration, the Trial Chamber in *Lubanga* stated:

*“that irregular decisions can be varied if they are manifestly unsound and their consequences are manifestly unsatisfactory.”*²⁷¹

149. The Court has found that a previous decision may be reconsidered when it is “manifestly unsound and [its] consequences [is] manifestly unsatisfactory, because, for instance, a decision was *made in ignorance of relevant information.*”²⁷²

150. According the Appeals Chamber could refer the matter back to the Pre-Trial Chamber to reconsider its Decision in light of the new evidence. The Appellant submits however that in the interests of judicial economy it would be preferable for the Appeals Chamber to consider the new evidence on appeal, having provided Libya with the opportunity to respond to the new evidence.

151. It should be taken into account that the Accused appears to have no express right under the Article 19(2)(a) of the Statute to apply for his case to be declared admissible

²⁶⁶ Transcript of hearing on 2 December 2010, ICC-01/05-01/08-T-42-CONF-ENG ET, page 2, line 2, to page 4, line 13.

²⁶⁷ *Prosecutor v. Bemba*, Public Redacted Version of the Decision on the “Demande de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo afin d'accomplir ses devoirs civiques en République Démocratique du Congo” of 2 September 2011, 6 September 2011, ICC-01/05-01/08-1691-Red, para. 17. See also, *Prosecutor v. Bemba*, Decision on the “Requête de la Défense aux fins d'obtenir de la Chambre de Première Instance III des décisions appropriées avant l'ouverture du Procès prévue pour le 22 Novembre 2010”, 16 November 2010, ICC-01/05-01/08-1010, para. 12.

²⁶⁸ Transcript of hearing on 2 December 2010, ICC-01/05-01/08-T-42-CONF-ENG ET, page 2, line 2, to page 4, line 13.

²⁶⁹ *Prosecutor v. Lubanga*, Trial Chamber I, Decision on the defence request to reconsider the “Order on numbering of evidence” of 12 May 2010, 30 March 2011, ICC-01/04-01/06-2705, para. 14.

²⁷⁰ *Prosecutor v. Lubanga*, Decision on the defence request for leave to appeal the “Decision on disclosure by the defence”, 8 May 2008, ICC-01/04-01/06-1313, paragraphs 23-24.

²⁷¹ *Prosecutor v. Lubanga*, Trial Chamber I, Decision on the defence request to reconsider the “Order on numbering of evidence” of 12 May 2010, 30 March 2011, ICC-01/04-01/06-2705, para. 18.

²⁷² *Prosecutor v. Lubanga*, Trial Chamber I, Decision on the defence request to reconsider the “Order on numbering of evidence” of 12 May 2010, 30 March 2011, ICC-01/04-01/06-2705, para. 18 (emphasis added).

before the ICC. In these circumstances, in the event that a State succeeds before the Pre-Trial Chamber in having a case declared inadmissible, but the circumstances subsequently change for the Accused, he should not be prevented from bringing these new circumstances that affect his rights to the attention of the ICC, especially if the matter is still *sub judice* before the Appeals Chamber. The “equality of arms” principle which guarantees balance between the parties during the proceedings²⁷³ requires that the Accused must be entitled to submit new evidence during the admissibility proceedings which directly impacts on the outcome of the proceedings, particularly when it concerns his own treatment in detention that would necessitate that he be tried at the ICC.

The new evidence

152. The new evidence consists of two confidential and *ex parte* annexes (Annexes 1 and 2) and one public annex (Annex 3) – a photograph of Mr. Al-Senussi taken at his hearing on 3 October 2013. The first two annexes can only be provided to the Appeals Chamber on a confidential and *ex parte* basis due to very serious security concerns and risks, as explained in the annexes themselves. In addition, the Defence requests the Appeals Chamber to take into account other *ex parte* and confidential materials which are directly relevant²⁷⁴.

153. The new evidence deals with the following issues:

- Mr. Al-Senussi’s physical and psychological mistreatment in detention, particularly after the hearing on 19 September 2013 in order to induce confessions from him to shorten the proceedings;
- The substantial influence and unlawful activities of armed militia groups, in particular the control they exert over the running of the Al-Hadba prison, and the lack of security and protection for Mr. Al-Senussi;

²⁷³ *Prosecutor v. Kony*, Decision on Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58, ICC-02/04-01/05-52, 19 August 2005, para. 30.

²⁷⁴ ICC-01/11-01/11-469-Conf-Exp-AnxA.

- The unfair and unjust manner in which the hearings in the accusation stage of the case have taken place in Al-Hadba prison in an intimidatory and insecure environment;
- The complete lack of respect for Mr. Al-Senussi's due process and human rights in detention and in the proceedings; and,
- The unavailability of witnesses for the defence due to their concerns for their safety and physical well-being.

The new evidence was previously unavailable

154. As explained in the evidence, particularly Annex 2, the new information has only become available following the Admissibility Decision in light of recent developments. It could not have been presented before the Pre-Trial Chamber. Certain of the incidents only occurred around the time or after the Admissibility Decision. The evidence was not obtained after the Admissibility Decision as a result of the lack of due diligence on the part of the Defence.

155. Furthermore, as explained in Annex 2, it has been extremely difficult to obtain certain of the new evidence due to the fears expressed by persons in Libya for their safety if it were known that they were providing information to the Defence. There are also other practical impediments to obtaining evidence, especially from within Libya, due to communication problems and need to find secure methods to provide information about Mr. Al-Senussi's circumstances. As submitted above, it should also be taken into account that the Defence has been unable to communicate with Mr. Al-Senussi in any way, let alone in a confidential and privileged environment.

156. The Defence thus has put before the Appeals Chamber all of the information that it has been able to gather in these circumstances as at the date of filing its appeal. As is evident from Annex 2, certain inquiries are still on-going and may produce further information. Given the circumstances faced by the Defence, the Defence reserves the right to seek to file any further evidence that it is able to acquire which has a decisive impact on the outcome of the appeal.

The new evidence should be admitted as it is highly relevant to Ground 1

157. As is plainly evident from the issues set out above, the new evidence is directly relevant to all of the errors that are the subject of Ground 1. The Defence submits that the legal requirements for the admission of new evidence on appeal, as set out above, are satisfied and the Appeals Chamber should therefore admit this evidence to consider in its determination of the appeal.

158. The Defence would undoubtedly have relied on this evidence, had it been available, before the Pre-Trial Chamber to demonstrate that Mr. Al-Senussi's rights were being violated by Libya. The mistreatment of Mr. Al-Senussi in detention would plainly have had a decisive impact on the outcome of the decision. The evidence establishes both that Libya is not bringing Mr. Al-Senussi to justice and that it is unable genuinely to carry out the proceedings.

159. The new evidence has to be considered in the context of the evidence already before the Appeals Chamber concerning the torture and mistreatment of persons in detention in Libya, including of high-profile detainees in Al-Hadba prison.²⁷⁵

²⁷⁵ Defence Response of 14 June 2013, para. 77, 79, 83, 84, 127; Further Submissions of 26 August 2013, para. 24; Addendum of 5 September 2013, paras. 5, 13; ICC-01/11-01/11-356-AnxC-Conf-Exp. See, UN Security Council Resolution 2095, S/RES/2095 (2013), para. 5; ILAC Report of 2013; New Libyan Government Struggles To Restore Order, Al Monitor (<http://www.almonitor.com/pulse/security/2013/01/new-libyan-government-works-to-restore-order.html>); Commission on Human Rights in the Libyan National Congress criticizing violations and torture, 26 February 2013 (<http://shorouknews.com/news/view.aspx?cdate=26022013&id=f3f500da-ed1b-4acd-b4e3-c27663e7368d>); Human Rights concerns about armed brigades holding detainees in Libya, Office of the High Commission for Human Rights website, 26 January 2013 (<http://www.ohchr.org/EN/NewsEvents/Pages/HRconcernsaboutarmedbrigadesholdingdetaineesinLibya.aspx>); Security Council Briefing, 14 March 2013, Special Representative of the Secretary-General and Head of UNSMIL, Tarek Mitri, para. 13, 14; Libya: Update of the Office of the United Nations High Commissioner for Human Rights on cooperation in the field of human rights, A/HRC/22/CRP.2, 18 March 2013, page 3; Libya: Ensure Due Process for Extradited Libyans, HRW, 30 March 2013 (<http://www.hrw.org/news/2013/03/30/libya-ensure-due-process-extradited-libyans>); International Crisis Group, Trial by Error: Justice in Post-Qadhafi Libya, 17 April 2013, p. 34; Libya: al-Gaddafi loyalists at risk of 'revenge' death sentences, Amnesty International, 2 August 2013 (<http://www.amnesty.org/en/news/libya-al-gaddafi-loyalists-risk-revenge-death-sentences-2013-08-02>); Libya: Latest abduction highlights 'dysfunctional' justice system, Amnesty International, 3 September 2013 (<http://www.amnesty.org/en/news/libya-latest-abduction-highlights-dysfunctional-justice-system-2013-09-03>); In the new Libya, former prisoners guard their onetime captors, Washington Post, 4 March 2013 (http://www.washingtonpost.com/world/middle_east/in-the-new-libya-former-prisoners-guard-theircaptors/2013/03/03/e2f7bf9c-7f47-11e2-b99e-6baf4ebe42df_story_1.html); Torture and Deaths in Detention in Libya, UNSMIL, 1 October 2013, p. 14; Report of the Secretary-General on the United Nations Support Mission in Libya, S/2013/516, 5 September 2013, para. 38, 40 (<http://reliefweb.int/sites/reliefweb.int/files/resources/N1343182.pdf>); Libya must surrender Saif al-Islam al-Gaddafi to International Criminal Court, Amnesty International, 18 September 2013 (<http://www.amnesty.org/en/for-media/press-releases/libya-must-surrender-saif-al-islam-al-gaddafi-international-criminal-court->); More instances of torture and killing in prisons, says Marghani, Libyan Herald, 2

160. The Defence submits that it has satisfied the requirements for the admission of the new evidence. The evidence should be accepted as it is obviously material to the issues on appeal. The failure to do so would occasion a miscarriage of justice.

Ground 3: the Pre-Trial Chamber erred in law and fact in concluding that Libya was investigating and prosecuting the same case as before the ICC

161. The Pre-Trial Chamber concluded in respect of the first limb of the admissibility test that Libya had established that it was investigated the same person for substantially the same conduct as the case before the ICC.²⁷⁶

162. The Appellant submits that the Chamber erred in reaching this conclusion for two reasons, each of which will be considered in turn:

- First, the Chamber relied heavily on the redacted witness statements / interviews supplied by the Libyan authorities to conclude that the evidence presented by Libya “allows the Chamber to discern the contours of the domestic case against Mr. Al-Senussi”²⁷⁷ and to be satisfied that “the facts that have been investigated by the Libyan authorities in relation to Mr. Al-Senussi ... comprise the relevant factual aspects of Mr. Al-Senussi’s conduct as alleged in the proceedings before the Court”.²⁷⁸ The Chamber, however, did not require these statements to be de-redacted for the Defence. It wrongly found that the redactions “did not affect the comprehension of the material at issue and, therefore, the ability of the parties and participants to provide meaningful observations”.²⁷⁹ In the absence of knowing the identities of the witnesses and being able to review the full statements, the Defence was substantially prejudiced in the observations it could make and the Chamber should not have made any findings adverse to the Appellant on the basis of the redacted materials.

October 2013 (<http://www.libyaherald.com/2013/10/02/more-instances-of-torture-and-killing-in-prisons-says-marghani/>).

²⁷⁶ Impugned Admissibility Decision, para. 167, 168, 311.

²⁷⁷ Impugned Admissibility Decision, para. 163.

²⁷⁸ Impugned Admissibility Decision, para. 164.

²⁷⁹ Impugned Admissibility Decision, para. 104.

- Second, the Chamber erred in finding that the “contours” of the case against Mr. Al-Senussi were discernable from the evidence submitted by Libya, and that Libya is investigating the same conduct as alleged in the case before the ICC. In particular, the Chamber found that the factual aspects that underpin the crime of persecution as a crime against humanity – one of the main and defining crimes that Mr. Al-Senussi is charged with before the ICC – were not covered by any crime under Libyan law with which Mr. Al-Senussi is charged. Even accepting that an accused need not be charged with the same international crimes as before the ICC, and can be charged with ordinary crimes, the Chamber erred in finding that it did not matter that the factual aspects of persecution could not be charged under Libyan law. This is because the underlying factual aspects – the conduct – that forms the basis of the ICC charges must be capable of being the subject of the charges in Libya for the case to be inadmissible before the ICC.

163. The Appellant submits that these errors materially affected the decision and but for these errors the decision would have been substantially different in that the Chamber should have found that Libya is not “undertaking domestic proceedings covering the ‘same case’ as that before the Court within the meaning of article 17(1)(a) of the Statute,”²⁸⁰ thus rendering the case admissible before the Court.

Redacted statements should not have been relied on by the Chamber

164. The Chamber relied almost exclusively on certain of the redacted witness statements – in particular those at Annexes 8, 10, 11, 12, and 16 who are ‘insider’ witnesses – to find that Libya was investigating the same conduct as before the ICC.²⁸¹ It rejected much of the other evidence submitted by Libya, which had also been relied on by Libya in Saif Gaddafi’s case, for the same reasons as put forward in the Admissibility Decision in Mr. Gaddafi’s case.²⁸² The redacted statements that were relied on by the Chamber thus served as the primary basis for the Chamber to distinguish its finding in Mr. Al-

²⁸⁰ Impugned Admissibility Decision, 165.

²⁸¹ Impugned Admissibility Decision, paras. 113-117, 119-121, 128.

²⁸² Impugned Admissibility Decision, paras. 84-93, 110, 149-152.

Senussi's case from that in Mr. Gaddafi's case in which the Chamber held that the "contours" of the national investigation were not discernable.²⁸³

165. The Appellant submits that the reliance placed on these statements was erroneous and grossly unfair. The statements should not have been accorded the significant weight given to them by the Chamber especially because the Defence was unable to investigate the source of the evidence. Without having the names of the witnesses, the Defence could not make proper inquiries about the legitimacy of the statements. The Defence accepts that the Chamber does not need to decide in the admissibility proceedings whether the evidence presented is sufficient to sustain a conviction beyond reasonable doubt.²⁸⁴ However, in the event that the evidence is a complete fabrication and thus of no value, such evidence could plainly not be relied on to find the case was inadmissible, particularly when it was the main evidence used to find that the first limb of the admissibility test had been satisfied. If a State were to rely on 'trumped up' evidence to launch sham proceedings, no reasonable chamber could conclude that such an investigation was sufficient to satisfy either the first or indeed the second limb of the admissibility test.

166. Yet, without knowing the identities of the key witnesses, the Defence has no ability to make proper and meaningful investigations and to seek to identify and submit any evidence about the statements relied on by Libya. Moreover, as set out above, the Defence was unable to get any instructions from Mr. Al-Senussi about the investigation and the statements gathered. The Defence was also not provided with any evidence of what Mr. Al-Senussi's response was to these statements when he was confronted with them²⁸⁵, if that in fact occurred. The identities of the witnesses are of course essential for taking instructions from the accused, as is widely recognised by the due process standards under international law.²⁸⁶

167. The Chamber erred in finding that it was proportionate for the Defence not to have access to the witness' identities at this stage of the proceedings.²⁸⁷ The Defence submits that Libya has not established that there are sufficient and compelling reasons

²⁸³ Impugned Admissibility Decision, paras. 107-135.

²⁸⁴ Impugned Admissibility Decision, para. 66(vii).

²⁸⁵ Admissibility Application of 2 April 2013, Confidential Annex 3, ICC-01/11-01/11-307-Conf-Anx3-Red.

²⁸⁶ See for example, International Covenant on Civil and Political Rights, Article 14(3)(e); Principles and Guidelines on the Rights to a fair Trial and Legal Assistance in Africa (defines and explains in detail the rights incorporated in the African Charter).

²⁸⁷ Impugned Admissibility Decision, paras. 102-105.

to withhold this information from the Defence, particularly given that the national proceedings are in the accusation stage in which the accused are entitled to receive the full dossier of evidence.²⁸⁸ Libya has not submitted any evidence which demonstrates that particular security or other concerns arise in respect of each of the particular witnesses. The Defence never requested that the materials should be made public, only that they are provided to the Defence on a confidential basis so that the Defence could fairly make the necessary inquiries. The Chamber failed to take account of the fact that knowing the identities of the witnesses was absolutely crucial for the Defence to be able to investigate and respond to Libya's admissibility application. It was highly prejudicial to the Appellant to have these redacted statements used against him as the foundation for declaring his case inadmissible and requiring him to face trial and the death penalty in Libya.

168. Furthermore, the Chamber erred in concluding that in general terms the statements are "comprehensible" despite the numerous redactions. Although, as noted by the Chamber, it only based its findings on those parts of the statements that were unredacted²⁸⁹, the Chamber had had the benefit of reading the statements in full without redactions which would have undoubtedly ensured that the Chamber could comprehend each of the statements as a whole. But this same opportunity was denied to the Defence. It is very difficult to follow certain of the allegations made in the statements due to the redactions.²⁹⁰ The dates when certain of the statements were taken also appear to have been redacted, as no dates appear on the redacted versions of these statements.²⁹¹ Many of the pages to which the Chamber refers to support its conclusions include parts that are redacted, and without knowing the content of these redactions it is very often impossible for the Defence to be certain which particular part of the evidence is relied on. Given that there is no compelling justification for withholding any of this information, the Defence submits that it should not have been placed at any disadvantage. The Chamber should not have relied on these statements in the way that it did to find that the first limb of the admissibility challenge was established by Libya.

²⁸⁸ Libya Submissions of 26 September 2013, para. 7.

²⁸⁹ Impugned Admissibility Decision, para. 105.

²⁹⁰ See for example, ICC-01/11-01/11-307-Conf-Anx8-Red; ICC-01/11-01/11-307-Conf-Anx10-Red; ICC-01/11-01/11-307-Conf-Anx11-Red; ICC-01/11-01/11-307-Conf-Anx12-Red.

²⁹¹ For example, ICC-01/11-01/11-307-Conf-Anx8-Red; ICC-01/11-01/11-307-Conf-Anx9-Red; ICC-01/11-01/11-307-Conf-Anx12-Red; ICC-01/11-01/11-307-Conf-Anx14-Red; ICC-01/11-01/11-307-Conf-Anx15-Red; ICC-01/11-01/11-307-Conf-Anx17-Red; ICC-01/11-01/11-307-Conf-Anx21-Red; ICC-01/11-01/11-307-Conf-Anx22-Red.

Libya did not establish that it was investigating the same conduct

169. As submitted above, but for the redacted witness statements relied on by Libya, there would have been no basis to conclude that Libya had shown it was investigating the same case. For the reasons, explained above, the Appeals Chamber should discount these statements, and find that on the balance of the evidence Libya has not established that it is investigating the same case. The Pre-Trial Chamber found that most of the remaining evidence, as it had done in Saif Gaddafi's case, was of no or very little value.²⁹²

170. In any event, the Defence submits that the "contours" of the case against Mr. Al-Senussi were not sufficiently established such that it could be concluded that the facts that were being investigated by Libya "comprise the relevant factual aspects of Mr. Al-Senussi's conduct as alleged in the proceedings before the Court".²⁹³ This applies particularly in respect of the factual aspects of the conduct that allegedly constitute the crime of persecution before the ICC.

171. The Pre-Trial Chamber found that for the purpose of determining, pursuant to Article 17(1)(a), whether Libya's national proceedings cover the 'same case', with the 'same conduct', it is not required that Libya's domestic proceedings concern each of the 'incidents' and 'events' mentioned in the Article 58 Decision in order to conclude that Libya is investigating or prosecuting Mr. Al-Senussi for substantially the same conduct as alleged in the proceedings before the Court.²⁹⁴ The Pre-Trial Chamber therefore concluded that for the purpose of Article 17(1)(a), "the conduct that is alleged in the criminal proceedings against Mr Al-Senussi is not shaped by the 'incidents' mentioned in the Article 58 Decision, [and] it is not required that domestic proceedings concern each of those 'events' at the national level in order for the Chamber to be satisfied that Libya is investigating or prosecuting Mr Al-Senussi for substantially the same conduct that is alleged in the proceedings before this Court."²⁹⁵

²⁹² Impugned Admissibility Decision, paras. 84-93, 110, 149-152.

²⁹³ Impugned Admissibility Decision, para. 164.

²⁹⁴ Impugned Admissibility Decision, para. 79.

²⁹⁵ Impugned Admissibility Decision, para. 79.

172. The Pre-Trial Chamber nevertheless found that the ‘incidents’ and ‘events’ in the Article 58 Decision would be used as “a relevant indicator that the case subject to said proceedings is indeed the same as the one before the Court.”²⁹⁶ The Chamber did proceed to consider the incidents and events which Libya was investigating, and the Chamber concluded that Libya “is undertaking domestic proceedings covering the ‘same case’ as that before the Court within the meaning of article 17(1)(a) of the Statute” because “the domestic proceedings cover, at a minimum, those events that are described in the Article 58 Decision as particularly violent or that appear to be significantly representative of the conduct attributed to Mr Al-Senussi.”²⁹⁷

173. In Saif Gaddafi’s case, the Pre-Trial Chamber found that it “is not persuaded that the evidence presented sufficiently demonstrates that Libya is investigating the same case as that before the Court”²⁹⁸ noting in its analysis of the evidence that there are only “discrete aspects that arguably relate to the conduct of Mr Gaddafi as alleged in the proceedings before the Court.”²⁹⁹ These “aspects” which relate to Mr. Gaddafi’s conduct included “instances of mobilization of militias and equipment by air, the assembly and the mobilization of military forces at the Abraq Airport, certain events in Benghazi on 17 February 2011, and the arrest of journalists and activists.”³⁰⁰

174. The Chamber, however, departed from this approach in Mr. Al-Senussi’s case and found that the same “aspects” did establish that Libya was investigating the same case. As submitted by the Defence, “[t]he conduct underlying the Warrant of Arrest and Article 58 Decision in Mr. Al-Senussi’s case is the same as that alleged in Mr. Gaddafi’s case”³⁰¹. The Chamber did not find in Mr. Gaddafi’s or Mr. Al-Senussi’s cases that the alleged conduct in the two cases was different. Instead, it noted the overlapping nature of the evidence.³⁰² The conduct in both cases, in essence, concerns the plan in February 2011 to use all forces and means to deter and quell the demonstrations of civilians against Muammar Gaddafi’s regime as part of a widespread and systematic attack on the civilian population in various places across Libya, including in Benghazi.³⁰³ Particular incidents including “certain events in Benghazi”

²⁹⁶ Impugned Admissibility Decision, para 79.

²⁹⁷ Impugned Admissibility Decision, para. 165.

²⁹⁸ Gaddafi Admissibility Decision, para. 134.

²⁹⁹ Gaddafi Admissibility Decision, para. 134.

³⁰⁰ Gaddafi Admissibility Decision, para. 134.

³⁰¹ Defence Response of 14 June 2013, para. 15.

³⁰² Impugned Admissibility Decision, para. 90.

³⁰³ Defence Response of 14 June 2013, paras. 21, 58.

were mentioned in the evidence submitted by Libya in both cases.³⁰⁴ One of the main ‘insider’ witnesses, whose statement is in Annex 16, was relied on by Libya in both cases, and is cited extensively by the Chamber in its Decision in Mr. Al-Senussi’s case.³⁰⁵

175. In the Defence’s submission, the Chamber erred in making a different finding on the first limb of the admissibility test in Mr. Al-Senussi’s case to that taken in Mr. Gaddafi’s case. In both cases the Chamber had to be satisfied that Libya had provided “specific information about the criminal conduct under investigation in Libya”³⁰⁶ which showed a “sufficient degree of specificity and probative value, that the same conduct is the subject of domestic investigations.”³⁰⁷ In Mr. Gaddafi’s case the Chamber found that Libya had not met this standard, whereas it had done so in Mr. Al-Senussi’s case. Yet, the Chamber failed to address in its reasoning that Libya alleges that it has sufficient and overlapping evidence to show that both the accused, together with other accused, are jointly involved in the same plan at the highest level to commit crimes in order to quell the demonstrations in Libya in February 2011. Having found that there was insufficient evidence and clarity about this overall plan in Mr. Gaddafi’s case, it is inconsistent for the Chamber to have found that there was nevertheless sufficient clarity regarding this same plan in respect of Mr. Al-Senussi.

176. Furthermore, as noted in the Defence’s Response, “specific incidents in Benghazi,³⁰⁸ Tripoli,³⁰⁹ Misrata,³¹⁰ and Al- Bayda, Derna, Tabruk and Ajdabiya³¹¹ ... gave the Chamber reasonable grounds to believe [in confirming the charges before the ICC] that ‘murders constituting crimes against humanity were committed from 15 February 2011 until at least 25 February 2011.’”³¹² While the Pre-Trial Chamber in assessing the evidence collected by Libya took into account specific incidents which occurred in Benghazi and elsewhere in February 2011,³¹³ the Appellant notes that several incidents, both in Benghazi and in other locations in Libya, which are identified and relied on in

³⁰⁴ See for example, Impugned Admissibility Decision, paras. 88, 111; Gaddafi Admissibility Decision, para. 134.

³⁰⁵ Impugned Admissibility Decision, paras. 111, 162, 165.

³⁰⁶ Defence Response of 14 June 2013, para. 42.

³⁰⁷ Defence Response of 14 June 2013, para. 42 citing Gaddafi Admissibility Decision, para. 116.

³⁰⁸ Defence Response, para. 17 citing Article 58 Decision, para. 36, 37.

³⁰⁹ Defence Response, para. 17 citing Article 58 Decision, para. 38.

³¹⁰ Defence Response, para. 17 citing Article 58 Decision, para. 39.

³¹¹ Defence Response, para. 17 citing Article 58 Decision, para. 41.

³¹² Defence Response, para. 17 citing Article 58 Decision, para. 41.

³¹³ Impugned Admissibility Decision, note 181.

the Article 58 decision are not covered in the evidence collected by Libya.³¹⁴ The case before the ICC clearly involves conduct and incidents that are spread across the whole country, and thus the Libyan domestic proceedings cannot be said to cover the ‘same case’ if Libya’s evidence is limited to certain locations, mainly in Benghazi.

In particular, conduct underlying persecution is not charged

177. The Pre-Trial Chamber noted that “a number of criminal acts that are alleged against Mr. Al-Senussi in the proceedings before the Court are qualified ... by having been inflicted on civilians ‘because of [their] political opposition (whether actual or perceived) to Gaddafi’s regime’”.³¹⁵ This is the underlying conduct that constitutes the crime of persecution before the ICC. The Chamber specifically confirmed that this “*factual aspect of the allegations against Mr Al-Senussi before the Court is not an element of any of the crimes with which it is currently envisaged that Mr Al-Senussi could be charged at the domestic level.*”³¹⁶

178. However, the Chamber erred in not finding that this was fatal to Libya’s application. Persecution is one of the main offences charged in this case before the ICC. The Chamber should have rejected Libya’s application when it had not shown that the conduct underlying persecution could form the basis of any charges against Mr. Al-Senussi under national law. This is because Mr. Al-Senussi cannot and will not be charged with any crimes under Libyan law which cover the conduct underlying the crime of persecution. In other words, a central “factual aspect” of the ICC’s case will not be reflected in the charges and prosecution in the national proceedings.

179. The Pre-Trial Chamber overlooked this fundamental deficiency by reasoning that Libyan law allows for these factual aspects of persecution to be taken into account during sentencing stage in Libya. The Pre-Trial Chamber found that “the fact that the crimes targeted a particular group of individuals by reason of the identity of the group ‘is an aggravating factor which is taken into account in sentencing under articles 27 and

³¹⁴ For example, Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah ALSENUSSI", ICC-01/11-01/11-1, 27 June 2011, paras. 36(vi), 37, 39 (incidents in cities near Benghazi, such as Al-Bayda, Derna, Tobruk and Ajdabiya, and Misrata).

³¹⁵ Impugned Admissibility Decision, para. 166.

³¹⁶ Impugned Admissibility Decision, para. 166.

28 of the Libyan Criminal Code,”³¹⁷ and accordingly, together with the crimes Libya “contemplates charging Mr Al-Senussi”,³¹⁸ these provisions “sufficiently capture Mr Al-Senussi's commission”³¹⁹ of the crimes alleged in the case before the Court; namely “(i) murder as a crime against humanity, within the meaning of article 7(l)(a) of the Statute; and (ii) persecution as a crime against humanity, within the meaning of article 7(l)(h) of the Statute.”³²⁰

180. The Appellant submits that the Chamber erred in making this finding. The fact that Libyan law may permit certain factual aspects of the crime of persecution to be taken into account as an aggravating factor during sentencing is not sufficient to show that Libya is investigating and prosecuting the same case as that before the ICC. Factors that may be taken into account at the sentencing stage, if the accused is even convicted, by their very nature do not concern the charges and case brought against the person at his trial. Mr. Al-Senussi would not be put on trial for crimes for which the underlying conduct would amount to the crime of persecution before the ICC.

181. The Appellant notes that the Pre-Trial Chamber has previously found in respect of Libyan law that domestic proceedings need not apply international crimes, but that it is sufficient for a domestic investigation or prosecution to include “ordinary crimes” “*to the extent that the case covers the same conduct*”.³²¹ The accused can therefore be charged with ordinary crimes in the national proceedings but these ordinary crimes must be capable of covering the same conduct as before the ICC i.e. in Mr. Al-Senussi's case the Libyan crimes must be capable of covered both the underlying conduct and acts of murder and persecution as a crime against humanity.

182. Though the Chamber has stated that the evidence collected during the domestic investigation may be charged as “ordinary crimes,” it must be established that the facts underlying these charges would rise to the level of crimes against humanity if these same facts were applied to the case before the Court.³²² If this were not the case, then Libya could, for example, charge Mr. Al-Senussi with the murder of one person who was in Benghazi on 17 February 2011 and assert that a trial on the basis of this single

³¹⁷ Impugned Admissibility Decision, para. 166.

³¹⁸ Impugned Admissibility Decision, para. 166.

³¹⁹ Impugned Admissibility Decision, para. 166.

³²⁰ Impugned Admissibility Decision, para. 69 citing Warrant of Arrest for Abdullah Al-Senussi, ICC-01/11-01/11-4, 27 June 2011, p. 6.

³²¹ See Gaddafi Admissibility Decision, paras. 85-88.

³²² Impugned Admissibility Decision, para. 66(iv).

charge was sufficient to cover the ICC's charges for murder as a crime against humanity.³²³ Clearly, this argument would be rejected by the Court as should the Chamber's finding that it is irrelevant that there are no crimes under Libyan law for which Mr. Al-Senussi can be tried which cover the underlying conduct and factual aspects of persecution as a crime against humanity.

183. The Appeals Chamber has never found that an aggravating factor in sentencing is an adequate substitute for being able to charge an accused under domestic law with offences, the elements of which cover the same underlying conduct as could be charged as an international crime. In any event, Libya has merely referred Articles 27 and 28 of the Libyan Criminal Code, but neither deals with aggravating factors as such, much less persecution as an aggravating factor. Article 27 states that a judge should determine the appropriate sentence, while Article 28 specifies the general factors that are relevant to the gravity of a crime. It does not refer to any aggravating factors, let alone include any reference to discrimination on political, racial, national, ethnic, cultural, religious, or gender grounds which is the defining feature of the crime against humanity of persecution.

184. In placing any reliance on what may happen in the sentencing stage in Libya, the Chamber has wrongly assumed that Mr. Al-Senussi will be convicted. Were Mr. Al-Senussi to be acquitted during the Libyan proceedings, then the factual aspects of persecution would never be applied in any way in the domestic proceedings in Libya.

185. For all of these reasons, the Appellant submits that the Pre-Trial Chamber erred in finding that Libya has established the first limb of the admissibility test.

IV. Request for an oral hearing

186. The Appellant urges the Appeals Chamber to hold an oral hearing on the merits of the appeal pursuant to Rule 156(3), which provides that "[t]he appeal proceedings shall be in writing unless the Appeals Chamber decides to convene a hearing". Although Libya and the Prosecutor will most probably submit that the written pleadings are extensive

³²³ Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah ALSENUSSI", ICC-01/11-01/11-1, 27 June 2011, p. 41; Warrant of Arrest for Abdullah Al-Senussi, ICC-01/11-01/11-4, 27 June 2011, p. 6. See also, Impugned Admissibility Decision, para. 69.

and therefore sufficient, the Defence submits that this appeal cannot be decided without hearing from the parties in an oral hearing where the key issues in dispute can be ventilated and scrutinised. Libya has itself urged the Appeals Chamber to grant an oral hearing for its appeal in Saif Gaddafi's case on the grounds that it is of "such significance" and "importance" and is "historic" in its consideration of key jurisprudential questions that are vital to the Libyan people, all States, and the broader international community.³²⁴

187. Libya stressed that, *"In this light, the manner in which this appeal is addressed by the Court will inform the way the perceptions of the Libyan people as to the legal process underlying the complementarity principle and the international community's response to the democratic aspirations of the new Libya. A public hearing will help effect the greatest possible openness and transparency as to the criminal process pertaining to Mr Gaddafi. It will also foster a better understanding of the ICC's processes and procedures, thereby reinforcing perceptions of its legitimacy."*

188. Given these submissions, it would be disingenuous for Libya to oppose an oral hearing in Mr. Al-Senussi's case when precisely the same jurisprudential issues are in dispute. The Prosecution should also be prepared to justify its stance of not seeking to retain jurisdiction of the Libya cases, in public at an oral hearing.

189. It is simply impossible for the present issues to be fully explored and considered in the absence of an oral hearing. The written submissions and evidence are voluminous and cover so many divergent and complex issues. They can only truly be tested in oral argument when the differing perspectives can be put and compared, and responded to, with the Appeals Chamber asking questions and putting its specific concerns to the parties before any judgment is rendered so that the parties have a chance to reply and to clarify and support their respective positions.

190. The Appeals Chamber has a broad discretion to permit an oral hearing and should exercise its powers to order such a hearing in this case. In Saif Gaddafi's case, the accused has at least been able to present his submissions at an oral hearing before the Pre-Trial Chamber. Mr. Al-Senussi was not afforded the same opportunity. It would

³²⁴ Document in Support of the Government of Libya's Appeal against the "Decision on the admissibility of the case against Saif Al-Islam Gaddafi", ICC-01/11-01/11-370-Red2, 24 June 2013, paras. 93-99.

be unfair for the future of Mr. Al-Senussi's case – and indeed his life – to be determined without the ICC hearing directly from his Counsel in an oral hearing and being permitted to address any concerns that the Appeals Chamber may seek to rely on in its judgment. The Appeals Chamber's decision is of such importance and the consequences are so great that an oral hearing should not be denied.

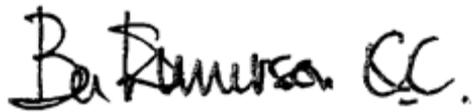
191. Furthermore, as explained in Ground 2, there is new evidence which the Appeals Chamber is requested to admit as it goes to the fundamental issues on appeal. An oral hearing will permit this essential evidence to be heard and examined by the Appeals Chamber, and for the parties to make submissions on the basis of this evidence. The Appeals Chamber should not make any adverse findings against Mr. Al-Senussi about his treatment in detention and in the national proceedings without hearing this evidence (and of course without having heard from Mr. Al-Senussi himself through his Defence Counsel having contact with him).

192. For all of these reasons, the Appellant submits that the present appeal should not be determined without an oral hearing.

V. Conclusion

193. The Appellant respectfully requests the Appeals Chamber to reverse the Pre-Trial Chamber's Admissibility Decision on the grounds set out above. The Appeals Chamber should order Libya to surrender Mr. Al-Senussi to the ICC for trial. He cannot and will not be treated fairly, impartially and independently in proceedings in Libya. Having regard to the international standards of due process and human rights, Libya is not bringing Mr. Al-Senussi to justice. Libya is unable genuinely to carry out the proceedings against him. His case must be heard at the ICC. Mr. Al-Senussi's case is, in the circumstances he faces in Libya, precisely the case that should be transferred to the ICC under the principle of complementarity. The ICC, and the Prosecutor, should not undermine the overriding purpose of complementarity to permit States to try their own cases *unless* they are unable and unwilling genuinely to bring the accused to justice in impartial, independent and fair proceedings taking into account the highest standards of due process under international law.

Counsel on behalf of Mr. Abdullah Al-Senussi,



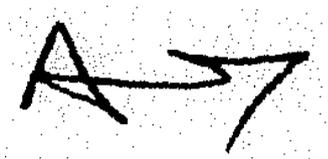
Ben Emmerson QC



Rodney Dixon



Amal Alamuddin



Anthony Kelly

Dated 4th November 2013
London, United Kingdom