

1 International Criminal Court
2 Appeals Chamber - Courtroom 1
3 Situation: Libya
4 In the case of The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah
5 Al-Senussi - ICC-01/11-01/11
6 Appeal Chamber Hearing for the delivering of a Judgment
7 Wednesday, 21 May 2014
8 (The hearing starts in open session at 4.31 p.m.)
9 THE COURT USHER: All rise.
10 The International Criminal Court is now in session.
11 PRESIDING JUDGE KOURULA: Good afternoon. Please be seated.
12 The hearing of the Appeals Chamber is now in session. I'd like to welcome everyone who is
13 here today in the courtroom, in the gallery and those who are joining -- welcome also those
14 who are joining us via the Internet or otherwise.
15 First I'd like to ask the court officer to please call the case.
16 THE COURT OFFICER: Thank you, Mr President. The situation in Libya in the case of The
17 Prosecutor against Saif Al-Islam-Gaddafi and Abdullah Al-Senussi, ICC-01/11-01/11. We are
18 in open session.
19 PRESIDING JUDGE KOURULA: Thank you very much.
20 I'm Judge Kourula and I'm the Presiding Judge on the appeal just called by the court
21 officer, and I note that permission was given by the Appeals Chamber that the
22 photographs -- there are photographs to be taken and I note that the photographer
23 has left. Thank you, anyway.
24 I would first like to ask the parties and participants present at this hearing to
25 introduce themselves. Should we start with the counsel for Libya?

1 MR AKHAVAN: Thank you, Mr President. Good afternoon. I'm Payam Akhavan
2 appearing on behalf of the Government of Libya together with my colleagues Michelle Butler,
3 Mr Wayne Jordash, QC, Ms Emma Collins and Mr Paul Clark.

4 PRESIDING JUDGE KOURULA: Thank you very much.

5 MR AKHAVAN: Thank you.

6 PRESIDING JUDGE KOURULA: Let me now turn to the Office of the Prosecutor.

7 MR GUARIGLIA: Good afternoon, your Honour. It's Fabricio Guariglia, Prosecution's
8 co-ordinator; and appearing with me today are Mr Julian Nicholls, senior trial lawyer;
9 Mr Reinhold Gallmetzer, appeals counsel; and Mr Hesham Mourad, trial lawyer.

10 PRESIDING JUDGE KOURULA: Thank you very much.

11 Then the Defence team of Mr Gaddafi, would you be so kind?

12 MR JONES: Yes. May it please you, Mr President, John Jones*, QC. I appear on behalf of
13 Saif Al-Islam Gaddafi, assisted by Ms Sarah Bafadhel.

14 PRESIDING JUDGE KOURULA: Thank you very much.

15 Counsel of the Office of the -- Counsel for the Office of Public Counsel for Victims, sorry?

16 MS MASSIDDA: Good afternoon, Mr President. Victims in these proceedings are
17 represented by the Office of Public Counsel for Victims. Appearing today, Ms Sarah Pellet,
18 counsel; Mr Mohamed Abdou, associate legal officer; and I am Paolina Massidda, principal
19 counsel.

20 PRESIDING JUDGE KOURULA: Thank you very much.

21 In addition to the court officer and court usher, I have in front of me Volker Nerlich, legal
22 adviser of the Appeals Division, and legal officers Barbara Roche and Anthony Jackson.

23 Thank you very much.

24 We are also joined today by the staff of the Registry, including court officer, court usher, as I
25 indicated, court reporters, interpreters, stenographers, security officers, and I welcome them

1 all and particularly thank for their assistance already at this stage.

2 I shall now summarise the Appeals Chamber's judgment and the reasons for it. I

3 would emphasise that this summary is not part of the written judgment, which is the

4 only authoritative account of the Appeals Chamber's ruling, rulings and reasons.

5 The written judgment will be made available to the parties shortly after the

6 conclusion of this hearing.

7 The Appeals Chamber's judgment is by majority, with a separate opinion by Judge Song and a

8 dissenting opinion by Judge Ušacka. I will also briefly summarise these opinions after

9 having concluded the summary of the majority judgment.

10 I will start with a very brief procedural history. On 1 May 2012, Libya submitted its

11 challenge to the admissibility of the case against Mr Saif Al-Islam-Gaddafi. Further

12 filings in relation to this challenge were made in the course of the following year by

13 both Libya and other parties.

14 On 31 May 2013, the Pre-Trial Chamber issued the impugned decision finding the

15 case against Mr Gaddafi to be admissible. On 7 June 2013, Libya filed its appeal

16 against the impugned decision requesting that the Appeals Chamber reverse the

17 impugned decision and determine that the case against Mr Gaddafi is inadmissible.

18 Again, further filings were made in the course of the following months.

19 Before turning to consider the grounds of the appeal raised by Libya, I will first deal

20 with a preliminary issue; that is Libya's request to submit additional evidence on

21 appeal.

22 In essence, Libya requested the admission of minutes of a hearing that took place in

23 Libya on 19 September 2013, in addition to the opportunity to file by 2 December 2013

24 the relevant extracts of the Accusation Chamber dossier and additional witness

25 statements and evidential material as well as limited submissions on their contents.

1 The Prosecutor, Defence and victims opposed this application.

2 The Appeals Chamber recalls previous jurisprudence in which it has found that its
3 function is corrective in nature and that, quote, "The scope of proceedings on appeal
4 is determined by the scope of the relevant proceedings before the Pre-Trial Chamber,"
5 unquote.

6 As the minutes of the hearing of 19 September 2013 concern a hearing that post-dates
7 the impugned decision, the Appeals Chamber reiterates that "Facts which post-date
8 the impugned decision fall beyond the possible scope of the proceedings before the
9 Pre-Trial Chamber and therefore beyond the scope of the proceedings on appeal."

10 Concerning the information which Libya wished to submit later as additional
11 evidence, the Appeals Chamber notes that this information has not been considered
12 by the Pre-Trial Chamber. In the circumstances of this case, it would not be
13 appropriate for the Appeals Chamber to consider this material when the Pre-Trial
14 Chamber has not done so. Accordingly, the request to submit this information must
15 be rejected.

16 The Appeals Chamber confirms that, should Libya wish this information to be
17 considered by the Court, the correct avenue would rather be for it to submit that
18 information to the Pre-Trial Chamber as part of an application under Article 19(4) of
19 the Statute which provides that, quote, "In exceptional circumstances, the Court may
20 grant leave for a challenge to be brought more than once or at a time later than the
21 commencement of the trial," unquote. In such circumstances, the Pre-Trial Chamber
22 could decide whether to grant leave to Libya to bring a second challenge to the
23 admissibility of the case.

24 Turning to the merits of the case - merits of the appeal, rather - I would recall that
25 Libya has raised four grounds of appeal, which I will now deal with in turn.

1 In the first ground of appeal, Libya argued that the Pre-Trial Chamber, having found that
2 there was an ongoing domestic investigation covering "discrete aspects" of the case before the
3 Court against Mr Gaddafi, should have concluded that the domestic investigation concerned
4 the same case in terms of Article 17(1)(a) of the Statute and that the Pre-Trial Chamber erred
5 by requiring proof of the "actual contours" of the case and its precise scope.

6 The Appeals Chamber considers that this ground of appeal essentially revolves
7 around the interpretation to be given to a "case," as referred to in Article 17(1)(a) of
8 the Statute, and in particular how a case being investigated by the Prosecutor and one
9 being investigated by Libya should be compared.

10 Article 17(1)(a) of the Statute provides in the relevant part that the Court shall
11 determine that a case is inadmissible where the case is being investigated or
12 prosecuted by a State which has jurisdiction over it, unless the State is unwilling or
13 unable genuinely to carry out the investigation or prosecution.

14 The Appeals Chamber considers that this ground of appeal raises three interrelated
15 issues.

16 First the meaning of the term "case" as referred to in Article 17(1)(a) of the Statute,
17 including the role of underlying incidents in defining the scope of a case. The
18 Appeals Chamber confirms that the parameters of a "case" are defined by the suspect
19 under the investigation and the conduct that gives rise to criminal liability under the
20 Statute.

21 The "conduct" that defines the "case" in situations such as the present is both that of
22 the suspect and that described in the incidents under investigation which is imputed
23 to the suspect.

24 Second, how to compare the cases under investigation by the Court and domestically
25 to determine whether they are under the same. The Appeals Chamber considers

1 that, in assessing admissibility, what is required is a judicial assessment of whether
2 the case that the State is investigating sufficiently mirrors the one that the Prosecutor
3 is investigating.

4 And third, whether a State challenging the admissibility of a case before the Court is
5 required to establish the "actual contours" or "precise scope" of the domestic
6 investigation. The Appeals Chamber considers that to be able to carry out
7 assessment as to whether the same case is being investigated, it will be necessary for a
8 Chamber to know the contours or parameters of the investigation being carried out
9 both by the Prosecutor and by the State.

10 Turning to the Pre-Trial Chamber's findings, the Appeal Chamber notes that the
11 Pre-Trial Chamber concluded, having analysed the evidence before it, that that
12 evidence did "... not allow the Chamber to discern the actual contours of the national
13 case against Mr Gaddafi such that the scope of the domestic investigation could be
14 said to cover the same case as that set out in the warrant of arrest issued by the
15 Court."

16 The Appeals Chamber has found that it must be possible for the Pre-Trial Chamber to
17 discern the contours of the investigation being carried out at the national level in
18 order for it to be able to compare if the same case is being investigated domestically as
19 well as by the Prosecutor. As the Pre-Trial Chamber required just that, the Appeals
20 Chamber can find no error in its legal conclusion.

21 Libya has also argued that the Pre-Trial Chamber erred in not providing sufficient
22 reasoning. The Appeals Chamber finds that the impugned decision is sufficiently
23 reasoned and that it indicates with sufficient clarity the basis of the decision.

24 I now turn to the second ground of appeal, which essentially raises allegations of
25 error of fact. In this regard at issue is not whether the Appeals Chamber would have

1 reached the same factual conclusion as the Pre-Trial Chamber, but rather whether the
2 Pre-Trial Chamber's factual conclusion could be reasonably reached based on the
3 evidence before it.

4 The Appeals Chamber first addresses Libya's allegations of error in relations -- in
5 relation to individual items of evidence.

6 Based on the above standard, and for the reasons set out in the judgment, the Appeals
7 Chamber concludes that the Pre-Trial Chamber's conclusions were not unreasonable.

8 Libya has also argued that the Pre-Trial Chamber took an unreasonable approach to
9 the evaluation of the evidence as a whole. The Appeals Chamber concludes that it is
10 apparent from the impugned decision that the Pre-Trial Chamber properly
11 considered the evidence that was before it.

12 It concluded that, although certain investigative activity was taking place in Libya, "...
13 the evidence, taken as a whole, does not allow the Chamber to discern the actual
14 contours of the national case against Mr Gaddafi such that the scope of the domestic
15 investigation could be said to cover the same case as that set out in the warrant of
16 arrest issued by the Court." The Appeals Chamber considers that this conclusion
17 was not unreasonable.

18 In conclusion, as Libya has failed to establish that the Pre-Trial Chamber's factual
19 conclusions were unreasonable, the second ground of appeal is dismissed.

20 Turning to the third ground of appeal, this essentially raises allegations of procedural
21 errors. Libya argues that the Pre-Trial Chamber erred procedurally, or acted
22 unfairly, by failing to "... take appropriate measures for the proper conduct of the
23 procedure," thereby depriving Libya of the ability to rely upon highly relevant
24 evidence in support of its admissibility challenge.

25 First, Libya argues that the Pre-Trial Chamber erred in failing to consider evidence

1 that Libya could have made available to it. It largely questions the procedure
2 implemented by the Pre-Trial Chamber for the conduct of the admissibility
3 proceedings, the argument being that the Pre-Trial Chamber erred by not properly
4 considering submissions in which Libya advised the Pre-Trial Chamber of the
5 existence of additional evidence supporting its challenge to the admissibility of the
6 case against Mr Gaddafi.

7 In essence the arguments revolve around appropriate interpretation to be given to
8 Rule 58 of the Rules of Procedure and Evidence, which provides inter alia that the
9 Chamber shall decide on the procedure to be followed and may take appropriate
10 measures for the proper conduct of the proceedings. In considering these arguments
11 the Appeals Chamber does not consider whether the Pre-Trial Chamber could have
12 conducted the admissibility proceedings differently, or whether it could have given
13 Libya an opportunity to submit additional evidence. Rather, the guiding question
14 for the Appeals Chamber's review in this ground of appeal is whether the procedure
15 the Pre-Trial Chamber adopted was so unfair and unreasonable as to constitute an
16 abuse of discretion.

17 Having considered its procedural background - the procedural background of these
18 proceedings - the Appeals Chamber concludes that the Pre-Trial Chamber did not err.
19 While it is open to Chambers, pursuant to Rule 58 of the Rules of Procedure and
20 Evidence, to be permitted the filing of additional evidence, there are not -- they are "...
21 not obliged to do so, nor could a State expect to be allowed to present additional
22 evidence."

23 Please excuse me. "Rather, it is for a State to ensure that the admissibility challenge
24 is sufficiently substantiated by evidence ..." at the time of the filing of the challenge.
25 The Appeals Chamber considers that the Pre-Trial Chamber in this case and in its

1 discretion provided Libya with ample opportunity to substantiate its challenge to the
2 admissibility of the case against Mr Gaddafi beyond the filing of the admissibility
3 challenge itself.

4 The Appeals Chamber considers that it was by no means unreasonable for the
5 Pre-Trial Chamber to draw the line when it did. Therefore, contrary to what Libya
6 submits, the Appeals Chamber finds that the Pre-Trial Chamber determined the
7 admissibility challenge "... on the basis of the facts as they existed at the time of the
8 proceedings" and did take into account the rapidly evolving circumstances in Libya.
9 Libya also argues that the Pre-Trial Chamber should have taken into account the
10 materials submitted in support of its challenge to the admissibility of the case against
11 Abdullah Al-Senussi, which was filed on 2 April 2013.

12 The Appeals Chamber considers that the Pre-Trial Chamber did not err, as Libya did
13 not specifically request that such material be considered in the context of the Gaddafi
14 proceedings and Libya had not been on notice that the scope of the case being
15 considered related only to the case of Mr Gaddafi.

16 Libya argues further that the Pre-Trial Chamber erred in failing to clarify its position
17 relating to the burden and standard of proof, recalling also that there was a significant
18 degree of disagreement as to the meaning of the term "case."

19 The Appeals Chamber considers that the existence of disagreement between parties as
20 to the interpretation of the legal text is not an uncommon feature of judicial
21 proceedings and that it is the responsibility of the Chamber to adopt the
22 interpretation that it considers to be correct when adjudicating on the proceedings.
23 It is usually only in its decision that the Chamber is required to provide what in its
24 view is the correct interpretation of the law, which is thereafter -- which it thereafter
25 applies to the relevant facts. The Appeals Chamber considers therefore that the

1 arguments presented by Libya under this limb are misguided and premised on the
2 misunderstanding of the obligations of a Chamber in circumstances such as those in
3 the instant proceedings.

4 In any event the Appeals Chamber also recalls that the Pre-Trial Chamber, in
5 particular in its decision issued on 7 December 2012, provided extensive guidance to
6 Libya as to what it expected should be filed to substantiate its challenge. In
7 providing such detailed guidance, the Pre-Trial Chamber provided effective and
8 useful guidance as to what Libya was required to produce to substantiate its
9 admissibility challenge.

10 Finally, Libya argues that the Pre-Trial Chamber essentially rejected its request to
11 submit additional evidence because it had in any event decided that there were
12 concerns as to Libya's ability genuinely to carry out the investigation or prosecution.

13 The Appeals Chamber rejects this argument. It notes that the impugned decision
14 devotes a considerable number of pages to considering the first limb of the
15 complementarity assessment. Paragraph 135 in particular clarifies that the Pre-Trial
16 Chamber considered the evidence as a whole and held that it did not allow it to
17 discern the actual contours of the national case against Mr Gaddafi since "Libya has
18 fallen short of ..." -- since, I quote, "Libya has fallen short of substantiating, by means
19 of evidence of a sufficient degree of specificity and probative value, the submission
20 that the domestic investigation covers the same case that is before the Court",
21 unquote.

22 Paragraph 136 and the first part of paragraph 137 clarify by means of recalling the
23 most salient steps of the proceedings, why the Pre-Trial Chamber was of the view that
24 it had provided Libya with sufficient opportunities to submit its evidence.

25 The Appeals Chamber has already found that these conclusions were not

1 unreasonable. Against this background the Appeals Chamber considers that,
2 although the wording of the impugned decision may be unfortunate, it is merely an
3 introduction to the next section of the impugned decision dealing with the
4 willingness or ability genuinely to investigate and prosecute. It does not interpret
5 the Pre-Trial Chamber to say that it rejected the submission of any additional
6 evidence because the second limb of the test was not satisfied.

7 Finally turning to the fourth ground of appeal, Libya argues that the Pre-Trial
8 Chamber erred in fact and in law in finding that, due to the unavailability of its
9 national judicial system, Libya is unable to obtain the accused or the necessary
10 evidence and testimony, or is otherwise unable to carry out its proceedings;
11 proceedings pursuant to Article 17(3) of the Statute.

12 The Appeals Chamber has concluded that the Pre-Trial Chamber did not err in
13 finding that Libya had not satisfied the Pre-Trial Chamber that it is investigating the
14 same case.

15 Noting that the fourth ground of appeal raises the question of Libya's ability under
16 Article 17(3) of the Statute, the Appeals Chamber recalls that it has found that in
17 considering whether the case is inadmissible under Article 17(1)(a) and (b) of the
18 Statute, the initial questions to ask are first whether there are ongoing investigations
19 or prosecutions, or second whether there have been investigations in the past and the
20 State having jurisdiction has decided not to prosecute the person concerned? It is
21 only when the answers to these questions are in the affirmative that one has to look to
22 the second half of the subparagraphs (a) and (b) and to examine the question of
23 unwillingness and inability. To do otherwise would be to put the cart before the
24 horse.

25 Accordingly, the Appeals Chamber does not proceed to consider the arguments

1 raised under ground four of the appeal.

2 In conclusion on the appeal pursuant to Article 82(1)(d) of the Statute, the Appeals
3 Chamber may confirm, reverse or amend the decision appealed. In the present case,
4 and for the reasons given, the Appeals Chamber confirms the impugned decision and
5 dismisses the appeal.

6 I now turn to the separate opinion of Judge Song.

7 Judge Song agrees with the majority of the Appeals Chamber that it is appropriate to
8 confirm the impugned decision and to dismiss Libya's appeal. However, he
9 disagrees with the majority's interpretation of the term "case" in Article 17(1)(a), the
10 first ground of appeal, and the conclusion of the majority that Libya has failed to
11 establish that the Pre-Trial Chamber's factual conclusions were unreasonable, that is
12 the second ground of appeal.

13 He, therefore, proceeds to consider the fourth ground of appeal in relation to which
14 Judge Song does not find any error in the Pre-Trial Chamber's conclusion in respect of
15 Article 17(3) of the Statute and finds the case to be admissible on that basis.

16 In relation to ground one, Judge Song considers that in comparing the conduct being
17 investigated by the Prosecutor with that being investigated by Libya, in the circumstances of
18 the specific case, he considers that for it to be found that the domestic investigation being
19 carried out in Libya covers the same case, it must be found that it covers, first, the use of the
20 State apparatus by Mr Gaddafi; second, for the alleged commission of the crimes of killing
21 and persecution; third, committed in the time period of 15 February 2011 to at least 28
22 February 2011, the same year; and fourthly, against civilian demonstrators or alleged
23 dissidents of Muammar Gaddafi's regime; and finally, fifth, across Libya.

24 Judge Song notes that the Pre-Trial Chamber found that the events expressly
25 mentioned in the arrest warrant decision constitutes samples of a course of conduct of

1 the Security Forces under Mr Gaddafi's control.

2 From this statement, he considers that it is clear that overlap between the incidents is
3 not a relevant factor for the purposes of determining whether the national
4 investigation covers the same conduct as that alleged by the Prosecutor in the present
5 case.

6 In Judge Song's view, it is irrelevant for the purposes of this admissibility challenge whether
7 the national investigation covers different incidents, including incidents not specifically
8 mentioned in the arrest warrant decision.

9 To require that the national investigation must cover the same incidents would, in his
10 view, set too onerous a standard for admissibility challenges in cases like this one
11 where there are potentially hundreds of incidents to investigate and where, in
12 addition, the person under investigation is not alleged to have physically committed
13 any acts of murder and persecution.

14 In relation to the second ground of appeal, Judge Song considers that the Pre-Trial
15 Chamber's findings -- finding on the evidence was unreasonable. He concludes
16 when assessing evidence -- the evidence as a whole, more than discrete aspects are
17 being investigated by Libya and the Pre-Trial Chamber should have concluded that
18 Libya is investigating the same case as that being investigated by the Prosecutor.

19 Having concluded that the same case against Mr Gaddafi is being investigated by
20 Libya, Judge Song found it unnecessary to consider the third ground of appeal.

21 However, in order to determine whether the case is inadmissible, he found it
22 necessary to consider the fourth ground of appeal, which concerns whether there was
23 any error in the determination of the Pre-Trial Chamber that Libya is unable
24 genuinely to carry out these proceedings.

25 In relation to Article 17(3) of the Statute, Judge Song addresses Libya's essential

1 arguments that the Pre-Trial Chamber erred in its interpretation and application of
2 the term "unavailability of its national judicial system" and that it further erred by
3 finding that the Libyan judicial system was unable in relation to the case against
4 Mr Gaddafi.

5 Judge Song does not find any legal error in the Pre-Trial Chamber's approach to
6 unavailability. Contrary to Libya's submissions, he finds that the Pre-Trial Chamber
7 did consider the criterion of unavailability separately from that of inability and
8 considered that the latter was a consequence of the former, citing the Pre-Trial
9 Chamber's finding that Libya's national judicial system was unavailable as a result of
10 Libya facing "... substantial difficulties in exercising its judicial powers fully across the
11 entire ..." country -- "... territory of the country."

12 As a result Libya was, inter alia, unable to obtain the accused. Judge Song opines
13 that the fact that the two factors require consideration does not mean that there is no
14 link between them.

15 Judge Song further finds that the correct interpretation of the term "unavailability", in
16 context, and in light of the object and purpose of the Statute, is that of the national
17 system being incapable of use, which incorporates the notion of being inaccessible, in
18 the circumstances of a particular case.

19 In relation to the Pre-Trial Chamber's finding that Libya was unable to obtain the
20 accused, Judge Song considers that the issue to be determined is whether the central
21 authorities have been able to obtain Mr Gaddafi for the purposes of trial. In this
22 regard, for the reasons he sets out in the separate opinion, Judge Song does not find
23 the conclusion of the Pre-Trial Chamber to be unreasonable; namely, that Libya had
24 not been able to secure the transfer of Mr Gaddafi from Zintan into the control of the
25 central authorities for detention and trial in Tripoli, and that, without such a transfer,

1 his trial could not take place.

2 Having not found any clear error or unreasonableness in the conclusions of the

3 Pre-Trial Chamber in respect of Libya being unable to obtain Mr Gaddafi, and given

4 that it is sufficient for one of the alternative criteria in respect of a State being unable

5 under Article 17(3) of the Statute to be satisfied, Judge Song does not consider it

6 necessary to rule upon the other aspects of Libya's alleged inability.

7 I now turn to the dissenting opinion of Judge Anita Ušacka.

8 And I'm very sorry that the air conditioning is not working.

9 Judge Ušacka disagrees with the majority that the impugned decision should be

10 confirmed. In relation to the first ground of appeal, Judge Ušacka considers that the

11 Pre-Trial Chamber's finding that the scope of the domestic investigation did not cover

12 the same case as that set out in the warrant of arrest issued by the Court is erroneous

13 due to its incorrect interpretation of Article 17(1)(a) of the Statute.

14 As this interpretation is based solely on the same person/substantially the same

15 conduct test, the problem lies, in her opinion, in the test itself.

16 Judge Ušacka considers that Article 17(1)(a), applied in accordance with the principle

17 of complementarity, does not require domestic authorities to focus on largely or

18 precisely the same acts or omissions that form the basis for the alleged crimes.

19 Requiring that domestic investigations would need to focus largely or precisely on the

20 same acts or omissions would strongly intrude upon the sovereignty of states.

21 Judge Ušacka considers that such a rigid approach would also not take into account

22 the many legal and practical differences between criminal justice systems and, even

23 worse, would potentially preclude a State from focusing its investigations on a wider

24 scope of activities and instead only on the narrower case selected by the Prosecutor of

25 the Court.

1 Judge Ušacka considers that the Court should, in comparing a case before the Court
2 and a domestic case, be guided by a complementarity scheme that contains multiple
3 criteria.

4 As one of the criteria that needs to be considered in this case, "conduct" should be understood
5 more -- much more broadly than by the Pre-Trial Chamber or the majority of the Appeals
6 Chamber. She states that, in the case at hand, the goal of fighting impunity is also achieved,
7 even if not exactly the same conduct as that before the Court is under Libyan investigation,
8 but if the suspect's link to the use of the Security Forces in Libya and their consequences are
9 being made the subject of the investigation of the Libyan authorities. A second important
10 criterion that can be derived from the complementarity scheme is the clearly expressed and
11 genuine will of the State that manifests itself in advancing investigating steps, as exemplified
12 by the concrete actions taken by Libya.

13 Judge Ušacka also considers that the Pre-Trial Chamber erred in imposing the burden
14 of proof solely on Libya and in its evidentiary standards when assessing the materials
15 relevant to Libya's investigations.

16 Judge Ušacka states that her suggested approach would most likely lead to a finding
17 that Libya is investigating the same case against Mr Gaddafi. However, upon
18 consideration of the impugned decision as a whole, especially the lack of reasoning
19 and uncertainty of the Pre-Trial Chamber in its findings on the first limb of Article
20 17(1)(a) of the Statute, shown by the fact that they addressed the second limb of
21 Article 17(1)(a) of the -- sorry -- of the Statute, she would have reversed the impugned
22 decision and remanded the matter to the Pre-Trial Chamber for a fresh consideration.
23 This concludes the summaries of both the majority judgment and the separate and
24 dissenting opinions.

25 My only task is to thank the parties and participants and reiterate my thanks that I

- 1 expressed to the staff of the Registry for all their assistance.
- 2 The session is now closed.
- 3 (The hearing ends in open session at 5.16 p.m.)
- 4 CORRECTION REPORT
- 5 The Court Management Section has made the following correction in the transcript:
- 6 *Page 2 line 12
- 7 "John James, QC." Is corrected by "John Jones, QC."