

1 Appeals Chamber - Courtroom 1

2 Situation: Libya

3 In the case of The Prosecutor v. Saif Al-Islam Gaddafi and

4 Abdullah Al-Senussi - ICC-01/05-01/13

5 Presiding Judge Akua Kuenyehia

6 Appeals Chamber Hearing for the delivering of a Judgment

7 Thursday, 24 July 2014

8 (The hearing starts in open session at 11.01 a.m.)

9 THE COURT USHER: All rise.

10 The International Criminal Court is now in session.

11 Please be seated.

12 (Pause in proceedings)

13 PRESIDING JUDGE KUENYEHIA: Now that we are finished with the

14 photographers, may I say good morning everyone.

15 Court officer, could you please call the case.

16 THE COURT OFFICER: Thank you, your Honour.

17 The situation in Libya in the case of the Prosecutor against Saif Al-Islam Gaddafi and

18 Abdullah Al-Senussi, ICC-01/11-01/11.

19 PRESIDING JUDGE KUENYEHIA: Thank you.

20 May I ask the parties to introduce themselves for the record, starting with the Office

21 of the Prosecutor, please.

22 MS BRADY: Good morning, your Honour. Helen Brady appearing on behalf of the

23 Prosecution and with me today Mr Julian Nicholls and Mr Hesham Mourad. Thank

24 you.

25 PRESIDING JUDGE KUENYEHIA: Thank you very much.

1 The Defence of Mr Al-Senussi, please.

2 MR DIXON: Good morning, your Honour. Rodney Dixon on behalf of

3 Mr Abdullah Al-Senussi, assisted today by Haydee Dijkstal. Thank you.

4 PRESIDING JUDGE KUENYEHIA: Thank you very much.

5 The Government of Libya.

6 MR AKHAVAN: Good morning, Madam President. I'm Payam Akhavan

7 appearing on behalf of the Government of Libya together with my colleagues,

8 Miss Emma Collins and Mr Paul Clark.

9 PRESIDING JUDGE KUENYEHIA: Thank you very much.

10 Office of Public Counsel for Victims.

11 MS MASSIDDA: Good morning, your Honour. Victims in these proceedings are

12 represented by the Office of Public Counsel for Victims. Appearing today,

13 Mr Mohamed Abdou, associate legal officer, and I am Paolina Massidda, principal

14 counsel.

15 PRESIDING JUDGE KUENYEHIA: Thank you.

16 Thank you very much, everyone.

17 Today the Appeals Chamber is delivering its judgment on the appeal by the Defence

18 of Mr Al-Senussi against the decision of Pre-Trial Chamber I entitled "Decision on the

19 admissibility of the case against Abdullah Al-Senussi." The decision was rendered

20 on 11 October 2013. In today's summary, I will refer to this decision as the

21 impugned decision.

22 I shall now summarise the Appeals Chamber's judgment. Please note that only the

23 judgment itself is authoritative. It will be notified to the parties shortly after this

24 hearing.

25 I'll start with the procedural background.

1 On 2 April 2013, Libya filed before the Pre-Trial Chamber I, pursuant to Article 19 of
2 the Statute, a challenge to the admissibility of the case against Abdullah Al-Senussi.
3 The Prosecutor, Defence and Victims all participated and filed submissions in the
4 proceedings.

5 On 11 October 2013, the Pre-Trial Chamber issued the impugned decision holding
6 that Libya was investigating the same case as the Prosecutor and that Libya was
7 neither unwilling nor unable to do so genuinely. As such, the case was found to be
8 inadmissible before this Court.

9 The Defence filed its appeal on 17 October 2013 and on 4 November 2013 filed its
10 "Document in Support of Appeal on behalf of Abdullah Al-Senussi against Pre-Trial
11 Chamber I's 'Decision on the admissibility of the case against Abdullah Al-Senussi'"
12 (which I shall refer to as the Documents in Support of the Appeal). Libya, the
13 Prosecutor and Victims all similarly participated and filed submissions in the
14 proceedings.

15 The Defence grouped its arguments under three grounds of appeal. However, the
16 second ground of appeal essentially was an application to submit additional evidence
17 on appeal in respect of the first ground of appeal. As this is a preliminary issue, the
18 Appeals Chamber will address the admission of additional evidence first.

19 The Defence annexed to its Document in Support of Appeal three items that it
20 requested to be admitted into evidence on appeal. In later filings there were
21 numerous pieces of additional evidence relied upon by both the Defence and Libya.

22 The Appeals Chamber recalls and reaffirms its jurisprudence from the recent Gaddafi
23 Admissibility Judgment regarding additional evidence in relation to appeals of an
24 admissibility decision. The Appeals Chamber's role is corrective in nature and, as
25 such, facts which post-date the impugned decision are beyond the scope of the

1 proceedings on appeal. In relation to evidence which predates the impugned
2 decision, the Appeals Chamber finds that in the circumstances of this case it would
3 not be appropriate to consider this material because the Pre-Trial Chamber did not do
4 so.

5 Accordingly, the Appeals Chamber decided not to admit any of the additional
6 evidence on appeal.

7 Ground 3 of the appeals: Whether the Pre-Trial Chamber erred in finding that Libya
8 is investigating and prosecuting the same case as that before this Court.

9 I shall now turn to the third ground of appeal, which relates to the Pre-Trial
10 Chamber's finding that Libya is investigating the same case as the Prosecutor. The
11 Defence essentially alleges that the Pre-Trial Chamber made three errors in this
12 regard, which I shall briefly address in turn.

13 The Defence -- the Defence's first submission in ground three is that the Pre-Trial
14 Chamber relied almost exclusively on redacted material. The Defence argues that
15 this was unfair and prejudiced the Defence's ability to respond to the admissibility
16 challenge.

17 The Appeals Chamber is not persuaded by the Defence's argument. The Pre-Trial
18 Chamber expressly noted the potential unfairness to the Defence. In doing so, the
19 Chamber observed that only the names and other identifying information of
20 witnesses had been redacted and specifically stated that in making its decision it
21 relied only on the redacted versions that were disclosed to the Defence.

22 Furthermore, despite not being able to investigate the sources of the information,
23 there was no unfairness to the Defence because they are -- these are admissibility
24 proceedings concerned with the venue for trial, as opposed to criminal proceedings
25 concerned with the criminal responsibility of an accused person.

1 In these circumstances, the Appeals Chamber finds that there was no error in the
2 Pre-Trial Chamber's exercise of discretion regarding the necessity and proportionality
3 of their redactions and subsequent reliance on the material.

4 The Defence's second argument -- second submission in ground three is that the
5 Pre-Trial Chamber erred in finding the same case was being investigated because the
6 case before the Court, and I quote, "clearly involves conduct and incidents that are
7 spread across the whole country, and thus the Libyan domestic proceedings cannot be
8 said to cover the 'same case' if Libya's evidence is limited to certain locations, mainly
9 in Benghazi.", unquote. In that regard, the Defence argues that the Pre-Trial

10 Chamber erred by not reaching the same conclusion as in the case of Mr Gaddafi and
11 that the Pre-Trial Chamber's interpretation of the term "same case" was incorrect.

12 Again, the Appeals Chamber is not persuaded by these arguments.

13 First, the Appeals Chamber finds no error in the Pre-Trial Chamber's distinction
14 between the present case and that of Mr Gaddafi's. This is for two reasons: First,
15 unlike Mr Gaddafi's case, Mr Al-Senussi's case was limited to criminal acts that
16 allegedly occurred in Benghazi; secondly, in the present case, Libya submitted
17 substantially more evidence than in the case of Mr Gaddafi, thus it was not
18 unreasonable for the Pre-Trial Chamber to reach a different conclusion in relation to
19 Mr Al-Senussi than in the case of Mr Gaddafi.

20 The second error alleged by the Defence is that the Pre-Trial Chamber applied the
21 wrong test in finding that the "same case" was being investigated. The Appeals
22 Chamber recently considered the issue of the correct legal test to apply with regards
23 to the "same case" in the Gaddafi Admissibility Judgment. The Appeals Chamber
24 reaffirms its finding that, and I quote, "what is required is a judicial assessment of
25 whether the case that the State is investigating sufficiently mirrors the one that the

1 Prosecutor is investigating. The Appeals Chamber considers that to carry out this
2 assessment, it is necessary to use, as a comparator, the underlying incidents under
3 investigation both by the prosecutor and the State, alongside the conduct of the
4 suspect under investigation that gives rise to his or her criminal responsibility for the
5 conduct described in those incidents.", unquote.

6 In the present case, the Pre-Trial Chamber found that, as a matter of law, the specific
7 incidents alleged against Mr Al-Senussi did not form part of the comparators in
8 deciding whether Libya is investigating the same case. This is not in line with the
9 jurisprudence of the Appeals Chamber that I just summarised. Nevertheless, when
10 assessing the specific facts of the case, the Pre-Trial Chamber did assess the specific
11 incidents under investigation and used them to conclude that Libya was investigating
12 the same case. In addition, based upon the factual findings contained in the
13 impugned decision, on its face it does not appear that the domestic investigation does
14 not sufficiently mirror the case before the Court.

15 While the Defence challenges some of the factual findings of the Pre-Trial Chamber in
16 that regard, these challenges are either not sufficiently substantiated or based on an
17 incorrect understanding of the scope of the case against Mr Al-Senussi.

18 Accordingly, the Appeals Chamber rejects the Defence's arguments in relation to the
19 issues of the "same case".

20 The Defence's third final -- third and final submission in ground three is that none of
21 the crimes against Mr Al-Senussi -- none of the crimes Mr Al-Senussi is charged with
22 domestically cover the crime of persecution under the Rome Statute, which is covered
23 by the case before the Court.

24 Again, the Appeals Chamber is not persuaded by the Defence's arguments.

25 The Appeals Chamber finds that there is no need for Libya to charge Mr Al-Senussi

1 with the international crime of 'persecution' per se, this is because the correct question
2 to answer is whether the same conduct, as opposed to the same crime, is being
3 investigated or prosecuted. On the facts of this case, Libya envisages that
4 Mr Al-Senussi will be charged with, inter alia, the following domestic offences: Civil
5 war, attacks upon the political rights of a Libyan subject, stirring up hatred between
6 the classes and "other crimes associated with fomenting sedition and civil war."
7 Further, the actual conduct which underpins Libya's case as a whole is the use of
8 Security Forces to suppress demonstrators against a political regime.
9 In relation to sentencing, the Appeals Chamber notes that the Pre-Trial Chamber
10 came to its conclusions on the combined considerations of crimes charged at the
11 national level and also considerations that a judge may have regard to on sentencing.
12 Therefore, the conduct underlying the crime of persecution is sufficiently covered in
13 the Libyan proceedings such that it can be said that substantially the same conduct as
14 alleged before this Court is being investigated by the Libyan authorities. As such,
15 the Appeals Chamber can find no error in the Pre-Trial Chamber's analysis.
16 In sum, the Appeals Chamber rejects the Defence's third ground of appeal.
17 Having concluded -- having concluded that the Defence has not established that the
18 Pre-Trial Chamber's determination that Libya is investigating the same case as that
19 before the Court was not erroneous, I shall now turn to the first ground of appeal.
20 With this ground of appeal, the Defence challenges the Pre-Trial Chamber's finding
21 that Libya is neither unwilling nor unable genuinely to investigate and prosecute
22 Mr Al-Senussi, that is, the second limb of the admissibility test of Article 17(1)(a) of
23 the Statute.
24 The Defence makes four broad submissions in relation to this ground of appeal:
25 First, errors in relation to the lack of contact between the Defence and Mr Al-Senussi;

1 second, errors in relation to the lack of counsel in domestic proceedings; third, errors
2 in relation to other purported due process violations occurring in the domestic
3 proceedings; and finally, errors in relation to the Pre-Trial Chamber's finding that
4 Libya is not unable to try Mr Al-Senussi.

5 The Defence submits that three specific errors arise because the Pre-Trial Chamber
6 did not adequately consider the lack of contact between Mr Al-Senussi and his
7 Defence team in the current admissibility proceedings.

8 The first error alleged is that the Pre-Trial Chamber should not have decided the
9 case -- should not have decided that the case is inadmissible in circumstances where
10 the Defence had not yet received instructions from Mr Al-Senussi. In support of this
11 argument, the Defence submits inter alia that there existed, and I quote, 'undeniable
12 right to counsel under the Rome Statute.', unquote.

13 For the reasons that I shall summarise now, the Appeals Chamber is not convinced by
14 the arguments of the Defence. The Appeals Chamber notes that the Court's legal
15 framework provides essentially for two forms of participation of a suspect in relation
16 to admissibility proceedings: First, a suspect has the right to challenge the
17 admissibility of a case pursuant to Article 19(2)(a) of the Statute; second, pursuant to
18 Rule 58(3) of the Rules of Procedure and Evidence, a suspect has the right to submit
19 written observations on admissibility -- on an admissibility challenge filed by
20 someone else. However, this latter right only applies to suspects who have been
21 surrendered to the Court, or have voluntarily appeared before it. Mr Al-Senussi is
22 not in either of these positions.

23 The provisions relied upon by the Defence with regard to a general 'undeniable right
24 to counsel' only confer a right to counsel in this Court's criminal proceedings or
25 during an investigation by this Court's prosecutor, but not admissibility proceedings.

1 Accordingly, Mr Al-Senussi did not have a right to participate in the proceedings in
2 relation to Libya's admissibility challenge. It follows that he also did not have the
3 right to be fully represented by counsel in the way argued for by the Defence.
4 Nevertheless, the Appeals Chamber recalls the broad discretion provided to the
5 Pre-Trial Chamber under Rule 58(2). Under this provision a Chamber may decide to
6 grant a suspect participatory rights that extend beyond those provided for in this
7 Court's texts. In the present case, the Pre-Trial Chamber allowed the Defence to
8 participate in the proceedings by filing submissions, but did not require that the
9 Defence receive instructions from Mr Al-Senussi. Accordingly, what remains to be
10 determined is whether it was unfair and unreasonable in the circumstances of the
11 present case not to grant Mr Al-Senussi broader participatory rights.
12 In the view of the Appeals Chamber, the Defence has not -- has not established that
13 the Pre-Trial Chamber erred in the exercise of its discretion. In fact, many of the
14 Defence's arguments appear to be based on the premise that Mr Al-Senussi was
15 entitled to participate in the proceedings. This, however, was not the case.
16 Furthermore, as highlighted by the Pre-Trial Chamber, the Defence did not submit
17 that a visit was a necessary pre-condition. Indeed, the Defence states on appeal that
18 they proceeded -- and I quote, "proceeded on the basis that no admissibility challenge
19 could succeed when Libya had refused to allow the Defence to visit or speak with
20 Mr Al-Senussi", unquote, and thus sought an "immediate decision on admissibility so
21 that Mr Al-Senussi could be transferred to The Hague ...", unquote.
22 In these circumstances, the Appeals Chamber finds that the Pre-Trial Chamber's
23 exercise of discretion was not so unfair and unreasonable as to amount to an abuse of
24 discretion conferred by Rule 58(2).
25 Furthermore, in respect of the Pre-Trial Chamber's findings that several Defence

1 allegations were 'generic' and 'without proof', the Defence alleges that the Pre-Trial
2 Chamber failed to take into account that they could have been further substantiated if
3 the Defence could have discussed the case with its clients in a privileged and
4 confidential environment and that the Pre-Trial Chamber reversed the burden of
5 proof because it was not for the Defence to prove that irregularities had occurred. In
6 support of this line of argument, the Defence rely on human rights jurisprudence
7 indicating that an allegation of a human rights violation can, in some circumstances,
8 demonstrate that a human rights violation has occurred if a State does not respond.
9 With regards to whether the Pre-Trial Chamber failed to take into account the lack of
10 instructions, the Appeals Chamber finds that the Pre-Trial Chamber explicitly stated
11 that they would take this into account and, as such, can find no error.
12 With respect to the reversal of the burden of proof, the Appeals Chamber recalls that
13 a State, in this case Libya, bears the burden of proof to show that a case is
14 inadmissible. Nevertheless, the Pre-Trial Chamber required the Defence to
15 sufficiently substantiate factual allegations. In the view of the Appeals Chamber,
16 this not -- this does not amount to an error. The human rights jurisprudence relied
17 upon by the Defence can be distinguished from the present case because in those
18 proceedings a State directly responds to an allegation of a complainant. By contrast,
19 the case as -- at hand is primarily concerned with the relationship between States and
20 this Court.
21 The Defence also submits that Libya's failure to facilitate a visit between Al-Senussi
22 and his lawyers demonstrates that Libya is both unwilling and unable in terms of
23 Article 17.
24 The Appeals Chamber notes that the Defence does not explain how lack of contact
25 with counsel would per se lead to a finding of unwillingness or inability, nor is this

1 self-evident. Therefore, the arguments of the Defence must be dismissed.

2 Accordingly, the Appeals Chamber sees no error in how the Pre-Trial Chamber dealt

3 with the lack of contact between the Defence and Mr Al-Senussi.

4 The Defence also argues that the Pre-Trial Chamber erred because it failed to take

5 sufficiently into account the lack of legal representation in Libya's domestic

6 proceedings concerning Mr Al-Senussi. The Defence makes four separate

7 submissions which purportedly illustrates unwillingness and/or inability:

8 First, the Defence argues that Libya's domestic laws have been violated, as well as

9 international human rights law;

10 Second, it submits that any irregularity during the investigation and accusation stages

11 taints any future proceedings in Libya 'irremediably';

12 Third, it argues that the Pre-Trial Chamber reversed the burden of proof and

13 contradicted its findings in Gaddafi;

14 Finally, it submits that the reason for lack of legal representation is not relevant.

15 The Appeals Chamber will first address the Defence's arguments to the extent that

16 they relate to the question of "unwillingness." The Appeals Chamber emphasises

17 that in the context of admissibility proceedings it is not called upon to decide per se

18 whether certain domestic or international requirements of due process are being

19 violated. The real question is whether the proceedings were conducted in a manner

20 which, in the circumstances, is inconsistent with an intent to bring an accused to

21 justice.

22 As will be explained later, for a violation of due process rights to constitute

23 unwillingness, the violation must be "so egregious that the proceedings can no longer

24 be regarded as being capable of providing any genuine form of justice to the accused."

25 The Appeals Chamber considers lack of access to counsel may be -- may be relevant

1 for a determination that a State is unwilling genuinely to investigate and prosecute a
2 suspect. Nevertheless, in the present case the alleged violations of Mr Al-Senussi's
3 rights do not meet the threshold for a finding of unwillingness. In this regard, the
4 Appeals Chamber notes Libya's submissions that the trial could not commence
5 without Mr Al-Senussi having a lawyer. In addition, the Appeals Chamber notes
6 that the Pre-Trial Chamber found that the reason why Mr Al-Senussi did not yet have
7 a lawyer was primarily the security situation in Libya. The Defence has not
8 established that this finding was unreasonable.

9 Turning to the question of the impact of lack of Defence counsel in domestic
10 proceedings has in respect of inability, the Appeals Chamber notes that neither party
11 disputes that the appointment of counsel at trial is a prerequisite for the trial to take
12 place in Libya. The Defence's submissions appear to be twofold.
13 First, that the proceedings have been compromised to such an extent that they could
14 no longer go ahead. In support of this proposition, the Defence submits that human
15 rights law suggests that, under certain circumstances, lack of legal representation in
16 the early stages of proceedings may render a trial unfair, and if no trial can take place
17 then Libya is 'unable' to try Mr Al-Senussi. The Appeals Chamber considers that this
18 proposition cannot be true. It is axiomatic that judicial proceedings may result in
19 acquittal for any number of reasons.

20 The second submission on inability that the Defence puts forward is that the Pre-Trial
21 Chamber's findings are speculative and contradicts its findings in Gaddafi -- in the
22 Gaddafi Admissibility Decision. In this respect, the Appeals Chamber notes that the
23 Pre-Trial Chamber found that Mr Al-Senussi was in a detention centre under the
24 control of the government, unlike Mr Gaddafi. Regarding the speculative nature of
25 the finding, the Pre-Trial Chamber made its findings of inability on the basis of facts

1 that presented itself to them at the time of the admissibility challenge, which
2 inherently involves some form of speculation.

3 The Defence then submits that due process violations, other than lack of a lawyer in
4 the domestic proceedings, also render Libya unwilling and unable genuinely to
5 investigate and to prosecute Mr Al-Senussi.

6 The first issue that has to be addressed in relation to the Defence submission is the
7 definition of unwillingness in terms of Article 17(2)(c) of the Statute. The provision
8 provides that unwillingness is established if "the proceedings were not or are not
9 being conducted independently or impartially, and they were or are being conducted
10 in a manner which, in the circumstances, is inconsistent with an intent to bring the
11 person concerned" to trial -- "to justice."

12 The Defence submits that "bringing an accused to justice must entail treating him
13 humanely and fairly and conducting fair proceedings - these requirements are all
14 integral to the definition of 'justice' as a matter of international law."

15 The Appeals Chamber observes that at first sight Article 17(2)(c) and the chapeau of
16 Article 17(2) could potentially support the proposition argued by the Defence.

17 However, on a closer analysis of the text, context, object and purpose of Article
18 17(2)(c), such an approach is unsustainable. This is because the purpose of the
19 exceptions under Article 17(2) to the principle that a case is inadmissible if it is being
20 investigated or prosecuted domestically is to prevent -- to prevent the abuse of the
21 principle of complementarity that results in the perpetuation of the impunity of
22 perpetrators of the most heinous crimes. Further, this Court was not established to
23 be an international court of human rights, sitting in judgment over domestic legal
24 systems to ensure compliance with international standards.

25 As such, violations of a suspect's right, in and of themselves, are not sufficient to

1 amount to unwillingness. However, notwithstanding this, there may be
2 circumstances, depending on the facts of the individual case, whereby violations are
3 so egregious that the proceedings can no longer be regarded as being capable of
4 providing any form of genuine justice. Ultimately, whether a case will be
5 inadmissible under Article 17(2)(c) will depend on the precise facts of the case.

6 In light of the above, and for the reasons further elaborated in the written judgment of
7 the Appeals Chamber, insofar as the Defence argues that a State is unwilling
8 genuinely to carry out the investigation or prosecution if it does not respect the fair
9 trial rights of the suspect per se, this argument must be rejected.

10 As the Defence highlights, the Pre-Trial Chamber did not provide an extensive
11 interpretation of Article 17(2)(c) of the Statute and its requirements. However, this
12 had no effect on the Pre-Trial Chamber's decision as a whole because the Defence has
13 not demonstrated the fact -- that the factual findings of the Pre-Trial Chamber were
14 unreasonable.

15 The Defence argues that the Pre-Trial Chamber overlooked "substantial and
16 compelling evidence" that established that "the conditions for holding a fair, impartial
17 and independent trial in Libya simply do not exist." However, the Defence has
18 failed to substantiate its argument and to indicate with sufficient precision the
19 purported errors in the impugned decision. The Defence has also put forward
20 numerous other submissions alleging errors of fact in the remainder of this section.
21 However, in the view of the Appeals Chamber, these submissions are either repetitive,
22 can be explained by a misunderstanding of the definition of 'unwillingness' or by a
23 misrepresentation of the impugned decision, or amount to mere disagreements with
24 factual findings of the Pre-Trial Chamber.

25 Accordingly, no error in the Pre-Trial Chamber's factual findings has been

1 established.

2 The Defence also submits that the Pre-Trial Chamber's finding in relation to inability
3 were unreasonable. The Defence raises three sets of arguments in this regard.

4 First, the Defence submits that the Pre-Trial Chamber erred when it found that Libya
5 exercised sufficient control over the detention centre where Mr Al-Senussi is held.

6 This is because, in the Defence's submission, militia groups participate in running the
7 prison and have free access to both Mr Al-Senussi and any defence witnesses.

8 The Appeals Chamber observes that the Pre-Trial Chamber set out the publicly
9 available evidence it relied upon in a footnote and also confidential ex parte evidence
10 that the Pre-Trial Chamber relied upon. Having reviewed this evidence, it cannot be
11 said that the Pre-Trial Chamber's findings were unreasonable.

12 Secondly, the Defence submits that the Pre-Trial Chamber's finding that the lack of
13 security for judicial authorities and organs did not indicate that Libya is "otherwise
14 unable to carry out its proceedings" was unreasonable. The Defence submits that
15 this finding is inconsistent with a decision in the Gaddafi case. The Appeals
16 Chamber considers that Defence -- that the Defence has not established that the
17 Pre-Trial Chamber's findings were unreasonable and that a distinction relied upon
18 with respect of the Gaddafi case were accurate. In relation to the latter, the Appeals
19 Chamber recalls that there are significant differences between the two cases.

20 Thirdly and finally, the Defence submits that the Pre-Trial Chamber erred in relation
21 to the impact that the lack of security for witnesses had on Libya's ability to obtain the
22 necessary evidence and testimony per Article 17(3). The Appeals Chamber recalls
23 that the Pre-Trial Chamber noted that the investigative material included exculpatory
24 evidence and specifically considered the Defence's submission that two witnesses
25 were no longer prepared to testify. The Appeals Chamber does not find the

1 Pre-Trial Chamber's finding unreasonable.

2 For all these reasons, the Defence's third ground of -- first ground of appeal is
3 dismissed.

4 In sum, the Appeals Chamber therefore confirms the impugned decision and
5 dismisses the appeal.

6 The Appeals Chamber's decision was taken unanimously. However, Judges Song
7 and Ušacka append separate opinions to the Appeals Chamber's judgment. I shall
8 now very briefly summarise these separate opinions.

9 Judge Song, in his separate opinion, recalls his separate opinion in relation to the
10 Appeals Chamber's judgment on the admissibility decision in the Gaddafi case. In
11 that separate opinion, he explained that in cases such as the present, there was no
12 need to rely on incidents as comparators when determining whether the domestic
13 investigation was the same as that before the Court. He therefore disagrees with the
14 parts of the judgment of the Appeals Chamber in relation to the third ground of
15 appeal that emphasises the importance of incidents for this determination.

16 Nevertheless, Judge Song agrees that there was no error in the Pre-Trial Chamber's
17 findings that Libya is investigating the same case.

18 Similarly, Judge Ušacka in her separate opinion recalls her dissenting opinion in
19 relation to the Gaddafi case. In that dissenting opinion, she explained why, in her
20 view, the same person/same conduct test was flawed and that a different test should
21 have been adopted. Nevertheless, based on her test, Judge Ušacka would also have
22 concluded that there was no error in the Pre-Trial Chamber's finding that Libya was
23 investigating the same case. Judge Ušacka also addresses certain issues in relation to
24 the first ground of appeal, notably the question of whether a distinction should be
25 made between the domestic case against Mr Al-Senussi and that against Mr Gaddafi.

1 This concludes my summary of the judgment. It only remains for me to thank the
2 parties and participants, the interpreters and court reporters and our audience in the
3 gallery. I also generally would like to thank the Registry staff for having facilitated
4 this hearing in the first week of the court recess.

5 Thank you. The session is now closed.

6 THE COURT USHER: All rise.

7 (The hearing ends in open session at 12.07 a.m.)